IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CIVIL APPEAL NO. 11 OF 2008

BETWEEN:

THE PRIME MINISTER AND MINISTER OF FINANCE **THE ATTORNEY GENERAL OF BELIZE**	**APPELLANTS**
AND	
ALBERTO VELLOS **DORLA DAWSON** **YASIN SHOMAN** **DARRELL CARTER**	**RESPONDENTS**

Before: **The Hon. Mr. Justice Mottley, President**
The Hon. Mr. Justice Sosa, Justice of Appeal
The Hon. Mr. Justice Carey, Justice of Appeal

Ms. Lois Young SC for appellant
Mr. Anthony Sylvestre and Mr. Kevin Arthurs for respondents

17, 19 June & 17 October 2008

MOTTLEY, P.

[1] On 9 May 2008, the respondents, as claimants, filed a Notice of Application for permission to apply for Judicial Review pursuant to CPR 56.3. The orders sought in that application were:-

(1) Permission to apply for Judicial Review by way of an order of Declaration that the Prime Minister is acting in violation of, in a

manner repugnant to, ultra vires of and inconsistent with section 2 (2) (a) and section 3 (1) of the Referendum Act by his failure to request that the Governor General issue a Writ of Referendum, in respect of a proposed amendment to section 5 of the Belize Constitution (protection or right to person liberty) by way of section 2 of the Belize Constitution (Sixth Amendment) Bill, 2008;

(2) Permission to apply for Judicial Review by way of an order of Declaration that the Prime Minister is acting in violation of, in a manner repugnant to, ultra vires of an inconsistent with section 2 (2) (a) and section 3 (1) of the Referendum Act by his failure to request that the Governor General issue a Wit of Referendum, in respect of a proposed amendment to section 17 of the Belize Constitution (protection of deprivation of property) by way of section 2 of the Belize Constitution(Sixth Amendment) Bill, 2008.

(3) Permission to apply for Judicial Review by way of an Order of Mandamus requesting the Honourable Prime Minister to request the Governor General to issue a Writ of Referendum pursuant to section 3 (1) of the Referendum Act.

[2] The grounds upon which the Application was made are set out in the application. A Bill entitled the Constitution (Sixth Amendment) Bill, 2008 had been introduced in the House of Representatives on 25 April 2008 and had been given its first reading by the House. The claimants alleged that the Bill intended to amend and derogate from the fundamental rights and freedoms contained in

sections 5 and 7 of the Constitution of Belize. They stated that section 2 (2) (a) of the Referendum Act mandated that a referendum shall be held on an issue which related to any amendment to or derogation from any of the provisions in Constitution which guaranteed the fundamental rights and freedoms. They further alleged that the Prime Minister had failed to request the Governor General to issue a Writ of Referendum in respect of the proposed amendment to the Constitution.

[3] On 15 May 2008, after an inter partes hearing, the Chief granted permission to the claimants to apply for judicial review. They were ordered to file their Claim Form for "the substantive matter within fourteen days."

[4] The application contained a request for "such further or other order as the Court deemed just." It did not contain a specific request for any interim relief by way of an injunction. However, counsel who appeared for the claimants before the Chief Justice sought, and obtained an interim injunction which restrained the Attorney General from taking steps to obtain the Governor General's assent in respect of the Referendum Amendment Bill 2008 until after the hearing of the substantive application for judicial review.

[5] The appellants were dissatisfied with the orders made by the Chief Justice and, on 23 May 2008, Ms. Lois Young SC who did not appear in the inter partes application, applied to the Chief Justice for leave to appeal against the Order of 15

May 2008. The Chief Justice refused to grant the appellants leave to appeal against his earlier order.

[6] It may be inferred from this application for leave made to the Chief Justice, that Ms. Young treated the Order as an interlocutory order from which leave to appeal was required. On 10 June 2008, counsel renewed her application by filing an Amended Notice of Motion in the Court of Appeal for leave to appeal pursuant to section 14 (3)(b) of the Court of Appeal Act Cap 90 (the Act).

[7] Section 16(1) of the Act provides as follows:-

> "16 (1) Where a person desires to appeal under this Part to the Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of the court within twenty-one days from the date on which the order of the Supreme Court or a judge thereof was signed entered or otherwise perfected."

It is clear from this subsection that the time for filing an appeal as of right or making an application for leave to appeal is within twenty one days of the date on which the order of the Supreme Court was signed entered or perfected. This provision is mandatory but is subject to subsection 3 which gives the court a discretion. This subsection is dealt with below.

[8] At the hearing of this Notice of Motion, this Court pointed out to counsel that in view of the provisions of section 14 of the Act no leave was required as the appeal is from an order granting an injunction.

[9] As no leave to appeal was required this appeal was of right. However, the appellants did not file an appeal within twenty one days, the time stipulated in section 16(1) the Act.

[10] This Court was asked to treat the Notice of Motion for Application for leave to appeal as an application to appeal out of time. Section 16(3) of the Act gives the Court power to extend the time given for appealing as set out in section 16 (1). Section 16 (3) provides as follows:-

> "16 (3) The Court may, subject to terms and conditions as it thinks fit extend the time limits mentioned in subsection (1) and (2) of the application shown to the satisfaction of the Court that he has been unavoidably prevented from filing his notice of appeal or grounds of appeal as the case may be. Provided that on the hearing of any application for an extension of time under this subsection, the opposite party shall have an opportunity of having heard and, if the Court thinks fit, of adducing evidence against the granting of leave."

[11] In order for the Court to exercise its discretion under this subsection, the applicant must show to the satisfaction of the Court that he was "unavoidably prevented" from filing his notice of appeal. In a 1983 case, **In the Matter of Order 11 Rule 3 of the Court of Appeal Rules and In the Matter of an Application for an Application for Extension of time within which to appeal**, this Court considered the meaning of those words. It was held that:

> "The words 'unavoidably prevented' are clear and do not cover a case of over sight, lack of diligence or even negligence and tardiness on the part of a solicitor."

Counsel for the appellants laboured under the mistaken belief that leave to appeal was required and hence did not file an appeal but rather filed an application for leave to appeal which was rejected by the Chief Justice. The Chief Justice apparently laboured under the same misapprehension as counsel when he refused leave.

[12] In considering the request to convert the application for leave into an application for leave to extend the time for filing the appeal the Court was referred to **Arturo Matus v Alfred Melhado** Civil Appeal No. 4 of 1992. The appellant in that case, under the mistaken belief that leave to appeal was required, applied for and was granted leave to appeal. At the hearing of the appeal, objection was taken on the ground that the appeal had been filed out of time. The Court distinguished this case from the 1982 case referred to in paragraph 11 above in

which it had explained the meaning of the words "unavoidably prevented." The court considered that:-

> "The circumstances of this case are however unusual in that not only was the Appellant's attorney in error when he applied for leave to appeal but the Respondent's attorney, if aware of the error, did not bring it to the attention when the application came up for hearing in the Supreme Court and the court itself perpetuated the error when it granted the application. If leave to appeal had in fact been required the Appellant would have done timeously all that he was required to do in relation to the appeal."

[13] Henry J.A. with the other judges agreeing, concluded that

> "….the application to the Supreme Court for leave to appeal ought to be treated as if it had been an application for extension of time….and the order granting leave to appeal as if it had been an order extending time for appealing to the date on which the notice of appeal was in fact filed. As a consequence the notice of appeal would be treated as if it had been properly filed."

[14] I would distinguish the case of **Matus v Melhado** (supra) on the basis that the appellant in that case, although acting under the misapprehension that leave

was required, had in fact obtained leave to appeal within the time fixed by the law. The appellants in this case did not obtain leave to appeal. No order had been granted which this Court could treat as an appeal. No appeal had been filed within twenty one days. In order for the Court to exercise its discretion to extend the time for appealing, the appellants must therefore show to the satisfaction of this Court that they were unavoidably prevented. The fact that counsel laboured under a misapprehension that leave to appeal was required cannot in my view amount to being "unavoidably prevented."

[15] The undisputed fact is that no appeal was filed within the time limited by section 16 (1) of the Act. Consequently, the appeal is not properly before the Court and should be dismissed. The respondents are entitled in the circumstances to their costs.

MOTTLEY P

SOSA JA

[16] I have read, in draft, the judgment of Carey JA and concur in the reasons for judgment given in it.

SOSA JA

CAREY JA

[17] These were applications for leave to appeal an order of the Chief Justice granting permission to apply for judicial review, leave to appeal having been refused by that judge and also an application for leave to extend the time for appealing an order for interim injunction which was made by the Chief Justice at the same time. The Court refused the applications. Reasons were promised. My reasons are set out hereunder.

[18] In support of the first application, Ms. Young, S.C. referred us to *Wang v. Atlantic Insurance Co. Ltd. (unreported) 21 July 1998*, a judgment of Sosa J (as he was then), who set out the circumstances in which leave will be granted, noting that they were the same as would operate in the English Court of Appeal. The correctness of that view has never been doubted or called in question. He identified the categories as:

"(i) where they see a prima facie case that an error has been made;

(ii) where the question is one of general principle, decided for the first time;

(iii) where the question is one of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage".

Counsel for the appellant asserted that the instant case" falls into all three categories". The error of law, she argued, which the applicants put forward as prima facie an error of law is so egregious that the applicants ought not to be made to wait until the hearing and conclusion of the substantive application for judicial review to see if it will be corrected.

[19] As to the egregious error of law which the judge must have perpetrated, this must be, as I think, a reference to the order granting leave to file for mandamus. This is the coercive order which counsel contends contravenes the principle of the separation of powers enshrined in the Constitution. But counsel then cited *Bahamas District of the Methodist Church in the Caribbean and the America and others v. Symonette and other [2000] UKPC 31* in which Lord Nicholls of Birkenhead delivering the advice of the Board, said at paras. 31 and 32:

"31. Their Lordships consider that this approach points irresistibly to the conclusion that, so far as possible the courts of The Bahamas

should avoid interfering in the legislative process. The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words 'so far as possible" are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the court's duty to give the Constitution the overriding primacy which is its due.

32. Their Lordships consider that this approach also leads ineluctably to the conclusion that the courts have jurisdiction to entertain a claim that the provisions in a Bill, if enacted, would contravene the Constitution and that the courts would grant immediate declaratory or other relief."

> The value of this case, I would suggest, is to demonstrate that the rule that the courts should not intervene in the parliamentary process, is not cast in stone. There are circumstances, albeit exceptional when the court is obliged to intervene, but there is no question but that the courts have jurisdiction. The jurisdiction can be claimed because the respondents allege that fundamental rights under the Constitution are likely to be abrogated by provisions of the Bill, in the instant case, the Belize Constitution (Sixth Amendment) Bill, 2008. The only question would be whether the jurisdiction should be exercised. The nature of these proceedings do not call for a definitive answer at this stage. What, in my opinion, must be clear, is that there is no error, no matter the pejorative adjective employed, to characterize it.

[20] Ms. Young did not address the court on the other two factors which might be considered if an application for leave to appeal is to succeed, viz. where the question is one of general principle decided for the first time and where the question is one of importance upon which further argument and a decision of this court would be to the public advantage. At all events, she would not have been able to argue that the question was one of general principle decided for the first time. The principle was discussed in the Methodist case (supra) in which references were made to a number of other cases, e.g. *Rediffusion (Hong Kong) Ltd* v *Attorney General for Hong Kong [1970] AC 1136, Cormack v. Cope (1974)*

131 CLR 432. Seeing that the principle is settled, no advantage is to be gained by further argument and decision by this court.

[21] At the end of the day I was not persuaded that leave should be granted and concurred in the order refusing leave to appeal.

[22] Ms. Young, S.C. not having filed an appeal against the order of the Chief Justice granting an interim injunction to restrain the Attorney General from taking steps to obtain the Governor General's assent in respect of the Referendum (Amendment) Bill 2008 until after the hearing of the substantive application for judicial review, applied for leave to appeal out of time. She sought to rely on a decision of this court in *Matus v. Melhado (unreported)* in May 1993. The circumstances in that case were as follows:- the appellant in that case, in the mistaken belief that leave to appeal was required, applied for such leave, which was granted. Notice of appeal in accordance with that leave was filed. When the appeal was called on, an objection was taken on the ground that no leave having been required, the time for filing notice had expired, the appeal was a nullity. The court took no decision. The appellant applied for and was granted leave to apply for an extension of time within which to appeal. The application came before a judge of the Supreme Court exercising jurisdiction as a single judge of this Court but he declined jurisdiction. The court itself granted the application on the footing that the circumstances in the case were unusual. They identified those circumstances as the error on the part of the appellant's attorneys, possibly that of

the respondent's attorney and that of the court itself when it purported to grant the application. Ms Young submitted that the facts were on all fours with the instant case and accordingly the court should grant the extension of time.

[23] Mr. Sylvestre, submitted that section 17(3) of the Court of Appeal Act, Cap. 90 imposes a burden on the appellant of satisfying the court, that "he has been unavoidably prevented from filing his notice of appeal …". The applicant, he urged, had failed to discharge that burden. The facts in *Matus v. Melhado (supra)* were distinguishable from the present case. The court should accordingly refuse the application.

[24] This court in *Matus v. Melhado (supra*) referred to an earlier decision of this court, "In the matter of Order II Rule 3 of the Court of Appeal Rules and in the matter of an Application for Extension of Time within which to appeal" (unreported 25 May 1983) in which it was stated:

> "The words 'unavoidably prevented' are clear and do not cover a case of oversight, lack of diligence or even negligence and tardiness on the part of a solicitor'.

Nothing has occurred, in my opinion, which has in any way, altered or changed the significance of that dictum. The case of *Matus v. Melhado* did not purport to lay down any principle which derogated from the words "unavoidably prevented" in the Statute. It merely illustrates the exercise of

> the court's discretion in the peculiar circumstances of that case. In my view, the instant case is not on all fours with *Matus v. Melhado (supra).* So far as the instant case is concerned, the application for leave to appeal was refused and the judge had jurisdiction to do so. In the earlier case, the judge had no jurisdiction to make the order he did. In the present case, after the judge had refused leave, counsel having carriage of the matter, was obliged to advise herself on the matter of further appeals. Oversight, even negligence, or lack of diligence, do not qualify as "unavoidably prevented". There is nothing, I venture to suggest, unusual about a lawyer being guilty of these sins it is an ill to which lawyers are heir. When the court itself falls prey to the like ills, consequences follow however.

[25] The peculiar circumstances of *Matus v. Melhado (supra),* even if they had recurred in the instant case, should not, in my opinion, be encouraged. *Matus v. Melhado (supra)* was a call to attorneys to comply with the Rules and file appeals in time. There is, it should be borne in mind, no fundamental right of appeal. It is one given by statute. Prospective appellants are accordingly obliged to take steps to put their tackle in order timeously.

[26] It is for these reasons I agreed that the application should be refused.

CAREY JA