

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 21 of 2015

BETWEEN:

ANSA MCAL (BARBADOS) LTD.

APPELLANT

AND

BANKS HOLDINGS LIMITED

FIRST RESPONDENT

SLU BEVERAGES LTD.

SECOND RESPONDENT

Before: The Hon. Justice Andrew D. Burgess, The Hon. Madam Justice Kaye C. Goodridge and The Hon. Justice William Chandler (Ag.), Justices of Appeal

2015: December 1, 11

Mr. Reginald Armour SC in association with Mr. Patterson K.H. Cheltenham QC and Mr. Alrick Scott for Ansa McAL (Barbados) Ltd.

Mr. Barry L.V. Gale QC in association with Mr. Roger C. Forde QC, Mrs. Laura Harvey-Read and Ms. Sheena-Ann Ince for Banks Holdings Limited.

Mr. Dale Marshall QC in association with Mr. Khamaal Collymore for SLU Beverages Ltd.

Mr. Garth Patterson QC in association with Ms. Lalita Vaswani for AM Caribbean Development Ventures Ltd. (watching brief)

Mr. Adrian King for the Financial Services Commission (watching brief)

Ms. Wendy Straker in association with Sir Henry Forde, K.A. QC for the Barbados Stock Exchange (watching brief)

BURGESS JA:

INTRODUCTION

[1] This Court has before it a Notice of Application for an order appointing Omstand Investments Inc. (Omstand), the applicant/intended appellant, as a representative party in Civil Appeal No. 21 of 2015 on behalf of itself, as shareholder of Banks Holdings Limited (BHL), the first respondent, and other common shareholders. The application is supported by an affidavit of Mr. Douglas Skeete, a shareholder and director of the applicant/intended appellant. The applicant/intended appellant was neither a party to the principal action nor the interlocutory application in the High Court.

[2] It appears to us that the order sought by the applicant/intended appellant is in fact twofold. The applicant/intended appellant seeks firstly to be added as a party to the appeal against the order on the interlocutory application, and secondly, if successful on the first limb, to be added as a party in a representative capacity.

BACKGROUND TO THE APPLICATION

[3] The applicant/intended appellant, Omstand, and the appellant, Ansa McAL (Barbados) Ltd. (McAL) are shareholders in the first respondent. The first

respondent is a public company incorporated under the **Companies Act, Cap 308 (Cap 308)**. The second respondent is also a shareholder in the first respondent and a company incorporated under **Cap. 308**.

- [4] On 28 September 2015, the second respondent, SLU Beverages Ltd. (SLU), issued an offer to the registered shareholders of the first respondent, to acquire any or all of the remaining issued shares in the first respondent. On 20 October 2015, AM Caribbean Development Ventures Ltd. (AMCDVL) issued a notice of intention to acquire all of the issued and remaining shares in the first respondent. AMCDVL is a wholly owned special purpose entity of Ansa McAL Ltd. (Ansa), a company incorporated under the laws of Trinidad and Tobago.
- [5] In effecting due diligence, Ansa unearthed a Convertible Debt Purchase Agreement (CDPA) which they determined gave rise to oppression. The existence of this agreement and its relevant provisions were subsequently published by BHL. McAL initiated proceedings in the High Court in Civil Suit No. 1533 of 2015 in pursuance of their complaints and sought *ex parte*, *inter alia*, an interim injunction to freeze the competitive bidding process and to restrain BHL from performing or otherwise giving effect to Article 6.2(b) and Article 8 of the CDPA, until the hearing and determination of the substantive issues of the claimant's claim. On 3 November 2015, the

Honourable Chief Justice **Sir Marston Gibson K.A.**, presiding as Judge of the High Court, granted the interim injunction. On 13 November 2015 **Gibson CJ** discharged the injunction at the *inter partes* hearing.

[6] By Notice of Appeal filed on 17 November 2015, McAL appealed against the decision of **Gibson CJ** to discharge the interim injunction, and by Notice of Application filed on 17 November 2015, again sought an interim injunction pending the determination of the appeal.

[7] By Notice of Application filed in the Court of Appeal on 19 November 2015, Omstand sought an order under **Part 21** of the **Civil Procedure (Supreme Court) Rules 2008 (CPR)** and the Court's inherent jurisdiction, to be appointed as a representative party in the appeal and interlocutory application.

THE SUBMISSIONS OF THE PARTIES

[8] Counsel for the applicant/intended appellant, Mr. Alrick Scott, submits that under **Rule 21.1**, in circumstances where at least five persons have the same or similar interest in the proceedings, the Court has authority to appoint one or more of those persons to represent some or all of those persons with the same or similar interest. The applicant/intended appellant on behalf of itself and other shareholders, contends *inter alia* that they equally have been

prejudicially affected by the CDPA and are likely to be irreparably injured by the ongoing takeover bid.

[9] The basis of counsel's argument is that **Rule 2.2** provides that these Rules apply to all civil proceedings in the Supreme Court, which is defined in the **Supreme Court of Judicature Act, Chapter 117A (Cap. 117A)** as consisting of the High Court and Court of Appeal. According to Mr. Scott, **Rule 2.2** must be interpreted in light of the overriding objective of the **CPR** and he therefore concludes that if the context of the rule or Part is not expressly limited in its application to the High Court, or the Court of Appeal, then the powers conferred thereunder are exercisable by either Court. Mr. Scott submits that there is no such limitation in either **Part 19** or **21** and consequently either the High Court or the Court of Appeal, and specifically, the Court of Appeal, may exercise its power to join parties to proceedings before it, or to appoint representative parties.

[10] Counsel for the second respondent, Mr. Khamaal Collymore argued that the Court of Appeal does not have jurisdiction to join a party to an appeal pursuant to **Part 19** or its inherent jurisdiction. **Rule 2.3** provides that "court" means the High Court and, where the context admits and in Part 64 the Court of Appeal. Counsel submits that **Parts 19** and **21** do not refer to the "Supreme Court" but to the "court", and to suggest otherwise, would

lead to the untenable conclusion that the Court of Appeal may grant orders under all parts of the **CPR** that do not expressly limit the Court of Appeal from exercising these powers. Further, it is unnecessary to join the applicant/intended appellant or any other shareholder to the appeal in an effort to resolve any matter in dispute or connected to the appeal, and the applicant/intended appellant will suffer no prejudice from the appeal proceeding in its absence.

CONSIDERATION OF THE APPLICATION

[11] We now turn to considering the application. As the second limb of the application relating to representative parties only arises if the Court allows the applicant/intended appellant to be added as a party, we shall firstly discuss the question of addition of parties.

[12] This Court derives its jurisdiction from **section 52 (1) of Cap. 117A** which provides:

“Except as otherwise provided in this or any other enactment, the Court of Appeal has jurisdiction to hear and determine, in accordance with the rules of court, appeals from any judgment or order of the High Court or a judge thereof.”

[13] **Section 61 (1) of Cap 117A** provides:

“...for all the purposes of and incidental to the hearing or determination of any appeal against any decision or determination of a court, tribunal, authority or person, in this section referred to as “the original court” and the amendment or enforcement of any judgment or order made thereon, the Court

of Appeal has, in addition to all other powers exercisable by it, all the jurisdiction of the original court...”

[14] It is clear that our jurisdiction strictly extends to hearing and determining appeals from any judgment or order of the High Court. In our view, the applicant/intended appellant has not shown that its application is an appeal from a judgment of the High Court within the meaning of **section 52 (1)** of **Cap. 117A** or that its application is for the purposes of, or incidental to the hearing and determination of the appeal, to which it seeks to be added, within the meaning of **section 61(1)** of **Cap. 117A**.

[15] Moreover, we consider that the submissions advanced by the applicant/intended appellant relating to prejudice, its common interest and common grievance do not indicate to the Court that its addition is incidental to hearing and determining the appeal. Mr. Scott did mention briefly in his oral submissions that the Court would benefit from his arguments and participation in the matter, however, he did not submit how or why.

[16] The role and function of the Court of Appeal must not be overlooked. This Court is supervisory in nature and consequently is precluded from impinging on the function of the court at first instance. The applicant/intended appellant is, in essence, inviting the Court to prematurely determine a question which ought to have firstly been raised and determined at the High Court, and we adjudge that we cannot do so.

- [17] It follows, therefore, that the question of the Court of Appeal exercising its jurisdiction under the **CPR** only becomes relevant if the applicant/intended appellant has established that this Court has jurisdiction to determine its application. Only if this threshold is met, the Court may determine the application “in accordance with the rules of court”: **Section 52(1) of Cap. 117A.**
- [18] The Court has, nonetheless, given consideration to the arguments of counsel for the applicant/intended appellant and counsel for the second respondent. We agree with Mr. Collymore’s submissions that the word “court” in **Rule 2.1** means the High Court, and where the context admits and in Part 64, the Court of Appeal; and further, that Mr. Scott’s argument that all provisions in the **CPR** which are silent as to its applicability to either the High Court or Court of Appeal necessarily implies that it is applicable to both Courts, would inevitably produce an unintended and obscure result.
- [19] The word “court” cannot only be taken to mean the High Court since an equally unintended result would be produced by rendering **Part 1** which references “court”, as inapplicable to the Court of Appeal. Therefore the question would turn on whether the context admits it, and in our view, **Part 19** does not admit to the Court of Appeal exercising its jurisdiction to grant the order for addition of parties as sought by the Applicant.

[20] With respect to Mr. Scott's argument regarding this Court's inherent jurisdiction, we refer to this Court's decision in **Oscar Maloney and Commissioner of Police Magisterial Application No. 6 of 2014** where **Goodridge JA** dealt with this question in detail. This Court held:

“In our view, it is first necessary for the Court to have jurisdiction, whether given by statute or by rules of court, to deal with a particular matter, before it can draw on its inherent jurisdiction. We do not consider that a Court's inherent jurisdiction can be relied upon to help create a jurisdiction which does not exist.”

[21] We abide with that view. The jurisdiction to determine this matter, as outlined in the circumstances above, is not conferred on this Court and consequently, counsel for the applicant/intended appellant is restrained from invoking our inherent jurisdiction.

DISPOSITION

[22] For all of the foregoing reasons, the application is dismissed. The applicant/intended appellant shall pay the costs of the appellant, the first respondent and second respondent, to be assessed, if not agreed by the parties.

Justice of Appeal

Justice of Appeal

Justice of Appeal (Ag.)

