

6/83

No. 6 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N:

ALEXANDRINE AUSTIN and DEBORAH AUSTIN,
SHARLENE AUSTIN and RICHARD AUSTIN
(infants by their Mother and next
friend MARIA LEZAMA) Appellants

10 - and -

GENE HART Respondent

CASE FOR THE APPELLANTS

Record

1. This is an appeal, by leave of the Court of Appeal of Trinidad and Tobago, from the majority Judgment of that Court (Corbin, J.A., Hassanali, J.A., and Kelsick, J.A. dissenting) dated 22nd July, 1980, which dismissed the Appellants' appeal against the Judgment and Order of Warner J. dated 25th July, 1977, whereby upon the hearing of a preliminary point the Appellants' action against the Respondent for damages under the Compensation for Injuries Ordinance (Chapter 5, No. 5) was dismissed with costs. Record
p. 67-68
p. 26-31
p. 54-66
p. 32-54

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2. The principal issues raised by the appeal are:

(1) whether upon a true construction of S.8 of the Compensation for Injuries Ordinance and S.21 of the Wills and Probate Ordinance (Chapter 8, No. 2) the Plaintiffs were entitled at the date of commencement to commence these proceedings against the Respondent;

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Record

(2) whether proceedings commenced contrary to the restraint imposed by S.8(2) of the Compensation for Injuries Ordinance are a nullity.

3. The deceased, Simon Austin, was killed in a motor accident on the 3rd May, 1974. By his Will he appointed two executors, William Austin and Ramesh Maharaj. The latter renounced probate, the former did not commence any proceedings on behalf of the Plaintiffs within 6 months from 3rd May, 1974, and was not granted Probate until the 28th May, 1976. The Appellants commenced these proceedings on their own behalf, in their respective personal capacities, by Writ dated 2nd August, 1974.

p. 1

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The Respondent took objection to the capacity of the Plaintiffs to bring the action by an amendment to the Defence, pursuant to leave granted by Narine J. on 16th June, 1975, and in an amended Defence dated 9th July, 1975. At that date fresh action by the Appellants and the Executor(s) was time-barred.

p. 9 - 11

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4. S.8 of the Compensation for Injuries Ordinance provides:

"(1) Every action in respect of injury resulting in death shall be for the benefit of the wife, husband, parent and child as the case may be, of the person whose death shall have been caused and shall be brought by and in the name of the executor or administrator of the person deceased.

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(2) If there be no executor or administrator of the person deceased, or if although there be such executor or administrator no such action shall within six months after the death of such deceased person have been brought by and in the name of his executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator."

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S.21 of the Wills and Probate Ordinance provides:

"No will of any person deceased shall have any effect whatever either in law or in equity, or shall pass any right title or interest whatever until the same has been duly proved in accordance with the provisions of this Ordinance."

- 10 5. Warner, J. held that at the date the proceedings were commenced there was an executor and since six months had not expired since the death of the deceased the Appellants were not competent to bring the proceedings. He rejected an argument that the Appellants had an inchoate right to bring the action and that the restraint upon commencement was purely procedural and did not affect the substance of the action. p. 16-24 p. 22 1.28
- 20 6. The Appellants appealed to the Court of Appeal on the ground that the learned Judge erred in law in holding that the action was not maintainable. Corbin, J.A. held that the Appellants were not competent to commence the action within six months of the death of the deceased since there was a Will in existence and an executor named therein. He rejected an argument that by reason of S.21 of the Wills and Probate Ordinance, executor in S.8 of the Compensation for Injuries Ordinance must be construed as "executor who has obtained probate". p. 25 1.11 p. 28 1.25-35
- 30 Hassanali J.A. in a full judgment agreed with the reasoning of Corbin, J.A. but also suggested, without deciding, that the effect of S.21 of the Wills and Probate Ordinance may well be that an executor named in the Will is prevented from commencing an action until Probate of the Will has been granted. Notwithstanding that such a construction would mean, assuming probate not to be granted within six months, that no person could commence proceedings for six months, p. 54-66 p. 60 1.35
- 40 Hassanali, J.A. held that "executor" must be given its primary meaning, according to which at the time these proceedings were commenced there was an executor. Further he held that a premature action was not maintainable because the restraint imposed by S.8 with a condition precedent to any right of action being vested in the relatives of the deceased. p. 61 1.50 p. 63 1.15 p. 63 1.18
- 50 7. Kelsick, J.A. dissented. The learned Justice of Appeal concluded that apart from S.21 of the Wills and Probate Ordinance, the

Record

Appellants' action being one commenced in their personal capacities, for their own benefit and in support of their own statutory rights was not substantially affected by the restraint imposed by S.8 which was, in essence, a procedural bar, which evaporated when six months had passed and no proceedings by an executor had been commenced. As to S.21 of the Wills and Probate Ordinance he concluded that the conjoint effect of S.8 and S.21 was to "assimilate the rights of an executor over the estate of a deceased to those of an administrator according to the law of England." Consequently at the time proceedings were commenced there was no executor of the deceased.

p.49 1.21
p.53 1.41

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8. It is respectfully submitted that Kelsick, J.A. was correct and the majority was wrong. If S.21 of the Wills and Probate Ordinance is to be given its natural and clear meaning an executor named in the Will cannot commence proceedings under S.8 until probate has been granted. If the undesirable and anomalous result, that for a time no right is vested in any person to commence proceedings, is to be avoided, "executor" in S.8 should be construed as "executor who has been granted probate".

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9. Further and alternatively, it is submitted that the majority of the Court of Appeal were unduly influenced and were led into error by the English authorities which established, under parallel Acts, that proceedings commenced by a party in a capacity which that party did not possess at the date of commencement, were a nullity. Such authorities are not in point. For the Appellants to maintain these proceedings no amendment is required. It was admitted in argument by Counsel for the Respondent that had twelve months not expired the Appellants could have discontinued and started again. Had they done so the proceedings would have been identical. It is submitted that the restraint imposed by S.8 is purely a matter of form. It was so described by the Earl of Selborne L.C. in Seward v. The Vera Cruz (1884-5 10. APP. CAS. 59.67) when describing Lord Campbell's Act:

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p.15 1.38

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"Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, 'actio personalis moritur cum persona', because the action is given in substance not to the person

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representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor". It is submitted that the "point of form" is designed to avoid multiplicity of suits. No doubt a Defendant would be entitled to stay proceedings commenced prematurely but justice does not demand that the proceedings be treated a nullity and nor is such a conclusion compelled by authority or principle. For example proceedings commenced without the fiat of the Attorney General, where such is necessary, are cured by amendment converting them into relator proceedings. Similarly proceedings commenced without authority may be ratified and such ratification will validate the proceedings from the first. (Alexander Ward & Co. Ltd. v. Samyang Navigation Co. Ltd. 1975 1 WLR 673). Again proceedings commenced by a minor as an adult are not a nullity, the Defendant's remedy will be a stay unless and until a next friend is added. The Respondent in this case would have been entitled to a stay until six months has passed. By such relief a Defendant's interests are adequately protected and the mischief with which the section of the ordinance is concerned, is prevented.

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10. The Appellants respectfully submit that this appeal should be allowed with costs and that the action should be remitted to the High Court of Trinidad and Tobago for a hearing on the merits, for the following, among other

R E A S O N S

(1) BECAUSE at the date proceedings were commenced there was no executor within the meaning of S.8(2) of the Compensation for Injuries Ordinance.

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(2) BECAUSE proceedings commenced contrary to the restraint imposed by S.8(2) of the said Ordinance are not a nullity.

GEORGE NEWMAN

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- and -

GENE HART Respondent

CASE FOR THE APPELLANTS

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