IN THE SUPREME COURT OF BELIZE, A.D. 2004

ACTION NO. 669 OF 2004.

(JOSE LUIS CRUZ	**CLAIMANT/RESPONDENT**
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(AND	
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(1. SOUTHERN CHOICE BUTANE	**DEFENDANT/APPLICANT**
(2. ENRIQUE ORTEGA TORRES	**DEFENDANT**

ACTION NO. 673 OF 2004

(LUIS ANGEL GUEVARA	**CLAIMANT/APPLICANT**
(	
(AND	
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(1. SOUTHERN CHOICE BUTANE	**DEFENDANT/APPLICANT**
(2. ENRIQUE ORTEGA TORRES	**DEFENDANT**

Ms. R. M. Usher, for the first applicant-defendant.
Mr. O. Sabido, SC, for the respondents-claimants.

AWICH. J.

22.12. 2005. DECISION

1. *Notes:* *Joint hearing of two identical applications in two actions in which the defendant-applicant was the same person. Each application was for an order to set aside default judgment on the ground that service of writ of summons on a registered company was irregular. Applicant subsequently filed notices of discontinuance of the applications but later wished to proceed with the applications.*

2. This is a joint decision in two applications, one in action No. 669 of 2004, and the other in action No. 673 of 2004. The applicant in both actions is the same entity, the Southern Choice Butane Ltd, the first defendant. In each action, the applicant asked for orders *"that the default judgment entered ... on 6.5. 2005, be set aside"*, and *"that in the meantime all proceedings in execution... be stayed"*. If a default judgment is set aside, the proper consequential order is also to set aside the writ of execution, not an order to stay the writ and all steps taken on the writ of execution.

3. The respondent-claimant in each action is a former employee of the applicant-defendant. The respondent-claimant, Jose Cruz in Action No. 669/2004, claimed $18,340.15, and the respondent-claimant, Luis Angel Guevara in Action No. 673/2004, claimed $48,585.00. In each action the claim was for part of employment remuneration that the claimant said the applicant-defendant had failed to pay to him. In each action the respondent obtained default judgment on 6.5.2005, and a writ of *fieri facia* on 20.5.2005, and six months later, on 7.12.2005, levied execution on the writ. The marshal of this Court marked a number of business vehicles belonging to the applicant for sale by auction. The marshal thereby took "walking possession" of those items.

4. On 26.5. 2005, soon after default judgment was entered in each action, each applicant-defendant filed an application in the respective action

for an order to set aside the default judgment. The applications were listed for hearing on the same, but distant date, 25.10.2005. In each action, before the hearing date of the application, a notice of discontinuance of the application was filed on 19.10.2005, on behalf of the applicant. Despite the notice, both applications were listed and presented for hearing on the appointed day, 25.10.2005. I dismissed each application on the grounds that a notice of discontinuance had been filed and that the parties, in particular, the applicant, did not attend the hearing. It was following the dismissals that the respondents proceeded on 7.12.2005, to attach the business vehicles belonging to the applicant. They obviously felt that the way was clear to act on the writs of execution that they had obtained earlier on 20.5.2005.

5. The applicant reacted by filing on 9.12.2005, an application in each action, asking for an order setting aside the order made on 25.10.2005, dismissing the application dated 26.5.2005, for an order setting aside the default-judgment dated 6.5.2005, so that the application would be restored for court hearing. It also asked for an order that *"all proceedings in execution ... be stayed"*. I have taken that to mean that the applicant asked for orders, setting aside the writ of *fieri facia,* and releasing the vehicles attached in execution. Both applications were heard together on 15.12.2005, as urgent applications on short notice. I made orders in each application removing the notice of discontinuance, and setting aside the dismissal order made on 25.10.2005. I made

further order in each case, staying the writ of *fieri facia*, until the decision in the application for order to set aside default judgment, but that the applicant pay costs to the respondents in the sum of $1,000.00, for both applications. As the result of the former order, each of the applications filed on 6.5.2005, for an order to set aside the default judgment was restored, and was listed for joint hearing with the other yesterday afternoon. This is the joint decision in the two applications.

6. The grounds urged in submission by learned counsel Ms. R.M. Usher, to support each application were that: (1) the notice of discontinuance was filed on 19.10.2005, by the applicant attorneys on the instruction of Mr. Torres, the second defendant, who had no authority to do so, he had been dismissed by the first defendant in July 2005; (2) in each action, the service of the writ of summons, as the process was known before 4.4.2005, was irregular because the service was not at the registered office of the applicant; (3) the defence in each case had prospects of success, the claim in each case was based on overtime work which the claimant was not entitled to because he held a managerial post, further each claimant had signed a document on receipt of a certain payment to him, agreeing that he had no further claim against the applicant; and (4) in the alternative in each case, that the computation of the sum claimed was wrong.

7. That part of the submission about the notices of discontinuance has

already been dealt with yesterday. An order removing the notice of discontinuance in each action has been granted because the instruction to discontinue the application for an order to set aside the default judgment was given fradulently. I think the better procedure was to make a separate application first for an order to remove the notice of discontinuance. Should it be refused the matter ends there.

8. The grounds raised in each memorandum of defence do have prospects of success. It is a matter of evidence whether or not the respondent in each case was employed in a post that would not entitle him to overtime payment under the Labour Act. It is not obvious at this stage from the papers filed, that he was not entitled. It is also an arguable question whether any document signed by each respondent releasing the applicant from future claim will defeat the respondents' claim. Beyond the question of facts proving the payment and the signing of a release, a question of law as to consideration for the release is likely to arise.

9. The question of delay is a weakness in both applications. I would have decided it against the applicant in each application had the attached vehicle been sold. Whereas the applicant acted promptly on 26.5.2005, when it filed an application in each action7y to set aside the default judgement entered on 6.5.2005, sixteen days earlier, the applicant did not act in each application with due urgency in obtaining a date for

hearing and in the meantime its manager Mr. Torres, instructed their attorneys to discontinue the application. In each application the applicant blamed Mr. Torres, its disgraced manager. But he was the applicant's manager and the applicant presented him as such to the claimants and the attorneys for the applicant, so that when Mr. Torres gave instruction to discontinue each application shortly after he had been dismissed, he continued to have ostensible authority.

10. The question of irregular service of the writ of summons was the crucial one in my decision. Under ***Order 10 rule 6, of the old Rules of the Supreme Court, 1973, Revised 1989***, service of a writ of summons is to be in accordance with the provisions of an Act where the Act provides for service. ***The Companies Act, Cap. 250 at SS: 64(1) and 117***, provides for service of *"all communications, notices [and] documents"* at the registered office of the company. The applicant is a registered limited company. In my view, a writ of summons is a document, so service of it had to be at the registered office of a registered company. Service of the writ in each case was at a place of business described as *"the major place of business"*. That service was irregular because it was not at the registered office of the applicant, as required by the Companies Act.

11. I certainly noted that the applicant did acknowledge each service by instructing attorneys to act on it. However, the old rule on the point

had progressed to the absurd point that acknowledgment of irregular service only made the service deemed due service, subject to proof to the contrary, and acknowledgment did not automatically operate as a waiver of the irregularity in the service.

12. The effect of the irregular service of the writ in each case was to render the default judgment entered irregular. The judgment could be set aside on application or ***meru mutu*** - see ***Anlaby v Pretorious [1888] 20 Q.B.D***. 764. Accordingly, I must set aside the default judgment entered on 6.5.2005, in each action. Each writ of execution issued on 20.5.2005, is also set aside. The goods marked and taken walking possession of by the marshal on 7.12.2005, are released.

13. However, consequences for the default in filing memoranda of appearance and for the delay in pursuing the applications for setting aside the default judgment must be visited on the applicant. However irregular a writ of summons or service of it may be, it should not be disregarded by a defendant. He must acknowledge it, that is, give notice of his intention to defend, by filing a memorandum of appearance, and then proceed to apply for an order to set aside the writ or service of it.

14. The applicant will pay costs in the sum of $1,750.00 in each action, a total of $3,500.00, and will pay the costs of execution according to the

schedule of costs in the rules in ***Supreme Court, (Civil Procedure)Rules, 2005.*** The costs ordered today are in addition to the costs of $1,000.00 which were the total costs ordered against the applicant on 15.12.2005. All the costs must be paid within 14 days.

15. I now direct that defence in each action be filed and delivered within 30 days notwithstanding that a draft defence has been exhibited in each case. Replies, if any, are to be filed within 28 days of service of the defence. Thereafter, the Registrar is to list the case for case management on a date available in the court calendar. All procedural steps will now be in accordance with the ***Supreme Court (Civil Procedure) Rules, 2005.***

16. Dated this Thursday the 22nd day of December, 2005.
At the Supreme Court,
Belize City.

Sam Lungole Awich
Judge
Supreme Court, Belize.