

THE LIBERIA TRADING AND DEVELOPMENT BANK (TRADEVCO)
by and thru its Chief Executive Officer, DR. STEFANO PELLEGRINO, Movant,
v. **HIS HONOUR JOHN M. MATHIES**, Judge, Debt Court for Montserrado
County, and **CAVALLA RUBBER CORPORATION**, Respondents.

APPEAL FROM THE RULING OF THE JUSTICE IN CHAMBERS IN A
PETITION FOR A WRIT OF CERTIORARI.

Heard: November 10, 1998. Decided: January 22, 1999.

1. A defendant is statutorily obligated to appear within ten days of the date of receipt of service of summons on him, and a failure to make such appearance provides a basis for subjecting him to default judgment.
2. The writ of certiorari, although accompanied by a citation requiring a time for appearance and filing of returns, is distinguishable from a writ of summons in that the latter is governed by the general rule of procedure in initiating a cause of action while the former is a special appellate proceedings directed to an inferior tribunal to correct interlocutory decision, and is not governed by the strict rule of pleadings and practice which obtains in the trial court.
3. To strike or dismiss the returns in certiorari proceedings because of the failure to file or appear within ten days of receipt of the writ is not only prejudicial and inconsistent with the principle of substantial justice but is in utter violation of section 16.27(c) of the Civil Procedure Law.
4. The only action available, where a respondent fails to appear or make returns to a citation, is for the Justice who issued the writ to compel such returns and to require it to be amended and perfected when necessary as provided by section 16.23(5) of the Civil Procedure Law.
5. A respondent should not disregard the orders of the Justice in Chambers contained in a citation to appear and file returns within a specified time, and a failure to respond or other act of disobedience, as directed, constitute contempt of court.

Respondents appealed from a ruling of the Justice in Chambers granting petitioner's motion to strike respondents returns filed in response to a petition for certiorari, for reason set forth by the Justice being that the respondents had filed the said returns beyond ten days period required by the Civil Procedure Law. The Supreme reversed the dismissal of the respondents' returns, holding that the statute governing certiorari does not require that the respondents filed returns within ten days of receipt of the

citation and petition. The Court noted that the ten-day requirement is applicable to proceedings in the lower court. The Court noted that while the failure to comply with the orders of the Justice in Chambers contained in the citation constituted contempt of court, it was not a basis for dismissal or striking of the returns. The Court accordingly *ordered* the reinstatement of the returns and the hearing by the Justice in Chambers of the petition on the merits.

N Oswald Tweb of Brumskine & Associates Law Firm appeared for the appellants *Stephen B. Dunbar, Jr.* and *J Emmanuel Wureh* of Dunbar & Dunbar Law Offices appeared for the appellee.

MR. JUSTICE JANGABA delivered the opinion of the Court.

The appeal before this Court grew from a ruling of our distinguished colleague, His Honour John Nathaniel Morris, Associate Justice presiding in Chambers during the March Term, A. D. 1998, granting the motion to strike respondents' returns to the petition for a writ of certiorari filed on May 12, 1997, before then Associate Justice, His Honour Pei Edwin Gausi presiding in Chambers, requesting a review of an alleged adverse ruling rendered by the trial judge in an action of debt.

The records show that on May 23, 1997, the alternative writ of certiorari was ordered issued and served on co-respondent with the command that the marshal of the Supreme Court instructs the respondents therein to file their returns to the writ in the office of the Clerk of this Honourable Court on or before the 5th day of June, A. D. 1997, at the same time the writ commanded the marshal to inform respondent to appear before the Chambers Justice on the 5th day of June, A. D. 1997, at the hour of 10:00 a.m. to show cause why petitioners' petition should not be granted..

The records further reveal that although the writ specified the date of appearance and filing of the returns on or before June 5, 1997, the co-respondent did not file any return to the writ until March 13, 1998, when co-respondent served their returns on petitioner after the case was assigned for hearing on March 19, 1998.

Petitioner Tradevco filed a motion to strike the returns as being in violation of section 9.2(3) of the Civil Procedure Law, Rev. Code 1, which requires that service of an answer or reply shall be made within ten days of service of the pleadings to which it responds.

Respondents substantially argued, *inter alia*, that although the returns were not filed on June 5, 1997, it was not a sufficient ground to strike the returns since section 16.6 of the Civil Procedure Law, Rev. Code 1, requires that service of return in certiorari proceedings shall be made at least one day before the time at which the petition is noticed to be heard.

After hearing the argument on both sides on the motion to strike, the Chambers Justice ruled in favour of petitioner substantially on the grounds that the writ of certiorari is analogous to a writ of summons and is governed by the same rules which require filing of a formal appearance within ten days of receipt of the writ of summons.

The foregoing ruling of the Justice in Chambers on the motion to strike the returns in these certiorari proceedings is the subject of the present appeal before this Court *en banc* and presents a single issue of law for the determination of this case. That issue is whether or not a writ of certiorari is analogous to a writ of summons which requires a respondent to file returns within ten days after the date of service, and the failure of which constitutes a legal ground to strike the returns.

During the argument before this Court, the respondents argued that certiorari proceedings are special proceedings and are governed exclusively by the provision of Chapter 16 of the Civil Procedure Law, Rev. Code 1, and not by section 9.2(1) of the said law, as alleged in the motion to strike, and on which the Chambers Justice also relied.

The petitioner on the other hand, argued that the citation which was issued by the Clerk of Court upon the order of the Justice in Chambers was a writ and that a writ is an order of the Court which must be strictly complied with. The petitioner further maintained that the controlling statute, section 9.2(3) of our Civil Procedure Law, Rev. Code 1, prescribes ten days within which to file and serve a responsive pleading and that respondents having failed to file returns in keeping with law is a ground to strike and dismiss the returns.

This is a case of first impression, as well as the first time the issue is squarely raised before us for determination. Therefore, it is important that we take recourse to our statute for guidance. Section 3.62 of the Civil Procedure Law, Rev. Code 1, imposes statutory obligation on defendant to appear within ten (10) days upon the service of a writ of summon, the failure of which pursuant to section 3.33 of the aforesaid law subjects him to default judgment. Section 9.2(3) specifies the time for service of

responsive pleadings which is also within ten (10) days; whereas a writ of certiorari, though accompanied by a citation requiring time for appearing and filing of returns, must be distinguished from a writ of summons, in that the latter is governed by the general rule of procedure in initiating a cause of action whilst the former is a special appellate proceeding directed to an inferior tribunal to correct interlocutory decision, and is not governed by the strict rule of pleadings and practice obtained in the trial court.

Our statute clearly spells out the procedure to follow with respect, to time for return in special proceedings, provided for in section 16.6 of the Civil Procedure Law, Rev. Code 1, which we herein quote for the benefit of this opinion:

"A return and supporting affidavits, if any, shall be served at least one day before the time at which the petition is noticed to be heard."

We hold that to strike or dismiss the return in certiorari proceedings because of the failure to file or appear within ten days of receipt of the writ will not only be prejudicial and inconsistent with the principle of substantial justice but is in utter violation of the provision of Section 16.27(C) which provides "that no peremptory writ shall issue before there has been an opportunity for argument by all interested parties to be heard."

It is the candid opinion of this Court that in the absence of any statutory provision to strike, dismiss or proceed by default judgment, as provided in chapter 16 of the Civil Procedure Law, Rev. Code 1, the only action available, if the respondents fail to appear or make returns to the citation, as in the instant case, is for the Justice who issued the writ to compel such returns and to require it to be amended and perfected when necessary as provided for in section 16.23(5). Our opinion, however, should not be construed to mean that respondents should disregard the order of a Chambers Justice in a citation to appear and make returns within a specified time in certiorari proceedings or any other special proceedings before this Court; for to do so would be a direct affront to the Chambers Justice's order and punishable by contempt. Moreover, we seriously frown upon any flagrant disregard for the order of our courts, be it the appellate court or the subordinate courts. Accordingly, we strongly maintain that disobedience to the order in the citation of the Chambers Justice is contemptuous but does not warrant the returns to be dismissed and stricken from the record. In conclusion, this Court holds that our distinguished colleague, the Chambers Justice, erred when he ordered that the return be stricken and the peremptory writ issued, inconsistent with our statute governing special proceedings.

Therefore, in view of the foregoing laws and reasoning it is the decision of this Court that the Chambers Justice was in error in dismissing and striking respondents' returns for failure to appear and file said returns within ten (10) days of service of the citation in certiorari. Consequently, his ruling is hereby reversed and the case remanded to the presiding Chambers Justice to have the certiorari disposed of in keeping with law and practice. Costs are to abide a final determination of this case. And it is hereby so ordered.

Ruling reversed.