[2018] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 11/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**SANDRA DURRANT**	**APPELLANT**
AND	**JACQUELINE KEMP**	**RESPONDENT**

Miss Colleen Franklin and Miss Andrea Lanaman instructed by Marion Rose-Green & Company for the appellant

Clifford Campbell instructed by Archer, Cummings & Company for the respondent

6 and 7 December 2018

PHILLIPS JA

[1] The appellant (Ms Sandra Durrant) has brought this appeal against the decision of Her Honour Miss Stephanie Orr, Parish Court Judge for the Corporate Area, made on 23 June 2017, wherein she refused Ms Durrant's application for an order that the default judgment entered against her on 29 November 2016, be set aside, and a trial date set.

Background

[2] The background facts have been taken from the helpful submissions of counsel for the appellant. Ms Durrant and Ms Jacqueline Kemp were tenant and landlord

respectively in relation to premises situate at 37 Lyndale Avenue, Kingston 20. Ms Durrant vacated the premises on 17 February 2016. On 8 March 2016, Ms Durrant received a summons indicating that she had been sued by Ms Kemp with regard to allegations that she had defamed her, by posting and publicising on boards and several light posts and shouting in her presence, words defamatory of her, which Ms Durrant strongly denied.

The chronology

[3] The matter first came up for hearing on 24 March 2016 and Ms Durrant attended court. She informed the court that she was unrepresented, and that she was challenging the claim that had been brought against her by Ms Kemp. The matter was adjourned to 15 April 2016. On that date, Ms Durrant and her attorney attended court and the matter was set for trial on 21 November 2016. On that date (21 November 2016), Ms Durrant was absent as she was not well, and the matter was set for default on 29 November 2016. However, neither Ms Durrant nor her attorney was present on that date.

[4] It was Ms Durrant's and her counsel's position that they thought that the matter had been fixed for hearing on 29 December 2016, and that it was when they had attended court on 29 December 2016, they discovered that the matter was not fixed for that date, and that a default judgment had been entered on 29 November 2016, the month before. Ms Durrant thereafter made an application for the default judgment to be set aside. Initially, it was set for 31 January 2017, but was adjourned and subsequently heard on 17 March 2017. The application was refused on 17 March 2017,

with an order for costs in the amount of $8,000.00 to Ms Kemp. Ms Durrant made a second application on 9 June 2017, which was heard by Her Honour Miss Orr and which was also refused, with costs of $11,000.00 to Ms Kemp.

Discussion and analysis

[5] There is no question that the approach of the appellate court to a decision of the judge of the lower court sitting alone exercising his/her discretion is well known, and the court will only interfere if the judge has proceeded on some error of law, or misapplied some principle of law, or misdirected himself/herself as to the facts, or on the application of the law to the facts, so that one can say, that the learned judge of first instance was palpably wrong (**Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042). There is also however dictum from Lord Denning in the case of **Ward v James** [1965] 1 All ER 563 making it clear, that the court will interfere if the judge has gone wrong. So, if the judge has given no or no proper weight to the evidence before him/her, or has been influenced by external considerations, then the Court of Appeal will intervene.

Whether there was merit in the appellant's case

[6] This appeal relates to setting aside a default judgment obtained in the Parish Court. Section 186 of the Judicature Parish Court Act, therefore, is applicable and it states that:

> "If on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer

> when called in Court, the [Parish Court Judge], upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only; and the judgment thereupon shall be as valid as if both parties had attended:
>
> Provided always, that the [Parish Court Judge] in any such cause, at the same or any subsequent Court, may set aside any judgment so given in the absence of the defendant and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, on sufficient cause shown to him for that purpose."

[7] So it is clear that on the date when the default judgment was entered, 29 November 2016, both Ms Durrant and her counsel were absent. No one attended court to sufficiently excuse their absence on that day, and so the default judgment was properly entered, and the defendant must therefore show cause for the judgment to be set aside. The application to set aside the default judgment was made timeously, as it was filed within a few days of the entry of the default judgment, although the application was not heard until the following month on 17 March 2017, when it was refused. On 9 June 2017, the second application to set aside the default judgment was also heard and refused, although leave to appeal was granted, and a stay of execution of the order made pending appeal.

[8] It is clear, that in endeavouring to show "sufficient cause", the defendant must demonstrate that there is merit in the appeal, on the basis of the principles enunciated in **Evans v Bartlam** [1937] 2 All ER 646, through information before the court which should be by way of affidavit, deponed to by somebody who can speak positively to the

facts. One could even say that the defendant must show a real prospect of success and not a fanciful one as set out by Lord Woolf in **Swain v Hillman and Another** [2001] 1 All ER 91. But it is important to note that rule 13.3 of the Civil Procedure Rules 2002 is not the applicable provision to this matter issuing out of and being heard in the Parish Court, as the Civil Procedure Rules relate to and govern matters filed and heard in the Supreme Court.

[9] In reviewing whether the appellant has shown sufficient cause to have the default judgment set aside, one must examine the merit of the case therefore, and the delay which has resulted in the judgment having been properly entered.

[10] The case for the appellant and the respondent are diametrically opposed. It was Ms Durrant's contention that she did not put up any notice on the lamp post, let alone a defamatory one of Ms Kemp. On the day that the notice had allegedly been fixed to the lamp post, she said that it had been raining heavily, and as a consequence, she had not gone outside. It was her contention that Ms Kemp was only claiming that she had defamed her as she had reported her to the police for putting urine and faeces on her garden, and so, she was being pursued in this way by Ms Kemp out of pure malice.

[11] Ms Kemp's position was that maybe something had been put on Ms Durrant's premises, but it was not done by her, and her son does urinate in the back of the yard on occasion due to some bathroom facilities difficulties that she had been experiencing, but that did not affect her position in any way that she had seen Ms Durrant publish the offensive defamatory notice on the light posts, as she had seen her do it. Ms Kemp

challenged the statement of Ms Durrant that it had rained on that day as she stated that the notice was affixed to the post and the notice showed no signs of being wet which therefore put the lie to that claim being made by Ms Durrant.

[12] These are clearly vastly contradictory competing contentions, and in our view, this can only be unravelled or cleared up by the court hearing both women, and having their evidence tested in cross-examination, their demeanour observed by the judge, and their testimonies scrutinized, in order to ascertain who was telling the truth. The credibility of both women is in issue. In these circumstances for the purposes of an application to set aside a default judgment, where the matter has not been decided on the merits but by way of an administrative act, the applicant could have a real chance of success. That would be so because if she was believed by the judge, she would have remained in her house while it was raining outside, she would not have placed the notice on the lamp post and she would not therefore have defamed Ms Kemp, and would not be liable for any damages accordingly.

[13] It is a matter crying out for trial, and we fail to see how the learned Parish Court Judge did not see this, and in failing to do so, in our view, she erred in her application of the law to the facts, and this court must correct that. We pause here to say that as counsel for the respondent, Mr Clifford Campbell, would have appreciated from the comments made by the bench during the hearing of the appeal, the fact that there were pictures attached to the affidavit on pages 27 and 28 of the bundle, placed before the court, did not take the matter any further. What these photographs really did was to show that this was a matter which required further investigation at a trial. We also

would wish to state that whereas Mr Campbell has said that Ms Kemp's evidence did not need to be corroborated, but Ms Durrant's evidence did, we do not think that in the circumstances of an application to set aside a default judgment, that that would have been required. The question which arose on the evidence was whether Ms Kemp had been defamed by Ms Durrant, as she alleged, by the defamatory material which had allegedly been placed on the lamp post. This was a matter for trial.

Delay

[14] The delay in this matter was also not one which we would say was inordinate. At the highest, the delay could be calculated at approximately two months from the date when the default judgment was entered to when the first application to set aside the default judgment was filed. Ms Durrant said she was ill on 21 November 2016, when she did not attend court. She said she was informed by her attorneys that the date fixed for the hearing which took place on 29 November 2016, was really 29 December 2016, and both her attorney and herself attended court on that day. When they discovered that the default judgment had already been entered a month before, within days the application to set aside the default judgment appears to have been filed.

The second application to set aside the default judgment

[15] It is true that it was refused on 17 March 2017 and then again on 9 June 2017, but that was due to the fact that sufficient information had not been placed before the court on the first occasion, although there had been a denial of the act of defamation. The details of the motive being relied on, and the revenge being claimed had not been explained by Ms Durrant in the first application, but was put before Her Honour Miss

Orr when the matter came before the court on the second occasion. **Rohan Smith v Elroy Hector Pessoa and Another** [2014] JMCA App 25 cited with approval the dictum Harrison P (Ag) on behalf of the court in **Trevor McMillan and Others v Richard Khouri** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2002, judgment delivered 29 July 2003, where he said:

> "A second and subsequent application may be made to the same or another judge of the Supreme Court to set aside such a judgment as long as the applicant can put forward new relevant material for consideration (**Gordon et al v Vickers** (1990) 27 JLR 60). Facts may be regarded as new material, although through inadvertence or lack of knowledge such facts were not placed before the court on the first occasion provided they are relevant (See also **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies et al** [1971] 1 WLR 550)."

It is clear that the information submitted in the second application was relevant to the matters in issue to be determined by the court in the exercise of her discretion.

[16] Additionally, it could not in all the circumstances of this case be said that an inordinate delay had occurred and also, in any event, it must be recognized that the mistake as to whether or not Ms Durrant and her attorney should have been in court on 29 November or 29 December 2016, was one that must be laid on the shoulders of the attorneys, which fact the court should scrutinize with great care in keeping with the principles enunciated by Lord Denning in **Saulter Rex & Co v Ghosh** [1971] 2 All ER 865 which states that one does not wish the litigant to suffer and bear the loss of litigation due to the ineptitude or negligence on the part of his or her attorneys.

Conclusion

[17] Ultimately, it appears that Ms Durrant has shown good cause for being absent from court on the relevant day, and also a real prospect of success on the claim, and so, the default judgment which was entered on 29 November 2016 ought to be set aside, and a trial date set for the matter to be heard so that the issues in controversy between the parties can be finally determined. The costs awarded to Ms Kemp in the sum of $8,000.00 and $11,000.00 respectively have now been paid by Ms Durrant to Ms Kemp, otherwise, an order would clearly have to have been made for them to be paid forthwith.

[18] In light of the above the appeal is allowed. The court orders therefore that the default judgment made on 23 June 2017, by Her Honour Miss Stephanie Orr is set aside. The matter should therefore proceed to trial. There shall be no order as to costs on this appeal.