

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 7/2014**

**APPLICATION NOS 143 AND 144/2017**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA  
THE HON MISS JUSTICE P WILLIAMS JA  
THE HON MISS JUSTICE STRAW JA (AG)**

**BETWEEN      MARILYN HAMILTON                          APPLICANT**  
**AND              UNITED GENERAL INSURANCE COMPANY**  
**LIMITED    RESPONDENT**

**AND**

**BETWEEN      UNITED GENERAL INSURANCE COMPANY**  
**LIMITED    APPLICANT**  
**AND              MARILYN HAMILTON                          RESPONDENT**

**Paul Beswick and Mrs Angel Beswick-Reid instructed by Ballantyne, Beswick  
& Company for Marilyn Hamilton**

**Lord Anthony Gifford QC, Conrad George and Andre Sheckleford instructed by  
Hart Muirhead Fatta for United General Insurance Company Limited**

**10 November 2017**

**PHILLIPS JA**

[1] Marilyn Hamilton (Hamilton) has a case against the United General Insurance Company Limited (UGI) for damages for wrongful dismissal. It was tried in the court

below and Sinclair-Haynes J (as she then was) gave judgment in her favour. Damages remain outstanding to be assessed.

[2] UGI filed a notice of appeal challenging that decision on 12 February 2014. They did so on several grounds. On 25 April 2014, Hamilton filed a counter-notice of appeal.

[3] There are several items of correspondence from the registrar of the Court of Appeal requesting UGI to file outstanding documents and/or to indicate that it intended to proceed without the notes of evidence of the trial below. Since nothing was done by UGI, in spite of several warnings from the registrar, Hamilton filed an application for the appeal to be dismissed for want of prosecution. The service of that application triggered an application from UGI for extension of time to be granted to regularise its appeal. This was filed on 20 March 2017. Efforts were made to file several documents on 17 May 2017 but they were filed out of time and would therefore be deemed invalid having been filed without the court's permission.

[4] Those two applications came before this court and were heard by McDonald-Bishop JA, P Williams JA and Straw JA (Ag), and on 23 June 2017, they made several orders:

- “1. The notice of application of Mrs Hamilton that the appeal be dismissed for want of prosecution is refused.
2. The application of United General Insurance (UGI) for extension of time to file skeleton arguments, chronology of events and record of appeal is granted.
3. The time is extended to the 28th July 2017 for UGI to file and serve record of appeal, skeleton arguments

and chronology of events all prepared in accordance with the relevant provisions of the Court of Appeal Rules including cross referencing as stipulated in the rules and proper labels ascribed to the record.

4. The documents filed by UGI on 17th May 2017 are not permitted to stand.
5. Upon UGI complying with these orders Mrs Hamilton if wishing to be heard on the appeal must file her skeleton arguments in accordance with rule 2.6(2) of the Court of Appeal Rules.
6. UGI is at liberty to file and serve skeleton arguments in reply within 14 days of service of Mrs Hamilton's skeleton arguments in accordance with rule 2.6(3) of the Court of Appeal Rules.
7. In accordance with rule 2.7(7) [of the Court of Appeal Rules], UGI must file a supplementary record containing all skeleton arguments and chronology of events.
8. Unless UGI complies with the order set out at paragraph 3 within the time specified, the appeal shall stand struck out for failure to comply with the orders and rules of the court unless the court otherwise orders.
9. Within one week of the final deadline for compliance with these orders, the Registrar of this court shall submit the matter to any of the judges of this panel unless not reasonably practicable to do so for consideration in chambers for further directions including the fixing of an expeditious date for Case Management Conference.
10. The costs of both applications to Mrs Hamilton to be agreed or taxed. Taxation is allowed."

Orders 3, 4 and 8 are of great significance in respect of the applications now before this court for determination.

[5] On 28 July 2017, UGI filed and served the record of appeal and chronology of events. It did not file the skeleton arguments.

[6] As a consequence, on 3 August 2017, Hamilton filed application no 143/2017 requesting *inter alia* that the notice of appeal (App No 7/2014) filed 12 February 2014, be dismissed for non-compliance with the Court of Appeal Rules, 2002 (CAR) and pursuant to order eight of the Court of Appeal order dated 23 June 2017 with costs. The grounds of the application were that the Court of Appeal had made several orders on 23 June 2017, and UGI had failed to comply with them particularly, the filing of the record of appeal, the chronology of events and the skeleton arguments, as though those documents had been filed earlier, the court had specifically stated that those documents were not permitted to stand.

[7] Counsel for Hamilton also complained that aside from the skeleton arguments not having been filed at all, the core bundle had enclosed at "Tab H" the document headed "Skelton Arguments" which had been filed on 17 May 2017, which, by order 4 of the Court of Appeal order dated 23 June 2017, had stated that it could not stand. Counsel submitted that this filing in the bundle/record of appeal could not satisfy order 3 of the said order made by the Court of Appeal. Additionally, the record of appeal did not comply with the provisions of CAR as critical documents, pleadings, witness statements and evidence from the court below were missing for example, the "Further Amended Particulars of Claim" which was filed on 4 November 2013. Additionally, counsel complained that the chronology of events was inadequate as it did not contain cross-references with pages and documents in the record of appeal. It also did not

contain and/or reflect the true sequence of events, and so could not be considered a proper filing. This application was supported by the affidavit of Angel Beswick-Reid who testified to the matters set out in the application.

[8] On 3 August 2017, UGI filed an application for relief from the sanction of striking out. The application relied on 8 grounds as set out below:

- “(i) This application is being made promptly;
- (ii) Non-compliance with the Court’s ‘unless order’ of 23<sup>rd</sup> June 2017 was not intentional;
- (iii) There is a good explanation for the non-compliance;
- (iv) [Hamilton] has suffered no prejudice as a result of [UGI’s] non-compliance;
- (v) The non-compliance can be remedied within a reasonable time;
- (vi) The non-compliance has not affected the timetabling of the hearing of the appeal;
- (vii) The effect of striking out the claim will be to strike out an appeal against a judgment leading to a quantum of damages over J\$30,000,000, which would be a disproportionate sanction relative to the breach in question.
- (viii) The overriding objective of the Honourable Court to deal with cases justly.”

[9] That application is supported by an affidavit of Andre Sheckleford filed on even date. In paragraph 2 of that affidavit, Mr Sheckleford having referred to the orders made by the court on 23 June 2017, and the fact that if certain documents were not filed by 28 July 2017 the appeal would be struck out, stated that:

“On 28<sup>th</sup> July 2017, [UGI] sought to file all three documents, and to this end a bearer was sent with the relevant documents. However, unfortunately, through inadvertence, the Skeleton Argument did not find its way on to the Court's file.”

He indicated that the skeleton argument was identical to the document filed earlier in the proceedings.

[10] Mr Sheckleford also indicated that UGI's representatives became aware that the document had not been filed when counsel for Hamilton filed an application seeking to dismiss the appeal for not complying with the court's order to have the same filed on 28 July 2017. The skeleton arguments were therefore filed on 3 August 2017.

[11] He stated that the pleading which had been omitted from the record was not on the file of the attorneys, so it was obtained from the Supreme Court file, and was filed as an addendum to the record of appeal along with copies of witness statements which were also missing from the record. Mr Sheckleford therefore stated that the non-compliance could be easily remedied, did not affect the time tabling of the hearing of the appeal, and striking out the appeal would be disproportionate to the nature of the breaches in question. He prayed in aid the overriding objective, given the importance of the case, the complexity of the issues and the amount of money involved.

[12] Mrs Beswick-Reid swore to an affidavit in reply. She pointed out that counsel for Hamilton was forced to file an application to strike out the appeal, yet again, in order to get UGI to attempt to be in compliance. They continued, she said, to act in breach and blatant disregard of the rules. The explanation of oversight and inadvertence and not

acting intentionally was unacceptable. UGI, she said, had not filed skeleton arguments in time and had filed other documents which were not in compliance with the rules. Mrs Beswick-Reid insisted that the actions of UGI (non-compliance with the rules) had caused Hamilton "considerable emotional distress and trauma, as there had been no finality to the proceedings".

[13] Mr Sheckleford responded and challenged the alleged prejudice and suffering that counsel for Hamilton claimed that Hamilton had experienced. He also challenged the allegations that the documents filed were not in order. He stated that there was no need for cross-reference to the transcript of *viva voce* evidence in the chronology of events, as UGI was, in the main, only challenging findings of law. He set them out at paragraph 10 as follows:

- “(i) That the failure of [Hamilton] to attempt to mitigate her loss was due to the circumstances of her dismissal, and, as such, [Hamilton’s] failure to mitigate should not be held against her.
- (ii) That reasonable notice for [Hamilton] was one year.
- (iii) That there is no statutory regime in place in Jamaica that provides redress in cases of unfair dismissal.
- (iv) That [Hamilton] is entitled to damages on the basis that she would have continued to work up until her age of retirement.
- (v) That [Hamilton] is entitled to damages in the sum of \$40,000.00 for non-taxable motor vehicle allowance.”

[14] The submissions of counsel for Hamilton referred to rule 26.3(b) of the Civil Procedure Rules, 2002 (CPR) which gives the court the power to strike out a statement of case where same is found to be an abuse of the court's process. Counsel also

referred to rule 1.7(2)(n) and 2.15(a) of CAR which gives the court wide powers to manage the process of appeals in furthering the overriding objective.

[15] Counsel argued that the litigation must come to an end. Litigation should not be allowed to continue to hang over the head of a litigant with such uncertainty spanning a decade; a party he said will suffer tangible prejudice due to that delay. He relied on **Reid (Spurgeon) v Corporal Lobban and another** (unreported), Supreme Court, Jamaica, Suit No CL 1989/R-014, judgment delivered 12 June 2001, where McDonald J said it encourages one to have peace of mind by knowing that the incident is closed.

[16] Counsel referred to several authorities dealing with the abuse of process and delay such as **The Commissioner of Lands v Homeway Foods Limited and another** [2016] JMCA Civ 21. We mean no disrespect to counsel by not referring to all the authorities and the submissions in relation to them here, but the principles derived from them are well known. Counsel also referred to several authorities with regard to the application for relief from sanction such as **Jamaica Public Service Company Limited v Charles Vernon Francis and another** [2017] JMCA Civ 2. We are all familiar with these as well. It is well accepted that "administrative inefficiency" is not a good explanation for delay nor is "inadvertence". One also cannot continue to pursue a course that one knows or reasonably anticipates will lead one to be foul of the order of the court and then pray in aid relief from the sanctions of the order.

[17] This brings us to the affidavit of Rushelle Kennedy filed on behalf of UGI on 6 November 2017, on the second day of the hearing of the applications, much to the



understandable chagrin of counsel for Hamilton. She is a bearer employed to Hart Muirhead Fatta, the attorneys representing UGI in these and earlier applications. She testified that on 28 July 2017, she attended the registry at the Court of Appeal with copies of the record of appeal and core bundle, the chronology of events and the skeleton arguments "intended" to be filed therein. She continued in paragraph 3 of her affidavit to say:

"Upon attending the registry with these documents I was informed by the clerk at the window, whose name I do not know, that skeletal arguments were already present on the file. As such I surmised that the skeleton arguments would not need to be re-filed. As such only the record of appeal and the chronology of events were filed."

[18] What was of even more significance was that this bearer merely placed the documents on the relevant file at the attorneys' offices but did not inform the relevant attorneys what had transpired. She said she did not realise that the failure to file the skeleton arguments was material until two working days later when she was informed of the application filed by the attorneys for Hamilton on 3 August 2017 to strike out the appeal. So she said she attended the court and had the document filed.

[19] Of course, and understandably so, counsel for Hamilton did not accept this statement as credible. They investigated the matter, wrote to the registrar of the Court of Appeal and requested confirmation of this alleged discussion with the representative of the registry at the Court of Appeal. The registrar did her research and responded timeously. She said that no one remembered that conversation or incident and she was therefore unable to offer any further assistance.

[20] The attorneys of Hart Muirhead Fatta had also received a letter dated 31 July 2017, from the deputy registrar of the Court of Appeal indicating that the skeleton arguments had not been filed and requesting that the non-compliance be addressed.

[21] We must say for our own part that this entire handling of the matter by the representatives of UGI leaves much to be desired. We would have thought, as we said at the hearing, that one ought not to wait until the last day to file documents ordered by the court under an unless order, and that if you do that, the process of filing should be monitored, checked and confirmed so that compliance is ensured. To the contrary, the process utilised in this case demonstrated a litany of errors and sloppy administration that was entirely unacceptable in our view.

[22] It simply cannot be good enough to say that the same document which ought to have been filed, was filed in the court bundle (without its individual court stamp), and then later, after the deadline of the 28 July 2017, on 3 August 2017, and then also subsequently, on 3 November 2017 when the correct paragraphing and formatting had been done.

[23] That having been said however, contrary to the disbelief of counsel for Hamilton, we accept that efforts had been made to file the skeleton arguments and the record of appeal and the chronology of events. An addendum had been filed in respect of the witness statements omitted from the record and with regard to the chronology of events. We accept that the grounds of appeal do relate, in the main, to findings of law as to whether Hamilton failed to mitigate her losses due to the circumstances of her

dismissal; whether reasonable notice had been given to her; whether there was a statutory regime in place in Jamaica providing redress for unfair dismissal; and was she entitled to damages and if so in what amount; and therefore, detailed cross-references to notes of evidence do not seem to be required.

[24] The lack of attention to the protection of UGI's rights, and the scant regard paid to the orders of the court and to the rules has been quite extraordinary in this matter. We hope that the strident warnings given by this court earlier in June of this year, and now yet again in this judgment, will help the representatives of UGI to take heed, as they will not obtain further indulgence, or receive benefits from the court with that dilatory approach.

[25] The exercise of the discretion of this court in favour of UGI on this occasion is only because there were efforts to comply. Indeed, two documents had been filed with efforts to file the third also. So we are constrained in the furtherance of the overriding objective and in treating with cases justly to permit this appeal to proceed which appears to have some merit dealing with matters of some importance with regard to the development of the law. We are mindful also that Hamilton has a counter-notice to pursue so the matter would continue to be on the court's list in any event.

[26] We therefore make the following orders:

1. Order no 2 of Application No 143/2017 is dismissed.
2. Order no 1 of Application No 144/2017 is granted.

3. Time is extended to 3 November 2017 for the filing of the skeleton arguments on behalf of UGI. The skeleton arguments filed on 3 November 2017 shall stand as properly filed.
4. The record of appeal and supplemental record of appeal filed on 28 July 2017 and 3 August 2017, respectively, are accepted as having been properly filed as well as the chronology of events filed 28 July 2017.
5. All other statements made by this court on 23 July 2017 stand.
6. Hamilton shall have costs on both application nos 143 and 144/2017 to be taxed if not agreed. Taxation is hereby authorised.
7. The following case management orders are hereby made:
  1. The appeal and counter-notice of appeal is fixed for hearing in the week commencing 14 May 2018 for five days.
  2. UGI shall have six hours for oral submissions on appeal. Hamilton shall have seven hours in response to the appeal and in respect of the

counter-notice of appeal. UGI shall have one hour for response to the counter-notice of appeal. UGI and Hamilton shall have half hour each for reply if necessary.

3. UGI shall file and serve further written submissions and bundle of authorities on which it intends to rely at the appeal on or before 14 December 2017.
4. Hamilton shall file and serve written submissions and bundle of authorities on which she intends to rely at the appeal and in support of the counter-notice of appeal on or before 2 March 2018.
5. UGI shall file and serve written submissions and bundle of authorities in response to the counter-notice of appeal on or before 13 April 2018.
6. UGI shall prepare, file and serve this order.