[2018] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 88/2014

APPLICATION NO 181/2017

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

BETWEEN	**LIJYASU M KANDEKORE**	**APPLICANT**
AND	**COK SODALITY CO-OPERATIVE CREDIT UNION LIMITED**	**1st RESPONDENT**
AND	**DEIDRE DALEY**	**2nd RESPONDENT**
AND	**DONNOVAN WARD**	**3rd RESPONDENT**

Lijyasu M Kandekore in person

Mrs Georgia Gibson-Henlin and Ms Stephanie Williams instructed by Henlin Gibson-Henlin for the respondents

13, 16 February and 9 March 2018

MORRISON P

[1] I have read in draft the reasons for judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

F WILLIAMS JA

Background

[2] This matter came before us as an application to set aside a default costs certificate issued by the registrar of this court on 21 October 2016. We heard

arguments in the matter on 13 February 2018 and on 16 February 2018 we made the following orders:

> "1. The application is refused.
>
> 2. Costs to the respondents to be agreed or taxed."

[3] These are our promised reasons for the making of those orders.

[4] In his notice of application filed on 6 October 2017 the applicant stated two grounds:

> "a. The default costs certificate should be set aside for good reason in that the Registrar did not have jurisdiction to set aside the default certificate.
>
> b. The Respondents freely and voluntarily withdrew their notice of taxation."

[5] In support of the application is the affidavit of the applicant sworn to on 6 October 2017. Paragraphs 8-13 of the said affidavit contain the substance of the applicant's contention and are worded as follows:

> "8. That on the 5th July, 2016 the Appellant timely filed and served a Points of Dispute to [the] Respondents' Bill of Costs but erroneously filed it in the Supreme Court instead of in the Court of Appeal.
>
> 9. The Respondents' counsel was aware of the error but did not bring it to the attention of the Appellant and instead misled the Court into believing that the Appellant was not interested in disputing the claim for costs.
>
> 10. The Appellant's error was not wilful or in disregard of the Court's rules but was in part caused by the multiplicity of errors in identifying the case made by the Respondents and which mislead [sic] the Appellant.

11. That the Appellant became aware of the errors on the 2nd November, 2016 when he visited the Registrar's office to enquire about the case.

12. The Respondents freely and voluntarily withdrew their notice of taxation.

13. I attach hereto marked "Exhibit 1" for identification a copy of the proposed points of dispute."

[6] For their part, the respondents relied on two affidavits of Ms Stephanie Williams: (i) that sworn to on 15 November 2016; and (ii) that sworn to on 11 July 2017. These affidavits set out a chronology of the matter and exhibited, *inter alia*, four documents that are important in the resolution of this application. Those documents are: (i) a further amended bill of costs filed and served on 23 June 2016, showing, underlined in red, that that bill was being filed in this court; (ii) notice to serve points of dispute also filed and served on 23 June 2016; (iii) notice of taxation filed on 7 July 2016; and (iv) notice of withdrawal of taxation filed and served on 20 July 2016. These documents are exhibited to the November 2016 affidavit as exhibits "SW 1"; "SW 2"; "SW 3" and "SW 4" respectively.

[7] In his affidavit, the applicant admits to receiving three of the four documents: he did not receive the notice of taxation and the respondents do not contend that that document was served on him.

The award of costs

[8] The applicant had brought two appeals challenging: (i) a decision of D Fraser J, refusing to order the return of the applicant's motor car which had been seized by the first respondent; and (ii) a decision of Batts J granting summary judgment to the

respondents on the applicant's substantive claim. These consolidated appeals (SCCA No 88/2014 and SCCA No 43/2015) were dismissed by this court on 6 May 2016 and costs ordered against the applicant both in this court and in the court below in respect of the two matters. Taxation proceedings were therefore instituted by the respondents in relation to the consolidated appeals and in relation to the matter in the court below.

The taxation proceedings

[9] The respondents made several errors in the preparation and filing of the taxation documents. For example, the bill of costs filed in this court on 21 June 2016 included costs for both courts. It was to correct this error and an error in the naming of the court in that document that the further amended bill of costs was filed and served.

[10] The applicant, on learning of the grant of the default costs certificate, sought at first to have the registrar of this court set it aside. This she refused to do on 27 March 2017. There were two bases for her refusal: (i) that the respondents had been entitled to the default costs certificate - the default costs certificate was correctly issued as the requirements of rule 65.21(1) of the Civil Procedure Rules (CPR) had been satisfied; and (ii) that the applicant had otherwise not shown "good reason" for the granting of the application as required by the relevant rule. The applicant next sought to have the certificate set aside by a single judge. On 21 September 2017, Brooks JA refused the application and had the matter referred to the court. In a careful and detailed written judgment, the learned judge of appeal opined, *inter alia*, that: (i) a single judge does not have jurisdiction to set aside a default costs certificate; and (ii) the registrar of this

court does not have jurisdiction to do so unless it is demonstrated that the receiving party was not entitled to it. Hence, the matter came before us.

The application

[11] In making his application, Mr Kandekore sought to persuade us to the view that there exists "good reason" for the default costs certificate to be set aside. In the main, he pegged his application on his error in filing his points of dispute in the Supreme Court instead of in this court. The fact of his filing that points of dispute, he contended, evinced an intention to contest the bill of costs in this court. Also, he argued, the respondents, in spite of being aware of his error, did not bring the said error to his attention.

[12] On behalf of the respondents, Mrs Gibson-Henlin QC contended in oral submissions that the application ought to be refused mainly because: (i) of the delay on the part of the applicant; and (ii) the applicant has demonstrated no reasonable likelihood of successfully contesting the costs awarded by default. The points of dispute that were finally filed by the applicant, it was argued, do not comply with the rules.

The law

[13] The relevant section of the Civil Procedure Rules (CPR) that govern taxation proceedings both in this court (incorporated by way of reference by rule 1.18 of the Court of Appeal Rules (CAR)) and in the Supreme Court is part 65. The rules that are primarily applicable to the application before us are rules 65.20 (dealing with the filing of points of dispute and the grant of a default costs certificate) and rule 65.22 (dealing

with the bases on which a default costs certificate may be set aside). These rules read as follows:

> "65.20 (1) The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on -
>
> (a) the receiving party; and
>
> (b) every other party to the taxation proceedings.
>
> (2) Points of dispute must -
>
> (a) identify each item in the bill of costs which is disputed;
>
> (b) state the reasons for the objection; and
>
> (c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item.
>
> (3) The period for filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).
>
> (4) If a party files and serves points of dispute after the period set out in paragraph (3), that party may not be heard further in the taxation proceedings unless the registrar gives permiss-ion.
>
> (5) The receiving party may file a request for a default costs certificate if -
>
> (a) the period set out in paragraph (3) for serving points of dispute has expired; and

(b) no points of dispute have been served on the receiving party.

(6) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate."

"65.22 (1) The paying party may apply to set aside the default costs certificate.

(2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.

(3) The court may set aside a default costs certificate for good reason.

(4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Dispute."

[14] At paragraph [30] of his judgment referring this application to the court, Brooks JA, indicated that, in writing the judgment in **Rodney Ramazan and Ocean Faith NV v Owners of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37, being unaware at the time that rule 65.22 of the CPR had been amended, he had erred in expressing the view that the registrar could set aside a default costs certificate for reasons other than that the receiving party was not entitled to it. He found that decision to be wrong in that limited regard. Apart from that, however, Brooks JA's judgment in the case of **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** gives useful guidance in respect of the matters a court might examine in considering whether to set aside a default costs certificate for "good reason".

[15] This was the guidance that he gave at paragraph [14] of **Rodney Ramazan and Another v Owners of Motor Vessel (CFS Pamplona)** after referring to a quotation from the case of **Dr Adu Aezick Seray-Wurie v The Mayor and Burgess of the London Borough of Hackney** [2002] EWCA Civ 909, at paragraphs 10, 11 and 12:

> "[14] The above quotation identifies specific issues, which should be considered in deciding whether a good reason existed for setting aside a default costs certificate. Without attempting to stipulate mandatory requirements it would seem that those issues would include:
>
> (1) the circumstances leading to the default;
>
> (2) consideration of whether the application to set aside was made promptly;
>
> (3) consideration of whether there was a clearly articulated dispute about the costs sought;
>
> (4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs;
>
> I find also that rule 2.20(4) of the CAR which requires a consideration of the principles of relief from sanctions applies in these circumstances. The rule states:
>
> '(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief.'
>
> It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief. In assessing the instant case I shall use the benchmark set out in rule 26.8, albeit in a somewhat adjusted order."

[16] Considering the factors outlined by Brooks JA, the answers that must be given are as follows:

Circumstances of the default

[17] The circumstances of the default, although perhaps being attributable in part to errors made by the respondents, should also have been apparent to the applicant, he being, not a layman, but a practising attorney-at-law who ought to be aware of the documents and procedures relating to taxation proceedings. It is of significance that the notice of withdrawal that was filed in this court and served on the applicant, specifically stated the reason for the withdrawal of the notice of taxation as follows:

> "TAKE NOTICE that the Respondents desire to and hereby withdraw their Notice of Taxation against the Appellant in light of the fact that the Appellant filed a Points of Dispute in the Supreme Court and did not file a Points of Dispute in the Court of Appeal."

[18] This notice was served on the applicant on 20 July 2016, and ought to have brought to his attention the error of his omission to file points of dispute in the Court of Appeal; yet no steps were taken to correct the error. As the rules clearly indicate, a taxation will only occur where points of dispute have been filed in keeping with a particular timeline. Additionally, where no points of dispute have been filed, a default costs certificate may be issued, as was the situation in this case.

Was the application to set aside made promptly?

[19] When viewed from the time of the issuing of the default costs certificate, it would appear that the application to set aside the default costs certificate was made promptly. The default costs certificate was issued on 21 October 2016 and the application was filed on 3 November 2016.

[20] However, it should still be borne in mind that, with the filing and serving on the applicant of the notice of withdrawal of taxation on 20 July 2016, he would have been given a reminder from that time of the risk of being in breach of the timeline for the filing of his points of dispute. The default costs certificate was not issued until almost three months later, with no action on the part of the applicant to comply with the rules.

Whether there was a clearly-articulated dispute about the costs sought; and whether there was a realistic prospect of successfully disputing the bill of costs

[21] These two factors might conveniently be considered together. They should be considered against the background of: (a) what is stated in the applicant's points of dispute; and (b) what the rules require points of dispute to state. The main statement relied on by the applicant in his points of dispute is this:

> "The Appellant disputes each and every item in the Respondents' bill of costs and the Appellant says that the Respondents Bill of Costs does not comply with the relevant court orders and the amounts claimed have no legal basis."

[22] The rules, however, require far more specificity. For example rule 65.20(2)(c) requires that the points of dispute:

> **"**(c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item."

[23] It is noteworthy that the notice to serve points of dispute, served on the applicant on 23 June 2016, makes the same stipulation for particulars, in keeping with the rule. In spite of the requirement for particulars, however, none have been provided

in this case. These considerations therefore cannot be resolved in favour of the applicant.

Disposal of the application

[24] In the case of **Orrett Bruce Golding and The Attorney General of Jamaica v Portia Simpson Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 3/2008, judgment delivered 11 April 2008, Panton P made the following observation on the question of delay and the failure to comply with the requirements of the CPR:

> "15. Before leaving this matter, I have to remind litigants and their attorneys-at-law that they ignore the Civil Procedure Rules at their peril. The days of paying scant regard to the Rules are over. Those days went out with the 1990s....There can be no return to such times as it is not in the interests of justice for the Courts to permit such laxity."

[25] While it does not appear that the failure to comply was intentional, one cannot conclude that a good explanation has been proffered for the breach in this case. The breach is compounded by the fact that the notice of withdrawal of taxation, served some three months before the default costs certificate was issued, by its clear wording would have brought to the attention of the applicant (a practising attorney-at-law) his failure to comply with the rules. In my view, bearing in mind the admonition of Panton P, it would not be in the interests of the administration of justice to grant the application, given the particular facts and circumstances of this case. In relation to ground "a" of the application, therefore, I find that sufficient "good reason" has not been shown.

[26] In relation to ground "b", the withdrawal of the notice of taxation would have paved the way for the issuing of the default costs certificate; and would not, as it seems the applicant thinks, mean that no such certificate should have been issued. A notice of taxation ought only properly to be filed after the filing of the paying party's points of dispute and no points of dispute were filed within time in this court. In the result, it was my view that the application ought to have been refused, with costs to the respondents to be agreed or taxed.

P WILLIAMS JA

[27] I too have read the reasons for judgment of F Williams JA and agree with his reasoning and conclusion. There is nothing further that I wish to add.