[2015] JMCA App 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 148/2010

APPLICATION NO 46/2015

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**F1 INVESTMENTS INC**	**1ST APPLICANT**
AND	**STEVE PALMER**	**2ND APPLICANT**
AND	**CHRISTOPHER KELLY**	**3RD APPLICANT**
AND	**PATRICE PALMER**	**4TH APPLICANT**
AND	**PETER KRYGGER**	**1ST RESPONDENT**
AND	**GARRIE DON**	**2ND RESPONDENT**
AND	**BRADLEY JOHNS**	**3RD RESPONDENT**

Paul Beswick and Miss Carissa Bryan instructed by Jobson Wadsworth Thompson Fontaine for the applicants

Kevin Powell instructed by Hylton Powell for the respondents

21 September and 9 October 2015

DUKHARAN JA

[1] I have read, in draft, the reasons for judgment prepared by my brother Brooks JA. I agree that they represent the court's reasoning for decision previously handed down and have nothing to add.

BROOKS JA

[2] If ever there was a case in which a party sought to have this court revert to the days when it was the parties that dictated the pace of litigation, this is that case. The applicants have repeatedly flouted the rules and orders relating to the time in which they should perform their allotted tasks in their appeal, yet they seek for the appeal to be reinstated after it was struck out for non-compliance with orders made by the court.

[3] We heard their application on 21 September 2015 and refused it at that time. The orders then made were as follows:

1. The application for reinstatement of the appeal and for extension of time to file skeleton submissions is refused.

2. Costs to the respondents to be taxed if not agreed.

[4] At that time we promised to deliver our reasons in writing at a later date. We do so now. It is first necessary to set out the background to the application.

The Background

[5] The 1st applicant is an investment company incorporated in Panama. The 2nd, 3rd and 4th applicants are Jamaican citizens who are resident in Jamaica and up to the material time conducted foreign currency trading in this country.

[6] The respondents claimed on behalf of 83 people (including themselves) that they had invested US$8,145,441.20 with the 1st applicant based on false representations by the 2nd, 3rd and 4th applicants.

[7] The respondents sued to recover the monies due to the investors, and on 26 November 2010 P Williams J, as she then was, granted summary judgment for the respondents for US$8,145,441.20 with interest at 9.09% p.a. from 7 June 2009 to 26 November 2010.

[8] The applicants filed their notice and grounds of appeal on 10 December 2010.

[9] Thereafter, there were a series of defaults by the applicants in complying with the rules of this court or with the orders made in the course of the pending appeal. They are as follows:

(a) The applicants failed to file the record of appeal within the required time. They applied, by notice of application for court orders, filed on 1 March 2011, for an extension of time in which to file the record of appeal. The affidavit filed in support of the application, sworn to by Mr Franz Jobson, the attorney-at-law

having conduct of their case, asserted that the failure was due to inadvertence (paragraph 5 of the affidavit of Franz Jobson filed on 28 February 2011).

(b) The applicants, without getting permission to file the record of appeal out of time, nonetheless filed the purported record on 8 August 2012. They sought to regularise the position by filing, on 3 April 2013, a notice of application for court orders asking for an extension of time within which to file the record, and for the 8 August 2015 filing to stand as having been properly filed. It also asked for the time to file the applicant's skeleton arguments to be extended to 1 May 2013. The affidavit in support, filed by Mr Jobson, explained that the applicants had changed attorneys-at-law twice, were not aware that they were in default and explained that the default was not intentional but that the applicants' efforts were being concentrated on an application for the stay of execution of Williams J's judgment (affidavit of Franz Jobson filed 3 April 2013). The application for extension of time was not opposed and was granted. The time for filing the skeleton arguments was extended to 24 May 2013.

(c) The skeleton arguments were, however, not filed until 20 September 2013. A further application for extension of time to file the record of appeal and skeleton arguments was also filed by the applicants on 20 September 2013. That application, very curiously, duplicated that which was filed on 3 April 2013 and was granted. There was no recognition by the court that the extension date of 1 May 2013 sought, in respect of the filing of the skeleton arguments, had already passed. The September application was granted without any reference to the anomaly.

(d) On 28 January 2014, the appeal came on for case management. Morrison JA, as he then was, made case management orders. Order one of the orders stated:

> "Supplemental Record of Appeal to be filed on or before 14th February 2014 to include (a) 2nd Affidavit of Kevin Powell sworn to on 6th April 2010, (b) Affidavit of Steve Palmer in support of plaintiff's response to May Daisy's Motion for summary judgment dated 3rd May 2010; (c) Affidavit of Kevin Powell sworn to on 27th October 2009 with 2 exhibits."

The case management also set the week of 21 July 2014 as the date for the hearing of the appeal.

(e) By letter dated 26 June 2014 the applicants attorneys-at-law applied to have the appeal taken from the list.

The respondents did not oppose the application and that was done.

(f) A subsequent case management held on 19 August 2014 revealed that not only had the applicants not complied with the order mentioned above, they had not even prepared or served the formal order from that case management conference.

[10] It was against that background of default that the case management orders made on 19 August 2014 contained a number of "unless orders". The orders made were as follows:

> "1. The Appellants shall, on or before the 30th day of September, 2014, file and serve copies of the Orders made at the Case Management Conference held on the 28th January, 2014, **failing which the Appeal shall stand as struck out**.
>
> 2. The Appellants shall, on or before 30th September, 2014, comply with Order number (1) one made at the Case Management Conference held on 28th January, 2014, **failing which the Appeal shall stand as struck out**.
>
> 3. The Appellant [sic] shall, on or before 12th January, 2015, file and serve full submissions, **failing which the Appeal shall stand as struck out**.
>
> 4. The Respondent [sic] shall file and serve full submissions on or before, 26th January, 2015.
>
> 5. The Appellant [sic] shall file and serve a Reply, if necessary, on or before 9th February, 2015.
>
> 6. The Appeal is set for hearing during the week commencing 13th April, 2015.

7. The time limitations set on 28th January, 2014 for the hearing of the appeal shall stand.

8. The Appellants shall file and serve formal order hereto on or before the 30th September, 2014.

9. Costs to the Respondents to be taxed if not agreed." (Emphasis supplied)

[11] Notwithstanding those coercive orders, the applicants failed to file and serve their submissions within the time stipulated. The registrar informed the parties, by letter dated 25 February 2015, that the appeal stood as struck out.

[12] On 10 March 2015, the applicants filed a notice of application for court orders asking for an extension of time to file skeleton submissions. An amended application was filed on 2 April 2015 asking that the appeal be reinstated and that the time be extended to file skeleton arguments. It is this amended application that this court considered.

[13] The reason for the default was set out in an affidavit by Mr Paul Beswick, counsel retained to argue the appeal. The affidavit was filed on 10 March 2015. In paragraph 5 of his affidavit, Mr Beswick candidly stated that his medical condition "forced [him] to exercise severe restraint on carrying out work for which there is no ready compensation". He essentially blamed the default on the applicants' inability to pay for his services.

[14] To date there has been no affidavit from any of the applicants speaking to their respective financial statuses, their reasons for failing to comply with the court orders, or

their prospects of ensuring that there would be no further delay in the proceedings due to financial concerns.

[15] Their application was scheduled to be heard by the court on 6 July 2015 but when it came on for hearing on that date it had to be adjourned.

The applicable principles

[16] Rule 1.7(3)(b) of the Court of Appeal Rules (the CAR) stipulates that this court may, when it makes an order, "specify the consequence of failure to comply with the order". Case management matters and procedural applications made to the court must first be considered and dealt with by a single judge of the court. A single judge is empowered to give directions on case management (rule 2.9(1) of the CAR), and by rule 2.11(1) of the CAR, to make orders on any procedural application. It seems therefore that a single judge may, as part of case management, "specify the consequence of failure to comply with the order". Such conditions will be binding on the parties. No point was taken that the single judge was not empowered to make the "unless orders" mentioned above.

[17] It is the application of the stipulated consequence of those orders that has placed the applicants in the position that their appeal stands as struck out. Mr Beswick approached the application to reinstate the appeal on the basis that the applicable principles were similar to that required by rule 26.8 of the Civil Procedure Rules, 2002 (the CPR), used in the Supreme Court. That rule deals with applications for relief from sanctions. The rules in Part 26 of the CPR are specifically endowed on this court by rule

2.15(a) of the CAR. Rule 2.15(a) states that in addition to other powers given to the court it has "all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26".

[18] Rule 26.8 of the CPR is comprehensive in its requirements and guidance for the assessment of applications for relief from sanctions. It states:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be -
> (a) made promptly; and
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that -
> (a) the failure to comply was not intentional;
> (b) there is a good explanation for the failure; and
> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to -
> (a) the interests of the administration of justice;
> (b) whether the failure to comply was due to the party or that party's attorney-at-law;
> (c) whether the failure to comply has been or can be remedied within a reasonable time;
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
> (e) the effect which the granting of relief or not would have on each party.

> (4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

[19] The applicants' application for reinstatement of the appeal and the extension of time to file skeleton arguments will be assessed along these guidelines.

Whether the application was made promptly

[20] The appeal stood struck out by 12 January 2015. The applicants' attorneys-at-law ought to have been aware of the default at that time if not before. They did not file an application. The registrar brought the default to the applicants' attention by correspondence dated 25 February 2015. It was on 10 March 2015 that they made their first effort to correct their situation. This was almost two months after the default. The application cannot be said to have been made promptly. In **H B Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and another** [2013] JMCA Civ 1 it was held that an application made one month after the maturation of an "unless order" was not made promptly and, for that reason, should not be considered. As was done in that case, however, the other aspects of rule 26.8 will also be considered.

Whether the application was supported by affidavit

[21] It has already been pointed out at paragraph [13] above that the application was supported by an affidavit sworn to by Mr Beswick. The absence of an affidavit from the applicants themselves has already also been mentioned at paragraph [14] above.

Whether the failure to comply was intentional

[22] It is difficult to say that the applicants' failure was intentional. It certainly appears that learned counsel who was briefed to prepare the submissions took the deliberate, considered decision not to prepare them in obedience to the order of the court. To that extent the failure was intentional. It is not known, however, whether he communicated his position to the applicants or his instructing attorneys. The affidavit evidence is silent in this regard.

[23] His instructing attorneys should have been acutely aware of the deadline for compliance with the order and the consequence of a failure to comply. They have also been silent on the point of what, if any, steps they took to secure the submissions from other counsel or whether they informed the applicants of the dilemma caused by counsel's stance. This aspect is closely tied to the issue of the reason given for the failure to comply and that issue will be considered next without coming to a conclusion in respect of the question of intent.

Whether there is a good explanation for the failure

[24] In his affidavit, Mr Beswick deposed that the applicants' "ability to adhere to their financial obligations to pursue this matter has been severely hampered" (paragraph 5). At paragraph 8 he again addressed the applicants' financial status without any distinction between them. He said:

> "…the Appellants [sic] have been left on the verge of bankruptcy due to this judgment, while the Respondents have already liquidated the assets seized from the Appellants [sic]."

[25] The assertion, Mr Beswick submitted in his arguments to the court, are supported by the evidence of Miss Shanique Scott who deposed on behalf of the respondents. Miss Scott confirmed, at paragraph 24 of her affidavit filed on 25 March 2015, that the respondents had partially enforced the judgement in their favour. She said:

> "…The Respondents have enforced their judgment (a considerable portion of which remains unsatisfied) pursuant to orders of the Supreme Court."

[26] Mr Beswick also submitted that the respondents have not asserted anything to counter the evidence that the applicants are impecunious.

[27] Mr Beswick is not on good ground with these submissions. Firstly, the burden is on the applicants to satisfy the criteria established by rule 26.8 of the CPR. It is not for the respondents to adduce evidence to the contrary, although of course, they may. Secondly, it was pointed out in **Alcron Development Limited v Port Authority of Jamaica** [2014] JMCA App 4 that it is not sufficient for an applicant to baldly state that it is impecunious; it must provide evidence to support the statement. It was also stated in that case that general evidence of financial difficulty, as in the case of **Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd** [2010] JMCA App 6, was not sufficient support for the assertion of impecuniosity.

[28] In this case, none of the applicants has stated what financial position he, she or it is in. None has stated that he, she or it was unable to secure, in time, the funding

required to place counsel in funds to have him prepare the submissions. None has explained whether the applicants are now in a position to finance the appeal going forward. As a result, the assertion by Mr Beswick is inadequate and it must be found that no good explanation has been given for the failure to obey the "unless" orders.

Whether the applicants have generally complied with all other orders, rules and directions

[29] Even if it may be said that the applicants were marginally on the incorrect side of the line in respect of the previous criteria that they are obliged to satisfy, the history of their performance in the prosecution of this appeal, as set out in the background above, has plainly been abysmal. Yet, in the face of default after default, failure after failure, with delay featuring in every step, Mr Beswick submitted that as long as each default had been previously cured, it cannot be said that the applicants have not been in general compliance with the previous orders of the court. Learned counsel argued that the efforts to correct each default showed that there was no contempt of the orders of the court.

[30] It is difficult to accept Mr Beswick's reasoning. The mere fact that there has had to be several efforts to correct previous incidents of non-compliance, it would seem, is evidence that there has been no general compliance with the court's rules, orders and directions. The rule does not ask whether the applicant is in compliance with all previous orders, directions and rules. The requirement of general compliance speaks to a tendency or trend and seeks to address or foreshadow what the position will be going forward. If there has been general compliance in the past, then a slip could be

considered an aberration and there is unlikely to be further slips going forward. Several slips in the past, however, are harbingers of further disobedience in the future. That would be in contravention of the principle that "[r]ules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed" (per Panton JA (as he then was)) at page 20 of the judgment in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (Motion No 12/1999) (delivered 6 December 1999)).

[31] Based on the above, it cannot be said that the court is satisfied that the applicants have "generally complied with all other relevant rules, practice directions orders and directions". In order to succeed in this application the applicants are obliged to satisfy all three requirements of rule 26.8(2) of the CPR. They have not done so and their application should, therefore, fail.

[32] Mr Beswick argued very strenuously that it was very important for the court to apply the overriding objective. Learned counsel argued the applicants' appeal has a real prospect of success and that they should be allowed to argue the appeal. The general conduct of the applicants in the past have, however, dashed their hopes going forward. The interests of the administration of justice require adherence to the rules of court. This is a concept with which the applicants seem to find impossible to adhere. The appeal was listed for hearing during the week commencing on 13 April 2015; a date long gone. It is noted that the applicants' attorneys-at-law did not apply, in advance, for an extension of time in which to comply with the case management orders. This is so despite the fact that they must have been aware that the date for

compliance was approaching without there being the likelihood of the required document being filed on time. Finally, in considering the matters set out in rule 26.8(3) of the CPR, it is noted that there has been no indication that if the application were granted, that the respondents, if they were eventually successful, would be able to recover their costs.

Whether there is an arguable appeal

[33] It was Mr Beswick's contention that the applicants were entitled to have succeeded in the court below on a point that the Jamaican court had no jurisdiction to hear the claim brought by the respondents. He submitted that the agreement between the applicants and the respondents specified that Panama was the country in which cases involving the contract should be tried.

[34] Mr Powell, for the respondents, submitted that the relevant clause in the contract, on which the applicants relied, stipulated an exception to the term cited by Mr Beswick. Mr Powell argued that the applicants could only have insisted on the Panamanian Jurisdiction if they had not previously submitted to the jurisdiction of the courts of Jamaica. He submitted that the applicants had done so on three occasions and therefore were barred from arguing an entitlement to Panama being the forum in which the case should be tried.

[35] The clause to which counsel referred appears at clause 10 of the contract and page 52 of the record of appeal. It states:

> "This Agreement shall be governed by the Laws of Panama and the Customer [respondents] consents to the exclusive jurisdiction of the Panamanian courts in all matters regarding it except to the extent that the [1st Applicant] Company invokes the jurisdiction of the courts of any country."

[36] Williams J accepted a similar submission to that which Mr Powell advanced before this court, namely, that the applicants had submitted to the jurisdiction of the Supreme Court, in applying for security for costs from the respondents and an order for summary judgment. Without seeking to resolve the question, it would seem that Mr Powell is on good ground. That issue, would, however, have to await full arguments and detailed assessment on another day.

The decision that justice requires

[37] The principle of dealing with the case justly impels the court to the conclusion that this application ought to be rejected. The respondents should be entitled to consider the appeal, filed in 2010, at an end and be allowed to pursue their judgment.

Conclusion

[38] The applicants have attempted to impose on these proceedings, a timetable of their own making. In doing so they failed to comply with the specific orders of the court despite the fact that they were aware of the sanction that their appeal would have been struck out if they failed to comply with certain orders made at the case management conference. Their application is to reinstate an appeal that was struck out for that failure. They have, however, failed to satisfy any of the three requirements for

securing relief from the sanction that was imposed. The failure that led to the striking out was, certainly on the part of their counsel, charged with the task, intentional. That may or may not be visited on the applicants. Secondly, no good reason was proffered for the failure that led to the striking out, and thirdly, they were not in general compliance with previous relevant orders directions and rules in respect of the appeal. Their application must therefore fail.

[39] It is for those reasons that I agreed with the orders set out at paragraph [3] above.

F WILLIAMS JA (Ag)

[40] I too have read, in draft, the judgment of my brother Brooks JA. I agree that the reasons expressed therein accurately reflect the court's views leading to the decision previously handed down.