[2010] JMCA App 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 88/2008

APPLICATION NO 145/2010

BEFORE: THE HON MR JUSTICE HARRISON, JA
THE HON MR JUSTICE MORRISON, JA
THE HON MR JUSTICE DUKHARAN, JA

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

Paul Beswick instructed by Ballantyne Beswick & Co. for the applicant

Conrad George, Miss K. Tennant and Miss Natoya Boyd instructed by Hart Muirhead Fatta for the respondent

25 October, 26 November and 20 December 2010

HARRISON JA

[1] This is an application pursuant to rule 2.11 of the Court of Appeal Rules 2002 (the COAR) to discharge an order made by McIntosh JA on 29 July 2010, whereby she ordered:

> "In light of the decision of the Honourable Mrs. Justice Harris, J.A., given on January 22, 2010, this Default Costs Certificate ought not to have been signed until the conclusion of the substantive matter.

> Her Ladyship clearly stated that 'although an application for Default Costs Certificate has been filed, the Registrar would not be empowered to proceed with the taxation until the proceedings are concluded.' This decision, unless varied or discharged, stands as the judgment of the Court and it ought not to have been ignored. The Respondent's Default Costs Certificate is accordingly set aside. This renders nugatory the application filed on 26th of July, 2010 and is accordingly dismissed."

Factual Background

[2] On 12 March 2007, the applicant filed a claim in the Supreme Court seeking, inter alia, damages for wrongful dismissal and defamation. Subsequently, the respondent filed an application to strike out the applicant's statement of case and for summary judgment on the claim. On 29 July 2008, Thompson-James J gave judgment dismissing the respondent's application and ordered costs in favour of the successful applicant, such costs to be taxed if not agreed.

[3] The respondent appealed from the decision of Thompson-James J. The appeal was heard by the Court of Appeal and dismissed on 15 May 2009. The Court of Appeal also ordered costs in that appeal against the respondent and in favour of the applicant to be taxed if not agreed.

[4] On 6 October 2009, the applicant filed a bill of costs in the Court of Appeal and on 18 December 2009, a notice to serve points of dispute was also filed. Stamped copies of these documents were served on the respondent's attorneys-at-law on 18 January 2010. On 2 December 2009, a default costs certificate was filed in the Court of Appeal. This certificate was not pursued because of a procedural error in relation to the application.

[5] On 14 December 2009, the respondent filed a notice of application for court orders seeking orders to strike out the bill of costs filed and for wasted costs against

the applicant's attorneys-at-law. This application was dealt with on paper pursuant to rule 2.10 (3) of the COAR and the application was refused. Harris JA in delivering her ruling in respect of the application to strike out the applicant's bill of costs, stated inter alia:

> "There is no provision in the Civil Procedure Rules which prevents a party in whose favour cost has been obtained, from laying a bill for the taxation of those costs. The mandate of Rule 65.15 is that unless ordered by the court costs of proceedings or any part thereof should not be taxed until the conclusion of the proceedings. The respondent's right to file a bill of costs is unfettered. The bill of costs is not invalidated by it being filed prior to the conclusion of the proceedings. Although an application for default costs certificate had been filed, the registrar would not be empowered to proceed with taxation until the proceedings are concluded."

[6] On 25 February 2010, the applicant applied for a default costs certificate in the Court of Appeal along with the necessary affidavit in support sworn to on 16 February 2010. This certificate was issued on 7 May 2010, and was served on the respondent's attorneys-at-law on 30 June 2010. The applicant later obtained an order for the enforcement of the default costs certificate.

[7] The respondent was spurred to action once more. On 12 July 2010, the respondent filed a notice of application for court orders and sought an order to set aside the default costs certificate obtained on 7 May 2010, and for wasted costs against the applicant's attorneys-at-law. On 26 July 2010, the respondent filed a further application seeking orders inter alia, to stay the execution of the default costs certificate. These applications were considered together on paper by McIntosh JA (Ag) (as she then was). On 29 July 2010, the learned judge made the ruling as set out in paragraph 1.

[8] The applicant, as I have said before, now seeks to have the order of McIntosh JA discharged and to restore the default costs certificate issued by this court on 7 May

2010.

Submissions

[9] The general rule is that the costs of any proceedings or any part of the proceedings are not to be taxed until the conclusion of the proceedings but the court may order them to be taxed immediately - see rule 65.15 of the Civil Procedure Rules 2002 (the CPR).

[10] Mr Beswick for the applicant submitted that once judgment in an appeal is handed down, as in this case on 15 May 2009, the "proceedings" constituting this appeal would now be unquestionably concluded. He referred to and relied on the provisions of rule 1.18 of the COAR which state:

> "(1) The provisions of CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal subject to any necessary modifications and in particular to the amendments set out in this rule
>
> (2) The following words are to be substituted –
>
> …
>
> for 'proceedings' substitute 'appeal';
>
> …
>
> (3) The expression -
>
> 'court' means the Court of Appeal;
>
> …"

[11] Mr Beswick argued that in so far as rule 65.15 is to be applicable in the Court of Appeal, it should be read as follows:

> 65.15 The general rule is that the costs of any <u>appeal</u> or any part of the <u>appeal</u> are not to be taxed until the conclusion of the <u>appeal but the court may order them to be taxed immediately</u>. (emphasis added)

[12] He therefore submitted that the condition set out in rule 65.15 had been met in that the "proceedings" (the appeal) were at an end and the applicant was only required to comply with rules 65.20 (1) and (5) and 65.21 (1) of the CPR. These rules state inter alia:

> "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.
>
> ….
>
> (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.
>
> …
>
> 65.21(1) A receiving party who is permitted by rule 65.20 to obtain a default costs certificate does so by filing -
>
> (a) an affidavit proving –
>
> (i) service of the copy bill of costs; and
>
> (ii) that no points of dispute have been received by the receiving party; and
>
> (b) a draft default costs certificate inform 26 for signature by the registrar.

(2) The registrar must then sign the default costs certificate.

…"

[13] Mr Beswick submitted that in the circumstances, the applicant is entitled to the default costs certificate which was issued on 7 May 2010. He further submitted that there is no rule or other basis on which this certificate should have been set aside.

[14] Mr George for the respondent submitted that the applicant's application to this court ought to be dismissed as it disclosed no basis, legal or factual, for making it. He did not dispute the applicant's entitlement to costs but disputes the timing for the assessment of those costs. He argued that the applicant's costs are therefore subject to detailed assessment which, according to rule 65.15, should properly commence at the conclusion of the "proceedings". He argued that since the word "proceedings" is not defined in the rules, some guidance can be derived from the English Civil Procedure Rules 1998. Rule 47.1 which he says is similar to our 65.15, reads as follows:

> "The general rule is that the costs of any part of the proceedings are not to be assessed by the detailed procedure until the conclusion of the proceedings but the court may order them to be assessed immediately."

[15] Mr George further submitted that guidance can be derived from section 28.1(1) of the English Costs Practice Direction, which reads:

> "For the purposes of rule 47.1, proceedings are concluded when the court has finally determined the matters in issue in the claim."

He therefore submitted that the word "proceedings" refer to the entirety of the steps taken between commencement (by the court issuing a claim form at the request of the claimant) and conclusion (usually by judgment being satisfied). He therefore submitted that detailed assessments of costs ought to commence at the conclusion of the proceedings in accordance with the procedure set out under rule 65.18 that is: "*The bill*

of costs must be filed and served not more than three months after the date of the order or event entitling the receiving party to costs".

[16] Finally, Mr George submitted that the applicant had received a default costs certificate which was prematurely granted and was lawfully set aside by McIntosh JA Accordingly, the applicant's application should be dismissed with costs to the respondent.

The Discussion

[17] This application raises a point upon which there appears to be some amount of doubt among members of the legal profession. The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the court, or given another party cause to have recourse to the court to obtain his rights, is required to recompense that other party in costs. Certainly, the court or a judge has an unlimited discretion to make what order as to costs it is considered that the justice of the case requires. Consequently, a successful party has a reasonable expectation of obtaining an order for his or her costs to be paid by the opposing party. There are several options open to the tribunal when it comes to the ordering of costs. These costs could be costs in the cause, costs reserved, claimant's or defendant's costs, costs in any event, costs thrown away, no order as to costs and taxation forthwith.

[18] Following the usual rules, a successful party on appeal is normally awarded the costs of the appeal. The Court of Appeal also has jurisdiction over the costs of the proceedings below, which it may exercise by granting 'costs here and below'. However, in its discretion, the court may decide to award a successful appellant only the costs of the appeal.

[19] In this matter, the respondent does not deny the applicant's entitlement to costs, so the issue to be determined is at what stage of the proceedings are these costs payable? The order made by this court on 15 May 2009 reads as follows:

> "The appeal is dismissed with costs to the respondent to be agreed or taxed."

[20] Is this costs order one which operates immediately or must it depend on the outcome of a case pending in the court below? In **Adam & Harvey Ltd v International Maritime Supplies Co. Ltd.** [1967] 1 WLR 445, it was held that where an appeal is "allowed with costs", such an order would enable the successful party in the appeal to have the payment of costs taxed and ordered to be paid at once. Further, the rules make it clear that with the substitution of the words set out in rule 1.18(2) of the COAR, there is much force in Mr Beswick's argument with regard to rule 65.15 of the CPR. I do agree with him that once the appeal process has been completed, the successful party would be entitled to have his or her costs taxed immediately.

Conclusion

[21] Having regard to the conclusion I have arrived at in respect of the default costs certificate, there is no need on this occasion, to discuss the other issues raised in the applicant's written submissions.

[22] In the circumstances, McIntosh JA was in error in discharging the Registrar's default costs certificate. I would therefore grant the application with costs to the applicant to be taxed if not agreed.

MORRISON JA

I have read in draft the judgment of my brother Harrison JA. I agree with his reasoning and the conclusion arrived at. There is nothing I wish to add.

DUKHARAN JA

I too agree with my brother Harrison JA and have nothing further to add.

HARRISON JA

ORDER

Application granted. Costs to the applicant to be taxed if not agreed.