

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 53/2008

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
 THE HON. MRS. JUSTICE HARRIS, J.A
 THE HON. MISS. JUSTICE SMITH J.A. (AG.)**

**BETWEEN CHRISTOPHER OLUBODE OGUNSALU APPELLANT
AND DENTAL COUNCIL OF JAMAICA RESPONDENT**

Ian Wilkinson and Ms. Sashawah Grant, instructed by Ian G. Wilkinson & Company for the appellant.

Ms. Hilary Phillips, Q.C. and Kevin Williams, instructed by Grant, Stewart, Phillips & Company for the respondent

22nd October, 2008 and 3rd April, 2009

SMITH, J.A.

I have read in draft the judgment of Harris, J.A. I agree with her reasoning and conclusion. There is nothing further I wish to add.

HARRIS, J.A.

1. In this appeal the appellant challenges an order of Donald McIntosh, J. in which he upheld a preliminary objection of the respondent that a Fixed Date

Claim Form filed by the appellant was a nullity as it had not been issued in accordance with Rule 56. 4 (12) of the Civil Procedure Rules 2002, (C.P.R.).

2. The appellant is a registered dentist in Jamaica and holds a practising certificate issued by the Dental Council of Jamaica (Respondent). In 2002 he obtained employment with the School of Dentistry at the University of the West Indies in Trinidad and Tobago. It was a requirement of the university that he should produce a letter of good standing from the Dental Council of Jamaica. The Council has not furnished same as there is a pending complaint against him which has been part heard before the Council's Disciplinary Committee.

3. On October 13, 2005, the appellant, intending to seek the relief of judicial review, filed a Fixed Date Claim Form without first obtaining the requisite leave to initiate the process. A file number Claim No. 2005/HCV. 03087 was assigned to the Fixed Date Claim Form.

4. On December 19, 2005, the appellant filed an ex parte application for permission to issue the Fixed Date Claim Form and to proceed to judicial review. On February 10, 2006 the application was renewed by the appellant and on February 15, 2006 an affidavit of the appellant in support of the application was filed. A further affidavit was filed by the appellant on February 21, 2006.

5. On March 17, 2006 Sinclair-Haynes, J. made an order in the following terms:

- “1. The Applicant, a qualified dentist was, at all material times, in good standing and entitled to have the Defendant issue a letter to that effect, having paid the relevant practising fee and having had a practising certificate issued to him by the Defendant;
2. The Applicant be granted leave to file an Application for Judicial Review of the Defendant’s said decision within **fourteen (14)** days of the date of the hearing of the instant application;
3. The Applicant be granted leave to apply for an Order of certiorari quashing the Defendant’s said decision;
4. The Applicant be granted leave to apply for an Order of Prohibition enjoining or preventing the Defendant from representing to any person that the Applicant is not in good standing;
5. The Applicant be granted leave to apply for an Order of Mandamus commanding the Defendant to issue a letter of good standing to the Dental Council of Trinidad & Tobago or to any person to whom the Applicant wishes to have a letter of good standing issued.
6. There be liberty to apply, and
7. There be no order as to costs.”

6. On March 31, 2006 the appellant filed a Fixed Date Claim Form. This was accompanied by an affidavit in support sworn to by Ian G. Wilkinson. A new file number, Claim No. 2006/HCV.1249 was assigned to these documents by the Registry.

7. On July 7 2006, Sinclair- Haynes J., made an order staying paragraph one of the order of March 17, 2006 until July 12, 2006.

8. On July 12 2006, the learned judge made the following order:

- "1. That paragraph 1 of the Notice of Application for Court Orders dated the 7th day of July, 2006 is amended as set out in paragraph 2 herein.
2. That paragraph 1 of the Order of the Honourable Mrs. Justice Sinclair-Haynes dated 17th March, 2006, be amended to insert after the word 'Applicant' the words "be granted Leave to apply for a Declaration that he is" and after the word 'Dentist' and between the word 'was' insert the word 'and', and delete the remaining words in paragraph 1 of the Notice of Application for Court Orders dated July 7, 2006; paragraph 1 of the said Order as amended would now read:

"The Applicant be granted Leave to Apply for a Declaration that he is a qualified dentist and was at all material times in good standing and entitled to have the Defendant issue a letter to that effect, having paid the relevant practicing fee and having had a practicing certificate issued to him by the Defendant."

9. On July, 21 2006, a Case Management Conference was held and the following orders were made:

- "1. The Final Hearing of the Fixed Date Claim Form fixed for the 7th day of March 2007 for one (1) day.
2. Trial by Judge alone in open Court.

3. The Claimant to serve the Amended Fixed Date Claim Form and all Affidavits in Support of the Amended Fixed Date Claim Form on the Defendant on or before the 14th day f(sic) August 2006.
4. The Defendant to file and serve its Affidavit(s) in response on or before the 20th day of October 2006.
5. The Claimant is to file and serve its Written Submissions and Bundle of Authorities on or before the 12th day of January 2007 and the Defendant's Written Submissions in response and Bundle of Authorities to be filed and served on or before the 26th January 2007.
6. Costs to be costs in the Claim.
7. Defendant's Attorneys-at-Law to prepare, file and serve the Order herein."

10. On May 24, 2007, the appellant filed a Fixed Date Claim Form headed "Amended Fixed Date Claim Form" with a file number 2005/HCV. 03087 inserted therein, together with affidavits of the appellant and Ian G. Wilkinson exhibited thereto. No amendments to the Fixed Date Claim Form of March 31, 2006 were made in this new document.

11. On July 25, 2007 pretrial review order was made by Daye, J., and on March 6, 2008 the Fixed Date Claim Form came on for hearing before McDonald-Bishop J., who made the following orders:-

- "1) Hearing of the Fixed Date Claim Form adjourned to 20th May 2008 for one (1) day.

- 2) Time for the Claimant to comply with the Order of the Honourable Mrs. Justice N.E. McIntosh extended to 10th April 2008. Time for the Defendant to file submissions in response extended to the 24th April 2008.
- 3) Unless the Claimant complies with the said Orders of the Honourable Mrs. Justice N.E. McIntosh as extended herein and attend the hearing as scheduled the Claimant's Statement of Case shall stand struck out.
- 4) Costs of today to the Defendant to be agreed or taxed. The Claimant is to satisfy the costs Order of the Honourable Mrs. Justice N.E. McIntosh made on the 6th December 2007 on or before the 19th May 2008, failing which the Claimant's Statement of Case shall stand struck out.
- 5) The Defendant's Supplemental Affidavit filed and served on the 4th March 2008 should stand. Permission granted to the Claimant to respond to the Defendant's Supplemental Affidavit on or before the 3rd April 2008.
- 6) Defendant's Attorneys-at-Law to prepare file and serve this Order."

12. On May 20 2008, the Fixed Date Claim Form came on for hearing before Donald McIntosh, J. A preliminary point was taken by the respondent. The learned judge, in upholding it, ruled as follows:

- 1) The Preliminary Point raised by the Defendant, to wit:

"That the Claim herein is nullity, the Fixed Date Claim Form having not been issued in accordance with PART 56.4(12) of the Civil Procedure Rules, that is within fourteen (14) days of the Order

granting leave to apply for Judicial Review."

is upheld and the Claimant's Claim is refused.

- 2) Costs to the Defendant
- 3) Leave to Appeal granted."

13. The following grounds of appeal were filed:

- (a) The learned judge erred in law in hearing the Respondent's application, *in limine*, as, inter alia, no proper Notice of the said application was given to the Appellant, the application being sent by facsimile transaction to the Appellant's Attorneys-at-Law on the same day as the hearing of the matter, namely the **20th May, 2008;**
- (b) The learned judge erred in law in finding or ruling that the Respondent's application, *in limine*, to strike out the Appellant's said Fixed Date Claim Form or Statement of Case should be upheld;
- (c) The learned judge erred in law in finding or ruling that the Appellant had not filed its Fixed Date Claim Form within the time stipulated by the said Order granted by Mrs. Justice Sinclair-Haynes;
- (d) The learned judge erred in law in finding or ruling that the filing by the Appellant of a Fixed Date Claim Form without a suit number was a breach of the said Order made by Mrs. Justice Sinclair-Haynes;
- (e) The learned judge erred in law in finding or ruling that there was no obligation on the Registrar of the Supreme Court to insert the correct or relevant suit number in the said

Fixed Date Claim Form filed by the Appellant
on the **31st March, 2006.**

No submissions were made by the appellant with respect to the first ground of appeal. This ground is taken to have been abandoned.

14. Mr. Wilkinson submitted that the learned judge, in striking out the appellant's claim had effectually struck out the appellant's statement of case for failure to comply with the order of Sinclair-Haynes, J., of March 17, 2006 granting leave to file an application for judicial review within the prescribed time. The Fixed Date Claim Form having been filed on March 31, 2006, had been filed within the stipulated period, he argued. He further argued that, in the alternative, striking out is only appropriate in plain and obvious cases and an amendment ought to be allowed in circumstances where there is a real prospect of success of the amended case and that striking out is wholly inappropriate where there are other sanctions available for preventing prejudice to a litigant.

15. It was submitted by Miss Phillips Q.C., that Part 56 of the C.P.R is peculiar to administrative proceedings save and except where that rule expressly states that any other rule applies. She argued that on an application for judicial review, a party must obtain leave under Rule 56.3 (1) and the grant of such leave is conditional upon the filing of a Fixed Date Claim Form for judicial review within 14 days of the grant of such leave, at which time the leave becomes absolute. In support of this last submission she cited the case of

Golding and Anor v. Simpson Miller S.C.C.A 3 of 2008 delivered April 11, 2008. Failure to file the Fixed Date Claim Form within the prescribed time rendered the appellant's claim invalid, the leave having lapsed, she argued.

16 The critical issue arising in this appeal is whether the Fixed Date Claim Form filed on March 31, 2006 had been filed outside the time prescribed by the rules and was therefore invalid.

17. Part 56 of the C.P.R. lays down the framework within which a party seeking judicial review must operate. Rule 56 .3 (1) demands that the obtaining of leave must be a precursor to an application for judicial review. The rule reads:

"A person wishing to apply for judicial review
must first obtain leave."

18. It is prescribed by Rule 56.4 (11) that on the grant of leave, the judge is required to fix a date for the first hearing and in the case of urgency, fix a date for the full hearing.

19. Rule 56.4 (12) provides that leave should be conditional on an applicant making a claim for judicial review within 14 days of the order granting leave. The rule states as follows:

"56.4 (12) Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave."

20. Rule 56.5 (1) provides for circumstances under which a party may renew an application where leave is granted on terms or refused. It states:

- “56.5 (1) Where the application for leave is refused by the judge or is granted on terms (other than under rule 56.4 (12), the applicant may renew it by applying –
- (a) in any matter involving the liberty of the subject or in any criminal cause or matter, to a full court; or
 - (b) in any other case to a single judge sitting in open court.”

It clearly excludes the renewal of an application where leave is granted under Rule 56.4 (12).

21. Compliance with Rule 56. 4. (12) is mandatory. Conditional leave granted in accordance with the rule is absolute as Miss Phillips, Q.C. correctly submitted. The requirement of the rule that, on the grant of leave to proceed to judicial review, a Fixed Date Claim Form must be filed within 14 days of the grant of leave enjoins a party to pay strict adherence thereto. See **Golding v. Simpson Miller** (Supra).

22. Leave was granted to proceed to judicial review on March 17, 2006. A Fixed Date Claim Form was filed on March 31 2006, with a file number other than that assigned to the application for leave to proceed to judicial review. Can it be said that the appellant had failed to comply with Rule 56.4 (12)? The

answer to this question invites an inquiry as to whether the C.P.R places an onus on a claimant, on the filing of a document, to insert a file number thereon.

23. Rule 3.6 (3) of the C.P.R states as follows:

“Every document to be filed at the court must –

- (a) be headed with the-
 - (i) full title of the proceedings; and
 - (ii) title of the document;
- (b) state the –
 - (i) name;
 - (ii) business address;
 - (iii) reference (if any);
 - (iv) telephone number; and
 - (v) FAX number if the party wishes to accept service by fax

of the person or persons filing it;
- (c) contain its date;
- (d) (except in the case of an affidavit) be signed by the person filing it; and
- (e) state the name and the party on whose behalf it is filed.”

24. The directions outlined in Rule 3.6 (3) a (i) and (ii) govern the form in which a document should be framed before filing. It requires a party filing a document to identify the document by stating the full title of the suit, as well as

the title of the document filed. Rule 3.10 requires documents to be prepared in accordance with the Forms laid down in the Appendices. The Appendices to the rules give guidance as to the form which a document should take on filing. Although the Forms in the Appendices make provision for the insertion of a suit number, the areas at which a suit number should be inserted remain blank. There is nothing in rule 3. 6(3) a (i) and (ii) which could be construed to mean that a document, when presented for filing, should contain a file number.

25. Section 12 (1) of the Judicature (Supreme Court) Act defines the duties of the Registrar of the Supreme Court. The section, so far as relevant for the purpose of deciding the issue in this case, states:

"The Registrar shall perform the following duties, that is to say –

.....

.....

examine, copy, enter, arrange, index and keep, proceedings and records of proceedings in the Supreme Court, and shall permit the public to search and take copies of the same in the office of the Supreme Court at reasonable hours;"

26. The foregoing section of the Act empowers the Registrar, to do among other things, enter, arrange and index the proceedings and records of proceedings. This being so, it is incumbent upon me to discover the intention of the legislators within the context of the words used in the Act. I am entitled

and indeed, obliged to assume that it is always the intention of Parliament to act reasonably. The question therefore is whether the use of the words "enter", "arrange" and "index " as used in Section 12(1) (Supra), (the phrase "... arrange, index and keep proceedings and records of proceedings...") is capable of imposing an onus on the Registrar to undertake the responsibility of assigning numbers to documents submitted by litigants for filing.

27. The entry, arrangement and indexing of documents presented to the Registry of the Supreme Court is clearly of an administrative character. As ordained by the Act, it is a function which must be performed by the Registrar and certainly not by a litigant. The proper execution of the requisite functions commanded by the Act could only be achieved by the Registrar putting in place a procedure by which documents could be properly identified and accounted for. As a consequence, in the interest of good administration, the Registrar, the custodian of the court's records, is bound to employ some order in the registration and recording of proceedings. It must be that Parliament had intended that in order to effect the efficient management of the court's business, the Registrar must adopt appropriate means to record proceedings and may do so by the assignment of numbers to documents submitted for filing. It would and could not have been the intention of the legislators that litigants should assign file numbers to documents. This would run contrary to the spirit and intent of the statute.

28. In keeping with the requirements of the Act, the responsibility of the Registrar demands the designation of a specific number in respect of each suit filed, which number would characterize such suit in all subsequent proceedings. The Registrar is therefore bound to ensure that any number assigned to a suit at the commencement of proceedings subsists throughout the life of the action.

29. A re-listed notice of application for court orders to proceed to judicial review, and affidavits in support thereof bearing suit number HCV 03087 of 2005, was filed on February 10, 2006. It is of worth to mention that the suit number placed on that application is identical to that which was assigned to the Fixed Date Claim Form which had been prematurely filed. There is no dispute that on March 31, 2006 when the Fixed Date Claim Form was presented for filing a suit number was not inserted in it by the appellant. A new suit number was eventually assigned to it. Obviously, this was done in the Registry.

30. Further, it is of significance that the respondent had been an active participant at several stages of the proceedings subsequent to the filing of the Fixed Date Claim Form on March 31 2006. Affidavits were filed, interlocutory matters were considered and orders made, yet, it raised no objections to the fact that the number HCV 1249 of 2006 was assigned to the Fixed Date Claim Form filed on March 31, 2006.

31. The following observations bear testimony to the foregoing:-

1. On July 12, 2006 an amendment was made to the order of March 17, 2006.
2. Case management orders were given on July 21, 2006 albeit on a document headed amended Fixed Date Claim Form. I propose to say some more about this pleading later.
3. A first hearing of the Fixed Date Claim Form came on for hearing on March 7, 2007 but was not heard. Further directions were given then.
4. The matter again came on for hearing on March 12, 2007 when it was brought to the parties' attention that there was an irregularity with respect to the suit numbers assigned.
5. On December 6, 2007, the matter came on for final hearing when the case management orders were varied.
6. On March 6, 2008 further case management orders were given.

32. The application to proceed to judicial review had been assigned the number HCV 03087 of 2005. Upon leave to proceed to judicial review being granted, a new Fixed Date Claim Form having been submitted without a file number inserted therein, it was incumbent on the Registrar to have investigated by way of a search of the indices of the records to ensure that a previous number had not been assigned in the matter before allocating a new suit number to the document which was filed on March 31, 2006.

33. In the case under review, it is obvious that the Registrar erroneously assigned a new suit number to the Fixed Date Claim Form filed on March 31,

2006. Liability cannot be ascribed to the appellant for the Registrar's failure to assign the appropriate number to that Fixed Date Claim Form. I find it impossible to conclude that it had not been filed before the expiration of the time prescribed by Rule 56.4(12). Therefore, **Golding v. Simpson Miller** would not avail the respondent.

34. The amended Fixed Date Claim Form bore the number HCV 03087 of 2005. This document contained no amendment either to the title of the proceedings, or the title of the document, or the claim, or the grounds on which the appellant sought relief. It therefore could not be regarded as superseding that which was filed on March 31, 2006. Any order made as a consequence of the filing of that Fixed Date Claim Form on March 31, 2006 must be treated as having been made under claim number 03087 of 2005. The order of Mrs. Sinclair-Haynes, J. made under that document would not be rendered invalid as contended for by Miss Phillips, Q.C. All consequential orders made would be valid.

35. The Fixed Date Claim Form filed on March 31, 2006 is valid and subsisting. It cannot be said that the appellant was in breach of the order to proceed to judicial review. The error in assigning the wrong suit number to the pleading is merely a mechanical exercise, which must be remedied by the Registrar affixing the correct suit number thereto.

36. I would allow the appeal with costs to the appellant to be agreed or taxed.

SMITH, J.A. (Ag.)

I too agree.

SMITH, J.A.

ORDER:

The appeal is allowed with costs to the appellant to be agreed or taxed.