[2019] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 92/2014

APPLICATION NOS 256 and 257/2018

BEFORE: **THE HON MRS JUSTICE MCDONALD-BISHOP JA**
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN **SOLOMON'S FUNERAL HOME LIMITED** **1st APPELLANT**

AND **CALMORE SOLOMON** **2ND APPELLANT**

AND **ERROL SOLOMON** **RESPONDENT**

Debayo Adedipe for the appellants

Ms Bobbette Brown instructed by Bobbette Brown & Co for the respondent

7, 8, 24 May and 18 October 2019

MCDONALD-BISHOP JA

[1] I have read in draft the reasons for judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing further to add.

P WILLIAMS JA

[2] On 24 October 2014, Solomon's Funeral Home and Calmore Solomon, the appellants, filed a notice of appeal in this court against a judgment of Cole-Smith J. At that time, they also applied for a stay of the judgment pending the hearing of the appeal. The application for the stay was refused by a single judge of this court but was subsequently granted by the full court on 4 May 2015. The appellants took no steps, thereafter, to advance their appeal.

[3] On 15 November 2018, Mr Errol Solomon, the respondent, filed two notices of application. He, however, proceeded with only one, seeking the following orders:

> "1. That the Notice of Appeal filed in this matter on 24th day of October 2014 be struck out for Want of Prosecution.
>
> 2. That the order of the Honourable Mr. Justice Panton P, The Honourable Mr. Justice Dukharan J.A. and The Honourable Mrs. Justice Sinclair-Haynes (A.g.) made on 4th day of May 2015 be set aside.
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> 3. That the orders of the Honourable Mr. Justice Brooks, J. A. made on 7th of November 2014 be reinstated."

[4] On 18 April 2019, the appellants filed a notice of application seeking the following:

> "i) That the bundle filed on May 1, 2015 be treated as the Record of Appeal;
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> ii) That in the alternative the Appellants be given permission to file a fresh bundle as the Record of appeal within seven days of the Court's order.;
>
> iii) That the time for filing submissions be extended to a period not exceeding seven days from the Court's order;

iv) That there be a speedy hearing of the appeal."

[5] The appellants' application had not been given a date for hearing when we commenced this matter, hence it was not properly before us. However, we recognised that the outcome of the respondent's application could determine the fate of the appellants' application and so it was permitted to be heard in these proceedings. On 24 May 2019, having heard and considered the very helpful submissions of counsel for the parties, we made the following orders:

> "1. On the Application No. 256/2018 the Notice of Appeal filed on 24 October 2014 is struck out for want of prosecution.
>
> 2. The stay of execution which was granted on 4 May 2015, is discharged.
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> 3. The appellants' application for court orders, which was filed on 18 April 2019, is refused.
>
> 4. Costs of both applications to the applicant/respondent (Mr Errol Solomon) to be agreed or taxed."

At that time, the court promised to put its reasons in writing. We now fulfil that promise.

Background

[6] The respondent is the father of the second appellant. The first appellant is a limited liability company and both men are shareholders in the company with the second appellant being the majority shareholder. The second appellant is also its managing director and the respondent was initially the only other director. The relationship between the men deteriorated and in 2013 the respondent commenced proceedings in the court below for orders determining his interest in and entitlements from the first appellant.

[7] On 29 May 2014, the matter came on for hearing before Cole-Smith J and the records indicate that only Ms Yolanda Kiffin, the attorney-at-law who was then appearing for the respondent, attended. An order was made for the respondent to file an amended fixed date claim form and the matter was adjourned to 25 July 2014.

[8] On 24 July 2014, Nathan McLean, a District Constable from Saint Elizabeth, filed an affidavit of service. In it, he stated that on 1 July 2014 he had served Janet Amos, a secretary of the first appellant, at its registered address, with the amended fixed date claim form dated 19 June 2014. He said further that she had "accepted service on behalf of" the second appellant.

[9] On 25 July 2014, upon the amended fixed date claim coming on for hearing before Cole-Smith J, and the appellants not appearing, the learned judge made the following orders:

> "a) A declaration that the claimant Errol Solomon is entitled to an interest amounting to a one third (1/3) share in Solomon's Funeral Home Limited situate at Gilnock in the parish of Saint Elizabeth;
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> b) An order that he is to receive his one third share in the profits of the said Solomon's Funeral Home Limited;
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> c) An order that the Claimant, Errol Solomon is to receive from the defendants a motor car valued at no less than One Million Five Hundred Thousand Dollars ($1,500,000.00) registered in the name of the Claimant within thirty (30) days of the service of this order;
>
> d) The said motor vehicle is to be fully insured and maintained, inclusive of fuel for a period of twelve (12) months;

e) The claimant is to receive from the Defendants a weekly payment of Thirty Thousand Dollars ($30,000.00) within thirty days of the service of this order, with an annual increase of Five Thousand Dollars per week for the duration of his natural life.

f) Costs to the Claimant in the sum of two hundred and fifty thousand dollars ($250,000.00) to be paid to the Claimant by the defendants within thirty days of service of this order."

[10] The appellants, on 15 October 2014, applied to the Supreme Court to set aside the judgment entered and for a stay of execution of the judgment pending the determination of the application. The application came on for hearing on 22 October 2014 but could not be heard, as the file could not be found. The matter was adjourned to 21 November 2014.

[11] Instead of awaiting the 21 November hearing in the lower court, on 24 October 2014, the appellants filed an appeal accompanied by an application for a stay of execution of the judgment in this court. On 28 October 2014, counsel Mr Adedipe wrote to the Registrar of this court informing her that he had filed and served a further affidavit in support of the application for stay of execution and made the following request:

> "Please arrange for the application to be put before a Judge at the earliest opportunity because execution of the order of the Court below is threatened and eminent [sic]."

The chronology of proceedings in this court

[12] By letter, dated 28 October 2014, the Deputy Registrar of this court wrote Mr Adedipe requesting a copy of the order of Cole-Smith J. She also requested that he state

in writing whether oral evidence was taken and directed his attention to relevant provisions of the Court of Appeal Rules (the CAR) in the event there was no oral evidence or, if applicable, the proceedings had been recorded. Finally, she requested he provide proof of service of the application for the stay of execution.

[13] On 29 October 2014, Colleen Clayton, who had acted as process server for Mr Adedipe, filed an affidavit of service. She indicated that the application had been served on the offices of Ms Kiffin on 27 October 2014.

[14] A single judge refused the application for a stay of execution on 7 November 2014, on the basis that the appellants "have given no good reason for their failure to attend the hearing of the fixed date claim form which led to the order being made".

[15] On 19 November 2014, the appellants filed another notice of application seeking a stay of the judgment/order pending the determination of the appeal. This application was amended on 5 December 2014, on the recommendation of the Deputy Registrar of this court, with the appellants seeking an order that the order of the single judge be varied along with the order granting the stay of the judgment/order. In April 2015, efforts were made to serve Ms Kiffin with the documents relative to the hearing of the appellants' amended notice of application, which was set for 4 May 2015. She, however, advised Mr Adedipe that she was, at that time, without instructions in the matter.

[16] On 30 April 2015, Colleen Clayton filed an affidavit of service indicating that she had sent the amended notice of application and the accompanying affidavit to the

respondent by registered post at the address of New Hope District, Santa Cruz PO, on 16 April 2015.

[17] As already indicated, this court heard the amended notice of application on 4 May 2015 and a stay of execution of the judgment, pending the determination of the appeal was granted. The respondent was absent from this hearing.

[18] The records of this court indicate that, having not received any response as to whether any evidence was taken in this matter, the Deputy Registrar made several efforts to obtain the relevant documents, relative to the appeal, from the court below. The first letter written to the Registrar of the Supreme Court making the request for the documents is dated 28 October 2014. Letters were written to the Registrar for the record of proceedings in several outstanding matters, including this one, on 13 March 2015, 21 August 2015, 19 February 2016, 22 August 2016 and 10 March 2017.

[19] On 29 January 2018, the respondent visited the registry of the court to enquire about the status of the appeal. The Deputy Registrar on that date wrote to Mr Adedipe and Ms Kiffin advising them of the respondent's visit. The attorneys-at-law were asked to indicate whether oral evidence was taken and were directed to the relevant provisions of the CAR. On the same date, she again wrote to the Registrar of the Supreme Court requesting the relevant documents in the matter.

[20] On 15 February 2018, Mr Adedipe filed a notice of application seeking to have his name removed from the record as representing the appellants in this appeal. The grounds on which the application was made are as follows:

"i) The Respondent, Errol Solomon has made a complaint against the Applicant to the General Legal Council.

ii) The applicant gave his undertaking to the General Legal Council at a hearing on January 27, 2018 to apply to take steps to have his name removed from the record as representing the Appellants herein.

iii) The application is made pursuant to the undertaking."

[21] This application was set for hearing before a single judge of this court on 20 March 2018. On 19 March 2018, Mr Adedipe wrote to the Registrar advising that the application had not been served and requested that the matter be set for another time. The matter was, however, still placed before a single judge on 20 March. There was no appearance from either of the parties and the matter was adjourned for a date to be fixed by the Registrar.

[22] In a letter dated 9 August 2018, the Deputy Registrar wrote to Mr Adedipe inviting him to file a re-listed notice of application so that a new date could be fixed for hearing the application. In another letter, dated 25 February 2019, the Deputy Registrar wrote to Mr Adedipe advising him that the matter could be fixed for inter partes hearing on 9 April 2019. He was requested to file a re-listed notice of application so that the date could be inserted. The application was back before the single judge on 9 April 2018. At this time, only Miss Bobbette Brown, who was by then appearing on behalf of the respondent, attended. The application was again adjourned for a date to be fixed by the Registrar. The application is still to be disposed of.

[23] It is to be noted that this court was made aware of a letter dated 11 July 2018 that Mr Adedipe wrote to the Disciplinary Committee of the General Legal Council (the GLC). In it, he stated inter alia:

> "I write to furnish you with an update on the captioned matter. I have not been able to secure any orders removing my name from the record but in relation to Claim No. 2013 HCV 06507 and Appeal No. 92 of 2014 my engagement has been terminated by Solomon's Funeral Home Limited and Calmore Solomon and a Notice of acting in person has been filed."

[24] Attached to that letter was a document titled "notice of acting in person" that was filed in the Supreme Court on 9 July 2018. It stated that the appellants had "terminated the engagement" of Mr Adedipe and "now appear in person". A similar document was filed in this court on 10 July 2018.

[25] On 18 April 2019, Mr Adedipe filed a notice of acting in this court. In it he stated:

> "Take notice that the appellants who now act in person and hitherto appeared by Debayo A Adedipe Attorney-at-law, now again appear by Debayo A Adedipe…"

[26] Despite the outstanding application to have his name removed from the records and the fact that he had given his undertaking to do so to the Disciplinary Committee of the GLC, this court took the view that we would have no legal basis to bar him from appearing for the appellants. We did not think it necessary to express any views concerning his appearance in light of the matter pending before the GLC.

The application to strike out the appeal

[27] On 15 November 2018, the respondent filed the notice of application for court orders seeking the orders as set out at paragraph [5] above. The grounds on which the respondent made its application are as follows:

> "(i) The appellant was served the Amended Fixed Date Claim Form on the 19th day of June 2014.
>
> (ii) The original subscribers for shares in the company are 2000 for Calmore Solomon and 1000 for Errol Solomon which would be consistent with 1/3 interest in the said Company.
>
> (iii) The orders were made in the absence of the Respondent on the 4th of May 2015 because the Respondent was not served, as he was not in the island. His then Attorney-at-law Ms. Kiffin indicated to Counsel for the Appellants that she had no instructions from her client at that time. Therefore, she could not accept service on his behalf.
>
> (iv) The Respondent who resides in the United States of America was not informed by his then Attorney-at-Law Ms. Kiffin of any such proceeding and he was not served with the said Application and has not received any registered mail or any other method of service informing him of the said application.
>
> (v) The Respondent has never received mails at the address on the court documents, his mails are sent to his mailing address for Solomon's Funeral Home Limited which is Gilnock Hall, Santa Cruz in the parish of Saint Elizabeth
>
> (vi) In relation to the serving of the said document on the Respondent. The Attorney-at-Law for the appellants relied on the use of registered post as his method of service. The Respondent in person attended upon the Post Office in Santa Cruz and was duly informed by

the Post Mistress that the said documents were returned to sender on the 17/6/2015.

(vii) The respondent being a man of age is experiencing grave hardships due to this stay of Execution of Judgment of the Supreme Court of Judicature of Jamaica."

[28] This application was accompanied by the respondent's affidavit filed 15 November 2018 in which he gave details in support of the grounds. He also asserted that he had started the first appellant and that he had done all the paper work including the incorporation of the company. He further asserted that the second appellant "later went behind [his] back and varied the said articles of incorporation to take [him] off as Director in 2008". He lamented the fact that he had been facing great hardships because he has not been able to reap the fruits of his labour from the first appellant. He complained that it was inordinate delay caused by appellants' conduct that had resulted in hardships.

[29] The appellants did not file any affidavits directly in response to this application. However, when the appellants filed their application, Mr Adedipe filed his own affidavit on 18 April in support of it. He commenced by referring to the fact that at the time the application for a stay of execution was made "a full bundle consisting of virtually all the relevant documents in the case was filed together with submissions".

[30] He asserted that the respondent had filed a complaint against him to the GLC alleging that, in relation to his representation of the appellants in this case, he was guilty of a conflict of interest. His affidavit continued with the following assertions:

"7. As a result of this proceedings at the General Legal Council I agreed to withdraw from all matters on the footing that Mr. Solomon would discontinue his complaint.

8. Following upon this I took steps to remove my name from the record in all relevant matters. In fact in respect of this appeal and the matter from which the appeal flowed the Appellants agreed to released me from the matters by signing documents indicating that they were thenceforth acting in person.

9. When my name was removed from the record in all the relevant matters Mr. Errol Solomon then said he wanted his complaint to be heard.

10. I do not accept that there is a conflict of interest.

11. The appellants have not been able to secure other legal representation since they agreed to release me.

12. That the Appellants wish for me to continue representing them and have instructed that an application be made for an extension of time within which to file a formal Record of Appeal and submissions on their behalf.

13. The Appellants tell me and I verily believe that their appeal has a good prospect of success.

14. A further affidavit from Calmore Solomon is anticipated and will be filed soon."

[31] Mr Adedipe filed a further affidavit on 3 May 2019 exhibiting a draft affidavit, which he anticipated would be later sworn and filed, from the second appellant, who he said was "presently beyond the seas". However, the anticipated affidavit from the second appellant was also filed on 3 May 2019. This affidavit had several paragraphs missing and this was brought to the attention of Mr Adedipe after the hearing had commenced before us. From this incomplete affidavit, it was gleaned that the second appellant was asserting

that there was a breakdown in communication between his attorney-at-law and himself after the stay of execution was obtained. He also asserted that he was advised by his attorney-at-law and verily believed that the appeal had good prospects of success.

[32] An attempt was made to remedy the deficiency in the affidavit of the second appellant, by the filing of an affidavit on 8 May 2019, from Janet Amos, the secretary/administrator of the first appellant. In it, she asserted that she made the affidavit with the express authority of the second appellant on behalf of both appellants. She firstly sought to address the problem surrounding Mr Adedipe's representation of the appellants. She also sought to address the issue of the prospect of success of the appeal.

[33] The respondent filed an affidavit in response to that of Mr Adedipe addressing primarily the matter of the complaint that had been made to the GLC.

The submissions

For the respondent

[34] Counsel, Ms Bobbette Brown, quite properly opted not to pursue two of the orders sought in the notice of application. She, therefore, in making her submissions on behalf of the respondent, argued that the appeal should be struck out because the appellants had not done anything for over four years to advance their appeal. There had not been the filing of any skeleton submissions or record of appeal. The appellants had not done anything to secure a new attorney-at-law to represent them, or to get their attorney to act or to complete the process of removing his name from the record.

[35] Counsel urged that the delay in the prosecution of the matter is equally on the appellants and their attorney-at-law. She noted that the attorney-at-law was instructed by the GLC to remove his name from the record because of an alleged conflict of interest but had not done so. Even though the appellants filed a notice of acting in person in the Supreme Court, he did not pursue the steps to remove his name from the record in the Court of Appeal. She pointed out that the hearing for this application to remove his name from the record in the Court of Appeal was set for 9 April 2019 but was unattended by the said attorney-at-law.

[36] Further, she observed that having filed the notice of acting in person in the Supreme Court, the appellants took no steps themselves to further the matter neither did they seek to get another attorney on record, but simply allowed time to pass until the said attorney could continue where he stopped over four years ago. She said it was only after the appellants were served with the respondent's application to dismiss the appeal that the attorney-at-law was spurred into action to indicate that he now appears again on behalf of the applicants.

[37] Counsel cited **Mirage Entertainment Limited v Financial Sector Adjustment Company Limited et al** [2016] JMCA App 30 where an appeal was struck out for want of prosecution in circumstances that she said were similar to this one. She further submitted that considering what is stated at paragraph [10] of that judgment, the appeal should have been brought on for hearing before this court on the Registrar's report with the recommendation that it be struck out for want of prosecution due to the inordinate

delay and the many failed attempts the Registrar had made to get the attorney for the appellants to act.

[38] Counsel submitted that the Privy Council decision of **Icebird Ltd v Winegardener (The Bahamas)** [2009] UKPC 24, though distinguishable from the present case, provides much guidance on the issue. She submitted that the principles laid down in this decision "echo that the power to strike out should only be exercised where the court is satisfied… that there has been inordinate and inexcusable delay on the part of plaintiff or his lawyers".

[39] Counsel also relied on **Birkett v James** [1978] AC 297 where the House of Lords considered the applicable principles where an application is made for dismissal of an action for want of prosecution. She also referred to **Grovit v Doctor** [1997] 1 WLR 640 in support of her submission that the delay in this case was one which could be viewed as involving an abuse of process and thus must properly be dismissed.

[40] Learned counsel urged the court to consider how the respondent has been prejudiced by the delay. Counsel cited the fact that he had been denied the fruits of his labour in a business that is currently thriving and that there is no guarantee that in a few years this will be the case. There is also a possibility, counsel urged, that given the severe hardship the respondent is facing at his age, he might not survive pursuing his case to a conclusion. From the actions of the appellants in the past, counsel submitted, it is reasonable to conclude that they have no interest in pursuing this appeal.

For the appellants

[41] Mr Adedipe commenced his submissions by acknowledging that he was generally in agreement with the chronology but had no recollection of having received the letter of 28 October 2014 from the Deputy Registrar of this court. Counsel, however, candidly admitted that there could be no denying that there was a delay on the part of the appellants in pursuing their appeal.

[42] Counsel also recognised that there was no substantial explanation for the delay given in the affidavits filed on behalf of the appellants. He, however, submitted that the material presented was sufficient to demonstrate that there would have been some uncertainty relative to the representation of the appellants from 2017. Counsel urged that the issue of the delay was but one factor albeit an important one.

[43] In his written submissions, counsel pointed out that a bundle comprising the entire record was filed when the proceedings for a stay of execution were before the court. He further noted that sufficiently detailed submissions encapsulating the arguments in support of the appeal were also filed at that time.

[44] It was counsel's submission that, in the interest of justice, this court must look at the merits of the appeal when an application such as this is being determined. It was submitted that there was indeed merit in the appellants' appeal such that it ought not to be struck out.

[45] Counsel submitted that the matter had been improperly commenced on a fixed date claim form. This, he contended, was an irregularity and there was no jurisdiction to

enter judgment on the fixed date claim that was filed. Further, counsel invited this court to note there was no proof of service of the original fixed date claim form as seen from the fact that the only affidavit of service spoke to the service of the amended fixed date claim on Miss Amos. It was urged that this service could not be taken as proper service on the second appellant.

[46] It was counsel's submission that in the circumstances of this case, where the non-service of the originating documents was an issue at the base of the appeal, the consideration of merit would bear greater weight than other cases.

[47] Counsel submitted that, in any event, there were no allegations directly affecting the first appellant. He noted that the first appellant was a person in law separate from its shareholders. He urged that there was no basis for saying there was an agreement between the first appellant and the respondent for the provision of any benefit, as the respondent claimed. There could accordingly be no liability on the part of the first appellant and hence there was no cause of action against it.

[48] Counsel further submitted that the learned judge erred in declaring that the respondent was entitled to one-third share in the first appellant because the second appellant, with whom he said he had the agreement, had never been served with the amended fixed date claim form. It was counsel's submission that the failure to serve the second appellant invalidates the order against him and he is entitled to have it set aside *ex debito justitiae.* Counsel referred to **Isaacs v Robertson** [1984] 3 W.L.R 705 and

Marilyn Hamilton v United General Insurance Company Limited [2017] JMCA App 38 in the course of his submissions.

Discussion and analysis

[49] The applicable rule in matters of this nature is rule 26.3(1)(a) of the Civil Procedure Rules, (2002) (the CPR), which applies to this court pursuant to rule 2.15(a) of the CAR. This court has in several cases considered the issue of striking out an appeal see for example **Pete Drummond and Anor v Carl McFarlane** [2013] JMCA App 28, **Gerville Williams & Ors v The Commissioner of Independent Investigations and the Attorney General of Jamaica** [2014] JMCA App 7 and **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21. It is recognised that ultimately the overriding objective requires that the court examines all the circumstances of the case to determine how best to deal with it justly.

[50] A useful consideration for a discussion on an application to strike out must be the statement of Lord Diplock in **Birkett v James** when he set out the principles applicable for such an application in courts of first instance. At page 318 he had this to say:

> "Those principles are set out, in my view accurately, in the note to R.C.S., Ord 25, r.1 in the current *Supreme Court Practice* (1976). The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as

between themselves and the plaintiff or between each other or between them and a third party."

[51] The House of Lords revisited and considered these principles in **Grovit V Doctor and Others** and at page 647 Lord Woolf had this to say:

> "The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C. 297."

[52] In **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir**, McDonald-Bishop JA (Ag) (as she then was), at para [51], had this to say:

> "In **Barbados Rediffusion Service Ltd v Asha Mirchandadi and Others** (No 2) (2006) 69 WIR 52, the question of the appropriateness of the sanction of striking out was also thoroughly and usefully examined by the Caribbean Court of Justice (the CCJ) within the context of an unless order and by reference to some relevant authorities. Some salient principles arising from that decision have been distilled as providing useful guidance on the subject. It is duly accepted, as their Lordships have postulated, at paragraph [40], that the approach of the court, in determining whether to strike out a party's case, must be holistic and so a balancing exercise is necessary to ensure that proportionality is maintained and that the punishment fits the crime. According to their Lordships, at paragraph [44], the discretion of the court is wide and flexible to be exercised as 'justice requires' and so it is impossible to anticipate in advance, and it would be

impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case."

[53] It is important to note that McDonald-Bishop JA (Ag) highlighted the difference that exists when an application of this nature is being considered in this court as distinct from in the courts below. At paragraphs [53] to [55] she stated:

"[53] It is recognised, however, that in proceedings at the appellate level, the requirements as to compliance with time limits are stricter and so the approach to the question whether an appeal should be dismissed or struck out for non-compliance with the rules and orders of the court or whether an extension of time should be granted for compliance is bit different from that which applies to cases at first instance. In **United Arab Emirates v Abdelghafar and Another** [1995] ICR 65, which was cited by Smith JA in **Peter Haddad v Donald Silvera**, it was said:

> 'The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. **The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals.**' (Emphasis added)."

[54] In Blackstone's Civil Practice 2004, first edition, at paragraph 71.41, it is noted, in part, under the heading, 'Dismissal for Non-compliance':

> 'Where the rules on lodging documents, skeleton arguments etc. are broken, an appeal may be considered for dismissal…The court sees it as its duty to protect the interests of respondents, who already have a decision of a competent authority in their favour, by insisting on all reasonable expedition and strict compliance with the timetable laid down…'
>
> [55] It means that although striking out should still be considered as a draconian or extreme measure and, therefore, should be considered as a sanction of last resort, the appellate court is less constrained than a court of first instance in resorting to it as an appropriate sanction in the circumstances of a given case."

[54] The length of the delay along with the explanation given for the delay is, therefore, of paramount consideration in applications for an appeal to be struck out for want of prosecution. In exercising the discretion judicially, consideration must also be given to the question of the greater prejudice to either party in the granting of the application. The question of the merit of the appeal, whilst important, is not of primary significance.

[55] In **The Commissioner of Lands v Homeway Foods and Stephanie Muir** McDonald-Bishop JA (Ag) said at paragraph [126] of the judgment:

> "When the interests of the appellant, in having the appeal determined on the merits to correct what is challenged as being an erroneous decision, is balanced against the interests of the administration of justice and the overriding objective, it is found that the considerations that would enure to the benefit of the appellant are significantly outweighed. In fact, the merit of the appeal does not hold sway in the face of all the other compelling and competing factors that have been

> considered and which have weighed against the appellant's entitlement to reprieve."

[56] In the instant case, the chronology discloses that the appellants failed to take any action to advance their appeal between the time the notice of appeal was filed on 24 October 2014 and when they filed their application for extension of time on 18 April 2019. Thus for four years and five months the appellants effectively did nothing in their quest to have the decision given against them set aside.

[57] The gross inaction by the appellants to advance the appeal must be juxtaposed against the considerable activity and agitation on their part in their quest to have the execution of judgment stayed. The formal order of the judgment of Cole-Smith J was served on the first appellant on 22 September 2014, the appellants promptly made an application for the order to be set aside and the judgment stayed. The failure to have the matter dealt with in the court below led to the equally prompt filing of the notice of appeal in this court accompanied with the application for the stay of execution. It would not be unreasonable for the conclusion to be drawn that the appellants, having filed the notice of appeal, were only interested in securing a stay of the execution of the judgment. It could be said that once that had been obtained, their interest in prosecuting the appeal waned.

[58] There are two possible reasons proffered for the delay. The first reason is that after the stay of execution was granted there was a breakdown in communication between the appellants and their attorney-at-law. The second reason stems from the fact that, in 2017, the respondent made a complaint against the appellants' attorney-at-law,

alleging that his representation of the appellants was a conflict of interest adverse to him. As a result, in 2018 the appellants filed notices in the court below indicating they would be acting in person and Mr Adedipe commenced efforts to have his name removed from the records in this court.

[59] The breakdown in communications was said to be due to the fact of the second appellant's frequent and sometimes lengthy absences from Jamaica. In this present age of technology driven communication, this explanation for a breakdown in communications, without more, can hardly be considered a good one. Further, this is compounded by the fact that there is no attempt to say exactly when the alleged breakdown took place after the stay in execution was obtained.

[60] In any event, it was not until 2018 that Mr Adedipe took steps to have his name removed from the records in this court by which time the period of inaction was three years. It is a fact that nothing was done to advance the appeal between the time the stay was granted and the time counsel sought to be removed from the matter and no proper reason or explanation has been offered for the delay. The delay is, by any estimation, inordinate, especially since the appellants knew the judgment had been stayed and the respondent was awaiting the outcome of the appeal for the resolution of the matter.

[61] There is no explanation offered for the delay between the time Mr Adedipe filed to remove his name from the record on 15 February 2018 and the time they received the notice of application to strike out appeal for want of prosecution, which was filed on 15 November 2018. This is particularly concerning given that at this time Mr Adedipe would

have been aware of the fact that enquiries had been made by the respondent about the status of the appeal. He also was advised of the steps that were required of him in advancing the appeal. There is no denial that Mr Adedipe received the letter from the Deputy Registrar, dated 29 January 2018, outlining this information.

[62] The appellants have not shown that they took any action to advance the prosecution of their appeal, whether by themselves or through giving further instructions to another attorney, when it was necessary to do so. They in effect offer no explanation for the failure to do so. The inaction and the delay continued.

[63] Counsel for the respondent had argued that the inordinate and inexcusable delay on the part of the appellants and their attorney-at-law is prejudicial to the respondent. Counsel also submitted that the funeral home was the respondent's only source of income and that with this funeral home having been taken away from him, and being an aged man, he is experiencing severe hardship, as he now has no source of income.

[64] The respondent's continued inability for four years to access the fruits of his judgment while a stay of execution remained in place, could well be viewed as being in and of itself prejudicial.

[65] If the appellant were to secure an extension of time and the appeal was to succeed, the proceedings would have to be remitted to the Supreme Court for trial. The resolution of the matter would, therefore, be further delayed, and given that there may be further appeals arising from the trial of the matter, there would be continued delay and prejudice to the respondent.

[66] On the matter of the merits of the appeal, the fact that the appellants had obtained a stay of execution by this court indicates that there must be some merit. In considering an application for a stay of execution, one of the issues this court is obliged to consider is whether the material provided by the appellants disclose an appeal with some prospect of success. As indicated previously, Mr Adedipe pointed out that all the relevant documents and sufficiently detailed submissions encapsulating the arguments in support of the appeal were filed at the time the appellants made their application. It found favour with this court, hence the stay was granted. In the circumstances, I do not think it necessary to consider that issue here in any detail.

[67] However, one matter requires consideration given the significance the second appellant placed on his assertion that he was never served with the papers in the matter and therefore the orders made against him were invalid and he was entitled to have them set aside *ex debito justitiae*. Mr Adedipe relied on the Privy Council decision of **Isaacs v Robertson** where the Board recognised the proposition that there is a category of orders of a court of unlimited jurisdiction which a person affected by the order is entitled to apply to have set aside *ex debito justitiae*, in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give the judge a discretion as to the order he will make (as per Lord Diplock at page 709).

[68] In that case, the appellant had contended that because of the operation of a particular rule of the West Indies Associated States Supreme Court, an order by the High Court granting an interlocutory injunction was a nullity, so disobedience to it could not

constitute a contempt of court. The Board dismissed this contention and agreed with the Court of Appeal's finding that, although the order granting the injunction ought not to have been made, and the appellant would have been entitled to have it set aside, he was in contempt in disobeying it. The order made had to be obeyed until it had been set aside by the court. In effect, therefore, the fact that the appellant was entitled to have the order set aside was no bar to the enforcing of any consequences that flowed from his being in breach of the order.

[69] If the assertion by the second appellant was correct, that he was not properly served, he was entitled to apply to have the orders made in his absence set aside. He did so and the matter was set for hearing on 22 October 2014 and adjourned for hearing on 21 November2014. The papers related to that application are not before this court so we cannot say definitively whether one of the grounds advanced for setting aside was the issue of non-service. An order made against a party who was not properly served is irregular and subject to being set aside. Until it is set aside, it remains a valid order of the court that must be obeyed.

[70] Instead of pursuing that application to set aside, the appellants chose to appeal the judgment and orders. Having chosen to take that step, the orders of the case below remain valid until set aside. It was therefore incumbent on the second appellant to vigorously pursue his appeal. The second appellant, who is the directing mind and will of the first appellant, would have taken service of the claim on behalf of the company as director and in that manner would have become aware of the claim. The orders made against the company would have to be carried out by the director and shareholders of

the first appellant, who is the second appellant, in any event. This very fact may well explain the appellants' tardiness in pursuing either the application in the court below or the appeal in this court.

[71] It is not as if the application to set aside or the appeal is unanswerable. The rules provide for alternative methods of service, for curing defects in service and for dispensing with service altogether. All these the respondent would have been entitled to raise but was prevented from doing so by the appellants' failure to pursue the application or appeal in a timely manner.

[72] It makes it that more egregious that the appellants having obtained the stay, which recognised that there must be merit in the appeal, seemingly sat back and did nothing to advance the appeal. Certainly when it was granted this court could never have envisioned that the appellants would have done nothing further to pursue the appeal for another four years.

[73] Ultimately, what is best in the interests of the administration of justice is a very relevant and important consideration. McDonald-Bishop JA (Ag) at paragraph [119] of **The Commissioner of Lands v Homeway Foods and Stephanie Muir** stated:

> "At the same time the court should also be concerned with challenges posed to its authority, by the failure of litigants to comply with its rules, directives and orders. There is a live and dangerous threat to the rule of law when the court's authority is undermined by inexcusable and persistent disregard for its rules and orders. The court is also concerned with what is fair and just to the parties to the proceeding as well as to other litigants who are standing in line to access the limited resources of the court, the most scarce of which is time."

[74] When the interest of the appellants, in having the appeal against judgment entered in their absence overturned, is balanced against the administration of justice and the overriding objective, it is found that the considerations that would enure to the benefit of the appellants are outweighed. The appellants have not provided this court with a good and acceptable reason for their delay in prosecuting the appeal. When this delay and the prejudice to the respondent is considered, it is clear that this is a case fit for the favourable exercise of this court's discretion to dismiss the appeal.

[75] In the circumstances of such an inordinate delay of over four years, and with no proper explanation for such a delay, the appellants are incapable of displacing the conclusion that there was no serious intention to prosecute the appeal. The appellate process demands more from the parties. A stricter adherence to time limits and compliance with rules and orders is required. The appellants' inordinate delay in obeying the rules of the court, particularly as they are the beneficiaries of a stay of execution pending the outcome of this appeal, is unfair to the respondent and can be viewed as an abuse of the process of the court.

[76] It was, therefore, for these reasons that after careful consideration of all the circumstances we made the orders at paragraph [5].

EDWARDS JA

[77] I too have read the draft reasons for judgment of my sister P Williams JA and agree with her reasoning and conclusions.