

JAMAICA

**IN THE COURT OF APPEAL
SUPREME COURT CIVIL APPEAL No. 27 Of 2004**

APPLICATION No. 7 Of 2009

BETWEEN:	AUBURN COURT LIMITED	1st Applicant/Appellant
AND	DELBERT PERRIER	2nd Applicant/Appellant
AND	NATIONAL COMMERCIAL BANK JAMAICA LTD.	1st Respondent
AND	RBTT JAMAICA LIMITED	2nd Respondent

IN CHAMBERS

Barrington Frankson, instructed by Gaynair and Fraser for the applicants.

Miss Corrine Henry, instructed by Myers, Fletcher and Gordon for the 1st respondent.

January 16 and March 18, 2009.

Harris, J.

1. This is an application filed by the appellants on January 16, 2009 in which they seek to set aside a default costs certificate issued on January 7, 2009 and to obtain an order that a date be fixed for taxation.

2. The following are the grounds on which they place reliance:

- i. That the Bill of Costs filed by Messrs. Myers, Fletcher & Gordon for the 1st Respondent was in contravention of the provisions of Rule 1.18 of the Civil Procedure Rules 2002 as the aforesaid bill was filed in excess of three (3) months after the date of the Order entitling the 1st Respondent to file the said Bill of Costs.
- ii. The Applicants' Points of Dispute was filed and served prior to the issuing of the Default Costs Certificate dated the 7th day of January, 2008".

3. The facts giving rise to this application are that on April 3 2002, the applicants brought an action against the respondents in which they sought various relief. On March 10, 2004, the action was dismissed by Anderson J, as disclosing no cause of action and/or as being frivolous and vexatious and an abuse of the process of the court.

4. On March 29, 2004 the applicants filed a Notice of Appeal. For a period, no steps were taken by them in pursuit of the appeal. On November 3, 2005 they filed an application for an extension of time within which to file their Record of Appeal. The application was dismissed by Cooke J.A. on September 28, 2008 on the ground that there was no valid appeal in existence. He ordered the applicants to pay the respondents' costs.

5. The 1st respondent filed its bill of costs on April 18, 2008, and its default costs certificate on June 13, 2008. The default costs certificate was perfected on January 7, 2009.

On July 21, 2008, the applicants filed their points of dispute. This was accompanied by a letter addressed to the registrar of this court for permission to file it out of time.

6. The Court of Appeal Rule 1.18 (1) empowers this court to determine matters which fall within the ambit of the present application. The rule provides:

“1.18 (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.”

7. Rule 64 and 65 of the CPR govern the matter of costs, including the procedure with respect to taxation. Rule 65.18 provides:

- “(1) Taxation proceedings are commenced by the receiving party-
 - (a) filing the bill of costs at the registry; and
 - (b) serving a copy of the bill on the paying party
- (2) 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.
- (3) (6)”

8. CPR 65.19 reads:

- “(1) Where the receiving party fails to commence taxation proceedings in accordance with rule 65.18 (2) the paying party may apply for an order requiring the receiving party to commence taxation proceedings within such time as the registrar may specify.

- (2) On an application under paragraph (1), the registrar may direct that, unless the receiving party commences taxation proceedings by a date specified by the registrar, all or part of the costs to which the receiving party would otherwise be entitled will be disallowed.
- (3) Whether or not an order is made under paragraph (2), the court may —
 - (a) disallow all or part of statutory interest on the costs in respect of any period of delay;
 - (b) disallow all or part of the costs of taxation that might otherwise be awarded to the receiving party.”

9. CPR 65.20 states:

- “ (1) The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on —
 - (a) the receiving party; and
 - (b) every other party to the taxation proceedings.
- (2) Points of dispute must:
 - (a) identify each item in the bill of costs which is disputed;
 - (b) state the reasons for the objection; and
 - (c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item.
- (3) The period of filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).

- (4) If a party files and serves points of dispute after the period set out in paragraph (3), that party may not be heard further in the taxation proceedings unless the registrar gives permission.
- (5) The receiving party may file a request for a default costs certificate if—
 - (a) the period set out in paragraph (3) for serving points of dispute has expired; and
 - (b) no points of dispute have been served on the receiving party.
- (6) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate. "

10. CPR 65.21 provides:

- "(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 in form 26 for signature by the registrar.
- (2) The registrar must then sign the default costs certificate.
- (3) A default costs certificate will include an order to pay the costs to which it relates."

11. No submissions were filed by the applicants. It is clear however, that the gravamen of their contention is that the bill of costs was not filed in compliance with the requirement of Rule 1.18 of the Court of Appeal Rules 2002 thus rendering the default certificate invalid.

12. It was Miss Henry's submission that the failure to file the bill of costs within the requisite period does not render it invalid as Rule 65.19 provides for the imposition of a possible sanction on the receiving party where there is a delay in filing the bill of costs. It was further submitted by her that the order having been perfected, related back to June 13, 2008, the date of filing and in support of this submission, she cited the case of **Workers Savings and Loan Bank v Mckenzie and Ors.** (1996) 33 JLR 410.

13. Under Rule 65.18 (1) a party, commencing taxation proceedings must file a bill of costs in the court's registry, a copy of which must be served on the party who is required to pay. Rule 65.18 (2) specifies that a bill of costs must be filed and served within a three month period subsequent to the receiving party becoming eligible for the payment of costs. Does the use of the word "must" in the rule impose a mandatory obligation on a receiving party to file and serve a bill of costs within three months of an entitlement to the receipt of costs? The answer to this question lies in the true construction of the rule. In construing the rule regard must be had to Rule 65.19 (2) and 65.19 (3). This

rule grants discretionary powers to the court as well as the registrar to bring into operation certain sanctions if a receiving party fails to commence taxation within three months.

14. Under Rule 65.19 (2), the registrar, on an application from the paying party, is permitted to disallow all or part of the costs if the receiving party fails to commence taxation within the time specified by the registrar. Where there is a period of delay in the filing of the bill of costs, Rule 65.19 (3) confers on the court an inherent power to disallow all or a portion of the statutory interest accruing on the costs. The court may also disallow all or part of the costs of taxation.

15. It appears to me that, the drafters of the Rules, in conferring discretionary powers on the registrar and the court to make certain orders on a receiving party's failure to commence taxation within the prescribed time, must have intended that the word "must" is not mandatory. It would have been contemplated by them that the word ought to be construed as meaning "may". It follows that the word "must" within the context of Rule 65.18 (2) is merely directory and therefore does not impose upon a receiving party any obligation to adhere strictly to the filing of a bill of costs within the requisite period.

16. I will now consider whether there are any circumstances which would operate to bar the default costs certificate from being treated as valid and

subsisting. An order for costs in favour of the 1st respondent was made on September 28, 2007. The bill of costs having been filed and served on April 18, 2008, shows that it was filed outside of the three month period specified by Rule 65.18 (2).

17. On the issue of the bill of costs on the applicants on April 18, 2008, they would have been under a duty to file points of dispute within 28 days from that date. They did not do so until July 21, 2008. The document containing their points of dispute was accompanied by a letter addressed to the registrar seeking permission to file the points of dispute out of time. This letter to the registrar would in no way have availed them. In fact, the transmission of the letter requesting the registrar's permission to file the requisite document was misconceived. The rules do not empower the registrar to make an order for an extension of time to file points of dispute. On the expiration of the time for filing points of dispute, the applicants ought to have made an application to the court for an order for an extension of the time within which to comply with rule 65.20 (3).

18. The default costs certificate was filed on June 13, 2008. However, it was perfected on January 7, 2009. The fact that it was perfected on that date would in no way affect its validity as it must be taken to have been filed on June 13, 2008. In the case of **Workers Savings and Loan Bank v Winston McKenzie et al** (supra) it was held that once the documents in support of the entry of a

default judgment are in proper order, the judgment, on filing, is to be taken as entered on the date of filing. The principles are applicable to this case. The default costs certificate had been filed and accordingly, perfected on June 13, 2008. There is nothing to show that its integrity has been impugned. Its validity remains intact.

19. The application is refused with costs to the 1st respondent.