[2014] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO 68/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE MCINTOSH JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN	**ERNEST DAVIS**	**APPELLANT**
AND	**THE GENERAL LEGAL COUNCIL**	**RESPONDENT**

Paul Beswick and Kayode Smith instructed by Ballantyne, Beswick & Co for the appellant

Mrs Sandra Minott-Phillips, QC and Miss René Gayle instructed by Myers, Fletcher & Gordon for the respondent

29 April & 2 May 2014

ORAL JUDGMENT

PANTON P

[1] On 29 April 2014 we heard submissions from learned Queen's Counsel for the respondent and counsel for the appellant. We reserved our decision and subsequently notified the parties that we were in a position to deliver our decision this morning.

[2] On 9 March 2012, the Disciplinary Committee of the General Legal Council handed down a decision that was adverse to the appellant in this matter. The disciplinary committee found the appellant, an attorney-at-law, guilty of professional

misconduct, in that, according to the committee, he had breached Canons I(b), IV(f), IV(r), IV(s) and VII(b) of The Legal Profession (Canons of Professional Ethics) Rules that govern the legal profession.

[3] On 11 May 2012, the appellant filed a notice of appeal in which he sets out what purported to be six grounds of appeal. However, on close examination and scrutiny of these six grounds, we concluded that they were not in the form that we were accustomed to see grounds of appeal. However, the fifth and sixth grounds, we found to be sufficiently properly worded to merit the description of grounds of appeal. These grounds are as follows:

> "5. On 28th April 2012, the decision of the respondent's Disciplinary Committee panel was handed down without giving the appellant any opportunity to cross-examine the complainant or to give evidence on his own behalf or to make submissions in defence of the complaint.
>
> 6. The appellant has been deprived of due process and the hearing of the complaint in which he was found guilty of professional misconduct was not conducted in accordance with either the rules of natural justice or the Legal Profession (Disciplinary Proceedings) Rules."

In that notice of appeal filed by the appellant he sought an order that the orders made in the decision dated 9 March 2012 be set aside and that costs of the appeal be granted to him.

[4] In the usual way, a case management conference was held in November and certain orders were made by the single judge who conducted that case management conference. Among the orders, were orders indicating that the appellant was to submit

written submissions and a list of authorities on which he intended to rely by 28 February 2014 and those submissions should have been filed and served. However, the appellant thought it fit to ignore the orders of the single judge and in his own sweet time on 23 April 2014, he filed the submissions and authorities. Once again, the court wishes to stress that case management orders are to be strictly obeyed. The court looks with disgust at the circumvention of orders of this nature, bearing in mind that they usually end up wasting the court's time with attorneys attempting to give flimsy explanations for their tardiness or disobedience.

[5] It is necessary to state that having found that the attorney was guilty of professional misconduct the disciplinary committee imposed a fine of $150,000.00 on him to be paid within 45 days of 9 March 2012. The orders of the disciplinary committee also said that the said fine is to be paid over to the complainants in satisfaction of any damage they may have suffered as a result of the attorney's misconduct, and that the attorney should also pay the costs of these proceedings in the amount of $20,000.00.

[6] Before us on 29 April learned counsel Mr Beswick on behalf of the appellant submitted that there was no evidence of service of the complaint and the notification of the date of the first hearing in this matter which was set for 4 July 2009. As a result of that, he said, the principles of natural justice had not been observed. He stressed that the appellant was entitled to proper notice and that prior to the commencement of the proceedings the committee ought to have satisfied itself that there had been proper

service, and proper service required that there be production of the registered slip, given the fact that the appellant was absent from the proceedings. He submitted that the court should be wary of accepting the evidence that has been advanced as evidence of service in lieu of the failure to prove service and disregard of its own rules by the General Legal Council, said Mr Beswick. There had been no due process and consequently the decision should be set aside.

[7] In response learned Queen's Counsel Mrs Minott-Phillips said that the failure of due process is usually the subject of judicial review and that the appellant was entitled to invoke those proceedings. She said that there was really no ground of appeal for the court to be hearing this matter and that the court should not extrapolate from non-existent grounds. Notwithstanding that submission, Mrs Minott-Phillips did point to what she terms possible grounds which happened to be the two grounds stated earlier by me. She asked, "where is the evidential material that establishes lack of service?" She submitted that it was not for the General Legal Council to prove that the appellant was not served.

[8] Both attorneys made references to the Legal Profession Act and the Rules formulated thereunder. Mrs Minott-Phillips cautioned the court in respect of the question of the exercise of what she said would be original jurisdiction in respect of the judicial review that she said would have been appropriate in this matter. In her view, the only conclusion that this court should arrive at is that the appeal ought to be dismissed.

[9] Section 16 of the Legal Profession Act is relevant in these proceedings. It reads:

> "16 – (1) An appeal against any order made by the Committee under this act shall lie to the Court of Appeal by way of rehearing at the instance of the attorney or the person aggrieved to whom the application relates, including the Registrar of the Supreme Court or any member of the Council, and every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court."

Also relevant in these proceedings are rules 5 and 21 of the Fourth Schedule to the Act. The Fourth Schedule is headed "The Legal Profession (Disciplinary Proceedings) Rules". Rule 5 reads:

> "5. In any case in which, in the opinion of the Committee, a *prima facie* case is shown the Committee shall fix a day for hearing, and the secretary shall serve notice thereof on the applicant and on the attorney, and shall also serve on the attorney a copy of the application and affidavit. The notice shall not be less than a twenty-one days' notice."

And rule 21 reads:

> "21. Service of any notice or documents required by these Rules may be effected by registered letter addressed to the last known place of abode or business of the person to be served, and proof that such letter was so addressed and posted shall be proof of service. Any notice or document required to be given or signed by the secretary may be given or signed by him or by any person duly authorized by the Committee in that behalf."

The final reference to be made is a rule of importance, rule 9:

> "9. Where the Committee have proceeded in the absence of either or both of the parties any such party may, within one calendar month from the pronouncement of the findings and order, apply to the Committee for a rehearing upon giving notice to the other party and to the Secretary. The

> Committee, if satisfied that it is just that the case should be reheard, may grant the application upon such terms as to costs or otherwise, as they think fit. Upon such rehearing the Committee may amend, vary, add to or reverse their findings or order pronounced upon such previous hearing."

[10] Mrs Minott-Phillips had submitted that rule 9 was an option that the appellant had and that this was not a matter for an appeal but rather for judicial review or an application under rule 9.

[11] We have considered all the documents that have been filed including the document that the respondent indicates as the notice that was served on the appellant. That document was one that contains a list of 13 names with addresses, headed "Registered Letters" and has a stamp "General Post Office Jamaica W I, 13 May 2009". The fourth name on the list is that of the appellant and apparently his address. This has been put forward as an indication of service on the appellant through the affidavit of the office attendant Mervalyn Walker and it also attaches a notice signed by the secretary of the Disciplinary Committee. We do not think that this document satisfies the provisions of rule 21 of the Legal Profession (Disciplinary Proceedings) Rule set out in the fourth schedule. The rules requires that the letter is to be addressed and posted; there has to be proof that it is not only so addressed but was also posted and that would be proof of service. A document which has a stamp of the General Post Office with several names including the name of the appellant is not evidence of any posting at any post office. What is required, and which has been the age old practice in Jamaica and other parts of the Commonwealth, is a slip which states "Certificate of

Posting" and it indicates the date and place of posting. If the index to the supplemental record of appeal page 14 is looked at, a proper certificate of posting of a registered article is there exhibited. Nothing less will suffice.

[12] In respect of the submission that the court should not entertain this appeal we are firmly of the view that section 16 gives the appellant the right to appeal against any order made by the committee and so the question of an option for judicial review is neither here nor there. He has a right of appeal. He is saying that he has been condemned by the committee without a hearing and the proceedings are really a nullity. It would be an act of injustice, we feel, to allow the condemnation of the attorney to stand on that ground when there is a clear provision in the legislation that he may appeal the order of the disciplinary committee.

[13] In the circumstances, we are of the view that this appeal must be allowed. The orders of the disciplinary committee are quashed and set aside. Costs to the appellant to be agreed or taxed. However, we hasten to add that it is open to the disciplinary committee to proceed afresh in a proper manner by effecting proper service on the appellant.

[14] We need to add also that the question of procedural fairness and the option for an appeal as opposed to judicial review was also dealt with in ***Century National Merchant Bank*** **and** ***Trust Co Ltd and Others v Davies and Others*** (1998) AC 628, and was summarily dismissed by their Lordships.