JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 83 and 124/2012

APPLICATION NO 9/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

IN THE MATTER of a complaint by Prosporex Limited Inc v Oswald James, an Attorney-at-Law

AND

IN THE MATTER of the Legal Profession Act 1971

BETWEEN	**DISCIPLINARY COMMITTEE OF THE GENERAL LEGAL COUNCIL**	**APPLICANT**
AND	**OSWALD JAMES**	**RESPONDENT**

Mrs Sandra Minott-Phillips QC and Miss Renee Gayle instructed by Myers Fletcher and Gordon for the applicant

Brian Barnes instructed by Wilson Franklyn Barnes for the respondent

30 January and 7 February 2014

PANTON P

[1] I have read, in draft, the judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

McINTOSH JA

[2] I too have read, in draft, the judgment of Brooks JA and agree that this application must be dismissed with costs to the respondent.

BROOKS JA

[3] On 11 September 2012, the Disciplinary Committee of the General Legal Council (the disciplinary committee) delivered a verdict against attorney-at-law, Mr Oswald James, in favour of Prosporex Limited Inc (Prosporex). Prosporex had complained, and the disciplinary committee found, that Mr James had committed breaches of the canons of professional ethics governing attorneys-at-law. The disciplinary committee found that those breaches caused Prosporex to be out of pocket to the amount of US $237,500.00.

[4] Resulting from those findings, the disciplinary committee ordered that Mr James be struck from the roll of attorneys-at-law entitled to practise law in this jurisdiction and ordered him to pay Prosporex US $237,500.00 together with costs of J$100,000.00.

[5] Mr James has appealed to this court against the decision and orders of the disciplinary committee (the civil appeal). He has also appealed against his conviction for certain criminal offences (the criminal appeal) arising out of the same transaction about which Proporex complained.

[6] The civil appeal came on for hearing in June 2013, but was adjourned to allow the criminal appeal to be concluded first. The criminal appeal has been heard but the decision has not yet been delivered. The civil appeal has again been listed for hearing. It came on before the court on 27 January 2014 and Mr James' attorneys-at-law have made a fresh application for it to be taken from the list pending the decision in the criminal appeal. Whereas the court is prepared to grant that request, the attorneys-at-law for the General Legal Council have applied for security for costs for the civil appeal. It is that application which is the subject of this judgment.

[7] The application for the adjournment was filed on 22 January 2014 and that for security for costs was filed on 24 January 2014. The grounds on which the General Legal Council has sought the security for costs are set out in its application thus:

> "1. There [sic] Appellant's [Mr James'] attorneys-at-law on December 20, 2013 informed the Respondent's [General Legal Council's] attorneys-at-law that the Appellant has left the jurisdiction of this Honourable Court.
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> 2. By order of this court made on November 28, 2012 the Appellant's application for a stay of execution of the Respondent's order that he, *inter alia,* grant restitution to the complainant [Prosporex] in the sum of US$237,500 with interest at 3% thereon from April 15, 2008 until payment and to pay the complainant $100,000 costs, was refused. The Appellant has adduced no evidence of having complied with those orders to date.
>
> 3. The Respondent's request of the Appellant for security for its costs of these appeals has not been granted by the Appellant.
>
> 4. The above gives rise to a serious concern on the part of the Respondent of the Appellant's ability to pay the costs of these appeals if ordered to do so.
>
> 5. It is just in all the circumstances to make this order."

[8] In her affidavit supporting the General Legal Council's application, its secretary, Ms Althea Richards deposed of being informed that Mr James had left the island. She expressed surprise, on behalf of the General Legal Council, that Mr James was no longer within the court's jurisdiction and, in that context, went on to express her concern as to the consequences of that situation. She stated at paragraph 8 of her affidavit:

> "The GLC is now very concerned that in the event this court orders costs in its favour following its determination of these appeals, it will be unable to recover those costs from Mr Oswald James"

Ms Richards' apprehension was apparently heightened by an insistence by Mr James' attorneys-at-law that the General Legal Council pay over certain costs due to Mr James from previous orders of this court.

[9] It may be gleaned from its letter of 23 January 2014, that it was Mr James' absence from the island which mainly prompted the General Legal Council to write to his attorneys-at-law demanding security for costs. Ms Richards exhibited the letter to her affidavit. There may, however, have been at least one other motivation for its demand. It will be mentioned below.

[10] When the appeal came on for hearing before us on 27 January 2014, Mr James was present in court. The court informed Mrs Minott-Phillips QC, who appears for the General Legal Council, that Mr James had left the jurisdiction with the prior approval of the court and that the court had stipulated the time for his return which stipulation had, apparently, been obeyed. Despite that information, Mrs Minott-Phillips indicated that

she wished to pursue the application. It was, therefore, adjourned to 30 January 2014 to enable Mr Barnes, who appears for Mr James, to take instructions from Mr James.

[11] Mr James filed an affidavit in response on 29 January 2014. In it he confirmed that he had travelled abroad with the permission of the court. He also confirmed that he had complied with the court's condition for granting its permission, that on his return he should surrender his travel documents to the police. He charged the General Legal Council with speculating that he had fled the jurisdiction and dismissed the concept as "spurious".

[12] As far as the issue of previous costs orders were concerned, Mr James pointed out that the General Legal Council was being inconsistent in its approach. He said that when it had an order for costs of $65,684.00 in its favour, it demanded immediate payment of that sum, but when costs of $583,669.66 were later awarded to him, the General Legal Council wanted to apply a different standard; suggesting that its payment be deferred until all the appeals had been heard. (In her oral submissions Mrs Minott Phillips pointed out that there were four appeals in all involving these parties.) Mr James postulates that it is his refusal to accomodate the latter approach that has prompted this application by the General Legal Council. He pointed out that, prior to that refusal, there was no mention of security for costs, despite the fact that the civil appeal had been in existence since September 2012.

[13] Before embarking on the assessment of the application, it is necessary to confirm that this court did grant Mr James permission to travel to Canada. It did so to enable him to visit his ill mother (who is of advanced years). In granting permission the court had ordered that Mr James should return to the island by 20 January 2014. His travel

documents had previously been in the custody of the police, as a condition of his bail pending the outcome of his appeal in the criminal appeal. Mr James having returned to the island and having re-surrendered the documents, he cannot properly be said to be an appellant who is based overseas and therefore beyond the reach of the jurisdiction of this court.

The submissions

[14] In advancing the application, Mrs Minott-Phillips did not pursue the line that the letter of demand, the notice of application and Ms Richards' affidavit had suggested. She made only passing reference, in her written and oral submissions, to Mr James' departure from the jurisdiction. Instead, learned Queen's Counsel argued that Mr James had not demonstrated that he had a meritorious appeal and that he would be able to satisfy an award for costs were he to be unsuccessful in this appeal. Learned Queen's Counsel pointed to the fact that Mr James had not paid to Prosporex, the sum ordered by the disciplinary committee. This failure, she submitted, raised the issue of impecuniosity, which is an issue that this court is required by its rules to consider.

[15] She argued that the Court of Appeal Rules, 2002 (the CAR) gives this court wider powers than those given to the Supreme Court by part 24 of the Civil Procedure Rules, 2002 (the CPR) in relation to the issue of security for costs. Mrs Minott-Phillips pointed out that, unlike part 24 of the CPR, which stipulates the bases on which the Supreme Court may make an order for security for costs, rule 2.12 of the CAR is less restrictive. It is significant, learned Queen's Counsel argued, that rule 2.12 speaks to the ability of a party to pay the costs associated with an appeal. She pointed out that in doing so,

the rule requires this court, unlike the trend obtaining in the United Kingdom, to consider the question of the impecuniosity of the parties to an appeal.

[16] Mrs Minott-Phillips, in applying the requirements of rule 2.12 to the present case, argued that, having failed to make the payment ordered by the disciplinary committee, the court should consider that he would be unable to satisfy an award for costs of the appeal in the event that his appeal was unsuccessful. In urging the court to find that the justice of the case requires an order for security for costs, Mrs Minott-Phillips pointed to five considerations that should lead the court to that conclusion. These were set out in paragraphs 26-30 of her written submissions on the point:

> "26. Firstly, it appears that the Appellant [Mr James] has left the jurisdiction in circumstances that justify a concern regarding whether or not he will return in the near future.
>
> 27. Secondly, there is no evidence of the Appellant having complied with the order of the Disciplinary Committee of the GLC to make restitution to the complainant [Prosporex Inc Ltd] and pay his [sic] costs following this court's refusal of his application for a stay.
>
> 28. Thirdly, the Appellant is not prepared to have a reckoning between the parties to his four appeals at the end of the hearing of all of them, but has insisted in the Respondent [General Legal Council] paying over to him the costs awarded against it in the first of his four appeals....[T]he Responent's apprehension that it will not be able to receive payment from the Appellant in the event costs are awarded in its favour on any of his subsequent appeals has understandably increased exponentially. This is particularly so in the light of the recent information from the Appellant's attorneys of their client having left the jurisdiction.
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> 29. There are also concerns in relation to the Appellant's ability to pay any costs that may be ordered that derive from his attorneys' disclosure that he is

awaiting the decision of this court in relation to his appeal from a criminal conviction.

30. Finally, the Appellant has not complied or given any indication that he will comply with the Respondent's written request for security for its costs of these appeals."

She relied on, among others, the cases of **Nasser v United Bank of Kuwait** [2002] 1 All ER 401, **MV Yorke Motors (a firm) v Edwards** [1982] 1 All ER 1024 and **Vadetech Corp v Seagate Software Group Ltd** [2001] EWCA Civ 1924, in support of her submissions.

[17] In addressing the timing of this application, learned Queen's Counsel submitted that it was Mr James' renewed application for an adjournment of the civil appeal, the fact that he had not pursued another of his appeals and his insistence on being paid his costs that culminated in the General Legal Council's apprehension that he would be unable to meet an order for costs.

[18] Mr Barnes, in response to those submissions, argued that the General Legal Council had not established that in all the cirumstances, it was just to make the order for security for costs. Learned counsel submitted that the application was an attempt to drive Mr James from the seat of justice but that it was based on "a sandy foundation". He dismissed the concept of Mr James being out of the jurisdiction and argued that:

a. the issue of the enforcement of the payment to Prosporex is not the concern of the General Legal Council, and

b. the General Legal Council had presented no evidence of Mr James' inability to pay costs if called upon to do so.

The analysis

[19] This court's authority to order an appellant to give security for the costs of its appeal is well established and has been the subject of judgments both before and after the advent of the CAR. Rule 2.12(3) specifically speaks to the issue of the inability of the appellant to satisfy an order for costs of the appeal. It states:

> "(3) In deciding whether to order a party to give security for the costs of the appeal, the court must consider –
>
> (a) **the likely ability of that party to pay the costs of the appeal if ordered to do so**; and
>
> (b) whether in all the circumstances it is just to make the order.' (Emphasis supplied)

[20] However, the issue of impecuniosity, or inability to meet an order for costs, is not the usual focus of applications to this court for security for costs. The issue of the appellant being located outside of the island is the more usual ground that is assessed. Nonetheless, there have been fairly recent cases on the point of impecuniosity (see **Cablemax Limited and Others v Logic One Limited** SCCA No 91/2009 (Application No 203/2009 – delivered 21 January 2010), **The Shell Company (WI) Ltd v Fun Snax Ltd and Another** [2011] JMCA App 6 and **Elita Flickinger v David Preble and Another** [2012] JMCA App 3).

[21] The main principle underpinning such applications is that a successful respondent should not be left out of pocket because of the inability of the appellant to pay the

costs of the appeal. The appellate court is more stringent in ensuring that the appellant is likely to be able to satisfy the costs of appeal, than a court at first instance would be with a claimant and the costs of his claim. Unlike the claimant at first instance, the appellant has had the benefit of a judicial pronouncement on the issues in dispute. In **Speedways Jamaica Ltd v Shell Company (WI) Ltd and Another** SCCA No 66/2001 (delivered 20 December 2004), P Harrison JA (as he then was) stated the approach of the appellate court in applications such as these. He said at page 6 of the judgment of the court.

> "As a general rule an appellate court will grant an order for security for costs of an appeal in circumstances where an appellant is impecunious and it seems likely that if he fails in his appeal the respondent would experience considerable delay and would be put to unnecessary expense to recover his costs of the appeal. The court will exercise its discretion depending on all the circumstances of the case."

Although that case dealt with a corporate appellant, it was implicit in that judgment and the authorities cited in it, that, before the court would consider making an order for the appellant to give security, it first had to be proved or be presumed that the appellant would be unable to satisfy an order for costs.

[22] In **Cablemax Limited**, Morrison JA, in considering an application on the basis of the appellant's inability to satisfy an order for costs, set out certain principles, which he opined were relevant to such applications. He said at paragraph [14] of his judgment:

> "[14] In **Keary Developments Ltd and Tarmac Construction Ltd and another** [1995] 3 ALL ER 534, the principles governing the exercise of the jurisdiction to order security for costs against a plaintiff company under the equivalent provision of the UK Companies Act 1985 were reviewed and restated by Peter Gibson LJ (at pages 539 – 542). These principles, which are in my view equally

applicable to an application made under rule 2.12 of the CAR, may be summarised as follows:

(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.

(ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.

(iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the appellant if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal.

(iv) In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.

(v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.

(vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.

(vii) The lateness of the application for security is a factor to be taken into account, but what weight is to

> be given to this factor will depend upon all the circumstances of the case.

[23] I respectfully and gratefully accept that these principles are in accordance with the authorities on the point and I find that they are applicable to the instant case. I find that the cases cited above are more helpful than those cited by Mrs Minott-Phillips, who, to be fair to her, did say that this court had to be careful in using authorities from other jurisdictions. Both **Nasser** and **Vadetech** predominantly involved the issue of the litigant being resident out of the jurisdiciton of the court. Both litigants (who were claimants in each of the cases) seemed to be in some unfortunate financial straits as well. In **Nasser**, the claimant was legally aided and **Vadetech** was no longer represented by solicitors but by one of its own directors.

[24] It may fairly be said that the appropriate questions to be asked, in giving effect to the principles, set out by Morrison JA, to the instant case are as follows:

a. Has the General Legal Council demonstrated that Mr James will be unlikely to satisfy an adverse award in respect of the costs of the appeals or any of them?
b. If the answer to a. is in the affirmative, is it likely that an order for security for costs would stifle Mr James' appeals?
c. Has it been clearly demonstrated that there is a high degree of probability of success or failure of the appeals?
d. Would there be greater injustice in granting an order for security or in refusing the application?
e. If an order for security is appropriate, what would be a suitable sum in these circumstances?

These questions will be examined in the order in which they have been stated above.

a. Has the General Legal Council demonstrated that Mr James will be unlikely to satisfy an adverse award in respect of the costs of the appeal?

[25] In assessing the question of Mr James' ability to satisfy an award for costs in the event of his appeal being unsuccessful, it would not be unreasonable to dismiss, as unfounded, all aspects of the General Legal Council's application which are based upon the fact or fear that Mr James was or would be out of the island. This dismissal would apply to paragraph 26 in its entirety and partially to paragraph 28 of Mrs Minott-Phillips' submissions cited above.

[26] Mr James' failure to pay the sums ordered by the disciplinary committee, considering his assertion that he placed Prosporex's funds as it had directed him, and considering the not inconsiderable amount involved, does not readily lend itself to an inference that he would not be able to meet the costs of the appeal. It is only the sums incurred as the costs of the appeal to which the rule refers. Although Mrs Minott-Phillips was scathing in her view of Mr James failure in this regard, the essence of paragraph 27 of her submission is not as potent as she argues.

[27] In paragraph 28, Mrs Minott-Phillips argued that Mr James' desire to immediately get the benefit of the costs order in his favour, has increased the General Legal Council's fear that he may not honour an award of costs that is adverse to him. The General Legal Council's fear does not seem to be well grounded. His demand for his "pound of flesh" and his refusal to accept what the General Legal Council may have deemed reasonable (in that its position would see it holding on to its funds until the

conclusion of the appeals), does not translate to Mr James being unable to satisfy an award of costs that is adverse to him. This aspect of paragraph 28 also fails.

[28] In paragraph 29 Mrs Minott-Phillips expressed the General Legal Council's anxiety that, in the event that Mr James' criminal appeal is unsuccessful, he may not pursue the civil appeal or, given the consequences of an unsuccessful criminal appeal, he may not be inclined to pay the costs of the civil appeal if he were also unsuccessful in that appeal. The level of speculation involved in this argument does not allow for any logical assessment. The application for security for costs should perhaps have been postponed until the result of the criminal appeal was known. Paragraph 29 cannot assist the current analysis.

[29] Paragraph 30 brings to the attention of the court Mr James' failure to reply to the request for security for costs. It must be noted that the request was dated 23 January 2014 and the application for security for costs was filed on 24 January 2014. Mr James would hardly have had an opportunity to respond to the request as his attorneys-at-law did not see him until the hearing came on before the court on 27 January 2014.

[30] In any event, the basis upon which the letter was sent is completely without foundation. At page two, the letter stated:

> "For reasons that **include your client's recent departure from this jurisdiction**, our client is very concerned that it will be unable to recover its costs from your client in the event it prevails in any or all of his 3 appeals at caption.
>
> Please, therefore, send to us by return security for our client's costs..."

No other detail, besides the departure, has been alluded to as supporting the demand.

[31] Considering all the above, the General Legal Council has failed to clear the first hurdle required for success in this application. It has not shown any basis on which Mr James is unlikely to be able "to pay the costs of the appeal if ordered to do so". On that basis, there is no need to assess the other questions listed above except to note the matter of the timing of this application. There was a similar postponement of the appeal in June 2013. It did not provoke any application for security for costs. The timing of this application seems to suggest that it is only Mr James' recent travels and his refusal to postpone receipt of his costs, which have prompted it. It must be dismissed.

Conclusion

[32] The General Legal Council, in the documents filed in this court, posited its application for security for costs, on the basis that the appellant, Mr James, was outside of the jurisdiction of this court. That foundation proved baseless. Its attempt to argue, through learned Queen's Counsel, that he would be unlikely to be able to satisfy an order to pay the costs of an appeal, was similarly afflicted by the absence of a factual basis. From all the circumstances, although the General Legal Council did pay the sum due to Mr James, the application seems to have been actuated by pique that he did not accede to its request that he defer collecting costs from it until all his appeals, involving it, had been resolved.

[33] Its application, thus flimsily supported, should fail.

PANTON P

ORDER

a. Application for security for costs refused.

b. Costs to the respondent to be taxed if not agreed.