[2017] JMSC Civ. 188

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 05253 OF 2009

IN CHAMBERS

BETWEEN	**JOSEPH NELSON**	**CLAIMANT**
AND	**DAVID ROBERT SPENCER SHAIN WHITE LUTHILD SPENCER (as trading as PNEUMATRON ELECTRICAL SERVICES)**	**1ST DEFENDANT/APPLICANT**
AND	**UC RUSAL ALUMINA JAMAICA LTD.**	**2ND DEFENDANT/RESPONDENT**

Ms. Renee Barker for the Claimant instructed by K. Churchill Neita & Co. for the Claimant.
Mr. Canute Brown instructed by Brown, Godfrey & Morgan for the 1st Defendant/Applicant.
Mr. Christopher Kelman instructed by Myers, Fletcher & Gordon for the 2nd Defendant/Respondent.

ORAL JUDGMENT

HEARD: 7th & 14th November 2017

Relief from Sanctions – Three criteria to be considered – Importance of promptitude in filing the application for relief from sanctions

PALMER HAMILTON, J. (Ag.)

Introduction

[1] A Notice of Application for Court Orders dated and filed 6th of November 2017 seeks the following orders:

1. Relief from sanctions imposed on the 1st of May, 2017 that the first defendant's Statement of Case be struck out for failing to file Listing Questionnaire by July 31, 2017 pursuant to Case Management Conference (CMC) Orders.
2. That Listing Questionnaire filed 11th of August 2017 be allowed to stand as filed and;
3. That time be abridged for the service and hearing of this Application

[2] The Claimant did not oppose this application. However, the 2nd defendant opposed it and relied on the case of **HB Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation & Incorporated et al [2013] JMCA Civ. 1** which was a procedural appeal. The judgment was delivered by Brooks, JA and careful analysis was made of Rule 26.8(1) of the Civil Procedure Rules (CPR) of which I agree.

Applicant's Submission

[3] Learned Counsel for the Applicant, Mr. Canute Brown, indicated that he should have applied for relief from sanctions as early as possible and urged the Court to consider Rule 26.8 (3) of the Civil Procedure Rules. Further, Counsel submitted that the matters itemized in the Listing Questionnaire would not prejudice the trial date. Counsel's view was that there was a hierarchy of important requirements and the least among them or the one that was on the lowest rung would be the Listing Questionnaire. All other requirements, such as disclosure of witness statements, were much more important in the preparation of the trial and were complied with.

Respondent's Submissions

[4] Learned Counsel for the Respondent, Mr. Christopher Kelman, argued that the history of this matter was replete with general non-compliance by the 1st Defendant (Pneumatron Electrical Services) and urged the Court to have the "Unless Order" take effect. Additionally, Counsel submitted that there was no reasonable promptitude on the part of the 1st Defendant and the explanation offered by the 1st Defendant as being one of inadvertence on the part of Counsel was not a good enough reason to grant the relief from sanctions. Counsel counter-argued that the Listing Questionnaire was just as important as the other documents.

Law and Analysis

[5] Rules 26.8 (1) to 26.8 (3) states:

26.8 (1) an application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –

a) made promptly; and

b) supported by evidence on affidavit

(2) The court may grant relief only if it is satisfied that –

a) the failure to comply was not intentional;

b) there is a good explanation for the failure; and

c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regards to

a) the interests of the administration of justice;

b) whether the failure to comply was due to the party or that party's attorney-at-law;

c) whether the failure to comply has been or can be remedied within a reasonable time;

> *d)* *whether the trial date or any likely trial date can still be met if relief is granted; and*
>
> *e)* *the effect which the granting of relief or not would have on each party.*

It is evident from Rule 26.8(1) that the application must be made promptly and supported by evidence. In the **HB Ramsay** case, Brooks, JA opined that the word "promptly" does have some measure of flexibility in its application. Whether something has been promptly done or not depends on the circumstances of the case. In the case at Bar, the Applicant relied on two affidavits, one filed on the 6th day of November 2017 and the second affidavit filed on the 9th day of November 2017. Although the second affidavit was filed and served after submissions were made, it was filed and served before judgment was delivered and as such, I exercised my discretion to accept it and I also placed some amount of reliance on it.

[6] In his affidavit dated and filed the 9th day of November 2017, Learned Counsel admitted that the documents should have been filed by the 31st day of July, 2017 and all except one, the Listing Questionnaire, were filed by that deadline. Upon such realization, which was on the 7th day of August, 2017, he took the Listing Questionnaire to the Registry of the Supreme Court and filed it on the 8th day of August 2017. I bear in mind that two different dates have been given as to when the document was actually filed, but upon my checks the date of filing was actually the 9th day of August 2017.

[7] Be that as it may, the filing of the document was within nine (9) days from the deadline stated in the "Unless Order." However, Rule 26.8(1) clearly stipulates that an application for relief from sanctions must be made promptly. As Brooks, JA had said, the context of Rule 26.8(1) does suggest a mandatory element. Once the application is found to have not been made promptly then it should not be considered. As was done in the **HB Ramsay** case Brooks, JA considered the

three criteria that must be met in order to satisfy the Court that relief may be granted.

[8] These three criteria in Rule 26.8 (2) are:

1. failure to comply was not intentional
2. there is a good explanation for the failure and
3. the party in default had generally complied with all other relevant rules, practice directions, orders and directions.

These three criteria must be read conjunctively as each criterion is inter-dependent with the other.

[9] In the case at Bar, I find that the failure to comply was not intentional. Was there a good explanation for this unintentional failure? The 2nd affidavit of Learned Counsel Mr. Canute Brown is instructive in this regard. Paragraphs 7-11 as Counsel has numbered them, read as follows:

"7. The hand-written witnesses' statements had all been done so it was not difficult to call in the witnesses to sign the formally prepared statements and also the List of Documents. The Listing Questionnaire did not require the litigant's signature.

8. Mrs. Onessa Mitchell, secretary in the firm's office in Mandeville, telefaxed the statements and List of Documents to the Registry of the Supreme Court but not the Listing Questionnaire which, as she subsequently explained to me, was prepared separately by another typist in the office and was not attached to the other filed documents.

9. When I returned to the office on 7th of August 2017 after the Independence Holidays, I checked to see if we had met the 31st of July deadline only to discover that the Listing

Questionnaire was in a separate file among the five physical files that had been created in this Claim over the years. I took the document to the Registry on 8th of August 2017 and filed it.

11. *The failure to file the Listing Questionnaire is entirely my fault because I am the attorney who has conduct of the matter. I am unable to locate the copies I retained after filing and cannot say whether or not I served it on the Claimant or the second Defendant. I am of the view that if was not so distracted by the sad events I experienced during that period, these mistakes would not have been made by me and greater care would have been exercised."*

[10] The definition of what is considered a "good explanation" seems almost elusive and at times subjective. However, paragraph 23 of the **HB Ramsay** case sheds some light by stating:

> *"To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation.* ***Similarly, if the explanation for the breach is administrative inefficiency."*** (My emphasis)

[11] Even if I were to find that this was an oversight, administrative inefficiency, which is what is explained in Learned Counsel's 2nd affidavit, is not regarded as a proper or good explanation for the failure to comply. As such, the application also fails on this limb and there is therefore no need for me to consider the third criterion.

[12] In considering the overriding objective of the **Civil Procedure Rules** (**CPR),** I must deal with this case justly, and in so doing I must ensure that it is dealt with

expeditiously and fairly. Hence, a dilatory approach to compliance will be frowned upon.

[13] In **Perrie Daley v Attorney General [2015] JMCA Civ. 11** another procedural appeal, McDonald Bishop, JA (Ag.) (as she then was) cited the cases of **Peter Haddad v Donald Silvera** (unreported), Court of Appeal, Jamaica **SCCA No. 31/2003,** judgment delivered 31st July, 2007 and **Revici v Prentice Hall Inc., [1969] 1 ALL ER 772**. The principle which was the common thread throughout her judgment was that the Rules of the Supreme Court are there to be observed; and *"the overriding objective principle of Part 1 of the Civil Procedure Rules applies to Rules of this Court. See **Rule 1.1 (1)** of the Rules. Generally speaking the rules of the Court **must** be obeyed."* (My emphasis)

[14] I will readily agree that promptitude allows some degree of flexibility and thus if the Court agrees to consider the application; the next hurdle that the applicant has to clear is that he must meet all the requirements set out in Rule 26.8 (2). Should he fail to meet those requirements then the court is precluded from granting him relief. (See **HB Ramsay** case, at paragraph 31.)

[15] In the case at Bar, Learned Counsel Mr. Brown, realized the error and sought to file within a couple of days. However, the application for relief from sanctions was made in November 2017, which was 3 months later. I agree, there was promptitude in filing the document but I do not find that there was promptitude in making the application for relief from sanctions. Bearing in mind that the Court does have the jurisdiction to extend time even after there has been a failure to comply with an "Unless Order", the 1st hurdle of promptitude in bringing the application for relief must be crossed.

[16] I also examined the case of **Dale Austin v The Public Service Commission & The Attorney General of Jamaica, [2016] JMCA Civ. 46**, however, this case was distinguishable from the case at Bar and could not assist the applicant. In the **Dale Austin** case, the application was made promptly, having been filed

before the expiration of the time limit and made two (2) days after the time for compliance had expired.

Disposal

1. Notice of Application for Court Orders dated and filed November 6, 2017 is refused and dismissed.

2. Case for the 1st Defendant stands struck out.

3. Costs in the application to be taxed if not agreed.

4. Permission for leave to appeal is refused.