[2014] JMCA App 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 84/1999

APPLICATION NO 111/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA(Ag)

BETWEEN	**ANTHONY POWELL**	**APPLICANT**
AND	**THE ATTORNEY-GENERAL FOR JAMAICA**	**RESPONDENT**

Oraine Nelson for the applicant

Miss Lisa White instructed by the Director of State Proceedings, for the respondent

6 and 13 November 2014

PANTON P

[1] Before us is a re-issued notice of application for reinstatement of appeal and extension of time to file and serve skeleton arguments. It will be observed that it is really a two-in-one application: firstly, to reinstate the appeal, and secondly to extend the time for the appellant to file and serve skeleton arguments. The key question, therefore, is whether the appeal should be reinstated.

[2] The applicant is seeking the orders on the basis of the general provisions in part 1 of the Civil Procedure Rules (CPR) and rule 1.7(2)(n) of the Court of Appeal Rules

(CAR) in respect of the overriding objective of the court. The applicant is also saying that it was not his fault why the application was not heard on a previously scheduled date. As regards the extension of time, he has pointed to rule 1.7(2)(b) of the CAR.

[3] This suit goes far back in time. It was filed in 1990, the writ of summons bearing the date 3 April 1990. It alleged that the applicant was assaulted, falsely imprisoned and maliciously prosecuted by members of the constabulary force between 16 September 1988 and 26 February 1989. The statement of claim was served in August 1990, and that was replaced by an amended statement of claim dated 19 May 1999. After a five day trial commencing on 27 May 1999 and ending 11 June 1999, the suit was dismissed on 7 July 1999 by Norma McIntosh J (Acting) (as she was then). The learned judge found, significantly, that the action was statute-barred. However, even if the action had been filed in time, the applicant's suit would have still foundered as the learned judge found that he was not a truthful witness.

[4] The applicant was prompt in filing an appeal on 15 July 1999. In the "notice and grounds of appeal", the applicant's primary challenge was that of the judge's finding that his evidence in respect of how he sustained his injuries did not accord with the medical evidence. The applicant also complained that the decision was unreasonable having regard to the evidence.

[5] The record of appeal was settled on 13 January 2000. However, nothing happened for several years despite promptings from the registrar of this court. Eventually, on 4 May 2010 Brooks JA (Acting) (as he then was) made several orders at a case management conference where both parties were represented by counsel. The learned judge gave the applicant an extension of time to 11 May 2010 to serve the record of appeal, and until 25 May 2010 to file and serve skeleton arguments on the respondent. The learned judge made a further critical order that if the applicant did not comply with the earlier orders extending time, it would "result in the appeal herein standing as struck out as of the date of the default".

[6] The case management conference was thereupon adjourned to 15 June 2010. On that date, the applicant having failed to comply with the orders of 4 May 2010, Harris JA adjourned the conference for the appellant to take steps to apply for the reinstatement of the appeal and for extension of time within which to file and serve skeleton arguments. The matter came back before Harris JA who on 4 August 2010, ruled that the matter was one for the court, instead of a single judge.

[7] The hearing of the application was fixed for 8 November 2010 but on that date the applicant did not appear and, further, no bundles had been filed by him. The matter has only now come back before us. There are two affidavits filed on behalf of the applicant – one by the late Mr Dennis Daly, QC and the other by Mr Oraine Nelson who appears for the applicant at this hearing. Mr Daly's affidavit, dated 22 June 2010, states:

> "The Skeleton Arguments were prepared and signed and ready to be filed on the 25th day of May 2010 as required but as a result of the declaration of the State of Emergency on or about the 24th day of May 2010 they could not be filed until the 28th day of May 2010 as the Court of Appeal registry was not open until then."

Mr Daly however went on to point out in his affidavit that although the skeleton arguments were filed at what he described as "the first opportunity", service "was inadvertently neglected and not effected until it was appreciated that it had not been filed". He laid the blame for this failure on a member of his office staff. Service was eventually effected on 16 June 2010. This means that even if the argument as regards the state of emergency was to be given any credit, the order was still not complied with, in that, service had not been effected.

[8] In my view, the statement as to inadvertent neglect is one that has been overworked in these courts and ought to be given short shrift. Legal representation is a very serious matter, and there is no place for inadvertent neglect when the court has set firm timelines, especially after there has been earlier disregard of the rules and orders made under those rules.

[9] In his affidavit dated 6 June 2014, Mr Nelson said that the applicant was not in a position to attend the hearing scheduled for 8 November 2010 as he was in custody from February 2010 until his unconditional release in or around June 2013. The excuse put forward for the failure of the applicant's attorney-at-law to attend was that he "was

in the process of leaving the firm". Needless to say, that excuse is not one that I can describe as acceptable.

[10] Mr Nelson submitted that the overriding objective ought to be considered in dealing with the application. He pointed to the incarceration of the applicant for over three years, and that the skeleton arguments were filed only three days late. Further, he said that there was no discernible prejudice to the respondent, if the appeal were to be reinstated. In answer to the court, he conceded that even if the appeal was relisted there would be difficulty in surmounting the limitation argument, in the absence of a ground of appeal to that effect.

[11] Miss White responded that the appeal had not been pursued in a timely manner, and that there had been no information as to why the orders of Brooks JA, had not been carried out by the applicant in the period between 4 and 25 May 2010. In addition, she said that incarceration does not prevent contact with one's attorneys-at-law. Miss White also contended that the application as framed was not one that the court could grant as the applicant ought to be seeking relief from sanction. She was referring to the power of the court to deal with applications for relief from sanctions imposed for a failure to comply with a rule, order or direction. This power is contained in rule 26.8 of the Civil Procedure Rules, as adopted by rule 2.15 of the Court of Appeal Rules. However, Mr Nelson did not embrace the idea. His failure to do so is understandable as an application of that nature must be made promptly – rule

26.8(1)(a). He would not have been able to get off the ground in view of the tardiness exhibited in this matter.

[12] The facts, in my view, tell a tale of unexplained dithering on the part of the applicant. It has resulted in the consumption of much judicial time, with the accompanying delay in arriving at a final determination of the matter. This is wholly against the spirit and intention of the rules that govern the operation of the Court of Appeal.

[13] Rule 1.7(2)(n) of the CAR, on which the applicant relies, gives the court the power to "take any other step, give any other direction or make any other order for the purpose of managing the appeal and furthering the overriding objective". The overriding objective as stated in part 1 of the CPR is to deal justly with cases, ensuring that the parties are on an equal footing, that matters are dealt with expeditiously and fairly and that an appropriate share of the court's resources is allotted to each case bearing in mind the need to allot resources to other cases. As the matter now stands, there is no appeal so the rule is inapplicable.

[14] The court from time to time dismisses appeals for want of prosecution, especially where there has been a persistent failure to file the record of appeal or there has been non-appearance at the time scheduled for the hearing of the appeal. The court has occasionally exercised its discretion to relist such an appeal where good grounds for so doing have been established. This appeal which the applicant is seeking to relist is in a

completely different category. It was not struck out for the usual want of prosecution. I think it is important to note that fact. It was struck out on 25 May 2010 as the automatic result of non-compliance with the order of Brooks JA. It seems to me that reinstating the appeal would therefore first of all involve a discharge of the order of the learned judge. The jurisdiction comes from rule 2.11(2) of the CAR which provides that any order made by a single judge may be varied or discharged. However, no material has been put before us to suggest that the learned judge erred in making any of the orders he made on 4 May 2010. Assuming that subsequent events may have had a dramatic effect on the orders of a single judge and so make it unjust for the orders to stand, the instant case is certainly not one such case as there has been no proper explanation for the failure of the applicant to serve the respondent within the extended time allowed by the learned judge.

[15] Looking at the merit of this appeal, it is difficult to see where such lies. The trial judge found that the matter was statute – barred. The grounds of appeal that were filed by very experienced counsel make no mention whatsoever of this particular finding by the learned judge. It means therefore that it is accepted. Instead, the applicant's complaint was in respect of the learned judge's findings on the facts – not an easy hurdle to get over – ***Watt* (or *Thomas*) *v Thomas*** [1947] 1 All ER 582; ***Industrial Chemical Co* (*Ja*) *Ltd v Ellis*** [1986] 23 JLR 35.

[16] In my view, the applicant has failed to show that Brooks JA erred in making the case management orders, and has not given a satisfactory reason for disobeying the

judge's orders. In addition, the appeal was without merit in view of the areas of challenge noted earlier. There is therefore no basis for reinstating the appeal. This case, looking at its history, has been on the books for far too long. There comes a time when the space it occupies has to be given to another. That time was 25 May 2010. There has to be finality in litigation. As has been said time and time again, litigants ignore the rules and court orders at their peril. I would refuse this application and awards costs to the respondent to be agreed or taxed.

PHILLIPS JA

[17] I have read in draft the judgment of Panton P and agree with his reasoning and conclusion. I have nothing to add.

McDONALD -BISHOP JA (Ag)

[18] I too have read the draft judgment of Panton P. I agree and have nothing useful to add.

PANTON P

ORDER

Application refused. Costs to the respondent to be agreed or taxed.