[2014] JMCA Civ 55

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 5/2014

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

BETWEEN	**BOBETTE SMALLING**	**APPELLANT**
AND	**DAWN SATTERSWAITE**	**RESPONDENT**

Mrs Caroline Hay and Nigel Parke for the appellant

Douglas Leys QC and Miss Kimone Tennant instructed by Knight, Junor & Samuels for the respondent

22, 23 and 24 October 2014

ORAL JUDGMENT

PANTON P

[1] This is an appeal against the judgment of Morrison J, in which he dismissed the notice of application for court orders dated 28 January 2014 and filed on 29 January 2014. He also refused the in limine application made by the appellant to dismiss the notice of application for court orders filed on 21 January 2014, on the points of jurisdiction and breach of consent order.

[2] In the formal order, the notice of application for court orders dated 28 January 2014 and filed 29 January 2014 and the in limine application made by the appellant to dismiss the notice of application are dismissed and leave to appeal granted.

[3] Before the learned judge was an application by the respondent for orders that a search and seizure warrant issued by McDonald-Bishop J on 16 December 2013, be set aside and that all files, transactions, communications etc. removed from the respondent's office and home, be returned to her forthwith and that there be an inquiry into damages suffered by her, consequent on the unlawful search and seizure of the various files. That application was filed on 21 January 2014.

[4] There was also an application before the judge by the appellant for the notice of application for court orders filed on 21 January by the respondent to be stayed, pending the respondent's compliance with the order of the court which was issued on 17 January. The order that was being referred to in respect of 17 January 2014, was one made by Morrison J, by and with the consent of the parties before us on appeal, for an order that:

(1) All the files referred to earlier, unrelated to the matters raised in the search and seizure warrant issued by McDonald-Bishop J be returned to the applicant forthwith.

(2) That on 17 January 2014 and for every succeeding day thereafter as may be necessary, the respondent to attend upon the premises of the Major Organized Crime and Anti Corruption Task Force

(MOCA) with counsel of her choice and in the presence of the Major Organized Crime and Anti Corruption Task Force counsel, Mr Nigel Parke, to identify such files and transactions which are unrelated to the matters raised in the search and seizure warrant.

(3) The consent order also specified that MOCA and is at liberty to make and retain a contemporaneous note by video recording the exercise and making available a copy of the said video recording to be handed to the respondent with an accompanying statement of the maker as soon as reasonable practicable.

(4) That all the files, transactions, communications etc. removed from the respondent's office and home, on 17 December 2013, be identified and agreed to be unrelated to the matters raised in the said search and seizure warrant to be transported to the respondent's office within 24 hours of completion of the exercise.

(5) Any files etc. removed from the respondent's office and home identified as above, but not agreed by MOCA and the respondent to be unrelated to the matters raised in the search and seizure warrant to be retained and resealed by MOCA for the further consideration of the court.

(6) MOCA shall retain sealed all material which is identified as listed material in the said search and seizure warrant for the further

consideration of the court commencing 17 January 2014 and for every succeeding day thereafter.

(7) MOCA shall clone each and every item uplifted and seized pursuant to the warrant for the purposes of securing the original data for re-sealing and detention by MOCA and returning and installing the cloned copy in the computer to the respondent in good working condition within 24 hours of completion of the exercise.

(8) In respect of the cellphone, IPADS, IPODS uplifted pursuant to the warrant, MOCA shall clone each and every said item for the purposes of securing the original data for resealing and detention by MOCA and returning the original items to the respondent within 24 hours of completion of the exercise.

(9) The costs were to be costs in the cause.

[5] The warrant referred to was applied for by the appellant. The application sought an order that the respondents, including this respondent and four others, permit the appellant and any other person named in Table A and any other person that may be reasonably required to offer assistance in the execution of these warrants, referred to as the search party, to enter, search for and seize the information and material relevant to the existing money laundering investigations against each of them and further specified in Table C listed material in accordance with the terms of the order. The

application sets out the names of the persons to be in the search party headed by Walter Scott QC supervising attorney and included three detective inspectors, three detective sergeants as also those officers attached to MOCA and to the Anti-Lottery Scam Task Force.

[6] The premises that were specified in the warrant in respect of this respondent were a townhouse at Cherry Hill Drive in the parish of Saint Andrew and her Chambers at 20 ½ Duke Street, Kingston. The application required the allowing of the search party to have access to containers, safes, boxes, brief cases, handbags, trunks, wallets, glove compartments, electronic devices, computers, servers, email files, electronic disks, fax machines memory banks, mobile telephones and several other such items.

[7] The application related to specific properties that are listed and the grounds for the application. Among the grounds stated are that there are reasonable grounds to believe that each of the respondents who are the subjects of money laundering investigations have committed the money laundering offences of engaging in transactions with criminal property by knowingly concealing, disguising and/or disposing of criminal property. The criminal property referred to in the application is suspected to have been proceeds of crime of one Andrew Hall Hamilton flowing directly or indirectly from his involvement in criminal conduct in the United States of America.

[8] The application indicates that Mr Hamilton had been convicted of criminal offences in 1998 and 2012 and was awaiting sentence for the 2012 conviction and the

warrants that were being sought by the appellant were for the purposes of the investigations in relation to the premises specified in the application.

[9] The warrant was duly issued by McDonald-Bishop J. An important part of the order says that:

> "…Whereas it appears to me that the seizure of the abovementioned articles will assist MOCA in the investigation of the following offences currently under investigation in Jamaica in respect of *inter alia* the respondent and the other persons named in the application."

[10] The offences are listed as:

(a) knowingly engaging in a transaction that involves criminal property contrary to section 92(1)(a) of the Proceeds of Crime Act 2007;

(b) knowingly concealing, disguising and disposing of or bringing into Jamaica any criminal property contrary to section 92(1)(b) of the Proceeds of Crime Act 2007;

(c) knowingly becoming concerned in an arrangement that facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person contrary to section 92(2) of the Proceeds of Crime Act 2007; and

(d) knowingly acquiring, using or have in possession of criminal property contrary to section 93(1) of the Proceeds of Crime Act 2007.

[11] The order went on to authorize and command in Her Majesty's name that the person to whom the warrant is issued may forthwith and with proper assistance and with such force as may be necessary enter the specified premises at any time of the day or night and there diligently to search for various articles that have been listed. The order gives full details of items and transactions in respect of premises.

[12] Before Morrison J, were the application by the appellant and the application by the respondent. On 30 January, the learned judge made the ruling referred to earlier dismissing the in limine point made requesting the stay of his hearing of the application to set aside the warrant.

[13] The record contains a note of the learned judge's reasoning. He said that he was basically only going to deal with one point because he felt that once he dealt with jurisdiction, the court should be prepared to hear the substantive matter. He noted the arguments made by the appellant and also the counter arguments by Queen's Counsel, Mr Leys.

[14] The point that was made was that Mr Parke was part of the search warrant team and that there was consequently an error on the part of all the parties and the judge himself in respect of the consent order. He described it as all the more a cardinal error and he went on to find, that the clear, unambiguous language of the rules run counter to the submissions of the appellant. He said that: "they require no gloss of case law authorities to throw light on them" and accordingly, the point in limine he said had to fail and this point was in respect of his ability to deal with the warrant and also the question of the effectiveness of the consent order. He felt that he should go on to deal with the substantive issue.

[15] We have been told that he heard submissions in respect of the validity of the warrant over a period of several months, one hour at a time, given the heavy work load that Mr Leys quite kindly, constantly referred to in his submissions in respect of the

burden that judges of the Supreme Court bear. To date, the learned judge, no doubt due to the workload, has not been able to hand down his decision in that regard.

[16] The appellant filed several grounds of appeal which, without meaning any disrespect, we found to be rather cumbersome in the statement of the grounds. However, we have been able to glean that what is being complained of is the judge's approach to the question of the consent order and Mr Parke's inclusion in it, and also as regards the approach of the judge in respect of the warrant for search and seizure, and the submissions that were made indicating that the warrant was subject to the Civil Procedure Rules.

[17] Counsel for the appellant Mrs Hay submitted that the respondent was duty bound to obey the consent order and that to date no application had been made to vary it. She submitted that the learned judge ignored the affidavit evidence before him and the precise terms of the consent order in holding that there had been a mutual error.

[18] According to Mrs Hay, he ignored the fact that the law required the making of an application to vary a consent order. She submitted also that a litigant was not to be allowed to approbate and reprobate. The litigant cannot 'cherry pick' what orders to obey and at the same time seek to get relief from the court. She submitted that the proceedings before Morrison J, ought to be stayed. Permitting those proceedings to continue, stymies, delays and prejudice the police investigations. Where an order is issued to support an investigation of a criminal nature by the authority of a statute,

that statute should be consulted for all authority and rights and that the Proceeds of Crime Act contains no provision which allows for the warrant to be challenged in the way that the respondent has sought to do.

[19] She submitted that rule 11.16 which was referred to by the learned judge has no relevance to the proceedings. Mrs Hay said there can be no question of there being a re-hearing of an application in a case of this nature. It was her submission that challenging of the warrant can only be done in a higher court. A warrant issued by the Supreme Court under the Proceeds of Crime Act, she submitted, cannot be set aside by a court of coordinate jurisdiction, unless the statue makes specific provision in that regard.

[20] Mr Leys QC for the respondent, fumed at the thought that the appellant was suggesting that what Morrison J did was a nullity. He said that it was wrong to say that a judge of the Supreme Court could do anything that is a nullity. He said that the consent order had been arrived at due to their consideration for the need for speed and the fact that judicial time and energy, where possible, ought to be saved. The intention of the respondent in all the proceedings was to co-operate with the process. He referred to letters which had passed between other counsel for the respondent and counsel for the appellant. He pointed out that the respondent's practice has been severely affected and hampered by these proceedings and that the court ought not to have allowed Mr Parke to be involved in the proceedings. The manner of the execution of the warrant was flawed and if the judge had acceded to the request of the appellant

to stay the proceedings that would have only complicated the issues before the judge. He submitted that Mr Scott QC had abdicated his duty.

[21] Reference was made to a case from this court in respect of ***Phipps v Morrison*** SCCA No 86/2008 - delivered 29 January 2010. Mr Leys suggested that this case was inapplicable in the circumstances. He said that "where a consent order was not in order, the judge can interfere with the order using his case management powers" and he relied on the fact that the application for the warrant was an *ex parte* application and that consequently, the Civil Procedure Rules relating to without notice application apply. He said the warrant was bad on its face as it did not comply with certain procedural rules. It was defective in his view. He strongly disagreed with the submission that there has to be an appeal in respect of the warrant, rather than an application to another judge of the Supreme Court. Another point that was made in respect of the consent order was also that it was not signed by the parties and so its validity was in doubt.

[22] Mrs Hay in her reply submitted that there is no evidence of any active participation by Mr Parke in the execution of the warrant. It was really a question of his presence. In any event, she submitted that all these points of procedure in the consent order were agreed to by the respondent and her attorneys who were all present.

[23] The case, as presented on appeal, calls for decision in respect of the approach to be taken to the consent order and also in respect of the warrant. In the case of ***Jamaican Bar Association v The Attorney General*** SCCA Nos 96, 102 &

108/2003 delivered on 14 December 2007, it is useful to mention that in matter which involve the search of several attorneys' offices, the legislation in that case, the Mutual Assistance (Criminal Matters) Act 1995 (MACMA) gave Resident Magistrates, the authority to issue search warrants and in that case the warrants were issued by the Resident Magistrate for the corporate area. The challenge to the validity of the warrant was not made by applying to another Resident Magistrate; it was made by applying to the Constitutional Court which was going to be seized with the question of the infringing of constitutional rights, in that the warrants were alleged to have breached sections 13, 18, 19 and 20 of the Constitution and the allegation also was that the warrants prejudiced the right of citizens to legal professional privilege contrary to common law and sections 19, 21 and 23 of MACMA. The point to be made here is that there was no question of going before another Resident Magistrate to set aside the warrants, the challenge had to be to a higher court. As it turned out the Constitutional Court found nothing wrong with the warrants. The Court of Appeal found that the warrants did not contain the details that were necessary to be in the warrants and they did not really apply to the situation that the officers were seeking to have proceedings in respect of.

[24] In the present situation, sections 115 - 118 of the Proceeds of Crime Act deal with the question of search and seizure warrants. In the instant case, it was specifically identified in that the warrants were being issued in respect of money laundering investigations and that there is an allegation that an individual has committed a money laundering offence. The Civil Procedure Rules cannot, in our view, be imported into the

proceedings under the Proceeds of Crime Act. A criminal investigation such as this cannot be made subject to rules relating to party and party in a civil matter governed by the Civil Procedure Rules. It would be chaotic if, as suggested by learned Queen's Counsel Mr Leys, these rules could be imported to derail the execution of a warrant issued by a judge of the Supreme Court by simply saying that a particular rule in the Civil Procedure Rules has not been complied with. These are criminal investigations; the Civil Procedure Rules have no application in this regard.

[25] So far as the learned judge has embarked on a process of hearing an application to set aside the warrant, we are of the view that he has erred. He has no jurisdiction to overrule another Supreme Court judge, so to be hearing the application is a futile exercise. So far as the consent order is concerned, there is no application for any judge to vary the order. The learned judge cannot take it on himself to vary the order, it being in respect of a criminal investigation under the Proceeds of Crime Act. The consent order was crafted by the attorneys-at-law for the respondent who is also an attorney-at-law. It is a mere quibble that is being imported into the proceedings to be complaining of Mr Parke. The execution of the warrant should have been completed by now. Its terms are clear and the consent order which was aimed at facilitating the process is also quite clear. Both the consent order and the directions in the warrant are to be carried out without further delay. The failure to comply on the part of the respondent exposes her to the possibility of contempt charges.

[26] In the circumstances, the appeal is allowed. The order of Morrison J, the subject of the appeal, is set aside. It is hereby declared and ordered that he has no jurisdiction to hear an application to set aside the warrant of search and seizure issued by McDonald Bishop J. It is further declared and ordered that the warrants of search and seizure issued under the Proceeds of Crime Act are not subject to the procedures set out in the Civil Procedures Rules. The respondent will bear the costs of the appeal.