

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 93 OF 2008**

**APPLICATION NO. 122/08**

<b>BETWEEN</b>	<b>MICHAEL STERN</b>	<b>APPELLANT</b>
<b>AND</b>	<b>RICHARD EDWARD AZAN</b>	<b>1ST RESPONDENT</b>
<b>AND</b>	<b>HASKELL THOMPSON</b>	<b>2ND RESPONDENT</b>

**IN CHAMBERS**

Abraham Dabdoub, Chumu Parris and Miss Akilah Anderson for Applicant/Respondent instructed by Scott Bhoorasingh and Bonnick.

Kirk Anderson and Miss Motheba Linton for the Appellant instructed by DunnCox.

**September 16 and 19, 2008**

**HARRISON, J.A.**

1. On September 1, 2008 the applicant Richard Azan filed a Notice of Application in the Registry of the Court of Appeal seeking the following orders:

“a) That the (Notice of) Appeal No.93 of 2008 filed herein on the 22<sup>nd</sup> day of August 2008 against the decision of Mrs. Justice Marva McIntosh contained in her Order made on the 30<sup>th</sup> day of July 2008,...be dismissed for lack of jurisdiction it having been filed and served out of time, or alternatively,

b) That the Appeal No. 93 of 2008 filed herein on the 22<sup>nd</sup> August 2008...be dismissed as being frivolous and vexatious and an abuse of the process of the Court it having absolutely no likelihood of success;

c) That the costs of this appeal be the Claimant's to be taxed or if not agreed".

2. On September 2, 2008 Panton P., considered the application on paper and made the following order:

"Schedule a hearing before a Judge in Chambers... for the Appellant to respond to this application to dismiss the appeal on the basis of it being filed out of time".

3. The matter came on for hearing on the 9<sup>th</sup> instant but was adjourned to the 16<sup>th</sup>. The application was heard on the 16<sup>th</sup> September and I proceeded to deal with it on the basis of the reference by the Honourable President of this Court. Submissions were made by the Attorneys at Law representing the respective parties and I reserved my decision for the 19<sup>th</sup> September.

4. The background to this application reveals that on July 16, 2008 Michael Stern (the Appellant/ Respondent) made an application in the Supreme Court seeking an order to have service of the Election Petition between Richard Azan (the 1<sup>st</sup> Respondent/Applicant) and himself set aside and to also have it struck out. The applications came up for hearing before M. McIntosh J., and after hearing submissions over several days, the learned judge made the following order on July 30, 2008:

- (a) "Application to strike out Notice of Presentation of Petition and Security and Fixed Date Claim Form (Election Petition) and Particulars is refused;"
- (b) "Application to set aside service of Notice of Presentation of Petition and Security and Fixed Date Claim Form (Election Petition) and Particulars is refused,"
- (c) "That the First Respondent file and serve his Defence by 12<sup>th</sup> August, 2008";
- (d) "That the matter will be set down for a Case Management Conference on the 23<sup>rd</sup> September, 2008;"
- (e) "Costs to the Claimant/Petitioner to be taxed if not agreed upon; and"
- (f) "Leave to the First Respondent to appeal is granted."

5. Mr. Dabdoub on behalf of the Applicant/Respondent submitted before me that because this is an appeal from an interlocutory order, the appellant was obliged to file the Notice of Appeal within 14 days from the date of the decision of the learned judge. He referred to Part 1.11(1) (b) of the Court of Appeal Rules 2002 ("the COAR") which provides as follows:

"1.11 (1) The notice of appeal must be filed at the registry and served in accordance with rule 1.15 –

...

(b) where permission is required, within 14 days of the date when such permission was granted;

..."

6. The records indicate that the Notice of Appeal in the matter was filed on August 22, 2008. This meant that it was filed 23 days after leave to appeal was granted. It was also not served on the Applicant/Respondent until the 26<sup>th</sup> August 2008. No application was made in the court below pursuant to Part 1.11(2) of the COAR to extend time for the filing of the Notice of Appeal. Mr. Dabdoub submitted that time for the filing of the notice of appeal would normally run during the vacation period and that in the absence of an order extending time to appeal, time having been spent in the instant matter, the Court would have no jurisdiction to hear the appeal and it ought to be dismissed.

7. Mr. Dabdoub submitted that the powers of this Court are limited by the COAR and that in respect to time it is particularly made clear by Rule 1.7(2) (b) that, "Except where these Rules provide otherwise, the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed". It is abundantly clear he said, that where the Court of Appeal Rules expressly provide for the filing and serving of an appeal within a specific time period no other rule can operate to lengthen or shorten time for compliance with Rule 1.11 save and except by compliance with the provisions of Rule 1.11(2) which gives the Court below the power to extend the time set out in Rule 1.11(1).

8. Mr. Anderson for the Appellant/Respondent, made some interesting submissions. He submitted that if the Court were to combine the provisions of Rule 1.1 (10)(f) of the COAR with Rule 3.5(1) of the Civil Procedure Rules 2002 ("the CPR"), the time for filing and serving of the Notice of Appeal would not run during the long vacation. He

submitted that a "statement of case" would be akin, to a Notice of Appeal since the latter sets out for the benefit of both the Court and the Respondent to the Appeal, the grounds underlying the appeal. It was therefore his view that having regard to Rule 3.5 of the CPR time would not run against the Appellant/Respondent during the legal vacation and that the appeal which was filed on the 22nd August 2008 and served on 26th August 2008 was filed and served within time. In these circumstances, it was not necessary, he submitted, for the Appellant/Respondent to make an application seeking extension of time in order to file the Notice of Appeal.

### **Conclusions**

9. The main issue which I have to determine is whether or not time runs during the legal vacation for the purposes of filing a Notice of Appeal. It is well-known that the legal vacation commences August 1, and ends September 15.

10. I have said before that Mr. Anderson did raise some interesting submissions so I now turn my attention to a closer examination of the Rules he has relied on.

11. Rule 1.1 (10) (f) of the COAR states inter alia:

"The following Parts and rules of the Civil Procedure Rules 2002 apply to appeals to the Court subject to any necessary modifications:

....

(f) Part 3 - (time, documents)"

12. Rule 3.5 of the CPR which was amended on September 18, 2006 states as follows:

“3.5 (1) During the long vacation, the time prescribed by these Rules for filing and serving any statement of case does not run.

(2) However, this rules does not override any order of the court which specifies a date for service of a statement of case”.

13. A statement of case is defined in Rule 2.4 of the CPR as follows:

“statement of case” means-

- “(a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
- (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court...”

14. It is abundantly clear to me that there is express provision in the COAR for the application of Rule 3.5 of the CPR to appeals subject to any necessary modifications. Rule 3.5 speaks of a “statement of case” and that the time prescribed by the Rules for the filing and serving of it does not run during the legal vacation.

15. Is it therefore legally correct to say as Mr. Anderson submitted that a statement of case is akin to a notice of appeal? He did point out that Rule 1.18 of the COAR could give some guidance although it deals specifically with the question of Costs. Let us examine how the draftsman has modified these rules where the question of Costs is to be dealt with in the Court of Appeal. I need only refer to a few examples. The word “appellant” in the COAR is to be substituted for the word “claimant” used in the CPR. The word “proceedings” is substituted for “appeal” and “statement of case” is substituted where appropriate for the words “notice of appeal” or “counter-notice”.

16. Since we are here dealing with the question of “time”, it is beyond dispute that Part 3 of the CPR comes into operation. Rule 3.5 deals specifically with the filing and serving of a statement of case during the vacation period but with the necessary modification I see no reason why the words “notice of appeal” could not be substituted for the words “statement of case”. In my judgment, there is considerable merit in the submissions made by Mr. Anderson on behalf of the Appellant/Respondent.

17. In the circumstances, I do agree with Mr. Anderson when he submitted that having regard to Rule 3.5 of the CPR, time would not run against the Appellant/Respondent during the legal vacation. The Notice of Appeal filed on August 22, 2008 and served on August 26, 2008 would not have been filed and served out of time. I further agree with him that it would be un-necessary for him to seek any extension of time in order to file the Notice of Appeal. In my judgment, the Court would therefore have the necessary jurisdiction to deal with the appeal. Accordingly, the Application which seeks to have the appeal dismissed would have to be refused.

### **The Order**

1. Notice of Application to dismiss the Appeal for lack of jurisdiction is refused.
2. Order of McIntosh J., is further stayed pending the determination of the appeal.
3. The appeal is hereby ordered to be set down for hearing on October 27, 2008
4. The 1<sup>st</sup> Respondent shall be required to file and serve his written submissions in response to the appellant’s submissions on or before September 30, 2008.
5. 5 ½ hours to be allocated to the hearing of the appeal.

6. The appellant is to be limited to 3 hours for oral submissions; the 1<sup>st</sup> respondent is limited to 2 hours for oral submissions and ½ hour to the Appellant for a Reply if necessary.
7. Costs of the Application to be costs in the Appeal.