[2011] JMCA App 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 116/2010

APPLICATION NO 204/10

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	HON SHIRLEY TYNDALL OJ	1ST APPLICANT
AND	PATRICK HYLTON	2ND APPLICANT
AND	OMAR DAVIES	3RD APPLICANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC	4TH APPLICANT
AND	CHARLES ROSS	1ST RESPONDENT
AND	WORRICK BOGLE	2ND RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	3RD RESPONDENT
AND	HON MR JUSTICE BOYD CAREY (RET'D)	4TH RESPONDENT

Dave Garcia instructed by Michael Hylton & Associates for Shirley Tyndall, Patrick Hylton and Omar Davies

Maurice Manning and Miss Ayana Thomas instructed by Nunes, Scholefield, DeLeon & Co for Jamaican Redevelopment Foundation Inc

Paul Beswick and Miss Lisa White instructed by the Director of State Proceedings for the respondents Charles Ross, Worrick Bogle and the Attorney General

28 February and 2 March 2011

ORAL JUDGMENT

HARRIS JA

[1] This is an application by the Honourable Shirley Tyndall OJ, Mr Patrick Hylton, Dr Omar Davies and the Jamaica Redevelopment Foundation to strike out a notice of appeal filed by Mr Charles Ross, Mr Worrick Bogle and the Attorney General.

[2] On 2 September 2010, the Full Court in the court below made the following orders consequent on an application for judicial review by the Honourable Shirley Tyndall (1st defendant), Mr Patrick Hylton (2nd defendant), Dr Omar Davies (3rd defendant) and the Jamaica Redevelopment Foundation (4th defendant):

> "1. An order of prohibition preventing the continuation of the Commission of inquiry into the collapse of financial institutions in Jamaica in the 1990's (hereinafter referred to as "the Commission") as currently constituted with the 1st Defendant as member and Chairman.
>
> 2. An order of certiorari quashing the decision of the 1st, 2nd and 3rd Defendants to continue with the hearings of the Commission.
>
> 3. An order of certiorari quashing the decision of the 1st Defendant whereby he refused to recuse himself from the Commission.
>
> 4. A declaration that the 1st Defendant by virtue of his having been a delinquent borrower whose debt was

acquired and handled by FINSAC is presumed to be affected by bias and is automatically disqualified from being a member and Chairman of the Commission.

5. A declaration that counsel to the commission by virtue of his (a) having been a shareholder and a member of the Board of an intervened institution and (b) having been treated by FINSAC as a delinquent debtor is presumed to be affected by bias and is automatically disqualified from acting as counsel to the Commission.

6. The court refuses to declare the proceedings thus far to be null and void.

7. Costs of all four Claimants against the 4th Defendant to be taxed if not agreed."

[3] On 14 October 2010, Messrs Ross, Bogle and the Attorney General filed the notice of appeal in which the following have been stated as the grounds upon which they propose to rely:

> "1. The Learned Full Court erred in exercising its discretion by awarding costs against the Attorney General, a successful party to the proceedings.
>
> 2. In the alternative, the Learned Full Court erred in exercising its discretion by awarding costs of all four Claimants against the 4th Defendant/3rd Appellant when they were successful only against the 1st Defendant.
>
> 3. The Learned Full Court erred in not awarding costs on a proportionate basis in the context where the Claimants had cast their claim disproportionately wide; requiring the 1st, 2nd and 3rd Appellants to meet such a claim.
>
> 4. The Learned Full Court erred in not exercising its discretion to award costs in favour of the

1st, 2nd and 3rd Appellants who were entitled to same, being successful parties in the judicial review proceedings.

5. The Learned Full Court erred in disregarding rule 64.7 of the Supreme Court Civil Procedure Rules, 2002 in the context where the Claimants had the same interest and were separately represented.

6. The Learned Full Court erred in disregarding the principle of cost following the event; the Claimants not showing that in respect of the 2nd, 3rd and 4th Defendants that a different approach should have been taken.

7. The Learned Full Court erred in ignoring the general rule that if several parties appear in the same interest on an application for judicial review, that they will be allowed one set of costs between them."

[4] Before addressing the submissions, it is necessary to make reference to the relevant statutory provisions and relevant rules dealing with permission to appeal. They, so far as are material for the present purposes, are to be found in section 11 (1) (e) of the Judicature (Appellate Jurisdiction) Act ("The Act") and rule 1.8 (1) and (2) of the Court of Appeal Rules, 2002.

Section 11 (1) (e) of the Act provides:

> "No appeal shall lie –
>
> without the leave of the Judge making the order or of the Court of Appeal from an order made with the consent of the parties or as to costs only where such costs by law are left to the discretion of the court."

Rule 1.8 (1) and (2) reads:

> "(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought."
>
> (2) "Where the application for permission may be made to either court, the application must first be made to the court below."

[5] Mr Manning submitted that the order of the Full Court goes to the issue of costs and there cannot be an appeal as of right as no permission had been sought for leave to appeal in compliance with section 11 (1) (e) of the ("The Act"). Further, he argued, in appealing, a party is required to comply with rule 1.8 (1) and (2) of the Court of Appeal Rules. Therefore, he argued, in absence of leave, this court has no jurisdiction to consider an appeal. In support of this submission he relied on ***Leymon Strachan v The Gleaner Co. Ltd & Anor.* -** SCCA 54/97, delivered on 18 December 1998.

[6] Mr Beswick submitted that Mr Mannings' submissions in respect of the law and the rules are correct but this court is empowered by rule 1.7 (2) of the Court of Appeal Rules to extend the time for the filing of an appeal. His recognition of the correctness of those submissions shows that he is aware that the Attorney General ought to have complied with the requisite statutory provision as well as the relevant rules. He, however, urged upon this court, that, on the face of it, the order of the Full Court is wrong in law and this court is empowered to entertain an appeal against an order for,

costs only where the order which has been challenged is founded on an error of law. In support of this submission he cited ***Donald Campbell and Company Limited v Pollak*** [1927] AC 732.

[7] The starting point in this case must be in terms of the order against which an appeal is sought. It is without doubt that the order relates to costs only. This being so, in light of section 11 (1) (e) of the Act, the question of the jurisdiction of this court arises. As ordained by law, where leave is required, this court is not clothed with the authority to entertain an appeal unless such leave is obtained. This proposition is bolstered by the dicta of Patterson J.A, in ***Leymon Strachan v The Gleaner Company Limited & Anor***, in which, in dealing with the question of the jurisdiction of this court, in the absence of leave, he said at page 10:

> "The jurisdiction of this court to hear and determine appeals is conferred by the Judicature (Appellate Jurisdiction) Act. The court cannot entertain an appeal, where leave is required, unless such leave has been obtained. Even if the respondents had not taken the preliminary objection, it seems clear to me that the court would be obliged to consider, on its own motion, the question whether leave to appeal was necessary in this case. It goes to the jurisdiction of the court."

[8] Under rule 64.6 (1) of the Civil Procedure Rules, as a rule, an unsuccessful party must be ordered to pay the costs of the successful party if the court decides to order costs. It is prescribed by rule 15 (5), that no order for costs may be made unless an applicant acted unreasonably in bringing an application or in the conduct of the application. Rule 56.15 (4) permits the court, on the determination of a hearing for an

administrative matter, to make orders as to costs as appears to the court to be just. These rules clearly confer upon the court discretionary powers to award costs. It appears that the court, in the exercise of its powers, would have acted, wrongly or rightly, by virtue of these rules. It follows therefore, that the order for costs is obviously one which is captured by section 11 (1) (e) of the Act and the requisite leave must be obtained prior to the filing of a notice of appeal.

[9] The case of ***Donald Campbell and Company v Pollak*** does not assist the Attorney General. The principle laid down in that case establishes that, despite a practice direction which does not permit an appeal for costs only without leave, an appellate court is competent to hear an appeal as to costs only where it is alleged that the order is founded upon an error of law. The distinguishing feature in that case is that the prohibition from appealing without leave is authorized by a practice direction. In the instant case, by operation of the law and the rules of court, a party is barred from appealing where leave is a prerequisite to an appeal. The Attorney General is obliged to act within the constraints of the law and the relevant rules. Where an appeal lies to costs only, leave to appeal must be obtained before proceeding to the appellate court. Further, in obedience to rule 1.8 (2) of the Court of Appeal Rules, an application for leave to appeal must be first made in the court below. The Attorney General has failed to make the relevant application to that court as she is bound to do. The requisite procedure having not been followed, this court is not empowered to consider an extension of time to appeal and for leave to appeal.

[10] A valid notice of appeal not having been filed, there is no appeal before this court. In view of this decision, it will be unnecessary to consider a further submission by Mr Manning that the notice of appeal ought to be struck out as an abuse of the process of the court, for the reason that Messrs Ross and Bogle seek to "affirm" the decision of the Full Court when they were not affected by that decision.

[11] The notice of appeal is struck out for want of jurisdiction. Costs are awarded to the applicants.