[2015] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 15/2012

APPLICATION NO 3/2015

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN **DIGICEL (JAMAICA) (MOSSELL) LTD (T/A DIGICEL)** **APPLICANT**

AND **THOMAS HAMILTON & ASSOCIATES LTD** **RESPONDENT**

Maurice Manning and Miss Michelle Phillips instructed by Nunes, Scholefield, DeLeon and Co for the applicant

Keith Bishop and Andrew Graham instructed by Bishop and Partners for the respondent

4 and 8 May 2015

ORAL JUDGMENT

PANTON P

[1] This is an application to strike out an appeal filed by the respondent against the order of King J, made on 26 October 2011 wherein he entered judgment on the claim in favour of the applicant, Digicel, with costs to be agreed or taxed. King J also non-

suited the applicant in respect of its counter-claim. The appeal was filed on 2 February 2012 and the sole ground filed reads as follows:

> "The learned Judge erred in finding that the words 'legitimate expectations' can only be used in public law and never used in private law although they were used by the Appellant in the Particulars of Claims and witness statement to describe the state of mind of the Appellant's agent/ servant who was asked to remain on the job and perform the required tasks for and on behalf of the Appellant."

In its notice of appeal the respondent reserved the right to file amended notice and grounds of appeal as soon as the transcript of notes are in hand.

[2] The matter before the learned judge was a suit by the respondent against the applicant for breach of contract and although the appeal was filed more than three years ago, we have not had the benefit of the notes of evidence that the learned judge may have recorded; nor do we have the benefit of his reasons for judgment. We adjourned the matter on Monday to today, Friday 8 May 2015 in order to facilitate efforts to contact the learned judge, who has retired. Although the registrar of this court contacted the registrar of the Supreme Court, we are in no better position today than we were in on Monday.

[3] Digicel in its application is contending that the respondent has been tardy in its prosecution of the appeal. In that regard, Mr Manning submitted that the court should not ignore the three years of slumber by the respondent. He submitted that the administration of justice requires a co-operative approach by the respondent and the filing of an appeal, then doing nothing else is not good enough. He referred to rules

2.2(6) and 2.5 of the Court of Appeal Rules (CAR) and submitted that both should be read together. Rule 2.2(6) states that "where either party has had the proceedings in the court below recorded, the appellant must notify the court when filing his or her notice of appeal."

Rule 2.5 deals with the question of action by the registry on receipt of a notice of appeal. It sets out in rule 2.5(1)(b) the procedure, particularly if the appeal is from the Supreme Court, that the registrar of the Court of Appeal is supposed to follow.

[4] Mr Manning also submitted that rule 1.14 of the CAR could have been invoked by the respondent. Rule 1.14 deals with the question of dispensing with procedural requirements on the application of any party. Mr Manning further submitted that, in any event, there is no merit in the proposed appeal. The learned judge is alleged to have said that the case contained reference to "legitimate expectation" a term, he said, that was confined to public law. So the case being in private law would fail. Mr Manning contended that the reasoning by the learned judge in this regard cannot be faulted, hence there is no prospect of success on appeal.

[5] Mr Bishop, for the respondent, filed an affidavit indicating that he had written to the registrar of this court on the matter and she in turn had written to the registrar of the Supreme Court. Mr Bishop submitted that the delay in the prosecution of the appeal is due to the failure of the Supreme Court to respond to the registrar of the Court of Appeal. He submitted that the respondent ought not to be penalized for this failure. He said that the notes of evidence not having being produced, the respondent

has been deprived of the opportunity to file other grounds of appeal. Both Mr Manning and Mr Bishop have differing views as to the state of the proceedings before the learned judge. Mr Bishop maintained that the trial was aborted whereas Mr Manning disagreed.

[6] The Court of Appeal Rules require certain actions by the registry of the Court of Appeal when a notice of appeal has been filed. Rule 2.5(1)(b) reads as follows:

> "Upon the notice of appeal being filed (unless rule 2.4 or paragraph (4) applies) the registry must forthwith –
>
> …
>
> (b) if the appeal is from the Supreme Court –
>
> (i) arrange for the court below to prepare a certified copy of the record of the proceedings in the court below and a transcript of the notes of evidence and of the judgment; and
>
> (ii) when these are prepared give notice to all parties that copies of the transcript are available from the registrar of the court below on payment of the prescribed fee; …"

During the course of the submissions on Monday, we were informed by the clerk that the registrar of the Court of Appeal wrote no less than seven times to the registrar of the Supreme Court in compliance with rule 2.5. The indication that we have had from the Supreme Court is that the notebook in which the evidence was recorded is not in the possession of the registrar. As I have said earlier we do not have a note of any judgment delivered by the learned judge.

[7] The state of affairs is unfortunate because the Judicature (Supreme Court) Act requires the registrar of the Supreme Court to keep a record of all proceedings in the Supreme Court. So, strictly speaking, at the end of a trial where there is an appeal, the registrar of the Supreme Court ought to have in her possession the notes recorded by the learned judge. If this practice had been followed, even without the reasons for judgment, we would have had an idea of what had transpired before the learned judge. We trust that the registrar of the Supreme Court will take the necessary corrective action so as to ensure that she complies with the requirements of the legislation.

[8] We were referred to two cases dealing with the issue of non-prosecution of an appeal. The cases are **D R Foote Construction Co Ltd v Lester Crooks** SCCA No 109/2001 delivered on 31 July 2003 and **Key Motors Limited and Executive Motors Limited v First Trade International Bank & Trust Limited (in liquidation)** [2014] JMCA App 8. We have noted that the case **D R Foote Construction v Crooks** makes no reference to the Court of Appeal Rules and so it ought not to be regarded as a guide to be followed under the current regime of the Court of Appeal Rules. On the other hand, the latter case, **Key Motors Ltd** makes significant references to the Court of Appeal Rules and provides the yardstick for measurement in matters of this nature.

[9] We are not satisfied that there has been any dereliction of duty on the part of the respondent and so there is no basis to prevent the appeal from going forward. In

the circumstances, we cannot accede to the application to strike out the appeal. The fault is squarely at the door of the registrar of the Supreme Court.

[10] In the circumstances, the respondent ought not to be penalized. We therefore order that the application to strike out the appeal is refused and costs in the application be costs in the appeal.

ADDENDA

Having refused, the application to strike out the appeal, the Court then proceeded to make an order dispensing with the requirement for the notes of evidence and written judgment. It was ordered that the record of appeal be filed by 30 June 2015, and the appeal be listed for hearing during week commencing 14 December 2015.

Case management orders were then made in respect of the filing and serving of written submissions, and the length of time allowed for oral arguments.