[2018] JMCA App 32

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 164/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**GRACE TURNER**	**APPLICANT**
AND	**UNIVERSITY OF TECHNOLOGY**	**RESPONDENT**

Owen Crosbie for the applicant

Gavin Goffe and Jahmar Clarke instructed by Myers, Fletcher & Gordon for the respondent

10 October and 15 November 2018

PHILLIPS JA

[1] In this application, the applicant Grace Turner (GT), sought a stay of execution of the judgments delivered by Morrison P and Brooks JA, on behalf of the court, on 23 and 26 October 2017, in Application No 62/2017. GT also sought, in the said application, an order setting aside the said judgments of this court. Application No 62/2017 was for an order for permission to appeal the judgment, made on 17 March 2017, by Simmons J, who refused to set aside a judgment entered in the court below in default of defence, and who also refused leave to appeal.

[2] A summary of the background facts to this case have been set out in paragraph [4] of the judgment of Simmons J, which I have adopted with gratitude as follows:

> "[GT] was formerly employed to the [University of Technology Jamaica (UTECH)] as a lecturer. In 2001 [UTECH] agreed to make the sum of one million two hundred and thirteen thousand seven hundred and twenty five dollars ($1,213,725.00) available to her to pursue studies at the University of the West Indies. She was also granted study leave for that purpose. In return, she was required to work with [UTECH] for two years after she returned from leave. She executed a bond to that effect. [GT] resigned before the expiration of that period."

[3] As a consequence, UTECH sued GT for the sum which it claimed amounted to the breach of the condition on the loan. The litigation which ensued included an amendment to UTECH's name, which was vigorously opposed, and became the subject of an appeal, and an application to strike out the claim on the basis that the claim was an abuse of the process. That application having been denied, UTECH appealed. The appeal was heard by a panel of this court, namely Harris, Dukharan and Brooks JJA, and was dismissed on 19 December 2013. That order of the court was delivered by a panel of this court comprising Panton P, Morrison and Brooks JJA. The litigation continued in the court below, and judgment was entered in default of defence by GT. GT thereafter took action to set it aside. It was that application which was dismissed by Simmons J, and she also refused leave to appeal. That application, therefore, had to be renewed before this court pursuant to rule 1.8 of the Court of Appeal Rules 2002.

[4] When the matter came before the court on 23 October 2017, the panel scheduled to hear Application No 62/2017 comprised Morrison P, Brooks and Sinclair-Haynes JJA. By that time, GT had already taken issue with the judgment of Harris, Dukharan and Brooks JJA having been delivered by Panton P, Morrison and Brooks JJA, stating that it was a breach of the Constitution of Jamaica (the Constitution) and was invalid, as the decision was delivered by persons who had not heard the appeal. He complained that the certificate of result of this court was fraudulent.

[5] On the 23 October 2017, the morning of the hearing of Application No 62/2017, which is set out in the judgment of Morrison P, the court was then dealing with the challenge by counsel for GT that Brooks JA ought to have recused himself from hearing the application for leave to appeal, as Brooks JA had been a member of the panel which had heard the appeal on 25 November 2013, and delivered the judgment on 19 December 2013. Counsel for GT indicated that that decision had been, "criticised as being manifestly irregular and unlawful as shown in the records and which judgment is material to this appeal". The complaint was that Brooks JA would have been a judge in his own cause. As a consequence, GT wished the matter to be taken out of the list, and a new date fixed for the hearing of the application by the registrar.

[6] At the hearing of the application, GT also requested that Morrison P recuse himself from hearing the application as "at an earlier stage of the proceedings, [he] had also had some connection with the matter".

[7] Counsel for GT submitted that if Morrison P and Brooks JA were to proceed to hear the matter, it would appear as if both were acting as judges in their own cause. Morrison P noted in his judgment, however, that counsel had been quick to assert that he had every confidence in the integrity and competence of both judges, but it was the appearance of bias that caused him concern. In his judgment, the learned President referred to the earlier litigation mentioned above, particularly, the decision of this court being handed down by a differently constituted panel of this court than the one that heard the appeal. The reasons for the decision of the appeal were handed down some six months later on 13 June 2014, and as the learned President noted, no doubt due to the complaint being made by counsel for GT, Harris JA who wrote the reasons for the judgment on behalf of the court, had added a postcript to the said reasons in respect of the judgment in issue. This is what she said at paragraph [33]:

> "When our decision was handed down on 19 December 2013 it was, out of sheer convenience, delivered by a panel that was available to do so on that date. It has come to our attention that, subsequent to the delivery of our decision, counsel for the appellant expressed concern about the delivery of the judgment by a differently constituted panel. From time to time due to the unavailability of all or some of the members of the panel of judges that heard submissions in a particular matter, an available panel is constituted for the sole purpose of delivering the decision arrived at by the original panel. We wish to make it abundantly clear that our decision, which is as indicated in paragraph [1] hereof, was arrived at through the deliberations of only the judges of appeal who sat and heard the submissions of counsel for both parties. It's delivery by a differently constituted panel in no way affects its validity."

[8] There was no appeal from this judgment. The learned President in summarising GT's complaint said this in paragraph [9] of the judgment:

> "So, in summary, the involvement of Brooks JA of which the applicant now complains is that he was a member of the panel that heard and adjudicated on the previous appeal; and my involvement is said to be that I was a member of the panel which handed down the decision on the previous appeal."

[9] Indeed, the learned President made it clear that the court having considered the situation carefully, especially "since it naturally affects the integrity of the court itself and goes to the very root of the judicial oath which all judges of the court take", ultimately decided that the application to recuse both judges from hearing the application for leave to appeal was entirely without merit, and ought to be dismissed. The court warned that it could not permit recusal of judges from matters once they had had only some connection with the litigation at an earlier stage as that would "bring the court to a state of paralysis". In any event, the learned President noted that the issues before the court in the application for leave to appeal were quite different from those that were being considered in the earlier appeal.

[10] The application for leave to appeal the judgment of Simmons J then proceeded and was heard by the panel as constituted, namely Morrison P, Brooks and Sinclair-Haynes JJA. Brooks JA set out the arguments of counsel for GT. He indicated that the position taken by Simmons J could not be faulted. She had examined carefully whether on the basis of the material disclosed in the affidavits, GT had demonstrated that she

had a real prospect of success, and she concluded that she had not done so. He noted that Simmons J had also examined properly the issue of, as he put it, "bond versus a contract and whether [GT] had an obligation to repay the loan made by [UTECH] to [GT]". The court concluded that it could find no fault with either the learned judge's approach, which they commended, nor any basis to disagree with her conclusion.

[11] In the application before us, counsel for GT had added another string to his bow or arrow to his quiver. His additional complaint was that since the ruling of this court in **Paul Chen-Young and Others v Eagle Merchant Bank Jamaica Limited** [2018] JMCA App 7, there was now another constitutional impediment to the validity of the decision relating to the appeal in this matter. As counsel argued it, the decision given by the panel comprised of Harris, Dukharan and Brooks JJA was invalid as the members of the court who delivered the decision were not the judges who had heard the appeal. The reasons which were delivered in June 2014, were also invalid, as at that time, Harris JA was no longer a sitting member of the court, as she had attained the age of 70 years in January 2014, and had retired from the office of Judge of Appeal. The reasons counsel posited were therefore null and void.

[12] In my view, that argument is completely unsustainable. The decision of the court of Harris, Dukharan and Brooks JJA was given on 19 December 2013. It was given by all three judges, who held office as judges of the court, and who acted competently and with integrity. The decision was delivered by Panton P, Morrison and Brooks JJA as it was convenient for the court to do so. Those three judges were also sitting members of the court. As Harris JA said eloquently in the postscript to the

judgment, that panel was constituted for the sole purpose of delivering the judgment arrived at by the original panel. The decision had been arrived at through the careful deliberations of the judges who had sat to hear the submissions of counsel. Harris JA said the delivery of the judgment "by a differently constituted panel in no way [affected] its validity". In my view, any interpretation of the dicta of the judges in **Paul Chen-Young** would not affect the validity of the judgment either.

[13] On 19 December 2013, none of the judges who heard and determined the appeal had reached retirement age. As they still held the office of Judge of Appeal, sections 106(1) and (2) of the Constitution were therefore inapplicable. Once the decision had been given, the appeal for all intents and purposes had been concluded. All that remained was the delivery of the written reasons for the decision that had been made and delivered. The reasons were delivered some months later when Harris JA was no longer a sitting judge, but that could not affect the efficacy of the ruling, or what had already been stated by the judges previously as the resolution of the issues between the parties on appeal.

[14] Indeed, this was not a situation as referred to by Morrison P in the **Paul Chen-Young** decision at paragraphs [62]-[63] where he mentions the decision from the High Court of Allahabad, given on 16 November 1953, in **Surendra Singh and Others v The State of Uttar Pradesh** [1954] AIR 194; 1954 SCR 330. In that case, even though one of two judges had initialled each page of a draft judgment, since he had died before the delivery of the judgment, the court held that the judgment was not valid. This was so, the court stated, because the judge who had died did not exist as a

member of the court at the moment of delivery of the judgment. This is what the court stated:

> "... [H]owever, much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the court. Only then does it crystallise into a full fledged judgment and become operative. It follows that the Judge who "delivers" the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery. But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved."

[15] That was not the position in the instant case in the appeal. The view of the court was not only known but had been delivered to the parties. No judge who had participated in the determination of the appeal could have changed their mind or the judgment after 19 December 2013, as the judgment had already been delivered to the parties, and thereafter published by the court. The judgment had crystallised into a "full fledged judgment and become operative". The facts in the appeal before Harris, Dukharan and Brooks JJA are entirely different from the facts in **Paul Chen-Young**

where all three judges had retired before the delivery of the judgment, and also in other cases referred to in **Paul Chen-Young** in respect of which section 106 of the Constitution and similar provisions in other legislation in other countries, may have been applicable. As a consequence, the application to set aside the judgments of Morrison P and Brooks JJA, refusing permission to appeal the decision of Simmons J, which itself was a decision refusing to set aside a default judgment, and which had also refused permission to appeal, is without merit and must be refused.

[16] Of even more significance however, which perhaps I should have dealt with first in this judgment, is that this court has no jurisdiction to set aside the earlier judgment of another panel of this court. The jurisdiction of this court is set out in section 10 of Judicature (Appellate Jurisdiction) Act. That section reads thus:

> "Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

[17] Any challenge to a decision of this court must be made pursuant to section 110(1) and (2) of the Constitution. Any application therefore for a stay of the execution of a judgment of this court, must be made subsequent to a successful application under those sections of the Constitution and The Jamaica (Procedure in Appeals to Privy

Council) Order in Council 1962 governing matters from this court to Her Majesty in Council. Rule 6 of those rules dealing with the stay of executions of judgments of this court is very limited in scope in terms of the exercise of the discretion of the court. Rule 6 reads as follows:

> "Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

GT may not be able to persuade the court that a stay of execution of the decision in Application No 62/2017 would be applicable.

[18] In any event, the application before us was not presented as one pursuant to the provisions of section 110 of the Constitution. As a consequence, no more need be said on that.

[19] Suffice it to say, any application therefore requesting this court to set aside the judgments pronounced previously by this court, and any application to this court for a stay of execution of an order of this court, by this court, not on appeal to Her Majesty in Council, is without any basis in law, cannot be sustained, and must be dismissed with costs to UTECH.

SINCLAIR-HAYNES JA

[20] I concur.

F WILLIAMS JA

[21] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. Application No 164/2018 is refused.
2. Costs to UTECH to be taxed if not agreed.