[2024] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00045

BETWEEN	**DEPUTY SUPERINTENDENT JOHN MORRIS**	**1ST APPELLANT**
AND	**DETECTIVE SERGEANT RALPH GRANT**	**2ND APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD APPELLANT**
AND	**DESMOND BLAIR**	**1ST RESPONDENT**
AND	**MICHAEL GRANDISON**	**2ND RESPONDENT**

Written submissions filed by the Director of State Proceedings for the appellants.

Written submissions filed by Kazembe and Associates for the respondents.

1 March 2024

Ruling on costs

P WILLIAMS JA

[1] On 6 October 2023, this court gave the following decision in this appeal:

> "1. The appeal is allowed.
>
> 2. Paragraphs a. and b. of the order made by Hutchinson J on 31 March 2022 are set aside.
>
> 3. The appellants are permitted to comply with paragraph c. of the order made by Hutchinson J within seven days of today's date.
>
> 4. The respondents' witness statements are stuck out.

5. The case is remitted to the Supreme Court for damages to be assessed.

6. Costs of the appeal to the appellants to be taxed if not agreed unless the respondents within 14 days of the date of this order file and serve written submissions for a different order to be made. The appellants shall file written submissions in response to the respondents' submission within seven days of service upon them of those submissions."

[2] Pursuant to the order made at 6, written submissions were received from the respondents on 20 October 2023 and from the appellants on 27 October 2023. The respondents are seeking to have the order vacated and that the parties be made to bear their own costs. The appellants are seeking to have costs of the appeal awarded to them and that such costs be taxed if not agreed.

[3] The background to this matter is set out in detail in the judgment from this court with neutral citation [2023] JMCA Civ 45 and no more than a brief statement on the facts relevant to this ruling on costs is necessary. On 31 May 2013, the respondents commenced proceedings for damages arising from their arrest, charge and subsequent acquittal for murder. The claims were for false imprisonment, malicious prosecution and included claims for aggravated, exemplary and special damages. The appellants failed to file their defence in the stipulated time and, on 23 December 2013, the respondents filed applications seeking permission to enter judgement in default against the appellants. The appellants applied for an extension of time to file a defence and for the claims to be consolidated. On 12 August 2016, the application for the consolidation of the claims was granted but the application for the extension of time was refused. At that time, it was ordered that the claims should proceed to assessment of damages.

[4] There were three dates set for assessment of damages from 2018 to 2020. The notes on the record of proceedings (minutes of order) for the first two dates intimated that the matter was adjourned due to ongoing discussions with a view to settlement. With the onset of the COVID-19 the original date set in 2020 was missed and, on 10 July 2020, when the matter was next before the court, case management orders were made for the assessment hearing to be

held on 7 December 2021. These included orders for the parties to file and exchange witness statements by 8 January 2021.

[5] On 17 September 2021, the respondents filed their witness statements and served them on the Director of State Proceedings ('DSP') on 20 September 2021. On 29 November 2021, the DSP filed an application for the witness statements to be struck out, which was set for hearing on 7 December 2021. On 2 December 2021, the respondents filed a notice of application seeking permission for the late filing of the witness statements to be accepted as evidence within the case, that permission be granted for the respondents to be called as witnesses within the case and for relief from sanctions.

[6] On 7 December 2021, when the assessment of damages came on for hearing before Hutchinson J ('the learned judge'), she adjourned that hearing to facilitate the determination of the various applications. She subsequently heard the applications and refused the appellants' application to strike out the respondents' statement of case, and granted the respondents' application for relief from sanction and permitted the witness statements, filed out of time, to stand.

[7] Having considered the submissions of counsel on the appeal, we identified three issues and set them out at para. [25] as follows:

> "1. whether the learned judge misunderstood the nature of the order sought by the appellants (grounds i and ii);
>
> 2. whether, in the circumstances of this case, the requirements under rule 29.11 of the CPR must first be satisfied before an application can be heard under rule 26.8 of the CPR (grounds iii, iv, v, vi); and
>
> 3. whether the learned judge erred in her approach to the application for relief from sanctions (grounds vii, viii, ix, x and xi)."

[8] We concluded that the learned judge erred in identifying the appellants' application as one to strike out the respondents' statement of case. We found that the basis on which the appellants sought to challenge the exercise of her discretion in relation to rule 29.11 of the Civil

Procedure Rules ('the CPR') could not succeed and that the learned judge was entitled to consider the provisions of rule 26.8 of the CPR. The learned judge, however, erred in the manner she addressed the issues which arose on the question of whether the application for relief from sanction should be granted and was in fact precluded from granting the relief sought. Ultimately we made the orders set out in para. [1] above.

The submissions

[9] The respondents commenced the submissions relative to the issue of costs, by acknowledging that the general rule was that costs should follow the event and submitted that we should deviate from this rule and apportion the costs as between the parties. It was submitted that despite being unsuccessful in the appeal, the respondents were successful on particular issues. Further it was contended that there was an offer to settle made by the respondents, who were always minded to having the matter resolved in the most efficient manner. It was posited that had the appellants genuinely participated in settlement discussions, the added costs incurred would have been significantly reduced.

[10] The respondents pointed out that the delay in moving the matter forward had its genesis in the appellants' failure to file their defence within the stipulated timeframe and filed an application for an extension of time to do so, which was refused, some 16 months after the respondents had filed an application for default judgment to be entered. Further, it was urged that the respondents at all times acted in good faith and did not waste the court's time and resources. Finally, it was submitted that the appellants failed to extend opportunities for out of court settlement and even denied that they were involved in settlement discussions, being never minded to resolve issues without the involvement of the court.

[11] In the submissions in response, the appellants contended that the respondents have not advanced any persuasive submissions that could militate against the general rule for an award of costs following the event. It was submitted that the respondents acted unreasonably in pursuing an application for relief from sanctions which was compounded by the reasons and inordinate delay shown in the affidavit in support of the application. Further, it was submitted that the respondents pointing to the fact that the appellants' conduct in not participating in

settlement discussions was not a good basis for the court to depart from the general rule and the issue was not material in the circumstances. It was submitted that the appellants' conduct before and during the proceedings did not act to waste the court's time. Rather, it was the respondent's attorneys-at-law intentional failure in flouting the court's order that resulted in the appeal. Ultimately, it was contended that although the respondents were successful in one issue, the substantive nature of the appeal was considered in favour of the appellant.

Discussion and conclusion

[12] Rule 1.18(1) of the Court of Appeal Rules provides that the provisions of Parts 64 and 65 of the CPR shall apply to the award and quantification of costs in this court. It is well settled that rule 64.6 of the CPR enshrines the common law principle that costs follow the event. The rule provides, *inter alia*:

> "(1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. (Rule 65.8(3)(a) contains special rules where a separate application is made which could have been made at a case management conference or pre-trial review.)
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
>
> (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances."

[13] In their submissions, the respondents placed much significance on the issue of there being on-going discussions with a view to settling the matter. However, as we pointed out in the judgment, whilst it was true that on at least two occasions the court seemed to have been made aware of these discussions and adjournments were granted apparently on that basis, at the time orders were made to facilitate the assessment hearing, there was no reference to any settlement discussions. When these orders were made, there was no indication that this was contingent on any further discussion. The parties were then obliged to obey the orders of the court one of which was to file and exchange their witness statements by the stipulated time, which was 8 January 2021.

[14] The respondents failed to comply with this order, choosing instead to file the statements on 17 September 2021 by which time the sanction had already taken effect. In an affidavit in support of their application for relief from sanction it was explained that at all material times, the witness statements were ready to be filed and were filed "approximately four (4) months before the date of hearing and thus the failure to file was remedied within a reasonable time". This explanation raised the presumption that the decision was taken to deliberately flout the orders of the court while hoping to pursue a settlement. We had no difficulty finding that in those circumstances there was some deliberateness in the decision to file the statements late.

[15] The respondents have continued to raise their reliance on the existence of settlement discussions as a reason why they should not pay the costs of the appeal where we have stated that this explanation was entirely unacceptable in the circumstances of the appeal. This reason could hardly justify a deviation from the general rule that as the unsuccessful party they should pay the successful party's costs. The respondents failed to comply with orders of the court to their peril.

[16] The respondents are correct that they succeeded on one aspect of the appeal. The application for relief for sanction was filed within days of the assessment hearing. It was filed after the respondents were served with the appellants' application for the witness statements filed after the stipulated time to be struck out. These applications forced an adjournment of the assessment hearing to facilitate the determination of the applications. We found that the learned judge erred in concluding that there was a need for the respondents to provide a good reason for their failure to apply for relief from sanction before the hearing date when in effect they had done so. However, the learned judge was thereafter entitled to consider the provisions of rule 26.8 and it was the errors that she made in that consideration that ultimately determined the appeal. The appellants are correct that they succeeded on the substantial part of the appeal and in these circumstances they are therefore entitled to their costs in entirety.

[17] The respondents have failed to establish that a different order other than the one made at 6 (set out in para. [1] above) would be appropriate. Accordingly, the order should remain that the costs of the appeal should be to the appellants to be taxed if not agreed.