The Court of Appeal for Bermuda

CIVIL APPEAL No. 9 of 2017

B E T W E E N:

AYO KIMATHI

First Appellant

-and-

DAVID TUCKER

Second Appellant

-v-

THE ATTORNEY-GENERAL FOR BERMUDA

First Respondent

-and-

THE MINISTER OF HOME AFFAIRS

Second Respondent

-and-

THE EXECUTIVE OFFICER OF THE HUMAN RIGHTS COMMISSION

Third Respondent

Before: **Baker, President**
Bernard, JA
Kay, JA

Appearances: The 2nd Appellant appeared in person
Eugene Johnston represented himself and J2 Chambers as a litigant-in-person on the wasted costs applications
Lauren Sadler-Best, The Attorney-General's Chambers, for the 1st and 2nd Respondent
Allan Doughty, Beesmont Law Ltd., For the 3rd Respondent

Date of Hearing: **8 November 2017**
Date of Judgment: **16 November 2017**

JUDGMENT

Failure of Appellant's Counsel to comply with Orders – application to have appeal dismissed – request for wasted costs Order

1. At its inception, this case raised interesting issues of constitutional law and human rights. The proceedings in the Supreme Court culminated in an erudite and elegant judgment handed down by the Chief Justice on 30 April 2017. The claim of Kimathi ("the 1st Appellant") wholly failed. That of Tucker ("the 2nd Appellant") succeeded, but only to a limited extent. Both appealed the substantive judgment with the leave of the Chief Justice. The 2nd Appellant also made an out of time application to appeal the Chief Justice's decision of 2 May 2017 on costs, which was that there be no order for costs *inter partes*. There has been no order extending time or granting leave to appeal in relation to costs.

2. The case was listed to be heard in this Court during the current session. On the first day of the session, Monday, 30 October 2017, it was listed for mention and directions. The Respondents were represented by Counsel, but the Appellants were neither present nor represented. The recent history of the appellate proceedings was explained to us. It is alarming with copious examples of non-compliance with directions and procedural requirements by the Appellants who are or were both represented by Mr. Eugene Johnston of J2 Chambers, a well-known member of the Bermuda Bar. Without at this stage, setting out the details of non-compliance, I simply state that, when we considered them on 30 October, they struck us as egregious and we made an order that unless security for costs was provided by close of business on 30 October (pursuant to an extant order of the Registrar) and a skeleton argument was filed by 2 November 2017, the appeal would be struck out and that, in that eventuality, we would hear any application for costs, including a wasted costs order, on 8 November

3. In the event neither condition was satisfied. On 8 November we further adjourned the costs issues to 10 November to enable Mr Johnston (by then a litigant in person) to prepare his firm's response and to enable the Appellants, particularly Mr Tucker who was present in court, to obtain fresh legal representation, if he so wished. Before turning to the applications before us, it is appropriate to refer to the approach taken to costs in constitutional cases. In *Minister of Home Affairs v Barbosa [2017] Bda LR 32 (CA)* the Lord President endorsed the "rule of thumb" that, generally, an unsuccessful claimant will not be ordered to pay the successful defendant's costs. However, he went on to say (at paragraph 10):

> "*I do however sound this note of caution as to its application. The general rule in constitutional cases should not be applied blindly. Individual cases may involve features which justify some departure from the general rule. Often, constitutional issues will be linked with other claims. Sometimes success or failure will be partial rather than total and sometimes.....there will be an appeal. In the end, the court has to make a just order according to the facts of the case.*"

4. The Chief Justice had that guidance very much in mind when he considered costs at first instance in the present case. I say at once that the history and substantive outcome of this appeal place it outside the ambit of the "rule of thumb". On any view, the Respondents have been put to the considerable expense of an appeal that, in the event, evaporated on a wave of non-compliance.

5. I should also say something about the position of Mr. Johnston at this stage. His attention to his responsibilities in this case had begun to fall short of what was required before 1 October 2017, but the application for a wasted costs order emphasises that date. Its significance is that his firm's professional indemnity insurance cover lapsed on that date. Since then, he has been without cover and therefore ineligible to practice, which was formally communicated to him by a letter from the Bar Council dated 11 October 2017, following voice mail messages left on 3 October, 2017.

Costs Inter Partes

6. The plain fact is that both Appellants commenced appellate proceedings which came to nothing for reasons of procedural non-compliance but only after the Respondents had been put to considerable expense. It seems to me that at the commencement of the appeal, the Appellants had the protection of the *Barbosa* "rule of thumb". However, that cannot avail them in relation to the period of procedural non-compliance leading to the appeal being struck out on 5 November or in the costs hearing before us. They had the option of abandoning the appeal and thereby saving the Respondents from incurring further costs, but they chose not to do that. Instead, they allowed it to suffer a slow and expensive death.

7. The requirements of justice convince me that since 6 September, 2017, that is the day after the directions hearing before the Registrar, the Respondents have been forced to incur costs unnecessarily because of the Appellants' unreasonable conduct of the litigation. As a result, the Respondents are entitled to their costs since 6 September 2017 against both Appellants on an indemnity basis.

The Applications for a Wasted Costs Order

8. Mr. Johnston disputes that this Court has the power to make a wasted costs order. It is true that there is nothing in the Court of Appeal Act 1964 or the somewhat sparse Rules of the Court of Appeal which expressly mentions such a power and counsel are unaware of this Court ever having made such an order. In *Hollis and Johnson v Scrymgeour [2008] Bda LR 31,* Bell J, sitting as a Single Justice of Appeal, was concerned with a wasted costs order which had been made in relation to a trial in the Supreme Court. There is no doubt that there is jurisdiction to make such an order in the Supreme Court. Perhaps the clearest exposition of that is to be found in the judgment of the Chief Justice in *Bermuda Investment Advisory Services Ltd v Aurelia Research (Bermuda) Ltd [2013] SC (Bda) 48 Civ.* The power derives from Order 62 Rule 11 of the Rules of the Supreme Court and it expressly permits an order to be made against an attorney

in relation to the costs of "other parties" (rule 11(1)(a)(ii)) and not just in relation to his own client.

9. Mr. Doughty for the Third Respondent, supported Ms. Sadler-Best for the First and Second Respondents, submits that a similar power exists in this Court. It seems to me that it would be counterintuitive if, given the existence of the power in the Supreme Court, no such power existed here. However, it is necessary for it to be properly established.

10. It is instructive to consider the history of this kind of order in England and Wales. It was clearly established by the House of Lords in *Myers v Elman [1940] AC 282* that the power to make an order exists and is founded on breach of the duty owed to the Court. Moreover, contrary to one of Mr. Johnston's more extravagant submissions, *Myers* accepted that the jurisdiction extended to ordering a solicitor to indemnify his client's adversary in respect of wasted costs. More recently, in *Ridehalgh v Horsefield [1944] Ch 205,* Sir Thomas Bingham MR referred (at page 226C) to the public interest,

> *"…recently and clearly affirmed by Act of Parliament* [then section 51 of the Supreme Court Act 1981],…*that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their* <u>*or*</u> *their opponents' lawyers."*

So when the subject came to be addressed by statute in England and Wales that was simply an affirmation of a pre-existing power which can properly be said to have emanated from the inherent jurisdiction of the Court.

11. That alone would be a sufficient basis to find that this Court has the power to make a wasted costs order pursuant to its inherent jurisdiction. However, the matter does not rest there. Mr. Doughty's further and alternative submission is

that jurisdiction to make an order also arises under the procedural provisions applicable in this Court. By section 13 of the Court of Appeal Act 1964:

> *"Upon the hearing of a civil appeal the Court may allow the appeal in whole or in part or may dismiss the appeal in whole or in part or may remit the case to the Supreme Court to be retried in whole or in part or may make such other order as the Court may consider just."*

12. Order 2 Rule 25 of the Rules of the Court of Appeal also empowers the Court

> *"…to give any judgment or make any order that ought to have been made, and to make such further order or other order as the case may require."*

In addition, Order 2 Rule 35 provides that, "where no other provision is made by these rules, the procedure and practice in force in the Court of Appeal in England shall apply insofar as it is not inconsistent with these Rules…"

13. For my part, I do not consider it necessary to invoke Order 2 Rule 35 because I believe that "other provision" is made by way of Order 2 Rule 25. However, if that is not right, then the gap which would arise would be filled by Order 2 Rule 35, which would bring in the English procedure and practice by analogy.

14. Bearing all this in mind, I have no doubt that we have jurisdiction to make a wasted costs order, subject to compliance with procedural safeguards (and it cannot be suggested that Mr. Johnston has been denied due process) and satisfaction of the applicable substantive criteria.

The Criteria

15. In the Supreme Court, the test provided by Order 62 Rule 11 is whether

> *"…costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failing to*

conduct proceedings with reasonable competence and expedition."

16. The regime in England now rests on section 51 of the Senior Courts Act 1981, subsection (7)(a) of which refers to "any improper, unreasonable or negligent act or omission". In order to maintain symmetry with the Supreme Court, it seems to me that we should confine ourselves to its criteria, thereby omitting the "negligent" criterion which, in any event, will usually add little to "unreasonable"

17. Adapting the *Ridehalgh* formulation (at pages 232-233) to this approach, the threefold test becomes:

> (1) Has the legal representative acted unreasonably or improperly?
>
> (2) If so, did such conduct cause the applicant to incur unnecessary costs?
>
> (3) If so, is it, in all the circumstances, just to Order the legal representative to pay the whole or part of the relevant costs ?

We must apply this test to the present case. Before doing so, I should set out the chronology of recent events in more detail.

<u>The Chronology of Events</u>

18. On 5 September the Registrar gave directions on a number of matters including the payment of court fees by 22 September; the filing of the Appellants' submissions by 6 October and the Respondents' by 13 October; and the preparation of a joint bundle of authorities by 16 October. She refused to make an order as to Security for Costs on that occasion but indicated that she would consider further written submissions on the issue.

19. Payment of court fees by 22 September did not occur. Nor did the filing of hearing bundles by 24 September, as had previously been ordered by the Registrar.

20. On 27 September, the Registrar issued a Notice of Hearing for case management on 10 October "to ensure compliance and for any further directions to be issued, if necessary".

21. No written submissions on behalf of the Appellants were filed by 6 October. By then Mr Johnston had lost his indemnity cover but the Respondents did not know that.

22. On 8 October, the Registrar changed the date of the case management hearing to 12 October. On 9 October, the 3rd Respondent's legal representative emailed Mr Johnston, noting that the Appellants were in breach of the directions as a result of not filing their written submissions by 6 October. Warning was given that if the directions continued to be ignored, an application for the appeal to be struck out and for a wasted costs order would be made. The email elicited no response from Mr Johnston. The court fee was, in fact, paid later that day but the Respondents did not know that.

23. On 10 October the Registrar emailed the parties vacating the case management hearing which had been fixed for 12 October. She added that the matter would be delisted from the cause list. Mr Doughty sought clarification from the Registry, asking if the appeal had been struck out and stating that he wished to be heard on the subject of costs.

24. The Respondents did not file their written submissions by 13 October because of the terms of the Registrar's email of 10 October.

25. On 18 October, the Registrar issued a Notice of Hearing for the following day. The covering letter observed that there had been flagrant non-compliance with the directions and invited submissions about non-compliance and security for costs. It also alluded to Mr Johnston's inability to practice and expressed the

expectation that he would appoint "an attorney [to] act in his stead". That was the first occasion on which the Respondents learned of Mr Johnston's plight.

26. On the morning of 19 October Mr Johnston sent the Registrar and the Respondents' legal representatives an email to which I shall refer in more detail later. Some 90 minutes later, the case management hearing took place in the absence of Mr Johnston. The Appellants were neither present nor represented. The Registrar made fresh procedural directions, extending time for the Respondents' written submissions and diverting the task of preparing the Record of Appeal and a Bundle to them alone. As regards costs, she made an order that the Appellants provide security in the sum of $5000 by 30 October. In her careful ruling promulgated on 24 October she made it clear that the Appellants had lost their *Barbosa* protection. She declined to adjourn the hearing of the substantive appeal which was listed for 8 and 9 November but initiated steps to list the case before the full Court on the first day of the current session, 30 October, for consideration of any further applications.

27. On 27 October, the Court published the calendar for the current session. The list for 30 October included this case which had been listed by the Court of its own motion to consider whether the hearing of the appeal should be adjourned.

28. On 30 October, Mr Doughty and Ms Sadler-Best appeared before us. The Appellants were not present or represented. The Registrar's order for security for costs was not complied with. We made the peremptory order referred to in paragraph 2, above, and the case took the course that I have already described.

<u>Application of the principle to the present case</u>

29. In my judgment, the criteria are plainly satisfied in the present case. In the course of his submissions, Mr. Johnston claimed to be disadvantaged in defending himself by the legal professional privilege of his clients (which we of

course acknowledge and respect) and repeatedly stated that, in any event, he had done nothing wrong. However, it is clear to me that without invading legal professional privilege, there is abundant evidence of his having conducted this appeal both unreasonably and improperly. In reaching this conclusion, I have at all times kept in mind the strictures propounded by Lord Bingham in *Medcalf v Mardell [2003] 1 AC 120,* paragraph 23:

> *"Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the Court should not make an order unless, proceeding with extreme care, it is (a) satisfied that the practitioner could say, if unconstrained, nothing to resist the order and (b) that it is in all the circumstances fair to make the order."*

30. The fact that the three Respondents were having to deal with an appeal which was being misconducted or conducted so lamentably, as shown by the chronology which I set out earlier, was totally unacceptable. It is obvious to me that Mr. Johnston's behaviour was both improper and unreasonable. One does not need to go into what passed or may have passed between him and his clients to be convinced of this.

31. Before Mr. Johnston saw that he had lost his indemnity cover, he was already failing to comply with the Registrar's directions. We have received no explanation for that. However, the truly unreasonable and improper conduct began on 1 October 2017. He must have known that, from that day, his firm had no indemnity cover and, therefore, could not satisfy the condition which permits practice. By the Bar Council's letter of 11 October 2017, he was told to "cease and desist operating legal services" until he had submitted proof of cover. He was also told that he should arrange for clients to be represented by another firm, "particularly those who have pending court cases."

32. Perhaps the most vivid insight into the attitude of Mr. Johnston after that, is to be found in his email to the Court dated 19 October 2017. Having stated that both Appellants were overseas, he stated:

> *"I am unable to practice for reasons I cannot explain in this email.* [In fact he knew that the Court had been sent a copy of the Bar Council letter of 11 October.] *But I expect the lunacy around that to end as early as next week. I cannot appoint another lawyer to act on my behalf this morning. It would be professionally embarrassing for both them and me. And I can't take the instructions to do that."*

He went on to say that, if he had been able to appear, he would have applied for a new directions timetable and the removal of the hearing of the appeal from the November list.

33. I regard that email as self-interested sophistry. Mr. Johnston's assertions to this Court are that none of the insurers he approached would touch him. Indeed, he claims a conspiracy to keep him out of practice. So the expectation to which he referred in the email was totally unfounded. By that time what he should have done - and what it was unreasonable and improper not to do - was to take steps to come off the record as the Appellants' legal representative. The hearing in this Court was rapidly approaching, directions remained ignored and the Appellants needed the opportunity to decide what to do about their appeal, unhampered by Mr. Johnston's stultifying continued presence on the record. The Court and the Respondents' legal representatives could deal only with Mr. Johnston but he had ceased to contribute to the process. In his submissions to us, he suggested that, so hamstrung was he by the cessation of his ability to practice and the constraints of legal professional privilege, that he could do nothing. He even seemed to suggest that taking steps to come off the record would have involved "practising" in breach of the Bar Council's direction. This is nonsense. It would simply have been a responsible way of dealing with the consequence of his inability to practice.

34. Mr. Johnston asserts that he attempted to find alternative representation for the Appellants but what he did is not the subject of evidence. I view his assertion with considerable scepticism, not least because of what he had said in his email to the Court and the Respondents' legal representatives dated 19 October 2017.

35. When one stands back, a clear picture emerges. Mr. Johnston, who had been pursuing this appeal without diligence even before his professional difficulties arose, caused a situation to materialise in which his own clients ceased to have legal representation and the Respondents and their legal representatives, denied the usual point of contact for the preparation of the upcoming appeal, had no choice but to continue with their preparation, including tasks which would otherwise have fallen to the Appellants' legal representatives. It was not until non-compliance with the unless order of 30 October eventuated in the dismissal of the appeal on 5 November 2017 that they knew that the hearing listed for the following week would not be going ahead.

36. In my judgment, Mr. Johnston's egregious approach to this appellate litigation, which was becoming apparent even before 1 October, but which intensified after that date, was undoubtedly unreasonable and improper in the *Ridehalgh* sense. There is no doubt that it caused both Respondents to incur unnecessary costs. They had to prepare for an appeal which, even as late as 5 November, they did not know would be struck out. It is just that a wasted costs order be made against Mr. Johnston's firm.

Conclusion

37. On the information before us, it follows from what I have said that I have no doubt that both Respondents have established their entitlement to a wasted costs order against Mr. Johnston's firm, J2 Chambers. Although it is arguable that it should run from an earlier date, both Mr. Doughty and Ms. Sadler-Best

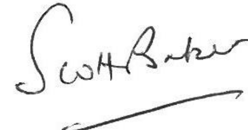
have limited their applications to the period commencing 1 October 2017. So I would limit the order to costs unnecessarily incurred by the Respondents since that date. Realistically, Mr. Doughty and Ms. Sadler-Best submit that the appropriate course is not for us to attempt to assess the quantum but to remit the matter to the Registrar for assessment. I would so order. I would also direct that copies of our judgment be provided to both Appellants and to the Bar Council for their information.

BERNARD JA

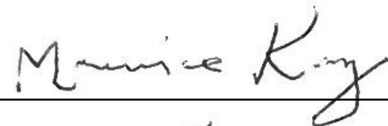
38. I have had the benefit of reading the judgment of my brother Kay with which I am in full agreement.

SCOTT P

39. I also agree.



Baker P



Kay JA

Bernard JA