SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV 2005/0652

BETWEEN:

STEPHEN JN. PIERRE

Claimant/Respondent

AND

KEITH ALLAN JN. PIERRE

Defendant/Applicant

Appearances:

Mrs. Esther Green – Ernest for Claimant/Respondent
Ms. Nathalie Augustin for Defendant/Applicant

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2008: MARCH 13

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RULING

[1] On 29th May 2006 when this court after a full hearing delivered an oral judgment, there was no mention made by the Court as to costs nor did either of the parties advert to the issue. It is also to be noted that no written judgment was ever given nor was there an appeal lodged by either party against the court's decision.

[2] The finding of the court was as follows:

> *(1) That the evidence does not support the contention that there existed between the parties an agreement or intention to form a partnership, it was merely an arrangement between the parties.*
>
> *(2) That the relationship between the parties amounted to that of employer and employee.*
>
> *(3) That having so decided, the Court is of the opinion that the Claimant is not entitled to any of the property of the business, any of the vehicles, occupying of all or part of the house or indeed the 50% of the business known as KND Enterprises which he is claiming.*
>
> *(4) That the allegation of misconduct against the Claimant is found to be proven for while the cashed cheques of the business have in the main been accounted for, the argument given by the Claimant for the issuance of the two (2) cheques to Delphina Trim could not be accepted by the Court, she being a person not in any way connected to the business,*
>
> *(5) That as a consequence of the above and more specifically No. 4 the Court finds that the Claimant was justifiable dismissed.*

[3] Some six (6) months later on 14th November 2006 the Defendant, in whose favour judgment was given, brought the present application for a costs order and assessment of damages based on (a) his travel costs from the United States of America to attend at trial,

(b) his loss of income consequent upon (a), (c) proceeds of a cheque written by the Claimant to a third party, and (d) his (the Defendant's) legal expenses. To this application, the Claimant objected.

[4] It is the argument of Counsel for the Defendant/Applicant that although the final judgment was silent as to costs and damages, since there were interim orders given during the proceedings these must necessarily be considered at or following the trial, and that this meant that full consideration of the costs was expressly deferred to a later hearing or date, that it was simply overlooked at the time of the rendering of judgment due to the passage of time.

[5] Counsel made reference to Blackstone's Civil Practice (2004) at page 773 wherein it is stated:

> *"Interim costs form part of the general costs of the proceedings, so the party awarded costs in the proceedings is entitled to costs of the interim application".*

[6] Counsel also referenced Part 65.2 (3) (a) CPR to the effect that the Court must at all times take into account all of the circumstances of a matter when rendering judgment which includes:

> *a) any order that has already been made,*

and as such, since interim costs orders had been made in the proceedings, these should necessarily have formed part of the final judgment and the omission was a "mere" slip on the part of the judge.

[7] Counsel submitted that part 42.10 (1) CPR would allow the court to correct this "mere" slip in order to give effect to its true intention and in any event, following the legal authorities, the High Court can of its own volition make a correction to its own order without the need for the matter to go to appeal. In support Counsel cited the cases of Seray – Wurie v Hackney London Borough Council (2002) EWCA CIV 909/ (2003) 1 WLR 257; and Taylor v Lawrence (2002) EWCA CIV 90 / (2003) QB 528.

[8] Counsel further contended that in accordance with s.41 of the Interpretation Act, the travel expenses incurred by the Defendant should be considered part of the costs due to him.

[9] In objecting to the Defendant's application, Counsel for the Claimant argued that since the Court did not make an order about costs of the proceedings in its final judgment, the only remedy available to the Defendant would be to appeal the decision which he has failed to do. In any event, the Defendant having provided no cogent or other proof of his damages cannot at this stage be entitled to such damages.

[10] Counsel also considered that the Defendant having not filed a counterclaim against the Claimant and as such never claimed damages against him is not entitled to seek such remedy by Notice of Application. Counsel contended that it was the duty of the Applicant to bring forward his whole case and he cannot now try to open the same subject of litigation in respect of this matter which he ought to have brought forward at trial. He would in effect be asking the court to now re-open the case and bring in the issue of damage which he had omitted to raise.

[11] To buttress this contention regarding the principle of res judicata, Counsel referred to the oft quoted statement by Sir James Wigram VC in Henderson v Henderson (1884) 3 Hare 100.

[12] In support of the argument that the Defendant was barred from seeking a costs order and damages after final judgment, Counsel referred to Part 64.6 CPR and stated that although the court has a discretion in relation to costs orders, the court must first make an order. Counsel also quoted Byron CJ in the case of Rochamel Construction Limited v National Insurance Corporation Civil Appeal No. 10 of 2003 where he spoke among other things of the "new culture" created by the introduction of CPR and made "some simple requirements" e.g. that:

> "*Legal practitioners should be encouraged to assist the court in the making of costs orders by providing information and or submissions as early as possible"*

[13] Counsel for the Claimant refuted any suggestion that Part 42.10 could operate to cure the defect on the grounds that the failure by the court to deal with costs could not amount to an accidental slip or omission.

Finding

[14] It is necessary to first revert to the history of this matter.

[15] Before the claim was heard there were two (2) applications. The Claimant filed a without notice application on 12th September, 2005 seeking injunctive relief against the Defendant which resulted in an interim order made on 16th September 2005.

[16] A request that costs be costs in the cause was granted as part of that interim order.

[17] A second application was made, also without notice, but by the Defendant on 20th September 2005, for discharge of the interim order of 16th September 2005, and a request for the costs of the application to be reserved. The court heard the application and discharged the interim order.

[18] Costs were reserved as requested.

[19] At the behest and by consent of the parties, this matter was given an early hearing. The Claimant in his claim, claimed against the Defendant, for among other things, damages and costs. However the Defendant in his Defence either failed, neglected and/or refused to claim damages and costs but merely sought to have the claim of the Claimant struck out as against him.

[20] As provided by Part 64.5, entitlement to recover the costs of proceedings by one party as against the other is only available by virtue of:

(a) an agreement between the parties;

(b) an order of the court; or

(c) a provision of these rules

[21] By Part 64.6 (1) where the court decides to make an order about costs, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. It is also open to the court to make no order as to costs: Part 64.6 (2).

[22] It is admitted that this judgment of the court is silent as to costs. It is my view however that although it is the general rule that costs should follow the event, in order for a party to be awarded costs, it is necessary for the party to first seek an order for costs. Although our CPR has no equivalent to Part 44.13 (1) of CPR UK which provides that if an order makes no mention of costs, none are payable in respect of the proceedings to which it relates, I am firmly of the opinion that an order which is silent as to costs can be equated with "no order as to costs" which in turn means that each party must bear its own costs of the proceedings: Blackstones op cit para 66.28 , page 774.

[23] As stated above the interim orders for costs were either costs in the cause or costs reserved. From the learning gleaned from Blackstones (op. cit) it means that the interim costs which it was agreed should be costs in the cause would form part of the general costs of the proceedings. Costs reserved defers any decision as to costs to a later hearing but if the judge dealing with the later hearing does not make an order relating to the interim hearing, the costs of that interim hearing are treated as being costs in the cause.

[24] It is apparent then that there having been no award of costs to either party by the judgment, makes the issue of costs redundant and each party will have to bear his own costs.

[25] While the court has an inherent power to vary its own order so as to make the meaning and intention of the court clear, Part 42.10 does not in my view contemplate the court returning to its judgment to re open the proceedings in order to examine the defect of a litigant's claim but merely to correct a clerical mistake or an error arising from any accidental slips or omission. I do not consider that the court not making an order for costs would fall into either of these categories. The Defendant in these circumstances must seek an alternative remedy.

[26] In the recently concluded case of R v Asylum and Immigration Tribunal # 2 (judgment delivered on February 20th 2008 and reported in The Times, March 11th 2008) the Court of Appeal reiterated the principles in Taylor v Lawrence (supra) and Seray Wurie (supra), cases cited by Counsel for the Defendant, viz that it is only in exceptional circumstances that a judgment, although final and perfected, is allowed to be withdrawn by the court that made it: Taylor, and so far as the High Court is concerned, only in cases where that court is sitting as an appellate court: Seray Wurie.

[27] The Court of Appeal continued:

> *"The reason why it had not so far been suggested that the principle applied to judgments of the High Court other than when sitting at the appellate level, was because in the normal course there was the remedy of an appeal, and the principle was necessary to prevent injustice only where there was no other remedy".*

[28] For our present circumstances then, the question is whether this court is dealing with the type of circumstances which brought into play the above jurisdiction. I think not. It is my view that it is and always has been open to the Defendant to register his disapprobation of the judgment by way of appeal to the Court of Appeal.

[29] In the circumstances, I cannot but accept the submission of Counsel for the Defendant: if this application can only be dealt with by way of appeal and the time for filing has passed through no fault of the Defendant's - there being no written decision handed down the Court – the court should fix the time for filing of an appeal to start from the date of the decision of the present application. I so find.

ORDER

Application for costs order and damages hereby dismissed.

Leave to appeal granted

SANDRA MASON QC

High Court Jud`ge