

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.47 OF 2005

BETWEEN:

RAYMOND DUPRES

Appellant

and

[1] CLIFFORD GEORGE
[2] HENRIETTA GEORGE
[3] PETER FELIX
[4] BENJAMIN ROSEMOND
[5] UNICE GEORGE
[6] EDDIE GEORGE

Respondents

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

Appearances:

Mr. Vernantius James for the Appellant

Ms. Edith Petra Jeffrey-Nelson for the Respondents

2006: December 19;
2007: January 5.

JUDGMENT

- [1] **BARROW, J.A.:** Both the application made by the respondents and the opposing application made by the appellant are directly rooted in an order (the extension order) made by Gordon JA on 14th February 2006 granting the appellants an extension of time for appealing a decision of the High Court dated 1st July 2005. The extension order specified the date for filing the notice of appeal and that costs in the sum of \$750.00 were to be paid by the appellants to the respondents "on or before 31st March 2006 failing which this appeal stands dismissed."

- [2] The appellant filed his notice of appeal in time. He did not pay costs when ordered but did so on 4th April 2006.
- [3] On 1st December 2006 the respondents applied for an order that the appeal stands dismissed. The grounds were stated to be that the appellant did not comply with the costs order and consequently the appeal stood dismissed, that the appellant is abusing the process of the court in that he has not complied with any time limit stipulated by this court, and that the appellant falsely represented to this court that he was not notified that the transcript of the High Court proceedings was ready whereas the transcript was in the possession of the appellant's attorney at law from 23rd December 2005.¹
- [4] On 7th December 2006 the appellant applied for relief from sanctions for his 'late compliance' with the extension order. The appellant did not state in the application the grounds on which it was made but stated that the grounds were contained in the accompanying affidavit. I divert to observe that this is deliberate non-compliance with the clear words of rule 11.7 (1) of **Civil procedure Rules 2000 (CPR 2000)** which says that "An application must state ... briefly, the grounds on which the applicant is seeking the order". It seems to me that an attorney at law who chooses not to comply with this rule abuses the process of the court and needlessly exposes his client to adverse consequences. Among the benefits of complying with that requirement, it seems to me, are that compliance serves to inform all concerned of the grounds of the application, to focus the mind of the applicant on the merits and demerits of his application and to provide conceptual clarity to all concerned. It also serves to direct the court's attention when reading the relevant papers and so avoids a waste of time and effort.
- [5] Even after hearing counsel for the appellant in argument and further considering the papers for the purpose of writing these reasons for decision I am not clear as to the grounds upon which the appellant seeks relief from sanctions. In the accompanying affidavit that was sworn by the appellant he told a story of what happened in the course of

¹ The transcript had been delivered in connection with an appeal by a different party to the High Court proceedings and not in connection with the instant appeal, which had not, at that date, been filed.

his attempt to comply with the extension order. I do not know if counsel thought the story equated to grounds for the application. If he did he was mistaken.

- [6] The story the appellant told was that because of his financial circumstances the appellant was unable to get the money to pay costs to his attorney at law before the afternoon of the deadline date, that his attorney at law attempted to telephone the attorney at law for the respondents but was unable to reach her, that the appellant thereafter took the money to the offices of the attorney at law for the respondents at 3:45 in the afternoon of 31st March 2006, that the office of the attorney at law for the respondents was closed and that although the appellant waited outside until 4:40 in the afternoon he did not make contact with anyone from that office.

- [7] The appellant's affidavit continued:

"10. I am credibly informed by my Solicitor that early on Monday morning 3rd April 2006, he contacted the Solicitor for the Respondents by phone and informed her that the \$750.00 cost award was available for payment from 3:25 p.m. on Friday 31st March 2006, but that such payment could not be made because no one was available up to 4:40 p.m. to receive same.

"11. My lawyer credibly informed me that the Solicitor for the Respondents indicated to him that she had no difficulties accepting the late payment as complying with the Order of the Court, which payment was made on 3rd April 2006."

- [8] In response to that statement the sixth-named respondent deposed that he was informed by his attorneys at law that their office hours are from 8:30 a.m. to 4:30 p.m. Monday to Friday and that on 31st March 2006 their offices remained open to the public until 4:30 p.m. The respondent therefore denied the appellant's story.

- [9] The respondent continued:

"4. I am further advised by Counsel Ms. Michelle Louis that in a conversation with Mr. Vernantius James regarding the late payment of costs, she explained that while the payment of costs of \$750.00 was accepted after the Court ordered deadline, that such acceptance was without prejudice to the Respondent's rights under the said order and that such order was binding on the parties. It is denied that "late payment was accepted as complying with the order of the Court.

"5. The sum of \$750.00 was paid into the office of [my solicitors] on 4th April 2006. A copy of receipt is attached."

[10] Rule 26.8 (1)(a) makes it a pre-condition to the grant of relief from sanctions that the application for relief must be made promptly and, manifestly, the core issue in relation to the appellant's application for relief from sanctions was promptness in applying for relief. This was the whole point of the appellant's affidavit referring to the alleged agreement between the attorneys at law to treat late payment as compliance – he had no need to apply for relief before, he is saying, because there was an agreement. It is therefore amazing that counsel should have thought it appropriate to attempt to prove the alleged agreement by relying on the hearsay statement by the appellant of what the appellant's attorney at law said the respondent's attorney at law said to the appellant's attorney at law. It is true that rule 30.3 (2) provides that affidavits for use in procedural applications may contain statements of information and belief but surely it must be appreciated that the probative value of such a statement will be nugatory if its truth is disputed.

[11] What was required in the instant situation was for the appellant's attorney at law to have sworn an affidavit giving first hand evidence of the agreement that the appellant alleges his attorney at law made with the attorney at law for the respondents. It is appreciated that by doing so the appellant's attorney at law would have become a witness and no longer permitted to appear as counsel on the instant application and the appellant would have had to engage another attorney at law as counsel for the instant application. If what the appellant says took place did, in fact, take place the benefit of properly proving the agreement should surely have been considered to far outweigh any disadvantage that would have been caused by having to change advocate.

[12] Instead, the appellant relies on rank hearsay to prove facts critical to the main issue of promptness. The respondent relies on equally rank hearsay to contradict the appellant. It should come as no surprise that I regard the two affidavits as equally unreliable. The result is misfortune for the appellant because the obligation was on the appellant to prove, on a balance of probabilities, that which he asserted – that the attorney at law for the respondents had induced his attorney at law not to make an application for relief from sanctions by agreeing to late compliance with the time limit imposed by the court. The

appellant's affidavit fails to satisfy me on a balance of probabilities that there was such an agreement.

[13] In **Dominica Agricultural and Industrial Development Bank v Mavis Williams**² this court observed that it did not have an unfettered discretion to relieve against the consequences of non-compliance with the rules and equally, to my mind, it does not have an unfettered discretion to relieve against an express sanction imposed by an order of the court. It can only relieve against sanctions in accordance with the aforementioned provision of rule 26.8, which mandates that an application for relief must be made promptly. The instant application was made eight months after the failure to comply and, since I find the appellant's affidavit incapable of proving that the respondents' attorneys at law had agreed to treat late payment as compliance, there is nothing to relieve against the conclusion that this application was not made promptly. In consequence, I cannot grant relief from sanctions.

[14] Neither counsel adverted to rule 26.7 (3), which is highly relevant to the appellant's attempt to rely on an agreement to treat late payment as compliance. That rule provides:

"(3) If a rule, practice direction or order –
(a) requires a party to do something by a specified date; and
(b) specifies the consequences of failure to comply;
the time for doing the act in question may not be extended by agreement between the parties."

Given the decision that I have already reached on promptness it is enough for me simply to advert to that rule. I do not need to consider its impact on the appellant's attempt to rely on the alleged agreement in the instant case.

[15] Rule 26.7 (2) states that if a party fails to comply with an order any sanction for non-compliance imposed by the order has effect unless the defaulting party applies for and obtains relief from the sanction. The appellant has failed to obtain relief from sanction. Therefore the order for which the respondent applied must be granted: the appeal stands dismissed pursuant to the sanction imposed by the extension order of 14th February 2006.

² Dominica Civil appeal No. 20 of 2006, at paragraph [19]; judgment delivered 18 September 2006

[16] I would award the costs of the two applications in the total sum of \$1,000.00 to Benjamin Rosemond the fourth respondent.


Denys Barrow, SC
Justice of Appeal