

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. NO. 1688 OF 2005

IN THE MATTER OF THE JUDICIAL REVIEW ACT 2000

AND

**IN THE MATTER OF AN APPLICATION BY THE NATIONAL LOTTERIES
CONTROL BOARD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF THE DECISION OF THE STATUTORY
AUTHORITIES' SERVICE COMMISSION NOT TO PREFER A CHARGE OF
MISCONDUCT/INDICIPLINE AGAINST MR. DEVANT MAHARAJ,
MARKETING AND PUBLIC RELATIONS OFFICER, NATIONAL LOTTERIES
CONTROL BOARD COMMUNICATED TO THE APPLICANT BY LETTER
DATED THE 20TH APRIL, 2005**

BETWEEN

THE NATIONAL LOTTERIES CONTROL BOARD

APPLICANT

AND

THE STATUTORY AUTHORITIES' SERVICE COMMISSION

RESPONDENT

BEFORE ASSISTANT REGISTRAR MRS. SHABIKI CAZABON

Appearances:

Ms. Sasha Franklin for the Applicant

Ms. Candace Cielto-Jones for the Respondent

REASONS

1. On 30th June, 2009 I granted the Respondent's application for an extension of time to file its Bill of Costs, to the 15th June, 2009 with no order as to costs,

pursuant to Order 62 Rule 16. These are the reasons for granting the application.

Background

2. The Applicant, by Notice of Motion filed 11th August, 2005 sought leave to apply for Judicial Review and inter alia an order of certiorari to quash the decision of the Respondent Commission, not to prefer a charge of misconduct against Mr. Devant Maharaj, the Interested Party.
3. The matter came on for hearing before the Honourable Mr. Justice Breaux and on 26th June, 2006 the learned Judge dismissed the Applicant's motion and ordered the Applicant to pay the costs of the Respondent and the Interested Party.
4. Subsequent to the decision of the learned Judge, the Applicant filed a Notice of Appeal on the 27th July, 2006 appealing the entire decision of the learned Judge and sought an order that the decision be set aside. The Appeal came on for hearing on the 18th February, 2009 and Applicant was granted leave to withdraw the said Appeal. It was further ordered that each party bear their own costs and that the order for costs in the court below do stand.
5. The Respondent subsequently filed its Bill of Costs on the 15th May, 2009 (hereinafter called "the Bill") pursuant to the order of the Honourable Mr. Justice Breaux dated 26th June, 2006 (hereinafter called the "said Order"). It is this Bill which is the subject of contention.
6. The Bill first came on for hearing before me on the 2nd June, 2009, and Attorney for the Applicant raised objection to the said Bill being taxed, on the basis that it was filed some 2 ½ years out of time and in breach of *Order 62 Rule 21(2) of the Rules of the Supreme Court 1975* as amended. I instructed both Attorneys to put their submissions in writing and adjourned the Bill to the 30th June, 2009.
7. Attorney for the Applicant filed her written submissions on the 18th June, 2009 while Attorney for the Respondent filed her submissions on the 16th June, 2009 as well as a Notice seeking an extension of time for the filing of

the Bill to the 15th June, 2009 therein setting out the grounds for the said application.

Analysis

8. The issues for my determination were:
 - (i) *whether the Bill was filed out of time and in breach of Order 62 Rule 21(2) and*
 - (ii) *if so whether the time for filing the Bill should be extend to 15th June, 2009.*
9. In determining whether the Bill was filed out of time I examined the provisions of *Order 62 Rule 21 (2) of the Rules of the Supreme Court 1975* as amended, which provides as follows:

“ where a party is entitled to require any costs to be taxed by virtue of –
(a) a judgment, direction or order given or made in proceedings in the Supreme Court; or
(b)
he must begin proceedings for the taxation of those costs within 3 months after the judgment or order was entered, signed or otherwise perfected....”
10. Attorney for the Applicant submitted that the Respondent was in breach of Order 62 rule 21(2), having presented the said Bill for taxation some 2 ½ years after the Order of Justice Bereaux was perfected on the 12th December, 2006. Attorney for the Respondent on the other hand submitted that the Order of Justice Bereaux was perfected on the 24th July, 2008 a mere delay of 6 months.
11. In the Court’s file there are two perfected orders of Justice Bereaux’s Order dated 26th June, 2006. One order was approved and entered on the 12th December, 2006 on behalf of the Applicant. The other order was approved and entered on the 24th July, 2008 on behalf of the Respondent. It was apparent that the Respondent was unaware that the Applicant had already caused the said Order to be perfected on the 12th December, 2006. As a result of which the Respondent erroneously had the said Order perfected on 24th

July, 2008. The issue that then arose was, which of the two perfected orders ought the Court to consider in ascertaining from when time for filing of the Bill started to run.

12. It is settled law, that the party who has the carriage of an order is the party to have the said Order “entered”, “signed” or “otherwise perfected”.

13. *Order 42 Rule 5 (1)* of the Rules of the Supreme Court provides as follows;

“every judgment given or order... shall unless otherwise ordered be drawn up and lodged...by the party having the carriage of the judgment...not later than fourteen days from the date of the order...”

(2) if the party having the carriage of the order does not bespeak within the period of fourteen days any other part...may do so with leave of the appropriate officer.”

Strict adherence to Order 42 Rule 5 therefore meant that the Respondent was the party to have the said Order perfected within 14 days of the date of the said Order and, in failing to so do the Respondent was entitled with leave of the appropriate officer (the Registrar) to have the said Order perfected. Leave was granted when the said Order was entered and signed by the Registrar on the 12th December, 2006.

14. The Applicant, having exercised the provisions of Order 42 Rule 5(1) (2), the court therefore found that time started to run for the presentation of the Bill from the 12th December, 2006. This perfected order being the first in time and not the order perfected on 6th July, 2008, so that the time for actual filing of the Bill of Costs would have expired on the 12th March, 2007. The court therefore found that the Bill which was filed on 15th June, 2009 was filed out of time and in breach of Order 62 Rule 21 (2) by approximately 2½ years.

15. This took me to the point as to whether the breach or delay in filing the Bill was sufficiently long to render it a nullity. Both Attorneys referred the court to the judgment of Deputy Registrar Mr. Robin Mohammed (as he then was) in *Lystra Linette Manohar-Maharaj -v- Shastri Kumar Manohar-Maharaj CA No. 68/1995 / HCA No. M-736/1990* where it was stated that,

“...the filing of a Bill of Costs out of time does not nullify the bill or the Order for Costs but amounts to an irregularity which the court has power to cure under Order 2 Rule 1(2) in the appropriate circumstances, if the justice of the case so requires.”

16. The learned Deputy Registrar also opined further at page 7 of the said judgment that the court has the discretion to correct such irregularities as it sees fit as provided for in Order 62 Rule 16 which provides;

“1. A taxing officer may-

 - (a) extend the period within which a party is required by or under this Order to begin proceedings for taxation or to do anything in or in connection with proceedings before that officer;*
 - (b)”*
17. It is this Rule which allows the taxing officer the discretion to grant an extension of time for beginning taxation proceedings even where the application is made after the time limited for so doing has expired.
18. Attorney for the Respondent by her Notice filed on the 16th June, 2009 applied to the Court for an extension of time for the filing of the Bill to the 15th June, 2009. In the said Notice the Attorney set out the grounds for the application, even though an affidavit in support was not filed. Attorney for the Applicant contended that the failure of the Respondent to file an affidavit in support or any evidence in support of the Notice was a bar to the court exercising its discretion under the provisions of Order 62 Rule 16.
19. In my view, it was inaccurate to assert such as Attorney for the Applicant did. In fact, the Respondent had fully set out in the Notice, the grounds upon which her application for the extension was being made. In particular, the fact that the delay in presenting the Bill for taxation was as a result of the fact that the said Order had been appealed.
20. It is well established law that an Appeal does not act as a stay of any proceedings unless so ordered (*see Order 59 Rule 36*). However, it is evident that Attorney for the Respondent was awaiting the out come of the Appeal before presenting the Bill for taxation.

21. I did not find that such a position taken by the Respondent was unreasonable, since the Appeal was of the entire Order and may or may not have affected the award for costs. I therefore concluded that the delay in the filing of the Bill was an irregularity, which could be rectified under the provisions of Order 62 Rule 16.
22. Before the court could exercise its discretion under Rule 16, the court was required to determine whether the length of the delay was inordinate and inexcusable. If the delay was found to be inordinate and inexcusable then the Court would have to determine, whether such delay was sufficient to infer prejudice against the Applicant.
23. Both Attorneys referred the Court to a number of authorities which dealt with the issue of delay. In particular *Drake & Fletcher Ltd -v- Clarke (1968) 112 S.J. 95* and *Chapman-v Chapman [1985] 1W.L.R. 599* were cases where delays of 3½ years were found to be inordinate. In the case of *Pamplin -v- Fraser (No.2) [1984] 1 W.L.R. 1385* a delay of 10 months was held to be inordinate. In the local decision of *Lystra Linette Manohar-Maharaj -v- Shastri Kumar Manohar-Maharaj (supra)* a delay of 4½ years was held to be inordinately long.
24. In the instant case, the delay in presenting the Bill for taxation was 2½ years. Having regard to the above authorities I found that the delay in the instant case was inordinate.
25. This brought me to the point as to whether the delay though inordinate could be considered inexcusable. I took into account the Respondent's submission, that the reason for the delay in filing the Bill was as a consequence of the Appeal being filed by the Applicant and that the award for costs was ultimately the subject of the said Appeal. I accepted the Respondent's submission, that as a matter of practice, in the profession, when a Bill of Costs is presented for taxation and there is an appeal pending, which would affect the issue of costs below, the said bill is often times not pursued until the determination of the Appeal.

26. In any event, had the Respondent presented its Bill of Costs for taxation within the time (12th March, 2007), with the Appeal pending, it is axiomatic that at the hearing of the taxation an application for an adjournment would have been sought and granted to await the out come of the appeal.
27. The Honourable Justice Longmore in Haji-Ioannou and others -v- Frangos and others (No.2) [2008] 1 W.L.R. 144 found a delay of 5 years to be excusable when the defendant had failed to present its bill of assessment after the award for costs was made and an appeal was outstanding and he stated at page 149;
- “...even though the delay is inordinate, it is not inexcusable, since it was clear that no money to pay any assessed costs would be available until the claimant’s Greek proceedings had come to some conclusion which has not yet happened.”*
28. The Appeal in the instant case was only determined on 15th February, 2009 so that the Respondent was well within its right to present its Bill of Costs for taxation after the order for costs was confirmed by the Court of Appeal. In Pamplin -v- Fraser (supra) it was stated inter alia, that the party seeking the extension of time must give justification for the delay in order to allow the court to exercise its discretion. Each case must however be determined on its own merits and I found that the Respondent satisfied the court that the delay was excusable.
29. I then examined the issue of prejudice. In Chapman -v- Chapman (supra), Sir Robert Megarry V.C stated at page 609 that
- “If a paying party contends that he has been prejudiced by the receiving party’s delay, I think that it is for the paying party to establish that there has been none. I do not think that it is normally open to the paying party to adduce either no evidence of prejudice, or else miserably feeble evidence of it, and then say that from mere delay, however gross and inordinate, the court should infer prejudice...But where there is no reason why the paying party should not establish just what prejudice he has suffered, I do not think that it would be right to infer prejudice from*

delay. Indeed, from the party's omission to demonstrate any prejudice, I would infer that there has been none."

30. The case of Chapman -v- Chapman was one in which there were 2 bills of costs filed out of time one 3 years late and the other 1 year late. Sir Robert Megarry V.C in finding both delays to be inordinate and inexcusable, opined that it was for the party contending prejudice as a result of the delay to adduce evidence of it and not to rely on prejudice being inferred from mere delay. The defendant in the said case failed to adduce any such evidence which was prejudicial.
31. The case of Chapman -v- Chapman is distinguishable from the decision of Pamplin-v- Fraser (supra) where Parker J held inter alia that no particular prejudice was shown, but mere delay can amount to prejudice. This was a case where the Defendant had been convicted on three motoring offences and his appeal against conviction was dismissed with costs to be taxed. The prosecutor commenced the taxation 10 months outside the time limited for so doing. The delay was held to be inordinate and inexcusable.
32. In fact Megarry V.C in Chapman -v- Chapman distinguished the Pamplin -v- Fraser decision stating further at page 610 that,

" I would read these references to delay (in Pamplin -v-Fraser, emphasis mine) which suffices to establish prejudice as referring only to cases where it has become impossible to adduce evidence of the prejudice, and not as enabling a paying party to refrain from putting forward such evidence and rely on prejudice being inferred from mere delay."
33. Each case must be determined on its own merits and in the instant case unlike the Pamplin-v- Fraser (supra) there was no risk or possibility of enforcement by imprisonment as a consequence of the delay. Therefore the question of an unqualified debt hanging over the Applicant's head could not be sustained, since it was the Applicant who challenged the Order for Costs.
34. The principles set out in Chapman -v- Chapman case were persuasive, in that once there is a justifiable excuse by the party in default, and no evidence of

prejudice by the paying party, prejudice ought not to be inferred from the delay, regardless of how inordinate.

35. In the instant case both parties were awaiting the outcome of the Appeal filed by the Applicant and the reality of the payment of costs only came about after the Court of Appeal made its order on 18th February, 2009.
36. Although I found 2 ½ years delay to be inordinate but excusable I could not infer any prejudice whatsoever to the Applicant even in the absence of such evidence by the Applicant.

Conclusion

37. I held the view that a party who has been awarded costs is entitled to have his costs taxed and should not be deprived of such costs unless some grave and inexcusable circumstances arise. I do not find the explanation given for the delay in the instant case to be so unreasonable as to cause the Respondent to be deprived of its costs. The justice of the case required that the successful party not be denied his award.
38. In light of the circumstances outlined above I found that the Bill of Costs in the instant case was filed 2 ½ years out of time. While I found this to be an inordinately long delay, it was excusable for the reasons outlined in paragraphs 26-28 above. I also found that the Applicant suffered no prejudice as a consequence of the Respondent's delay.
39. Accordingly, I exercised my discretion under Order 62 Rule 16 and extended the time for the filing of the Bill to the 15th June, 2009 with no order as to costs.

Dated 26th November, 2009

Shabiki Cazabon
Assistant Registrar

