

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal Application No. S 008 of 2015

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Applicant

AND

WAZIR MOHAMMED

Respondent

**PANEL: I. Archie, CJ
A. Mendonça, JA
G. Smith, JA**

APPEARANCES:

Mr. S. Julien appeared for the Applicant

Mr. A. Ramroop appeared for the Respondent

DATE DELIVERED: February 15th, 2017

JUDGMENT

1. The application before the Court raises the short but important point whether leave is required under section 38(2)(b) of the Supreme Court of Judicature Act (SCJ) to appeal to the Court of Appeal from an assessment of costs by the Assistant Registrar.
2. The relevant facts and circumstances giving rise to this appeal may be briefly stated.
3. On April 20th 2015 the Master assessed the damages in this matter and ordered the Attorney General (the defendant in the claim and the applicant before this Court) to pay the respondent's costs. The Master ordered that the respondent's costs were to be assessed. Subsequently the assessment of costs was referred by the Master to the Assistant Registrar pursuant to rule 67.12(2) of the Civil Proceedings Rules 1998 (as amended) (the CPR).
4. On July 1st 2015 the Assistant Registrar assessed the respondent's costs in the sum \$92,028.00. This amount included the sum of \$50,000.00 which the Assistant Registrar allowed as the fee on brief for Counsel for the respondent on the assessment of damages. The Attorney General being aggrieved by the sum allowed as the fee on brief applied to a single Judge of the Court of Appeal sitting in Chambers for leave to appeal from the sum allowed. The Attorney General was of the view that leave was required pursuant to section 38(2)(b) of the SCJ.
5. The respondent resisted the application. Counsel for the respondent submitted to the Court that section 38(2)(b) has no application to this matter. The assessment of costs from which the Attorney General was seeking leave to appeal is a decision of the Assistant Registrar and not the Judge as provided for in the section. In the circumstances, it was submitted, that leave to appeal was not required.
6. The single Judge agreed with the respondent and dismissed the application. The Judge however indicated that there were several similar applications before the Chamber Court and perhaps the issue of what is the proper mode of appeal from an assessment of costs by the Registrar should be argued before the full Court.

7. On December 23rd 2015 the Attorney General applied to the full Court pursuant to rule 64.18(2) of the CPR for the following relief:
- (1) An order varying and/or discharging the decision of the single Judge refusing to grant to the applicant leave to appeal the Assistant Registrar’s assessment of costs on the basis that it was the wrong mode of initiating the appeal;
 - (2) An order granting the applicant leave to appeal to the Court of Appeal against the decision of the Assistant Registrar’s assessment of the fee on brief in the sum of \$50,000.00;
 - (3) An order staying the payment of the Assistant Registrar’s assessed the costs pending the outcome of the appeal;
 - (4) Such further orders and/or directions as the justice of this case may require.
8. Before we summarize the arguments of the parties it is convenient to set out various provisions of the SCJ and the CPR to which reference has been and will be made at various points in this judgment:

The Supreme Court of Judicature Act

- “35. *Subject to the Constitution, to the provisions of this Act and to the Rules of Court, the Court of Appeal shall have all the jurisdiction and powers formerly vested in the former Supreme Court in the exercise of its appellate jurisdiction under the Judicature Ordinance.*
38. *(1) Subject as otherwise provided in this Act or in any other written law, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High court, in all civil proceedings and for the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court.*
- (2) No appeal shall lie, except by leave of the Judge making the order or of the Court of Appeal from—*
- (a) an order made with the consent of the parties;*

- (b) an order as to costs;*
- (c) a final order of a Judge of the High Court made in a summary proceeding.*

67. (1) *The Registrar shall have power and jurisdiction to do such of the things and transact such of the business as by virtue of any written law, or by custom, or by the Rules and practice of the High Court, are done and transacted by a Judge of the High Court sitting in chambers as may from time to time be prescribed by rules of Court; but the Registrar shall have no jurisdiction in respect of matters relating to the liberty of the subject.*

67. (2) *A person affected by any order or decision of the Registrar sitting in chambers may appeal to the High Court or to the Court of Appeal, as the case may be, in such cases as may be provided for by Rules of Court. The Rules of Court relating to appeals from the Registrar to the High Court or to the Court of Appeal shall be-*

(a) in the case of the High Court, such as are prescribed by Rules of Court; and

(b) In the case of the Court of Appeal, the Rules of Court relating to appeals from a Judge in Chambers.

68. (4) *The Deputy Registrar and every Assistant Registrar shall in the exercise of his office have all and singular the like authorities, powers, duties, immunities and liabilities of the Registrar, except where otherwise provided by Rules of Court.*

The Civil Proceedings Rules, 1998

Powers, authority and jurisdiction of the registrar

2.4A (1) *The registrar shall have power to transact all such business and exercise all such authority and jurisdiction as may be transacted and exercised by a judge sitting in chambers in respect of the following matters, that is to say:*

(a) assessments of costs referred to the registrar under Part 67.12(2).

64.1(2) *In this part-*

“procedural appeal” means an appeal from a decision of a master or judge which does not directly decide the substantive issues in a claim...

How to obtain leave to appeal

64.2 (1) *Where an appeal may be made only with the leave of the judge making the order or the court a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought.*

(2) *The application for leave to appeal must set out concisely the grounds of the appeal*

(Section 38(2) of the Supreme Court of Judicature Act, sets out the circumstances in which leave is required, Part 11 of these Rules deals with applications).

Time for filing notice of appeal

64.5 *The notice of appeal must be filed at the court office –*

(a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;

(b) in the case of any other appeal, within 42 days of the date when the judgment was delivered or the order made; or

(c) where leave is required, within 14 days of the date when such leave was granted.

Powers of single judge

64.18 (2) *Any order made by a single judge may be varied or discharged by the court.*

Assessment of Costs- General

67.12(2) *Where the assessment [of costs] relates to part of court proceedings it may be carried out by the judge or master hearing the proceedings, or the judge or master may give directions as to how the assessment is to be carried out.*

9. Counsel for the Attorney General argued that pursuant to rule 2.4A (1)(a) of the CPR the Assistant Registrar in assessing costs acts as a Judge in Chambers. Section 67(2)(b) of the SCJ is applicable in those circumstances as it relates to appeals from the Judge in Chambers, which is what the Assistant Registrar was empowered to act as pursuant to rule 2.4A (1)(a) of the CPR in relation to an assessment of costs. It was therefore submitted that the question then becomes what are the rules of Court relating to appeals from a Judge in Chambers. Part 64 of the CPR is relevant in this regard. This indicates that the proper route is via a procedural appeal. Similarly rule 64.2 points to section 38(2) of the SCJ which provides that leave is required to appeal from an order as to costs. Counsel therefore submitted that the only way spelt out by statute for appealing a costs order, which is corroborated by rule 64.2, is to seek leave of the Judge (which

the Assistant Registrar is empowered to act as) making the order or of the Court of Appeal. In those circumstances counsel argued that the order of the single Judge of Appeal should be set aside and this Court should grant leave to appeal as well as a stay of execution of the order as to costs pending the hearing and determination of the appeal.

10. The respondent on the other hand submitted that an order or decision of the Assistant Registrar does not fall within section 38(2)(b) of the SCJ. As he had done before the single Judge, counsel submitted that this was so for two reasons. First the section referred to the Judge making the order. The Assistant Registrar is not a Judge. Second, the assessment of costs is not an order as to costs within the meaning of the section.
11. As to the mode of appeal, counsel for the respondent further submitted that an appeal from an assessment of costs was not a procedural appeal because a procedural appeal as defined in the CPR is an appeal from an order of the Master or Judge and not the Registrar. This is clear on the face of the definition of “Procedural Appeal” found at 64.1(2) of the CPR. He submitted that an appeal from an order as to costs fell within rule 64.5(b) and a notice of appeal could be filed without leave and had to be filed within 42 days of the assessment.
12. It was further submitted by the respondent that even if leave were required under section 38(2)(b) of the SCJ that this Court ought not to grant it because of the delay in filing the present application. The application was filed 44 days after the decision of the single Judge and that was an unreasonable delay but the appellant adduced no evidence to account for it. On the stay of execution counsel submitted that the appellant had put before the Court no material on which it could properly exercise its discretion to grant a stay of execution.
13. The issues raised on this application are therefore, (1) whether leave is required to appeal to the Court of Appeal from an assessment of costs by the Assistant Registrar; (2) if leave is required should leave now be granted in view of the delay in making the application to this Court to review the order of the single Judge of the Court of Appeal; (3) what is the appropriate procedure to appeal to the Court of Appeal from an assessment of costs by the Registrar; and (4) if leave is granted to appeal, should a stay of execution be granted pending the hearing and determination of this appeal.

14. I now turn to the first issue.

15. The Court of Appeal is a creature of statute and its powers and jurisdiction are statutory (see **Re DC, An infant** (1966) 9 JLR 568 and **Young v Bristol Aeroplane Co. Ltd** [1944] 2 ALL ER 293). Both parties agree that the jurisdiction of the Court of Appeal to hear appeals from a Registrar is to be found at section 67(2) of the SCJ. This section refers to the Registrar which is defined in the SCJ to mean the Registrar of the Supreme Court of Judicature. It does not make any mention of Assistant Registrar or Deputy Registrar but we have no doubt that this section applies equally to appeals from the Deputy Registrar or Assistant Registrar. Section 68(4) of the SCJ gives the Deputy Registrar and every Assistant Registrar, *inter alia*, all the authorities and powers of the Registrar. The Assistant Registrar, therefore, has the same powers as the Registrar to transact any business as a Judge in Chambers as provided for in section 67(1). It would be remarkable if section 67(2) which deals with appeals from the Registrar is not to be construed as applying to appeals from the Assistant Registrar. In our opinion, it is to be so construed. So hereafter, if and when we refer to the “Registrar” that is also to be taken as referring to the Assistant Registrar.

16. Under section 67(2)(b), the person affected by any order or decision of the Registrar sitting in Chambers may appeal to the High Court or the Court of Appeal as the case may be in such cases as provided for by Rules of Court. Rules of Court are therefore necessary to confer or complete the jurisdiction of either the High Court or the Court of Appeal in relation to appeals from the Registrar. The question that arises is what do the rules of the Court provide in relation to appeals from the Registrar to the High Court and/or the Court of Appeal.

17. It is accepted that the rules of Court referred to in section 67(2) of the SCJ are the CPR. On a perusal of the CPR, there are no provisions that prescribe the cases where there is an appeal from the Registrar to the High Court. The High Court therefore has no jurisdiction to entertain appeals from the Registrar.

18. In relation to the Court of Appeal, section 67(2)(b) gives the Court of Appeal jurisdiction to hear appeals from the Registrar as it would have to hear appeals from a Judge in Chambers. The

CPR apply to appeals generally from the High Court. There is no rule in the CPR that refers specifically to a Judge in Chambers. But that term should pose no difficulty in understanding section 67(2)(b). In our view it simply means an order that may be made by a Judge when sitting in Chambers as opposed to open Court. So for the purposes of section 67(2)(b) the Court of Appeal has jurisdiction to hear appeals from the Registrar in such cases as it has to hear appeals from orders that a Judge may make while sitting in Chambers. This will certainly apply to an assessment of costs. We therefore agree with counsel for the parties that section 67(2)(b) gives to the Court of Appeal the jurisdiction to entertain an appeal from an assessment of costs by the Registrar. But the question that arises in this matter is whether leave to appeal is necessary. The answer to this question is not to be found in section 67(2) or rule 2.4A of the CPR as the submissions of the applicant seem to imply. It is to be found in the proper interpretation of section 38(2)(b) of the SCJ. The crux of the issue is whether “Judge” in Section 38(2) also refers to the Registrar.

19. The parties were unable to refer the Court to any direct authority on whether the word “Judge” as used in section 38(2) includes Registrar. The possible reason for the absence of authority is that until the CPR, appeals from the Registrar were to the High Court. Further, the former rules, in any event, did not provide for an appeal from the taxation of costs by the Registrar. They provided for a review of the taxation by the Registrar first to the very Registrar and then to the High Court. Appeals to the Court of Appeal in relation to the taxation of costs came to the Court of Appeal as an appeal from the Judge’s decision. In those circumstances prior to the CPR the question would not have arisen whether leave was required to appeal to the Court of Appeal from the Registrar’s taxation of the bill of costs. But still it is surprising that more than ten years since the CPR, the question has not arisen whether leave is necessary to appeal the Registrar’s assessment of costs which replaced the taxation regime under the former rules.
20. Although no direct authority was provided there are 2 cases which suggest that the use of the word “Judge” in section 38(2) of the SCJ includes the Registrar (and by implication, the Master).
21. Firstly, in **Universal Projects Ltd v Bhagwansingh’s Hardware and Steel Industries Ltd** Civ App No 33 of 2006, the Court of Appeal was construing section 38(2)(c) of the SCJ. Section

38 (2)¹ provides that no appeal shall lie except with leave from “(c) a final order of the Judge of the High Court made in a summary proceeding.” Warner JA held that the expression “Judge of the High Court” has a specific meaning when construed with other provisions of the SCJ and the Constitution. That is, a puisne judge appointed under the Constitution. The words “a Judge of the High Court” therefore necessarily excluded a Master (and by necessary implication, a Registrar).²

This case suggests that when the SCJ seeks to limit the powers or jurisdiction to those of a puisne judge, the SCJ uses the specific wording of “Judge of the High Court.” If these words are not used then there is no specific intention to limit a power or jurisdiction to a puisne judge.

22. In **Purcell v Ingell** [1971] 1 QB 858 the Court of Appeal of England was considering section 31(h) of the Supreme Court of Judicature (Consolidation) Act 1925 (UK). This Act provided that “no appeal shall be without the leave of the court or judge making the order, from an order of the High Court or any judge of thereof made with the consent of the parties”. The issue was whether the leave of the District Registrar was needed in respect of an appeal from a consent order entered before him. It was held that the leave of the District Registrar was needed.

In arriving at the decision Lord Denning referred to a long standing interpretation in the following terms.

“Ever since the Judicature Act, 1873, the words “court” or “judge” have been used to include a master or registrar when he is exercising the powers which a High Court judge can exercise in chambers.”

By similar reasoning, the requirement in section 38(2)(b) for leave of the Judge to appeal from an order as to costs would include the Registrar. A fortiori where there is no limitation of the jurisdiction to “a Judge of the High Court.”

23. In our judgment therefore the appellant would need to get leave to appeal from an order as to costs made by a Registrar.

24. It was argued by the respondent that an order as to costs within the meaning of section 38(2)(b) does not refer to an assessment of costs. We however see no merit in the respondent’s

¹ Cited at paragraph 8 above

² This case agreed with the earlier decision of Mc Millan JA in *THA v Vidal* (1988) 42 WIR 372 and impliedly overruled the decision of Master Doyle in *Maharaj v Singh* HCA 1295 of 1996

submission. “As to” simply means “with regard to” which is wide enough to capture an appeal from an assessment of costs. So in our view, section 38(2)(b) would apply in relation to an appeal from a Judge’s assessment of costs.

25. The second issue that now arises is whether leave to appeal should be granted in this case.

It should be noted that the application for leave to the Court of Appeal Chamber Court was made in time. The decision of the Registrar was on 1st July 2015. The application for leave to the Court of Appeal Chamber Court was made on 16th July 2015 or 14 clear days from the order as required by rule 64.2(1).

However, the Single Justice of Appeal dismissed the application for leave on the 9th November, 2015. The appellant then appealed to the Full Court on 23rd December 2015; this was approximately 44 days later.

Although there is no time limit for seeking a variation or discharge of the order of a Single Justice of Appeal, any such application should be made within a reasonable time.³

On the special facts of this case, we do not consider the delay of 44 days to be unreasonable since the issues in this case were novel and required in depth research and mature consideration before pursuing the appeal. Further, the issue on the appeal is not frivolous but requires mature consideration.

In the circumstances we grant leave to the appellant to appeal the order as to costs.

26. Although the point did not arise in this case, for the sake of clarity we suggest that in the future, the application for leave to appeal should ordinarily be made before the Judge, Master or Registrar (as the case may be) before coming on appeal.

27. The third issue is whether the proper way to approach the Court of Appeal in respect of an appeal from an assessment of costs is by way of a procedural appeal.

28. The CPR defines what is a procedural appeal (see rule 64.1(2)) and it deals with procedural appeals quite differently from other appeals. In the case of the procedural appeal, a notice of appeal has to be filed within 7 days of the decision appealed against (see rule 64.5). This is a shorter period than the other two categories of appeals identified in rule 64.5, namely “any other

³ See Section 23 of the Interpretation Act

appeal” and appeals where leave is required. In the case of any other appeal, the notice of appeal must be filed within 42 days of the date when the judgment is given and in the case of an appeal where leave is required a notice of appeal must be filed within 14 days of the date when leave is given. So the question now is whether this is a procedural appeal or any other appeal.

29. “Procedural appeal” is defined to mean “an appeal from a decision of a Master or Judge which does not directly decide the substantive issues in a claim”. The definition goes on to exclude certain specific orders and decisions which are not relevant to this application.

30. For the purpose of this application there are two aspects of the definition that are relevant, namely that the decision appealed from must not be a decision that decides the substantive issues in a claim and that it is a decision of the Master or Judge. There is no dispute that as this matter concerns a proposed appeal from an assessment of costs it could not be described as one that directly decides the substantive issues in the claim. If an appeal were filed in this matter, it would be an appeal from a decision that does not directly decide the substantive issues in a claim. So the appeal would therefore satisfy that part of the definition.

31. Counsel for the respondent however argued that the other aspect of the definition is not satisfied as the appeal would not be from a decision of the Master or Judge but of the Assistant Registrar.

32. We, however, do not think that that argument carries any weight. In our view the submission overlooks the source of the Court of Appeal’s jurisdiction in relation to appeals from the Registrar, i.e. section 67(2)(b) of the SCJ. As we have mentioned that section gives to the Court of Appeal the jurisdiction to hear appeals from the Registrar and it does so by reference to the rules of Court relating to appeals from a Judge in Chambers. As a procedural appeal would be the proper way to approach the Court on an assessment of costs by the Judge, it is also the proper way to approach the Court of Appeal from an assessment of costs by the Registrar. The word “Judge” in the definition of procedural appeal is therefore to be construed as including the Registrar for the purposes of such an appeal.

33. The fourth and final issue is whether a stay of execution of the order for costs should be granted. Suffice it to say that the Applicant focused his case on the issues surrounding leave to appeal.

No evidence has yet been proffered that would assist us in respect of the decision to grant a stay of the order for costs and we propose to make no order for a stay of the order at this time.

34. For the reasons above the application is allowed. We will hear the parties on costs.

**I. Archie,
Chief Justice**

**A. Mendonça,
Justice of Appeal**

**G. Smith,
Justice of Appeal**