REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

Civ. App. No. S051 of 2017
CV No. 2013-04212

BETWEEN

CRISTOP LIMITED

Appellant/Plaintiff

AND

MYRTLE DOROTHY PARTAP

First Respondent/Defendant

MYRTLE DORTOTHY PARTAP

(Administrator Ad Litem of the Estate of Ramessar Partap)

Second Respondents/Defendant

BEFORE

Pemberton, J.A.

APPEARANCES:

For the Appellant: **Mr. A. Ashraph instructed by Mr. Z. Ashraph**

For the Respondent: **Mr. A. Hosein**

DATE OF DELIVERY: **25th April 2018**

DESCION

1. **INTRODUCTION**

This appeal concerns the consequences of the untimely service of the Notice of Appeal. The matter came up before the Chamber Court on 26th October 2017, when Jamadar JA granted I permission to the appellant *to file an affidavit in response in relation to the service of the notice of appeal pursuant to Part 64.6 of the CPR on or before 10th November 2017*. This direction was satisfied. When the matter returned to court on the 30th November 2017, I gave directions for filing and exchanging of written submissions.

2. **BACKGROUND**

On 8th March 2017, the appellant filed a notice of appeal against the order of the trial judge. On 17th August 2017, the appellant filed an application in Chambers seeking directions from the court with respect to "*the manner in which the evidence given in the courts below and the reasons of the (trial judge) forgiving judgment*" may be brought before the court. The grounds of the application included, the lapse of 3 months since the filing of a notice of appeal on 8th March 2017 and the court of office's failure to arrange for a transcript of the proceeding for the judge's reasons. This they say, was not in keeping with the court offices duty under rule 64.18(b) of the CPR.

3. Before the matter came up before the court, the respondent filed an affidavit in response in which she asked the court to strike out the appeal including the notice of application before it, on the ground of late service of the notice of appeal. The usual order for costs attended the request.

4. It is instructive that the appellant filed an affidavit in response admitting to the nonservice of the notice of appeal, until sometime after the filing of the notice of application before this court.

5. It is interesting that to date, there is no application before this court for an enlargement of time to serve the notice of appeal. I must say here, that the notice of appeal triggers the appellate process. It is the initiation of the appeal. There must be service for the Respondent to be notified that the judgment is under review.

6. Part 64.6(1)(a) provides that a copy of the notice of appeal must be served forthwith on all parties to the proceeding. The CPR does not provide any sanction for a failure to observe the provisions of this rule.

7. The meaning of "forthwith" carries different meanings depending on the context. In some cases it means immediate and in others it means within a reasonable time[1]. It does not and cannot admit to a meaning which will legitmise a lapse of 188 days between the filing of the notice of appeal and its service on the respondent. Mr. Ashraph in the affidavits filed in support of the application before the court accepted responsibility for what is nothing short of a debacle. I commend him. However, as I said before, there was no application for an enlargement of time or any request to have the court pronounce on the extraordinarily late service. That would have involved a close look at the evidence which he supplied and I do not think that such an examination will take me anywhere in deciding the issue at hand.

8. The question for determination is, <u>in the absence of any sanction contained in the CPR, do I use my discretion to allow the service of the notice of appeal, some 180 days after filing to stand so that the appeal may be prosecuted?</u> And if so, how must I treat with the application before the court? One of the keys to unlocking the exercise of court's discretion is that there must be a good reason for so doing. Has the appellant provided me with good reason for the exercise of my discretion? In other words, how do I treat with attorney-at-law error in these circumstances?

9. If I were to follow Mendonça JA in **JAMES**, I would examine this case in light of dicta appearing at Paras. 22 to 28 so helpfully summarized in Mr. Hosein's submission.[2] **JAMES** dealt with the filing of

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[1] Different meanings have been ascribed to the word **"forthwith"** depending on the context of its usage**.** In **Simpson v Henderson (1820)** Mood + M 300 at 301-302 Lord Tenterden CJ said "*The word forthwith indeed, instructions, means immediately; but it is plain that this cannot be the construction to be affixed to it here. It was known that she (the ship) required some repairs,… and some time must be allowed for that*". **In R v Worcestershire JJ (1839)** 7 Dowl 789 at 790, Coleridge J said '*I agree that the word "forthwith" is no to receive a strict construction like the word "immediately"… it seems that whatever is to be done…. Ought to be done without any unreasonable delay...*".

[2] **ROLAND JAMES v THE ATTORNEY GENERAL Civil Appeal No 44 of 2014** per Mendonça JA:
Para 22: *In my judgment on an application for an extension of time, the factors outlined in rule 26.7(1), (3) and (4) would generally be of relevance to the application and should be considered. So that promptness of the application is to be considered, so too whether or not the failure to comply was intentional, whether there is a good explanation for the breach and whether the party in default has generally complied with all other relevant rules, practice directions, orders and directions. The Court must also have regard to the factors at rule 26.7 (4) in considering whether to grant the application or not.*

defenses and applications for extension of time to do so. The law in that area is fairly well settled. Even if I were to apply the criteria as laid down in that case, the appellant will fall woefully short. In fact, my consideration of this case will be stillborn in the absence of evidence, a clear criteria set in **JAMES** when assessing applications.

10. In addition to the above, Mendonça JA stated that apart from the above factors, the court should bear in mind any prejudice that may attend both parties if the application is granted. This he cast against the background of the overriding objective in dealing with cases justly[3]. In the absence of any criteria, to address whether the respondent will suffer prejudice if the time is enlarged to accommodate the service of the notice of appeal in particular, Mr. Asraph referred me to Jones JA who opined that late service of the notice of appeal if it is substantive appeal," is of *no* moment" if no harm has been alleged on the part of the respondent.[4] In this case however, the respondent is alleging prejudice.

11. **WAS HARM OR PREJUDICED ALLEGED?**

    Ms Partap's evidence in support of her request, which is uncontradicted, stated that she continued to treat with the subject lands as her own. She submitted a claim for compensation on the receipt of a land acquisition notice. When she was not served in a timely manner with the notice of appeal she continued dealing with the land acquisition agency. Mr. Ashraph discounted this as any evidence of prejudice and characterized it as vague and unsubstantial. The continued dealings with the land acquisition agency to me, is cogent reason to support Ms Partap's contention that

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Para. 28: *It follows from what I have said above that applications for an extension of time should generally be supported by evidence.*

[3] See para. 24 **JAMES *infra.*,** which reads as follows: *Apart from the factors already discussed the court should take into account the prejudice to both sides in granting or refusing the application. However the absence of prejudice to the claimant is not to be taken as a sufficient reason to grant the application as it is incumbent to consider all relevant factors.* ***Inherent in dealing with cases justly are considerations of prejudice to the parties in the grant or refusal of the application.*** *The Court must take into account the respective disadvantages to both sides in granting or refusing their application.* ***I think the focus should be on the prejudice caused by the failure to serve the defence on time.*** (Emphasis mine)

[4] See **DOC'S ENGINEERING WORKS (1992) LTD & OTHERS v FIRST CARIBBEAN INTERNATIONAL BANK (TRINIDAD AND TOBAGO LTD). CA No 34 of 2013** para. 20. The issue before the court was whether the appeal filed was procedural or substantive. The Justice of Appeal had this to say: *Part 64.6(1)(a) further requires that the notice of appeal must be served forth with on all the parties to the proceedings. The notice of appeal was served on the respondent on 22nd of April 2013 2 months after it was filed. By the rules a procedural appeal is required to be heard within 28 days of its filing. In these circumstances therefore if the appeal is properly a procedural appeal then the service of the notice of appeal some two months after filing would not comply with the requirements that it be served forthwith. If the appeal is not a procedural appeal then, although strictly speaking the notice of appeal was not served forthwith, no* ***harm has been alleged by the respondent*** *and as such a lapse of time is of no moment.* (Emphasis mine).

prosecution of this appeal will be prejudicial to her. That is evidence enough to convince me that harm or prejudice was put before me and proved on the evidence.

12. In the premises of appellant upon whom this burden lay, has not discharged it by proving upon evidence, that no prejudice will arise to the respondent, if the late service of the notice of appeal in this case, the substantive appeal, were allowed to stand and the appeal to continue. In fact, the appellant's position is compounded by his failure to this day, to make a request for time to be enlarged in the face of the undeniable and confirmed delay in service of 188 days. As a result, the entire appeal struck out.

13. The appellant will pay the respondents' costs incurred in this appeal.

ORDER

1. The Appeal filed on 08/03/17 is struck out.
2. All consequential applications including that filed on 17/08/17 are struck out.
3. The Appellant to pay the Respondent's costs assessed in the sum of $3,900.00.

/s/ CHARMAINE PEMBERTON
COURT OF APPEAL JUDGE
CHAMBERS