

COMMONWEALTH OF THE BAHAMAS

2022/COM/LAB 00017

IN THE SUPREME COURT

Commercial Law Division

BETWEEN

MINETTE A. CARTWRIGHT

Claimant

AND

HALSBURY CHAMBERS

First Defendant

AND

W. A. BRANVILLE MCCARTNEY

Trading as Halsbury Chambers

Second Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Mr. Obie Ferguson, KC and Keod Smith for the Claimant

Mr. Carl Bethel for the First Defendant

Hearing Date: October 23, 2023

*Appeal from a Registrar – hearing proceeding on security for costs despite notification by Counsel of their unavailability to appear on the date – security costs ordered against the Claimant – whether fair in the circumstances*

## **RULING**

**Darville Gomez, J**

### **Introduction and Background**

1. The Claimant commenced this action against the First Defendant, her former employer for breach of her contract of employment and sought liquidated damages for wrongful dismissal and unfair dismissal. The specially endorsed Writ of Summons was filed on

March 9, 2022 and on its face it bore the address of her attorney, Obie Ferguson & Co., snug Haven, Elizabeth Avenue, P.O. Box N 3300, Nassau, Bahamas.

2. The First Defendant's Counsel contend that despite the Writ containing the address of her attorney that it was not endorsed with her address contrary to the provisions of Order 6 Rule 4(1)(a) of the Rules of the Supreme Court, 1978 ("RSC").
3. By letter dated March 28, 2022 they drew this to the attention of Counsel for the Claimant and invited him to amend the Writ "to avoid an application being made to the Court". However, the said letter referred to Order 6 Rule 4(a), RSC.
4. By letter dated March 29, 2022, the Claimant's Counsel replied, advising that there was no Order 6 rule 4(a), but instead there was an Order 5, rule 4(a) and confirmed that "the Writ was endorsed after service and returned to the Civil Registry of the Supreme Court".
5. Thereafter, the First Defendant's Counsel applied by Ex Parte Summons filed on April 6, 2022 for leave pursuant to Order 12, rule 6 to enter a conditional appearance on the grounds that the Claimant did not comply with the provisions of Order 6 rule 4(a), RSC indorsing her address on the face of the Writ of Summons; it was supported by an Affidavit of Rhchetta Godet also filed on the same date. Further, they sought an Order setting aside the said Writ of Summons.
6. The Deputy Registrar of the Supreme Court granted leave to the First Defendant to enter a conditional appearance on November 11, 2022. However, the Court took notice that the leave granted failed to specify the time within which the application to set aside the writ must be issued.
7. After filing the Summons for leave to enter a conditional appearance on April 6, 2022, the First Defendant filed a Summons on June 13, 2022 and again on November 15, 2022 for an order for security for costs against the Claimant pursuant to Order 23 rule 1(c); it was supported by an Affidavit also filed on the same date.
8. I refer to Order 23 rule 1(c) which provided that the court may if it thinks just order the plaintiff to give security for costs where the plaintiff's address is not stated in the writ or is incorrectly stated. Order 23, rule 2 provided that "the Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive."

9. On November 25, 2022 the Deputy Registrar ordered that the Claimant pay security for costs to the Defendant in the sum of \$30,000 to be paid within 30 days of service of the Order.
10. This order is the subject of this application. I set out the details of the present application below, however, I wished to address what transpired after the grant of conditional leave by the Deputy Registrar.
11. After the First Defendant obtained conditional leave to enter an appearance on the basis of an irregularity with the writ, the next application ought to have been to set aside the Writ within a reasonable time. The usual time is within 14 days of the grant of conditional leave, however, that is within the discretion of the Registrar.
12. However, instead, the First Defendant's sought to make an application for security for costs and relied upon Order 23, rule 2 (set out at paragraph 8). Therefore, on the one hand, the First Defendant complained of the irregularity and on the other, relied upon it. This constituted a waiver of the irregularity in my view. The court adopts the position taken in the case of ***The Assunta [1902] P.150***. In that case, the Defendants had complained of an irregularity but also applied for security for costs. The irregularity complained of involved the title of a Plaintiff who commenced an action in the name of his firm alone and not "as owners". However, the indorsement reflected the term "as owners". The court found that it was a mere irregularity which could be cured by leave to amend. Further, Sir F. H. Jeune P., said "*...as the defendants had, by applying for security for costs, taken a fresh step after knowledge of the irregularity, they were precluded by rule 2 of the same order from taking advantage of the irregularity.*"
13. Similarly, in the instant case, I also share the view that the omission of the Claimant's address was a mere irregularity that could have been cured by an amendment with leave. However, this is unnecessary now given the effect of the position taken by the First Defendant.

### **The Present Application**

14. By a Notice of Motion filed on December 23, 2022 the Claimant sought an Order to vacate and discharge the order for security for costs granted by the Deputy Registrar on November 25, 2022 on the following grounds:
  - (i) The learned Deputy Registrar erred in fact and law of his ruling and Order by failing to acknowledge the letter of November 22, 2022 stating that Counsel for the Claimant was not available to attend the hearing of the Defendant's Summons which was scheduled for November 25, 2022 at 11am. The said



notice was served on the Registrar's chambers at 2:15pm on November 23, 2022.

- (ii) The learned Deputy Registrar erred in not ascertaining from Counsel for the First Defendant whether notice was given and served on him indicating that the Claimant's Counsel was not available to attend the hearing scheduled for November 25, 2022 at 11am. That communication was received by Counsel for the First Defendant at 3:22pm on November 23, 2022.
- (iii) The learned Deputy Registrar's order was unreasonable having regard for the contents of the letter of November 22, 2022 and that the notice was communicated to all parties and signed by their respective offices acknowledging receipt of the notice by signing the service sheet.
- (iv) The learned Deputy Registrar failed in the circumstances of this case to properly consider this matter.
- (v) We invite the Honourable Judge to allow the appeal in the interest of equity and fair play which will allow the Claimant to present her case as the Affidavit attached to his motion clearly shows that she has established a prima facie case as to why the order should be vacated with costs to the Claimant.

#### **Issue**

15. The issue to be decided is whether the Deputy Registrar erred in refusing the Claimant's application for an adjournment of the hearing for security for costs.

#### **The Law**

16. Order 58, rule 1 of the Rules of the Supreme Court prescribes, "*(1) An appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar.*"
17. Order 36, rule 2 provides for the powers of Registrars which also includes discretionary powers:

*2. (1) Subject to any directions contained in the order referring any business to the Registrar —*

*(3) The Registrar may hold any trial or any other proceedings before him at any time which appears to him to be convenient and may adjourn the proceedings from place to place as he thinks fit, but he shall not have power to make orders of committal.*

#### **Discussion and Analysis**

18. Prior to the hearing for security for costs scheduled for November 25, 2022, Counsel for the Claimant notified the Deputy Registrar by letter dated November 22, 2022 that the

date secured by the First Defendant had conflicted with a trial date and gave his available dates. This letter was copied to Counsel for the First Defendant and the Service Form contained in the Affidavit of Queenie Ferguson filed on December 23, 2022 evidenced that it was served on the office of the Deputy Registrar and the First Defendant on November 23, 2022 at 2:14 pm and 3:22pm respectively.

19. The First Defendant's Counsel subsequently wrote to the Claimants by letter dated November 23, 2022 inquiring details of the trial that he was scheduled to attend on November 25, 2022 because they had conducted a search and had found no record of him having a trial. The Claimant did not respond to this letter.
20. While the letter did not provide which Court the trial was being held, there was no reason to second guess or doubt the authenticity of Counsel's letter without more.
21. The practice of seeking to obtain convenient dates with opposing Counsel was not followed. The First Defendant's Counsel made much ado as to whether this practice of canvassing convenient dates from the opposing side applied to Registrars and in fact, he insisted that it only applied to Judges. I do not agree. It is a courtesy that is extended to Counsel opposite to avoid or minimize adjournments which only wastes the court's time.
22. In any event, the fact that this was not followed was not fatal because Counsel for the Claimant once served with notice of the application advised of his unavailability to attend (three days in advance of the date). Counsel cannot assume that whatever dates are obtained for hearings would always be convenient to the other side. The notification by the Claimant's Counsel ought to have caused the First Defendant's Counsel to seek an adjournment in the circumstances.
23. In ***Teinaz v LB Wandsworth [2002] EWCA Civ 1040*** the Court at paragraph 20 pronounced that *"...Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice."*
24. The Deputy Registrar provided no reason for the hearing of the proceedings in spite of Counsel for the Claimant's request for an adjournment unless he too did not accept that Counsel for the Claimant was properly before another court. It certainly was obvious to this Court that he did not properly consider the fact that any Order given would likely adversely affect the Claimant.
25. Further, when Order 23, rule 2 is considered, it is pellucid that the Plaintiff would have had a defence to the application viz., the omission of her address was made innocently and without the intention to deceive.
26. In ***Terluk v Berezovsky [2010] EWCA Civ 1345*** Sedley LJ stated that:



[18]“Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair. In Gillies v Secretary of State for Work and Pensions [2006] UKHL 2, [2006] 1 All ER 731, [2006] 1 WLR 781, Lord Hope said (at para 6) “[T]he question whether a tribunal . . . was acting in breach of the principles of natural justice is essentially a question of law.”

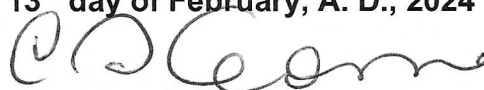
[20] .... As Lord Widgery CJ indicated in Bullen, it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was “the” fair one.

27. In my opinion, this matter fell into the category of one which required the Deputy Registrar to accede to the application for an adjournment in the circumstances. There was nothing to suggest that Counsel for the Claimant was being dishonest about his unavailability or even evasive. The reality is that convenient dates were not canvassed with him as it ought to have been and the Deputy Registrar and Counsel for the First Defendant were aware in advance of the hearing date of his obligations elsewhere. In addition, the application for security for costs should be heard *inter partes* given its nature.
28. In applying the test of fairness, it cannot be said that the Deputy Registrar properly considered the postponement request.
29. Finally, although I was not required to consider the exercise of the Deputy Registrar’s discretion to grant an order for security for costs against the Claimant, it is doubtful whether the instant case was an appropriate one for the grant of such an order in the circumstances.

#### **Disposition and Conclusion**

30. Accordingly, and in the circumstances, the Order of the Deputy Registrar dated November 25, 2022 is hereby set aside and I award fixed costs to the Claimant of \$2,000.

Dated this 13<sup>th</sup> day of February, A. D., 2024



**Camille Darville Gomez**  
Justice