

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Appeal No. 1 of 2014**

**BETWEEN:**

**PRINCE COURTNEY SINCKLER                      Appellant**

**AND**

**EDITHA MARGUERITA SINCKLER                      Respondent**

**Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and  
The Hon. Kaye C. Goodridge, Justices of Appeal.**

**2014: May 12, September 16, December 8**

**2015: February 10**

**2016: May 12**

**Mr. Deighton K. Rawlins for the Appellant.**

**Mr. Dennis Headley for the Respondent.**

**DECISION**

**GOODRIDGE JA**

**Introduction**

[1] This appeal is yet another event in protracted proceedings between the parties under the **Family Law Act, Cap. 214 (the Act)**. The appellant

has appealed against the order of **Kentish J** made on 28 March 2014 that he be committed to prison unless he pays the sum of \$7,600.00, being arrears of spousal maintenance, on or before 27 June 2014.

[2] When the appeal first engaged the attention of this Court on 12 May 2014, it was adjourned to 16 September 2014 at the request of counsel who appeared holding papers for the attorney-at-law for the respondent who was absent because of illness.

[3] On 16 September 2014, the Court granted the appellant leave to file a notice of appeal in the proper form and made other orders designed to ensure that the appeal could be heard on 4 November 2014. However, due to the failure of counsel for the appellant to comply with that order, that date was vacated and the matter rescheduled for 8 December 2014. Counsel for the respondent filed his written submissions on 5 December 2014. The submissions of counsel for the appellant were eventually filed on 16 January 2015. The appeal was heard on 10 February 2015.

### **The Background**

[4] We consider it necessary to set out in some detail the background to this appeal.

- [5] The appellant and the respondent were married on 17 December 1983 after cohabiting for 10 years. The relationship produced five children. On 6 February 2006 an order was made dissolving the marriage. The respondent made an application to the High Court for spousal maintenance and property settlement. The maintenance application was heard by **Kentish J** on 8 November 2007, who ordered the appellant to pay to the respondent the sum of \$950 a month with effect from 28 November 2007 and continuing on each succeeding month until further order (the maintenance order).
- [6] The appellant appealed that decision and on 14 December 2007 this Court determined that the maintenance order should be treated as an interim order, and remitted the matter to the High Court for the maintenance and property settlement applications to be heard together. The interim maintenance order was discharged by **Richards J** on 6 June 2008.
- [7] The appellant did not pay any maintenance for the period 8 November 2007 to 6 June 2008 as had been ordered by the court. We pause here to state that during the hearing of this appeal the Court was informed by Mr. Rawlins that he instructed the appellant not to "pay one penny" and he was "not ashamed of that".

- [8] Thereafter the respondent sought to enforce the maintenance order by filing an application supported by affidavit on 30 September 2008. On 24 June 2010 when the application came on for hearing before **Richards J**, neither the appellant nor his counsel was present and the judge issued a summons with a warning to the appellant and directed that the documents filed on 30 September 2008 be re-filed.
- [9] On 15 November 2010 the respondent filed an application with supporting affidavit as directed by the court. When the matter came on for hearing before **Kentish J** on 7 September 2011 the respondent withdrew the 2008 application as there were by that time two applications before the court for the same relief.
- [10] The application was eventually heard by **Kentish J** on 27 November 2012. The judge ordered, inter alia, that:
1. In view of the fact that the respondent was seeking committal of the appellant for his refusal to obey the 2007 order (which had been converted into an interim order by this Court), and that order had not been served on the appellant, a certified copy of the order of this Court be served on counsel for the appellant on or before 14 December 2012 in the interest of saving judicial time and with the object of bringing to an end the protracted proceedings in this matter.
  2. The respondent serve on the appellant and his counsel on or before 14 December 2012 a certified copy of the order of **Richards J** made on 6 June 2008 discharging the interim order.

3. The matter be adjourned until 4 February 2013.

[11] The appellant appealed this order and at the conclusion of the hearing on 3 July 2013, this Court made the following order:

- (i) the appeal is dismissed;
- (ii) the matter is remitted to the High Court to be adjudicated by **Kentish J**;
- (iii) the appellant shall pay to the respondent costs in the sum of \$2,500.00.

[12] On 28 March 2014 **Kentish J** heard the application for contempt and made the following order:

- "(i) the application of the respondent/wife dated 15th November 2010 is not dismissed;
- (ii) that unless the applicant/husband pays to the respondent/wife the sum of seven thousand six hundred dollars (\$7,600.00) on or before Friday 27th June 2014 he shall be committed to Her Majesty's Prison Dodds for a period of ten (10) days."

### **The Appeal**

[13] In the Notice of Appeal filed on 19 September 2014, the appellant has challenged the order of **Kentish J** on two grounds:

- "1. That the Learned Trial Judge erred in adjudicating in proceedings which were not initiated in accordance with the Enforcement Proceedings of the Family Law Rules Chapter 214.

2. That the Learned Trial Judge erred in overruling the submission made by the Counsel for the Appellant/Husband contained in the following Australian case:- In the Marriage of Reid (Full Court of Family Court of Australia- Pawley SJ, Fogarty and Davey JJ-November 1978 to the effect that an arbitrary period of twelve months has traditionally been adopted and in the absence of change by legislation, the established approach should not be brought to an end.”

## **Ground 1**

### **The Submissions of Counsel**

- [14] On this ground Mr. Rawlins, counsel for the appellant, argued that the application brought by the respondent was flawed and ought never to have been entertained by the court as it failed to comply with the **Family Law Rules, 1982** (the **Rules**). Counsel set out **rules 102(1), 106(1) and (2) and 107** in his grounds of appeal but did not address these rules in his submissions to the Court.
- [15] Mr. Rawlins also in his written submissions contended that the judge, in making the order for spousal maintenance in 2007, failed to follow the provisions of the **Act** and that the order ought never to have been made. He stated that when that order was appealed, this Court "equally injudiciously ordered that the order be varied to an interim order, and failed/or neglected to fix any time to the said order", and

"failed/neglected to properly adjudicate the said appeal and failed/or neglected as the court below to apply the provisions of the Act".

[16] We have disregarded that particular submission which appears to be an attempt by counsel to revisit the earlier decision of this Court.

[17] In response Mr. Headley, counsel for the respondent, submitted that **rule 102(1)** confers no automatic right to the appellant to have a Form 28 notice served on him. It confers a right on the respondent if she wishes, to make an application to the judge for the issue and service of such a notice on the appellant.

[18] According to Mr. Headley, under oral examination by **Kentish J** on 6 July 2012, the appellant had disclosed to the court that he received a weekly pension of \$457.94 and had obtained gratuity from his former employer in the sum of \$58,000.00. Mr. Rawlins did not dispute this contention. In addition, the appellant was always represented by counsel and had never argued that he could not afford to pay the monies owed or that he needed time to pay.

[19] Turning to **rule 106(1)** and **(2)**, counsel submitted that when the application relating to the appellant's contempt was heard on 28 March 2014, and before making the order for committal, the judge

asked Mr. Rawlins to address her on the application and he stated that he had nothing to say.

- [20] As to **rule 107**, Mr. Headley submitted that there was compliance with this rule in that a certified copy of the court order with penal notice was served on the appellant. He noted that during the committal proceedings, counsel for the appellant made no representations to the judge that the appellant had not been served with the requisite documents together with the attached penal notice.

### **Discussion**

- [21] It would perhaps be useful to start our consideration of this ground by examining the relevant sections of the **Rules**.
- [22] **Part XIII** of the **Rules** applies to the enforcement of orders under the **Act**. **Rule 101** applies to an order that a party to a marriage pay maintenance for the benefit of the other party to the marriage.
- [23] **Rule 102(1)** provides for the attendance before the court and oral examination of a person who has failed or refused to comply with an order of the court. This rule provides for the service of a Form 28 notice on the respondent to an application to institute enforcement proceedings. What is the significance of this rule?

[24] The case of **Marshall v Marshall Civil Appeal No. 1 of 1993, (decision of 9 October 1996) (Marshall)** is instructive. In **Marshall** the husband appealed against an order made by a judge on 31 July 1992 which required immediate payment by him of \$11,540.00 maintenance arrears which the wife claimed were due and owing under court orders for the support of their two children. The arrears were for a period of three years. It was argued, inter alia, that the proceedings under which the order was made were defective in that there was a total failure to comply with the requirements of **rules 101 to 103** of the **Rules**. **Williams CJ** stated:

"The lynch-pin of counsel's argument on the first point is rule 102(1) which provides that, in matters to which rule 101 applies, the appropriate officer shall, on the application of the person or authority entitled to institute proceedings for enforcement of decrees, issue for service on the respondent a notice in accordance with Form 28. But, as the title of Form 28 states, that form does no more than prescribe a notice for the request of information. If the person or authority entitled to initiate proceedings for the enforcement of a decree already has the financial information needed, there would be no need to resort to rule 102(1). Moreover that person or authority could always seek to invoke the Court's powers in rule 102(2) to enable the oral examination of any person or the production of any document or thing. So that it does not seem that rule 102(1) has the fundamental significance that counsel would attach to it."

In this case the respondent and the court were aware of the appellant's financial position from the earlier hearing.

[25] **Rule 106** deals with contempt. **Rule 106(1)** provides two methods by which a person who appears to be guilty of contempt in the face of the court may be brought before that court. This was not a case in which the contempt was alleged to have been committed in the face of the court. **Rule 106(2)** sets out the procedure to be followed by the court once the person is before it. The court:

- (a) shall cause him to be informed orally of the contempt with which he is charged;
- (b) may require him to show cause why he should not be dealt with for the contempt;
- (c) after hearing him and any evidence offered, may determine whether he is in contempt; whether he has purged the contempt; and whether he should be punished for contempt; and
- (d) may make an order for punishment or discharge, as the court thinks fit.

**Rule 106(3)** gives the court the discretion to keep the person in custody or order his release pending the disposal of the charge.

[26] **Rule 106(4)** provides that if a person alleges that another person has wilfully disobeyed a decree of the court, he or she may file an application in accordance with Form 6 together with an affidavit

setting out the details of the alleged wilful disobedience. A copy of the application and affidavit shall be served on the other person. At the hearing of the application, if the other person appears, the court may act in accordance with **rule 106(2)**. In this case, the respondent utilised the provisions of this rule.

[27] We must point out that we have not had the benefit of seeing the judge's reasons or the notes of proceedings in this matter.

[28] Mr. Headley submitted that the judge informed the appellant as to the nature of the contempt and gave him and his counsel an opportunity to show cause why the appellant should not be dealt with for the contempt. Before making the order for committal, the judge asked Mr. Rawlins to address her on the application and he stated that he had nothing to say. This account of the proceedings on 28 March 2014 has not been challenged by the appellant's counsel neither has it been alleged that the judge failed to follow the established procedure. In all the circumstances we are of the opinion that there was compliance with **rule 106(2)**.

[29] **Rule 107** provides as follows:

"Every order or judgment in any proceeding requiring a person to do any act ordered by that order or judgment shall state the time within which the act is to be done and there shall be endorsed on the copy of the order or

judgment served upon the person required to comply, the following words

'If you (AB) neglect to comply with judgment/order you will be liable to process of execution for the purpose of ensuring your compliance'."

[30] The order of 28 March 2014 did not contain the precise words in **rule 107**. However it stated the time within which the appellant was to perform the act, that is, pay the arrears of maintenance by 27 June 2014, the amount to be paid and that the appellant would be committed to HMP Dodds unless he complied with the order. In our view, the wording of the order was sufficiently clear and contained the relevant information as stipulated under the rule. The appellant who was served with the order containing these words would be left in no doubt that a penal sanction was attached to failure to comply with the order. We are of the view that there was no breach of the rule.

[31] We therefore conclude that the enforcement proceedings were initiated in accordance with the **Rules** and that the judge did not fall into error when she dealt with the application.

## **Ground 2**

[32] On this ground it is alleged that the judge erred when she rejected the "Australian practice" whereby a party is precluded from recovering arrears of maintenance after the expiration of a 12 month period.

### **The Submissions of Counsel**

[33] Mr. Rawlins submitted that, while there is no express provision in the **Act** or the **Rules** requiring an application for arrears of spousal maintenance to be made within 12 months, such a practice existed in Australia and that practice could only be altered by legislation. Therefore it was his contention that the judge should not have made an order on an application brought 3 years later since this was inconsistent with the Australian practice.

[34] In response, Mr. Headley submitted that there is no law in Barbados which stipulates that a person in whose favour a maintenance order has been made is only entitled to enforce maintenance arrears for a period of 12 months, nor has such a practice been developed or adopted by our courts.

### **Discussion**

[35] **Section 61(8)** of the **Act** deals with the cessation of orders. That section provides:

"Nothing in this section affects the recovery of arrears due under an order at the time when the order ceased to have effect."

It is therefore open to a party who has not received maintenance as ordered by the court to take the necessary action to recover any arrears which may be due. No time limit has been prescribed for so doing.

[36] Mr. Rawlins relied on a number of Australian authorities namely **Biggs v Dienes 12 ALR 590 (Biggs); In The Marriage of Spry and Roet (1977) FLC 90-301(Spry v Roet) and In the Marriage of Reid (1978) FLC 90-529 (Reid)**. These cases illustrate the application of the rule in Australia. The salient facts of these cases are set out below.

[37] In **Biggs**, on the dissolution of the marriage, the husband was ordered to pay maintenance for the children which he did for about two years until he stopped in 1968. He resumed payments in 1973 but paid no arrears. The judge refused to order payment for arrears beyond those which had accrued since September 1972. The wife appealed on the grounds that the court had no jurisdiction to decline to enforce arrears of child maintenance and to make an order relieving the husband from the obligation to pay arrears in whole or in part.

[38] It was held that the court always had a discretion as to whether and to what extent it would enforce payment of arrears; that there was a rule of practice that the court would generally enforce payment only of

recent arrears. Further, that the practice that payment of arrears which had accrued over a period longer than 12 months would not be enforced by the process of the court had arisen because maintenance was intended to be of a stipendiary nature to enable the wife to meet the ordinary regular outgoings necessary for her support, and it was not intended that it should accrue into a lump sum, which a wife, after a considerable period of time could then seek to recover. It was found that the wife had been content to allow matters to drift and had been subsidised by her father.

[39] In **Spry v Roet**, the applicant was seeking to recover from her former husband maintenance arrears which had accumulated for nearly six years. The judge noted that the court has a discretion, not only as to the period in respect of which accumulated arrears under an order for periodic maintenance will be enforced, but as to whether they should be enforced at all. In determining not to exercise his discretion in favour of the applicant Frederico J stated:

"While I appreciate the importance of the court discouraging deliberate contravention of its orders I am of the view that it would be in the circumstances of the present case quite abhorrent and contrary to the spirit of the Family Law Act to enforce the payment of the substantial arrears of periodic maintenance when the order has lapsed for nearly six years."

[40] Finally in **Reid** the wife appealed a decision of Walsh J, upholding a magistrate's decision relating to her application to enforce maintenance arrears. The magistrate had applied the 12 months rule having concluded, on hearing the evidence of both parties, that no reasonable efforts had been made to locate the husband during the intervening seven years. The appeal was dismissed, the court holding, inter alia, that if the magistrate was correct in coming to the conclusion that no reasonable efforts had been made to locate the husband, it was a proper situation to apply the rule.

[41] The framers of the **Act** and the **Rules** used as their model the 1975 Family Law Act and Rules of Australia. In interpreting and applying our legislation, both the courts and legal practitioners have generally been guided by the Australian authorities. However, the 12 months rule has not been adopted or applied in this jurisdiction. While no time limit has been set out in **section 61**, the practice has been that a person seeking to recover arrears of maintenance must take action within a reasonable time.

[42] In **Marshall**, this Court, while not expressly dealing with the issue of the application of the 12 months rule, made it clear that it was not simply a case of a court making an order for enforcement when there

had been some lapse of time between the non-payment of maintenance and the making of an application for enforcement. In allowing the appeal and remitting the case for inquiries to be carried out, and an appropriate order made, this Court stated:

"After the lapse of about 3 years without payment being made, it was not simply a matter of applying to collect arrears that were outstanding. All the circumstances, including the children's current needs and the husband's circumstances, had to be inquired into in order to determine what order the court should make with respect to the amounts that had not been paid."

[43] As can be seen from **Marshall**, while a party is not precluded from recovering arrears after a period of 12 months, when an application is made after a lapse of time, the court is duty bound to inquire into all the circumstances of the case in order to determine what order should be made with respect to the amount which has not been paid.

[44] In this case the order was in effect for 8 months from November 2007 to June 2008. Having not received any payment from the appellant, the respondent filed an application in September 2008 seeking to recover the money due. When that application came on for hearing on 24 June 2010, it was at the direction of the court that another application was filed. The respondent did not abandon her previous application. She however complied with the judge's order. It is clear

that the respondent has not been idle, but has been diligent in seeking to recover the money due over the years.

[45] Further, Mr. Rawlins did not consider it necessary to make submissions to the judge prior to the making of the order for committal, although provided with the opportunity to do so. The trial judge cannot be faulted for this omission.

[46] Having considered the history of the matter and all the circumstances of the case, it is our judgment that the judge acted appropriately when she exercised her discretion in favour of the respondent and made the order. We see no reason why that order should be disturbed.

[47] One final observation. It is a matter of great regret that Mr. Rawlins, counsel for the appellant, advised his client to disobey the order of the court. That action appeared to have been designed to frustrate the legal process and prolong the entire proceedings. The conduct of the appellant and his counsel appears to be contumacious and unconscionable.

[48] It is necessary to remind all persons who come before these courts that orders of the court must be obeyed. As was so correctly stated by Romer LJ in **Hadkinson v Hadkinson [1952] 2 All ER 567**:

"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a

court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or even void."

Mr. Rawlins is a lawyer of longstanding and as an officer of the Court it is his duty to ensure compliance with orders of court which have not been stayed.

### **Disposal**

[49] In view of the foregoing it is ordered as follows:

1. The appeal is dismissed.
2. Each party to this appeal shall bear his or her own costs.

Justice of Appeal

Justice of Appeal

Justice of Appeal