

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No: 16 of 2013

BETWEEN:

KENRICK HOYTE

Respondent/Appellant

AND

ELECTRIC SALES & SERVICES LIMITED

Applicant/Respondent

Before: The Hon. Sir Marston C.D. Gibson, K.A., The Hon. Sherman R. Moore, CHB and The Hon. Andrew D. Burgess, Justices of Appeal

2014: July 18

2016: October 19

Mr. Dale Marshall, QC and Mr. Khamaal Collymore for the Applicant/Respondent

Mr. Bryan Weekes for the Respondent/Appellant

DECISION

MOORE JA:

Background

[1] The background to this application is taken, partly, from the decision of

Goodridge JA.

[2] The respondent/appellant (Hoyte) was employed by the applicant/ respondent

(ESSCO) as a driver/messenger. On 4 August 2000 Hoyte was assisting other

employees who were carrying out work at a site in St. Peter when he fell from a ladder. He suffered a fracture of the radius and the ulna on his left forearm. On 3 June 2002 Hoyte filed a claim against ESSCO for damages for personal injuries suffered as a result of ESSCO's alleged negligence.

- [3] The matter proceeded at a leisurely pace until 10 May 2010 when Hoyte applied by way of summons for an interim payment pursuant to **Order 29, rule 11** of the **Rules of the Supreme Court, 1982 (RSC)**. The application was heard by **Cornelius J** on 5 July 2010. On 28 May 2011 the judge ordered (i) ESSCO to make an interim payment of \$20,000 to Hoyte within one month; (ii) a speedy trial; and (iii) costs to be costs in the cause.
- [4] On 9 August 2012, **Beckles J (Ag.)** dismissed Hoyte's claim for damages and on 28 November 2013 he filed a notice of appeal against the decision.
- [5] On 6 December 2013 ESSCO applied to this Court for security for the costs of the appeal and for the costs of the application. The application was heard by **Goodridge JA** and on 9 May 2014 she dismissed it and awarded costs of \$3,000 to Hoyte.
- [6] It is that order of **Goodridge JA** that ESSCO has asked this Court to vary and to provide security for ESSCO's costs of the appeal and also for the costs of the present application.

Application before this Court

[7] At paragraph 16 of her decision, **Goodridge JA** stated that the issue she had to determine was whether ESSCO's application for security for costs should be granted. At paragraph 17 she said, "**section 61 (1) (h) of Cap.117A and rule 62.17** give the court the discretion to order a party to provide security for the costs of an appeal". She then set out **rule 62.17** in its entirety.

[8] From paragraphs 19 to 30 **Goodridge JA** discussed the requirements of **rule 62.17** in light of relevant authorities and at paragraphs 31 and 32 she concluded:

“[31] No evidence was advanced by the appellant regarding his current financial position or his ability to raise finances from other sources which would enable him to provide security. Instead his attorney-at-law focused on the alleged injustice of granting the application based on the appellant's prospects of success in the appeal. Counsel relied on **Cornelius J's** grant of an interim payment and the judgment of the Court of Appeal which upheld that decision. Thus, counsel argued, there are two rulings which support the appellant's view of the strong prospects of success and, in those circumstances it would be unjust to award security for costs.

[32] In undertaking a balancing exercise, the Court must ensure that it does justice to both parties. On one hand, there is the interest of the appellant, who, having exercised his right to appeal, wishes to have that appeal heard. On the other hand, the respondent's position is that the appeal should not proceed unless the appellant provides security for costs, on the basis that he is impecunious. No argument has been advanced by the respondent that the appeal is frivolous. After careful consideration of the arguments advanced by both counsel, and having regard to all the circumstances, including the fact that the

respondent has not established that special circumstances exist, the Court is satisfied that it would not be just to order the appellant to provide security for the costs of the appeal. To do so would stifle the appeal”.

Applicant’s Grounds

[9] ESSCO’s application set out the following grounds:

- “1. That Mr. Hoyte is unlikely to be able to pay ESSCO’s cost (sic) in the event that the appeal is unsuccessful, given that Mr. Hoyte, during the course of the proceedings in the High Court, applied for and was awarded an interim payment in the sum of \$20,000.00 relying on the fact that he was impecunious in that his sole source of income was an invalidity benefit which he receives from the Government of Barbados;
2. That Mr. Hoyte has refused and/or neglected and/or been unable to repay the interim payment having lost his case in the High Court;
3. That the Learned Trial Judge erred in law in holding that ESSCO failed to establish the existence of special circumstances, given that impecuniosity has been held to be a special circumstance by courts in the Commonwealth Caribbean: **Huggins v Five Star Medical Services Ltd TT 2007 CA 21 per Weekes JA.**
4. That the Learned Trial Judge erred in not considering the fact that Mr. Hoyte failed to file an Affidavit in support of his opposition to ESSCO’s application for security for the costs of the appeal setting out therein the basis upon which he would be able to meet the costs of an unsuccessful appeal or that he would be unable to find any person to assist him with the costs of an unsuccessful appeal: **Locke v Bellingdon BB 2002 CA 3** at para **47 per Simmons CJ.**
5. That while the Courts are keen to ensure that justice is done and usually guard the interests of a

Defendant/Appellant's access to justice, see **Knox v Deane [2012] CCJ 4**. Mr. Hoyte in this appeal, is an unsuccessful plaintiff who brought ESSCO to Court and who has had the benefit of a full trial before a judge of the High Court".

[10] Grounds 1 and 2 are the identical grounds considered by **Goodridge JA**.

Applicant's Submissions

[11] In support of his grounds, counsel for ESSCO relied on the cases set out in paragraph 3 to 5 of these grounds. He submitted as follows:

"... that these cases are authorities also for the submission that the consideration which the Court of Appeal ought to take into account in deciding whether to make an order for security for costs of an appeal include:

- a. to act in the light of all the relevant circumstances, as it has a complete discretion;
- b. not to refuse an order for security merely because the appellant might thereby be deterred from pursuing (sic) its claim;
- c. not to allow a genuine appeal by an indigent appellant to be stifled, particularly when the basis of the claim might have been a material cause of the appellant's impecuniosity but not to let an appellant use its inability to pay costs as a means of putting unfair pressure on the other party;
- d. to have regard to the appellant's prospects of success without considering the merits in detail, unless there was clearly a high degree of likelihood of success or failure;
- e. not to order a simply nominal amount of security;

- f. to be satisfied that a valid appeal probably would be stifled and that the appellant could not provide security from anywhere else if unable to do so out of its own resources”.

[12] At paragraphs 24 and 25 of his written submissions, counsel for ESSCO also contended:

“[24] It is not for ESSCO to establish that the appeal is frivolous, but rather it is for Mr. Hoyte to demonstrate that his appeal is so strong that to make an order which would effectively result in a stay, would be to work an injustice.

[25] In this case Mr. Hoyte is appealing a decision given by a Judge who heard the evidence, saw the witnesses, set out the applicable principles of law and applied them properly to her findings of fact”.

Counsel then submitted at paragraph 28 that:

“... there is nothing in the judgment of **Beckles J (Ag.)** which would or should lead the Court of Appeal to the conclusion that her decision is in any way perverse or so obviously based on a mis-apprehension of the law that there is any danger of a miscarriage of justice being allowed to occur should the Court make an order for the security of the Respondent’s costs in this appeal”.

[13] At paragraph 29 he prayed:

“ESSCO asks the Court of Appeal to consider the justice of allowing an appeal to proceed where:

- a. it has already been ordered to pay the sum of \$20,000.00 to Mr. Hoyte, a sum which it may never recover;

- b. it has prevailed in the High Court and where the High Court made an order that both parties were to bear their own legal costs of the High Court proceedings;
- c. it is having to bear the expense of defending the Appeal now before the Court knowing that it may never be able to recover those costs if successful; and
- d. Mr. Hoyte's appeal is not so manifestly strong that to order the security requested would be unjust in all of the circumstances".

[14] Finally, he submitted "... it is right and just for the court to make the order for security requested by ESSCO in this appeal".

Respondent's Submissions

[15] Counsel for Hoyte submitted that the application should be dismissed because ESSCO had failed to prove that **Goodridge JA** erred. He contended that in order for ESSCO to succeed, it had to prove that **Goodridge JA** exercised her discretion on incorrect grounds: either that she failed to consider relevant factors or that she considered irrelevant factors. In support of his submission, counsel for Hoyte relied on **Toojays Ltd. v Westhaven Ltd. Civil Appeal No. 14 of 2008 (Unreported) (Toojays)**.

Discussion

[16] Counsel for ESSCO contended that it was not for ESSCO to establish that the appeal was frivolous but rather it was for Hoyte to demonstrate the strength

of his appeal. He submitted that there is nothing in the judgment of **Beckles J (Ag.)** that would lead to the conclusion that she erred.

[17] In our view he who avers must prove. Counsel for ESSCO never attempted to show that the appeal is frivolous. He did not demonstrate from the decision of **Beckles J (Ag.)** that Hoyte had no prospects of success. It is not required of the Court on its own motion to seek to determine Hoyte's prospects of success.

[18] Counsel also admitted that "in any event the Court may still exercise its discretion not to make the order for security even where the respondent establishes 'special circumstances', if, in looking at the substance and merit of the appeal, it would be unjust to prevent the appellant from prosecuting the appeal".

[19] Counsel for ESSCO highlighted all relevant issues (see paragraph 8 above). At paragraph 19 to 30 of her decision **Goodridge JA** considered those issues.

[20] In our opinion the outcome of the application before **Goodridge JA** depended upon the exercise of her discretion after taking into account all relevant matters. Having reviewed her decision in light of submissions from counsel for the parties, we hold that **Goodridge JA** exercised her discretion on correct principles. It is trite law, oft repeated in this Court, (see **Toojays**) that this Court will not interfere with the exercise of judicial discretion unless it:

“... be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should or should not have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale”. (Adopted by **Toojays** from **Phonographic Performance Ltd. v AEI Rediffusion Music Ltd. [1999] 1 WLR 1507,1523-D.**

Disposal

[21] In the circumstances, this application is denied. Hoyte shall have his costs of this application.

Chief Justice

Justice of Appeal

Justice of Appeal