

NOVA SCOTIA COURT OF APPEAL
Citation: *Downey v. Burroughs*, 2021 NSCA 87

Date: 20211229
Docket: CA 507417
Registry: Halifax

Between:

Lavell Andrew Downey

Appellant

v.

Sabrina Burroughs

Respondent

Judge: Bourgeois J.A.

Motion Heard: December 15, 2021, in Halifax, Nova Scotia in Chambers

Held: Registrar's motion to dismiss granted, with costs

Counsel: Glenn Jones, for the appellant
Christine Nault, for the respondent
Caroline McInnes, Registrar

Decision:

[1] On December 15, 2021, I heard a motion brought by the Registrar, Caroline McInnes, to dismiss an appeal commenced by Lavell Andrew Downey. In addition to the Registrar, I heard from Glenn Jones, who was appearing on behalf of Barry Mason, Q.C. (the appellant's solicitor of record), and Christine Nault on behalf of the respondent. Mr. Jones submitted the motion ought to be dismissed and the appellant given the opportunity to resuscitate the appeal. Ms. Nault was in support of the Registrar's motion. For the reasons to follow, I grant the motion and dismiss the appeal.

Background

[2] I will begin with a review of the procedural and factual background giving rise to this motion.

[3] On July 5, 2021, Mr. Mason, as solicitor for the appellant, filed a Notice of Appeal with the Court. The pleading frames the matter under appeal as follows:

The appellant appeals the judgment dated May 27, 2021 of the Supreme Court of Nova Scotia, Hfx No.: 446589, made by Chief Justice D. Smith. The decision granted the Defendant's request that the Plaintiff be held liable for a motor vehicle accident on June 30, 2015. The appellant appeals the whole of the decision.

[4] The Notice of Appeal did not attach an order or reasons arising from the decision under appeal.

[5] On July 16, 2021, the Registrar sent her customary letter to Mr. Mason advising of the filing requirement for a Motion for Date and Directions and accompanying Certificate of Readiness. The Registrar advised the deadline for filing was October 28, 2021, and if not met, she was obligated to bring a motion to dismiss the appeal.

[6] The appellant failed to file a Motion for Date and Directions as required. On November 9, 2021, the Registrar made a motion to dismiss the appeal pursuant to *Nova Scotia Civil Procedure Rule* 90.43(3) and (4). The motion was set to be heard on December 1, 2021.

[7] On November 26, 2021, the Registrar was contacted by Laura Neilan, on behalf of Mr. Mason, requesting an adjournment of the motion. The reason for the request was that Mr. Mason was out of the country, but the Registrar was advised he could be available on December 15, 2021. As a result of the request for adjournment, the motion was rescheduled as requested by the appellant's counsel.

[8] On the afternoon of December 14, 2021, the appellant filed an affidavit of Mr. Mason and a brief in support of his request for the Registrar's motion to be dismissed. The appellant did not request the Registrar or Court to extend the deadline for filing a response to the motion, which, in accordance with the *Rules*, had expired. The Registrar provisionally accepted the filing.

[9] Later on December 14, 2021, Ms. Nault, counsel for the respondent, filed correspondence with the Court in support of the Registrar's motion, asserting the appellant "has unduly, and without reasonable explanation, delayed the perfection of this appeal".

[10] The motion was heard on December 15, 2021. The first matter for consideration was whether I ought to accept the out-of-time filings received on December 14. Notwithstanding Mr. Jones being unable to explain why the appellant's response to the motion was not filed in compliance with the *Rules*, I determined I would consider the materials. I reached the same conclusion with respect to the letter filed on behalf of the respondent.

[11] The only evidence placed before me on the motion was the affidavit of Mr. Mason. The appellant did not file an affidavit. Mr. Jones had no direct knowledge regarding either the trial before Chief Justice Smith, her decision or the management of the appeal. He was unable to answer a number of questions I had arising from the materials before me other than repeating the explanation for not filing the Motion for Date and Directions contained in Mr. Mason's affidavit:

8. Mr. Downey and I engaged in some discussion about proceeding with this appeal. As a result of these discussions, I was under the erroneous impression that he did not wish to proceed. I realize now that Mr. Downey did wish to proceed, potentially with alternative counsel. From speaking to Mr. Downey this week, it is clear to me that he wishes to pursue this appeal.

[12] In terms of the advancement of the appeal, I note:

- the respondent has not been served with the Notice of Appeal in accordance with Rule 90.14;

- the respondent only became aware of the existence of the appeal by virtue of being copied on correspondence from court administration;
- the appellant has not served the trial judge with the Notice of Appeal in accordance with Rule 90.16(5);
- the appellant has been in possession of the issued order of Chief Justice Smith since July 8, 2021;
- the appellant has not filed the order of Chief Justice Smith with this Court;
- the appellant has been in possession of a recording of the trial evidence since July 21, 2021, but has not taken steps to have it transcribed;
- the appellant has been in possession of a recording of the trial judge's reasons since July 28, 2021, and has had it transcribed; and
- the appellant has not filed a transcript of the trial judge's oral decision with the Court, nor provided a copy to the respondent.

The Law

[13] The Registrar's motion was brought pursuant to *Nova Scotia Civil Procedure Rule* 90.43(3) and (4). Rule 90.43 provides:

- (1) In this Rule 90.43 a "perfected appeal" means one in which the appellant has complied with the Rules as to each of the following:
 - (a) the form and service of the notice of appeal;
 - (b) applying for a date and directions in conformity with Rule 90.25;
 - (c) filing the certificate of readiness in conformity with Rule 90.26;
 - (d) the ordering of copies of the transcript of evidence, in compliance with rule 90.29;
 - (e) filing and delivery of the appeal book and of the appellant's factum.
- (2) A respondent in an appeal not perfected by an appellant may make a motion to a judge to set down the appeal for hearing or, if five days notice is given to the respondent, to dismiss the appeal.
- (3) In an appeal not perfected before 80 days from the date of the filing of the notice of appeal, or before any other time ordered by a judge, the registrar must make a motion to a judge for an order to dismiss the appeal on five days notice to the parties.

(4) A judge, on motion of a party or the registrar, may direct perfection of an appeal, set the appeal down for hearing, or, on five days notice to the parties, dismiss the appeal.

[14] Rule 90.43(3) places an obligation on the Registrar to monitor appeals filed with the Court and act when they have not been perfected. When a motion to dismiss is brought, *Rule 90.43(4)* provides a chambers judge with the discretion to provide further directions to move a stalled appeal toward conclusion, or grant dismissal.

[15] In *Islam v. Sevgur*, 2011 NSCA 114, Justice Saunders summarized the principles governing a chambers judge's discretion to dismiss for failure to perfect the appeal. He wrote:

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of her intended motion has been given, **the defaulting appellant must satisfy me, on a balance of probabilities, that the Registrar's motions ought to be denied.** To make the case **I would expect the appellant to produce evidence** that it would not be in the interests of justice to dismiss the appeal for non-compliance. While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
- (ii) whether the grounds of appeal raise legitimate, arguable issues.
- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.
- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the *Rules*.
- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.
- (vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.
- (vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.
- (viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

[37] It seems to me that when considering a Registrar's motion to dismiss, a judge will wish to weigh and balance this assortment of factors, together with any other circumstances the judge may consider relevant in the exercise of his or her discretion.

(Emphasis added)

[16] As noted by Justice Saunders, the above factors do not constitute a finite list. Further, the unique circumstances of each appeal will make certain factors more or less relevant to the exercise of a chambers judge's discretion.

Analysis

[17] In his written submissions, Mr. Mason asserts the *Islam* factors weigh in favour of dismissing the Registrar's motion. Specifically, he says it was a misunderstanding between the appellant and counsel that resulted in missing the deadline for filing the Motion for Date and Directions. As such, there is a good reason, sufficient to excuse the failure. Further, he submits there are arguable grounds raised on appeal, the appeal was taken in good faith, the appellant will now proceed expeditiously and will be prejudiced if the appeal is dismissed. He says "there is no evidence of any prejudice to the respondent."

[18] The respondent asserts the appellant has failed to adduce evidence to establish, on a balance of probabilities, there is a reasonable excuse for his failures. Further, she submits the appellant's late filing of the motion materials, after having in excess of a month's notice of the matter, unfairly deprived her of being able to advance meaningful arguments in relation to the arguable grounds and prejudice factors.

[19] I turn now to the factors informing my decision.

Reasons for the default

[20] Other than a single paragraph in Mr. Mason's affidavit, there is no other evidence explaining the appellant's failure to file a Motion for Date and Directions. I agree with the respondent that Mr. Mason's assertion of misunderstanding (outlined above) raises a number of questions. For instance, when did the misunderstanding arise? Is Mr. Downey going to obtain new counsel? If Mr. Mason believed the appeal was not proceeding, or proceeding with other counsel, why did he not file a Notice of Discontinuance or advise the Court of his change in

status? Perhaps, if Mr. Mason had been in attendance, he could have spoken to these matters.

[21] The other significant observation is Mr. Downey himself did not file an affidavit. I am left with concern regarding his intentions, in light of the past miscommunications between himself and Mr. Mason. I am not satisfied the appellant has provided evidence to satisfy me there is a reasonable excuse for the default.

Arguable grounds of appeal

[22] The Notice of Appeal cites the following grounds of appeal:

- (1) The learned trial judge erred in failing to recognize the concepts of unconscious and subconscious bias in assessing the evidence of two Halifax Regional Municipality police officers who gave evidence during the trial;
- (2) The learned trial judge erred in failing to take into account the Defendant's apology to the Plaintiff following the motor vehicle accident when assessing the Defendant's credibility and liability for the motor vehicle accident;
- (3) The learned trial judge erred in finding the Plaintiff liable for the motor vehicle accident;
- (4) Such other grounds as this Honourable Court finds just.

[23] I have been provided with limited information about the matter under appeal. I understand the trial involved a determination of liability in relation to a motor vehicle accident. I am aware from the pleadings that the trial judge determined the appellant was liable for the accident notwithstanding that the respondent had uttered an apology. From the grounds of appeal, and confirmed by Ms. Nault, apparently two police officers gave evidence at trial, including about the location of the vehicles.

[24] I am aware from Mr. Mason's affidavit that the trial judge had requested and received post-trial submissions on the application of the *Apology Act*, S.N.S. 2008, c. 34. The *Apology Act* states:

- 3(1) An apology made by or on behalf of a person in connection with any matter
 - (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter;

- (b) does not constitute a confirmation of a cause of action or acknowledgment of a claim in relation to that matter for the purpose of the *Limitation of Actions Act*;
 - (c) notwithstanding any wording to the contrary in any contract of insurance or any other enactment or law, does not void, impair or otherwise affect any insurance coverage that is or, but for the apology, would be available to the person in connection with that matter; and
 - (d) **may not be taken into account in any determination of fault or liability** in connection with that matter.
- (2) Notwithstanding any other enactment or law, evidence of an apology made by or on behalf of a person in connection with any matter **is not admissible in any court as evidence of the fault or liability** of the person in connection with that matter.

(Emphasis added)

[25] As noted earlier, despite it being available to the appellant, I have not been provided with a transcript of Chief Justice Smith’s reasons. This leaves me to assess the existence of arguable grounds without the benefit of seeing how she reached her decision. My difficulty is compounded by what appears to be very clear legislative direction that any apology uttered by the respondent was not admissible in the determination of liability. In these circumstances, the appellant has not satisfied me there is an arguable ground of appeal in relation to the use of the respondent’s apology.

[26] Further, I am in the same position regarding the trial judge’s alleged failure to take into consideration the concepts of unconscious or subconscious bias in her assessment of the police testimony. Ms. Nault, the respondent’s trial counsel, advised that neither police witness was questioned about bias, nor was any evidence called relating to that subject. She further advised that according to her recollection, the issue of potential bias was raised “in a single line” of the appellant’s closing oral submissions. Unfortunately, despite the motion being adjourned to permit his attendance, Mr. Mason was not present to provide any further clarification.

[27] Finally, I am of the view that the third and fourth grounds of appeal do not, without more, raise an arguable ground of appeal.

Appeal taken in good faith

[28] As mentioned earlier, I have no evidence from the appellant directly with respect to whether he is advancing the appeal in good faith. In his written submissions, the appellant states “there is no evidence that the appeal is being brought in bad faith”. With respect, the numerous failures of the appellant to abide by the requirements contained in the *Rules* could be seen as an indicator of bad faith. As I discuss later, the same can be said about the timing of the appellant’s response to this motion. The onus is on the appellant, as the defaulting party, to establish his good faith intention. In these circumstances, he has not done so.

Willingness and ability to comply with further requirements

[29] In his written submissions, Mr. Mason asserts he will file a Motion for Date and Directions immediately if the appeal is permitted to proceed. That, however, does not answer the question of whether the appellant will provide directions to do so, or if he will ask another counsel to proceed. Although I note Mr. Mason’s assertion of his willingness to proceed, I am not satisfied I can be assured of same regarding the appellant. There has already been at least one instance of serious miscommunication between Mr. Mason and the appellant. Further, there appears to be the possibility of the appellant retaining alternate counsel. If so, perfecting the appeal may be further delayed. In light of that, the absence of direct evidence on this motion from the appellant is concerning.

Prejudice to the appellant

[30] It is a certainty that there will be prejudice to the appellant if his appeal is dismissed.

Prejudice to the respondent

[31] Regarding this factor, the appellant asserts “there is no evidence of any prejudice to the respondent”. I find this statement troublesome. It would be the respondent who would lead any evidence of prejudice. The appellant is correct in saying no such evidence was lead. However, context is important.

[32] Despite having known about this motion since November 9, the appellant did not file a response until the afternoon of December 14. The respondent received the appellant’s motion materials at 3:00 p.m., with the motion scheduled to be heard the following day at 10:00 a.m. It is not reasonable to expect the respondent to be in a position to review, digest and respond in any meaningful way

to materials filed by the appellant. Given how the appellant had failed to properly advance the appeal to date, it was certainly open to the respondent to expect the appellant would not contest the dismissal. The respondent cannot be criticized for failing to advance evidence of prejudice—she was deprived of the opportunity to do so.

[33] As noted earlier, Mr. Jones was unable to explain why the appellant's motion materials were filed late, on the eve of the hearing. The circumstances raise a concern that the appellant's late filing was strategic and intended to preclude the respondent from producing evidence and thorough submissions not only regarding the existence of prejudice, but also on whether the grounds of appeal were arguable.

Disposition

[34] The information before me readily establishes the rules regarding the perfecting of the appeal have been breached and the appellant has had ample notice of the motion. The appellant has failed to establish on a balance of probabilities the Registrar's motion should be dismissed. The motion is granted, and the appeal is dismissed. The appellant shall forthwith pay costs to the respondent in the amount of \$250.00.

Bourgeois J.A.