NOVA SCOTIA COURT OF APPEAL
Citation: ***Power v. Power***, 2013 NSCA 137

Date: 20131128
Docket: CA 416358
Registry: Halifax

Between:

Joseph Patrick Power

Appellant

v.

Angela Rose Power

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	November 21, 2013, in Halifax, Nova Scotia, in Chambers
Held:	Appellant shall post security for costs in the amount of $5,000 on or before January 15, 2014.
Counsel:	Kim Johnson, for the appellant Judith A. Schoen and Ian McIsaac, for the respondent

Decision:

INTRODUCTION

[1] Angela Power asked that I order Joseph Power to post $8,775.20 as security for costs by January 15, 2014, failing which, his appeal would be dismissed. I heard the motion on November 21, 2013. At the end of the hearing, I granted the motion, but on different terms. I ordered that Mr. Power must pay $5,000 by January 15, 2014, failing which the respondent would be at liberty to apply to have the appeal dismissed. My reasons are as follows.

FACTUAL BACKGROUND

[2] The facts, as gleaned from the decision of The Honourable Justice Mona M. Lynch of the Supreme Court, are, at least from Mr. Power's point of view, not pretty. Her decision is reported (2013 NSSC 99). There is no reason to be reluctant to rely on the factual findings by Justice Lynch. Neither Mr. Power's Notice of Appeal, nor submissions before me allege any misapprehension of evidence or any factual error.

[3] Angela and Joseph Power were married in 1991 and divorced in 2005. There are two children of the marriage. The Corollary Relief Judgment identified the income of Mr. Power as $51,600 and required him to pay child support of $700 a month. He was also ordered to provide a copy of his income tax return and Notice of Assessment to Ms. Power by June 1st of each year.

[4] In 2010, Ms. Power filed an application to vary child support. Mr. Power replied, filing financial information that showed his annual income to be about

$40,000 per year. He threatened to apply to have his child support lowered. Ms. Power abandoned her application to vary.

[5] In December 2011 Ms. Power renewed her application to vary child support and requested it be retroactive to 2006. There were a number of pre-hearing conferences.

[6] Ms. Power requested disclosure of documents from Mr. Power. The Court expected Mr. Power to respond. Filing directions were given with deadlines. Scheduled dates for the hearing of the application to vary were released because those deadlines were not met.

[7] The Court again directed disclosure of financial information from Mr. Power, in the form of bank accounts, information from Revenue Canada, corporate accounts and statements of financial information from Mr. Power's current spouse. Deadlines were again given. Mr. Power did not fully comply. But from the information that was filed, it was apparent that Mr. Power had been dishonest with Ms. Power, the Court and Revenue Canada about his income. Justice Lynch had the following to say about Mr. Power's credibility:

> [10] Mr. Power has admitted lying in the sworn documents he filed with the court. In April 2012, Mr. Power filed a sworn statement of income showing an income of $52,000.00. Mr. Power now admits to earning $162,530.00 in 2011. This amount is the amount paid to his company net of his expenses. He provided documentation indicating that as of August 2011 he was working exclusively as an employee. This was not true. He was receiving income from other sources and was not an employee. In November 2012, it was again asserted on behalf of Mr. Power that he is now only an employee.
>
> [11] In 2010 when Mr. Power filed financial information he indicated that his company was no longer active. He did not disclose that he started a new company.

> [12] Mr. Power did not provide the full disclosure requested by counsel for Ms. Power. Mr. Power was not truthful when he testified before the court on February 25, 2013. He was asked on cross-examination where his current spouse banked and he indicated that he did not know. Further questions revealed that his current spouse does not work outside the home and that he does transfer money into her account to pay the household bills. He then admitted he did know where his current wife banked.
>
> [13] When financial information was ordered to be provided by his current spouse the information provided to the court was that the couple did not have a joint account and that Mr. Power did not put any monies into his spouse's account, although all household bills were paid from that account. The bank account records of his current spouse were ordered to be disclosed. Mr. Power then indicated that he and his current spouse separated two days after that direction was given. During testimony at the hearing, Mr. Power indicated that they are separated but living under the same roof.
>
> [14] During his testimony, Mr. Power contradicted himself on numerous occasions; he hesitated frequently and had to be directed to answer the questions asked.
>
> [15] Mr. Power has been dishonest from the start of the proceeding and while he has admitted to some dishonesty, he is still not credible. The court finds that the documents filed by Mr. Power and his testimony are not credible.

[8] At the hearing before Justice Lynch, Mr. Power admitted he was guilty of "blameworthy conduct". The extent of that conduct was described by the motions judge as follows:

> [30] Although Mr. Power has admitted blameworthy conduct, it is necessary to review some of his actions. He swore to knowingly inaccurate financial information which he filed with the court and provided to Ms. Power. He diverted income; he failed to disclose that he started a new company; he failed to provide disclosure ordered by the court; he gave false and misleading testimony in the court and he intimidated Ms. Power into withdrawing a prior application to vary.
>
> [31] But by far the most blameworthy of his abundance of blameworthy conduct was that he watched while Ms. Power struggled to provide for the children and he did not increase the amount of child support payable although his income increased substantially. Even after he admitted to providing false financial information he tried to justify his actions by suggesting that Ms. Power would have used the child support inappropriately. Mr. Power's conduct goes beyond blameworthy.

[9] Justice Lynch ordered retroactive child support to 2007 in the amount of $171,786, and ongoing child support of $3,242 per month, effective April 1, 2013. The retroactive child support was to be paid within 90 days. In a separate unreported decision, costs of $21,938 were awarded against Mr. Power, to be paid on or before June 10, 2013.

[10] Mr. Power has paid nothing towards the outstanding order of retroactive child support, nor the costs award. Neither has he paid the monthly child support ordered by Justice Lynch.

[11] Instead, Mr. Power, effective April 2013 made payments to the Maintenance Enforcement Program of $1,830 per month. These continued until September 2013, then stopped.

[12] In justification, Mr. Power explains in his affidavit of November 18th, 2013, that the child support payment of $1,830 is the table amount for an income of $140,000. He recites that his evidence at trial was that as of January 2013 he was no longer self-employed – but was employed at an annual salary of $140,000. He has been unable to make any payment towards the orders for costs and retroactive support because of his focus on making child support payments that he could reasonably afford.

[13] Even the payments of $1,830 per month have stopped. Mr. Power's affidavit elaborates. Maintenance Enforcement was able to have Mr. Power's passport revoked. He says his employment is dependent on his ability to travel internationally. No passport, no job. He says he's no longer employed, does not quality for EI, and is not entitled to severance. As a consequence, he announces

his intention to immediately file an application to vary child support on the basis of a change in circumstances.

THE LEGAL TEST

[14] *Civil Procedure Rule* 90.42 gives a judge of this Court the power to order security for costs. It provides:

> **90.42** **(1)** A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.
>
> **(2)** A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[15] An order for security for costs is not routinely granted. To get to first base, the moving party must demonstrate that there are "special circumstances". This inquiry focuses on the degree of risk that if the appellant is unsuccessful, the respondent will be unable to collect his or her costs on the appeal (see: *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40; *Fotherby v. Cowan*, 2012 NSCA 77 and more recently *Blois v. Blois*, 2013 NSCA 39).

[16] Merely a risk that an appellant may be unable to afford a costs order is insufficient to establish "special circumstances". Usually a judge must be satisfied that the appellant in the past has acted in an insolvent manner towards the respondent. An order for security for costs should not be granted if it would prevent a good faith appellant, who was truly without access to resources from being able to prosecute an arguable appeal (see: *Disabled Consumer Society of Colchester v. Burris*, 2009 NSCA 21).

ANALYSIS

[17] Evidence about Mr. Power's financial circumstances, including access to resources, is thin. This much is clear, Mr. Power admitted playing games about his legal and moral obligation to support his children. He lied to Ms. Power, CRA and to the Court about his income. The motions judge found that Mr. Power was evasive and not credible in his oral testimony and documentary filings. There is no challenge to these findings. As a consequence, significant orders were made against him for retroactive child support and costs.

[18] Mr. Power has paid nothing. In the meantime, he pursues an appeal. The grounds of appeal he advances are:

> (1) The trial judge erred in the determination of the Appellant's income for child support purposes;
>
> (2) The trial judge erred in fixing the effective date of the variation of child support;
>
> (3) The trial judge erred in determining that the retroactive payment must be made within 90 days;
>
> (4) The trial judge erred in determining the quantum of costs;
>
> (5) The trial judge erred in ordering the production of a Statement of Property as part of a costs decision; and
>
> (6) The trial judge erred in awarding interest.

[19] Neither party made submissions with respect to strength, or lack thereof, of the grounds advanced.

[20] Ms. Power's affidavit reveals that she has incurred substantial legal fees in obtaining the orders now under appeal, and again faces the same prospect responding in this Court.

[21] Mr. Power's affidavit of November 18th, 2013 is a scant 14 paragraphs in length. He says he has no assets other than a personal vehicle (worth approximately as much of the debt he owes on it) and a RRSP of just over $3,000. He also says he's unemployed and has no income. He sums up his circumstances in the following paragraph:

> [13] I have no ability to pay security for costs. My parents have agreed to help me with the disbursements for my appeal so that I can proceed with it, but they cannot assist me anymore, and they certainly cannot afford to pay the costs and lump sum awarded at the trial level.

[22] Mr. Power was cross-examined on his affidavit. I found his evidence to be generally not credible. He was evasive. Some of his evidence was in direct contradiction to what Justice Lynch found to be the case.

[23] If Mr. Power is insolvent then the respondent has ample grounds to fear she will never be able to recover a prospective costs award. Even if he is not insolvent, I am also satisfied that there is grave cause to fear the respondent will not be able to recover a costs award should she be successful in resisting this appeal.

[24] Based on the evidence and record before me, I am not satisfied that Mr. Power has no resort to resources to post security for costs.

[25] I am therefore satisfied that special circumstances exist and that an order for security for costs is appropriate. This leaves the issues of quantum, and the consequences should the amount not be paid as directed.

[26] The decision of Cromwell, J.A., as he then was, in *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 52 guides the setting of the quantum. The amount to be posted must relate to the likely costs of the appeal; and a conservative

approach may well be warranted in arriving at that number, or by setting the amount somewhat less than the likely costs on appeals (¶50-52). The amount must be fair to both parties and not result in an unwarranted impediment to an appeal.

[27] It is frequently said that party and party costs on appeal are 40 percent of the costs awarded in the lower court. An award of costs is always a discretionary one, to be decided by the panel who hears the appeal.

[28] It is this 40 percent rule that animates the respondent to seek security for costs in the amount of $8,775.20 (40 percent of costs award of $21,938). The appellant argues that if there should be an order requiring security for costs it should not exceed $1,500. The basis for this submission is the argument that typically costs awarded on appeals in matrimonial matters range from $1,000 to $3,000. The appellant cites *Barkhouse v. Wile*, 2011 NSCA 50 and *Kedmi v. Korem*, 2012 NSCA 124; *Richards v. Richards*, 2012 NSCA 7; *St.-Jules v. St.-Jules*, 2012 NSCA 97; *Dunnington v. Emmett*, 2012 NSCA 55; *Campbell v. Campbell*, 2012 NSCA 86; and *Blois v. Blois*, 2013 NSCA 39 ($3,000). With respect, none of these cases assist in illuminating what may or may not be an appropriate award of costs should the appellant be unsuccessful on this appeal.

[29] I would note that in *Blois v. Blois*, my colleague, MacDonald, C.J.N.S. ordered 40 percent of the trial costs ($7,500) in arriving at the security of costs award of $3,000.

[30] Applying a "fairly conservative" approach, I ordered that $5,000 would be an appropriate amount, payable into Court on or before January 15, 2014.

[31] The respondent requested that if security for costs was not paid as ordered, the appeal should stand dismissed. While there may well be circumstances that such an order is appropriate, I see no reason to do so in this case. If the funds are not paid into Court as directed, the respondent has her remedy set out in *Rule* 90.40(2).

Beveridge, J.A.