IN THE COURT OF APPEAL OF BELIZE AD 2018

CIVIL APPEALS NOS 29, 30, 31, 32 AND 33 OF 2016

SABINA CARBALLO Appellant

v

(1) **ROBERT GABOUREL**
(2) **ERNEST** or **ERNESTO GABOUREL** Respondents

FRANCISCO DEPAZ Appellant

v

(1) **ROBERT GABOUREL**
(2**) ERNEST** or **ERNESTO GABOUREL** Respondents

DORA PRADO Appellant

v

(1) **ROBERT GABOUREL**
(2) **ERNEST** or **ERNESTO GABOUREL** Respondents

MIGUEL ANGEL MESTIZO Appellant

v

(1) **ROBERT GABOUREL**
(2) **ERNEST** or **ERNESTO GABOUREL** Respondents

JOSE ROMERO Appellant

v

(1) **ROBERT GABOUREL**
(2) **ERNEST** or **ERNESTO GABOUREL** Respondents

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Hafiz Bertram	Justice of Appeal

K L Arthurs for the respondents, raising a preliminary objection.
H E Elrington SC for the appellants, opposing the preliminary objection.

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17 October 2018 (On written submissions)

SIR MANUEL SOSA P

Introduction

[1] In the course of case management on 30 January 2018, it was ruled by the Court that five separate applications filed by the respondents be treated as preliminary objections and directions were given for the filing and delivery by the parties of submissions in writing. Following such filing and delivery, it was directed, with the consent of the parties during further case management on 16 April 2018, that the deemed objections should be ruled upon on the basis of the submissions in writing so filed and delivered.

[2] The respondents' applications were for the striking out of these five appeals, with costs, on the ground of failure by each of the five appellants to serve a copy of the notice of appeal in his or her appeal on the respondents. It is not in dispute that the relevant notices of appeal were filed on 30 October 2017. Affidavits filed in support of these applications clearly assert failure on the part of the appellants to effect the necessary service. They state that service has not been effected on the respondents in person nor on Mr Arthurs as their attorney-at law in the appeals.

The essence of the material submissions

[3] It is submitted on behalf of the respondents that, copies of the notices of appeal not having been served on them as required by Order II, rule 4(2) of the Court of Appeal

Rules ('the Rules'), the appeals are not properly before the Court and cannot therefore be heard. The submission relies on the language of the rule and the decisions of this Court in both *Dawson v Central Bank of Belize*, Civil Appeal No 18 of 2015 (majority judgment delivered on 20 July 2017), and *Valence v Augustine and anor*, Civil Appeal No 5 of 2016 (unanimous judgment delivered on 6 September 2017).

[4] Before summarising the submissions of counsel for the appellants to this Court, it is important to note that, as underscored by the respondents, the appellants have chosen not even to go through the motions of filing application for an extension of time. Given that they do not acknowledge that the Court lacks jurisdiction to extend time in a case such as this one, this is, at first glance, surprising. After all, the position initially taken by them in their written submissions filed on 17 April 2018 is that -

> '… [a]ppellants attempted to serve a true copy of the notice on Attorney Kevin Arthurs …' (emphasis added)

(see the second paragraph – unnumbered – of such submissions). If there was no more than an attempt to serve, and the appellants believe that this Court has jurisdiction to extend the time for service, it is difficult to understand why there is no application for an extension. As one continues reading the submissions in question, however, it becomes clear that the position of the appellants is in fact soon inexplicably and radically transformed. After having said (in the submissions themselves rather than by affidavit) that Mr Arthurs had refused to accept service of the notice, counsel for the appellants unabashedly states (concerning the position taken by them from the outset of case management) –

> 'The Appellants (*sic*) position was that he could only argue that service on the Attorney Kevin Arthurs was good service in law …' (emphasis added)

Nothing more is heard from counsel for the appellants thereafter with respect to the attempted service upon Mr Arthurs and his flat refusal to accept such service.

[5] On the basis of this newly adopted version of the facts, counsel for the appellants turned to three decided matters in search of support for his argument that service upon Mr Arthurs constituted good service on the respondents. The first matter was *Watson v Fernandes*, CCJ Appeal No CV 2 of 2006 (judgment delivered on 25 January 2007), an appeal from the Court of Appeal of Guyana. The second and third matters, *Fort Street Tourism Village Ltd v The Attorney General and ors* and *BEDECO Ltd and ors v The Attorney General and ors*, Civil Appeal No 4 of 2008 and Civil Appeal No 6 of 2008, respectively (ruling delivered on 23 April 2008) were applications dealt with by Muria J, a judge of the court below, sitting as a single judge of this Court, and were determined together by a single ruling. The Court shall return to consider the relevance or otherwise of these decided matters for present purposes a little later in this judgment.

Discussion

[6] The salient facts for purposes of this discussion must be that, on the affidavit evidence before the Court, there cannot have been more than an attempt to serve a copy of the notice of appeal. The only version of the facts that can, so to speak, count is that rendered in the affidavit evidence adduced on behalf of the respondents. According to that version, as already indicated above, the copy notice has not been served on the respondents. All assertions, to the contrary as well as otherwise, made by Mr Elrington in the course of his written submissions, interesting though they may be, simply do not count, not being admissible evidence. Moreover, even if it had been the case that those assertions were made by affidavit (by a deponent other than Mr Elrington himself) their weight would stand to be affected by the fact that they are contradictory as regards the central question whether there was ever more than an unsuccessful attempt to deliver a copy of the notice to Mr Arthurs, on what could have been nothing more than an assumption or hope that he was still representing the respondents.

[7] With those salient facts in mind, one returns to the case law already cited above. Taking, *Watson*, the earlier of the two decisions, first, that was a case concerned with questions not arising in the instant matter. As the Court made clear, at para [2] of its judgment in that case, those questions were-

> ‘First, is an attorney-at-law who is not “on the record” entitled to sign a notice of appeal on behalf of his client? [And secondly]: what consequences should follow if such an attorney does sign the notice of appeal?’

The Court was considering those questions in the light of rules of Court which operate in Guyana by virtue of what the Court referred to as the High Court Rules and the Court of Appeal Rules. The latter rules, which were held by the Court to be applicable in the matter before them, are not *in pari materia* with the Rules (ie the Court of Appeal Rules in force in Belize); and counsel for the appellants in the instant matter has not submitted that they are. Moreover, and crucially in my respectful view, *Watson* concerned a factual context in which the attorney in question, a Mr Gibson, had acted (ie signed the pertinent notice of appeal) with the authority of his client. As the Court there stated, at para [31]:

> ‘In the case before us … there was no suggestion that at any material time, Mr Gibson lacked the actual authority of his client.’

It is obvious to me that *Watson* is irrelevant to the present discussion, concerned as this discussion is with a case in which the very submissions of counsel for the appellants proceed on a wholly ambiguous basis, one which, at least initially, includes the assertion that Mr Arthurs roundly refused to accept delivery of the relevant copy notice on the ground of lack of authority. (Without seeking to elevate them to the level of evidence, one sets out here the actual words of the submissions, in the second unnumbered paragraph: ‘[Mr Arthurs] had informed the server that he had not been retained by Respondents for purposes of the Appeal and could not accept the service on behalf of the Respondents.’)

[8] The second and third cases, *Fort Street Tourism* and *BEDECO*, are, to my mind of no present relevance for the same reason. In the ruling of Muria J, sitting as already noted above, as the Single Judge, the passage from the judgment in *Watson* just quoted above, is matched by the following one, appearing at p 13:

> ‘There is every indication that at all material times Mr Fred Lumor SC and Mrs Samira Musa-Pott were indeed the legal representatives of the (*sic*) Maritime and Eurocaribe who are parties directly affected by the Appeal.’

That is not the position in the present case where the undisputed fact, on the affidavit evidence, is that there has been no service of the copy notice of appeal on the respondents. No factual issue at all is raised as to whether delivery to Mr Arthurs was ever attempted, let alone effected, given that there is no evidence to that effect before the Court. Accordingly, the further issue, primarily legal, as to whether such delivery would have constituted service on the respondents does not arise either.

[9] Those being the circumstances, the lingering fact of overriding importance, in the final analysis, is that no copy of the notice of appeal was served on the respondents within the time prescribed by the applicable rule.

[10] This renders entirely apposite paragraph [6] of my judgment in *Slusser v Bergquist and ors*, Civil Appeal No 3 of 2015 (judgment delivered earlier today), in which the decisions in both *Dawson* and *Valence* have been followed:

> 'There is no need to quote *in extenso* from the reasoning in these two decisions of the Court which have served fully to clarify the legal position in respect of the service of copies of notices of appeal. Suffice to say that, in *Dawson*, the majority view, as set out in para [13] of my judgment, was as follows:
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> > "One thus comes to the inescapable conclusion that, given that there is at this time no known legal basis for Ms Dawson's application, it must inevitably be refused …"
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> and that, in *Valence*, the majority decision in *Dawson* was followed by the Court (Sosa P and Hafiz Bertram and Ducille JJA), whose members were in agreement that, in the words employed by me at para [2] -
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> > "[t]he applicable law has … been correctly set out … in … [*Dawson*], in which case my reasons for judgment enjoyed the full concurrence of my learned Sister, Hafiz Bertram JA, and thus constituted the reasons for judgment of the majority. I see no reason to recapitulate in the present judgment. Suffice to say that the conclusion stated by me as to the existing law in my judgment in *Dawson* is that there is no known legal basis for an application for extension of the time within which to serve a notice of appeal

in this jurisdiction. Accordingly, the governing legal provisions as regards service of a notice of appeal are those to be found in Order II, rule 4 of the Court of Appeal Rules ..."'

[11] The position is, therefore, that, not only are the appellants out of time but, in addition, they are unable to apply for an extension of the time within which to serve a copy of the notice of appeal on the respondents.

[12] In *Rochester v Chin and anor* (1961) 4 WIR 40, the Court of Appeal of Jamaica had before it a preliminary objection taken by respondents who had been purportedly served with a copy notice of appeal out of time. To quote from the headnote:

> 'Section 256 of the Judicature (Resident Magistrates) Law, Cap 179 (J), requires an appellant from the decision of a resident magistrate in a civil action to serve a written notice of appeal upon the opposite party or upon his solicitor within fourteen days after the date of the judgment appealed from. Section 266 provides that the provisions of the law conferring a right of appeal in civil matters shall be construed liberally in favour of such right, and if any of the formalities have been inadvertently or from ignorance or necessity omitted to be observed, the Court of Appeal may in certain circumstances (there set out) admit the appellant to impeach the judgment appealed from.'

It is clear from this quotation that, taken by itself, the requirement to serve the notice under the Jamaican Law there under consideration was essentially the same as the requirement with which this Court is concerned in the present case. (There is, of course, the difference that, unlike the Belizean rule, the Jamaican one expressly provided for service upon 'his solicitor', whatever that phrase may have meant.) The Court of Appeal of Jamaica held that, far from being a mere formality, such requirement constituted a condition precedent to the hearing of the appeal. Writing the reasons for judgment of that court, Duffus J stated as follows, at p 44:

> 'As stated by us when we upheld the preliminary objection in the instant case, it is our view that the giving of notice of appeal is a condition precedent, the performance of which founds the jurisdiction of the court of appeal to hear the

appeal. It is not a formality and the provisions of the statute must be strictly complied with. The Court has no power to enlarge the time when the notice is given or served out of the prescribed time.'

The preliminary objection was upheld and the appeal dismissed. I respectfully yield to the persuasive effect of this decision.

Costs

[13] The respondents' application for costs takes into account the fact that, for reasons best known to counsel for the appellants, a separate appeal was purportedly brought on behalf of each of them, thus forcing the respondents to file the five separate applications here being treated as preliminary objections. Counsel for the respondents has not opposed the submissions of Mr Arthurs regarding costs. I accept such submissions and consider the sums put forward by the latter reasonable.

Disposal proposed

[14] It follows from all of the foregoing that, for my part, I would sustain the preliminary objections and dismiss the appeals. I would further order that the respondents have their costs in the amount of $5,400.00 as against each appellant.

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SIR MANUEL SOSA P

AWICH JA

[15] I agree with the orders made by the learned President, Sir Manuel Sosa P. that:

(1) each of the five applications by the respondents, which raised the same preliminary objection to the appeal of each appellant is allowed, and the preliminary objection is sustained, the five appeals are struck out (dismissed); and

(2) costs of the applications are awarded to the respondents.

[16] My reason is that, the appellants did not file any affidavit evidence in response to the affidavit evidence filed by the respondents, deposing that, they were never served with a copy of the notice of appeal at all. The time limited for serving a copy of a notice of appeal is 7 (seven) days from the date the notice of appeal is filed. Seven days had long expired by the date on which the respondents filed their applications. The explanation by Mr. H. Elrington SC, for the appellants, from the bar table, that he attempted to serve the copies of the notice of appeal on Mr. Arthurs who had represented the respondents in the court below, is not evidence. In any case, it would be improper service since Mr. Arthurs is said to have advised that, he had not been retained by the respondents in the appeal. We had to decide the applications on the one-sided evidence by the respondents.

[17] My reason does not include any mention of whether or not an application for the order of this Court to extend time for serving a copy of a notice of appeal is authorised by the Court of Appeal Rules,1967, Cap. 90. The issue did not arise in the applications.

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AWICH JA

HAFIZ BERTRAM JA

[18] I concur in the reasons for judgment given, and the orders proposed, in the judgment of the learned President.

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HAFIZ BERTRAM JA