IN THE COURT OF APPEAL OF BELIZE AD 2019

CIVIL APPEAL NO 1 OF 2018

TAMARA PETERSON LEMUS Appellant

v

GALACTIC BUTTERFLY BZ LIMITED Respondent

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BEFORE

The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

M Marin-Young along with A Jenkins for the applicant/appellant.
D Arzu-Torres for the respondent.

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30 October 2018 and 25 March 2019.

HAFIZ-BERTRAM JA

Introduction

[1] The appellant, Tamara Peterson Lemus ("Tamara") filed a notice of appeal on 8 January 2018, against an order made by Young J, in relation to the terms of a judgment

in default made on 12 December 2017 and perfected on 19 December 2017. The appeal itself was not heard as Tamara filed a notice of motion on 1 June 2018, for permission to amend her grounds of appeal and to adduce further evidence. On 17 August 2018, she filed an amended notice of motion for permission to file two alternative grounds. The application was made pursuant to Order II rule 1 sub-rule (5) of the Court of Appeal Rules.

[2] Tamara filed an affidavit sworn on 1 June 2018, in support of the notice of motion. She filed a second affidavit sworn on 17 August 2018, in support of the amended notice of motion.

[3] The Court heard the application on 30 October 2018 and reserved its decision.

Background

[4] The respondent, Galactic Butterfly BZ Limited ("Galactic Butterfly") filed Claim No. 547 of 2017, by a claim form (not being a fixed date claim form), dated 30 August 2017, claiming against Tamara for: (1) A declaration that Tamara breached the contract made in writing on 1 May 2017, between Tamara and Galactic Butterfly, for the purchase "of property and being a license to 5,574 square feet of seabed for the purpose of managing an existing pier with one restaurant and one rental building situated between Parcels 922 and 4049, San Pedro Registration Section;" (2) An order that Tamara delivers up possession of the property and being the pier together with its licence for 5,574 square feet of seabed with one restaurant and one rental building; (3) damages for breach of contract; and (4) Interest and costs.

[5] The claim was served on Tamara and she acknowledged service on 13 September 2017. The parties engaged in discussion hoping to settle the matter amicably but this failed. In the meanwhile, the time for filing the defence expired and on 12 October 2017, Galactic Butterfly made a request for 'Judgment in Default of Defence'.

[6] On 13 October 2017, a judgment in default was entered which states that "*the Court enters judgment against the Defendant in terms to be determined by the Court."* The Order was signed by the Registrar (Order 1).

[7] By a notice of application dated 18 October 2017, Counsel at the time for Tamara, applied to the trial court for an order, that "Judgment entered in default of defence dated the 13th day of October, 2017, be set aside and the defendant be at liberty to file a defence herein within such time as may be fixed by the Court." An amended application was filed on 21 November 2017, to include an additional ground. The application was supported by the affidavit of Tamara and she exhibited a draft Defence and Counterclaim.

[8] On 26 October 2017, Galactic Butterfly filed an application for entry of the terms of the default judgment on the ground that default judgment was entered against Tamara on 13 October 2017. At this time, the application to set aside the default judgment had not been heard by the trial judge.

[9] On 12 December 2017, the trial judge heard two applications (a) application to set aside the default judgment and (b) application for the terms of the default judgment to be determined by the trial court.

[10] On the said day, 12 December 2017, the trial judge dismissed the application to set aside the default judgment (Order 2). The judge then proceeded immediately to hear the application for the terms of the default judgment which it granted and the order was perfected on the same day (Order 3).

[11] On 8 January 2018, Tamara changed her counsel to Marin Young and Company (MMY). On the same day, newly appointed counsel, Mrs. Marin-Young filed a notice of application to set aside the terms of the default judgment, Order 3, (not the default judgment which is Order 1) or for leave to appeal the terms of the default judgment. This application was supported by an affidavit sworn by Tamara.

[12] On 8 January 2018, a Notice of Appeal was also filed with the Court of Appeal by Tamara, appealing the terms of the default judgment (Order 3).

[13] On 16 January 2018, when the application dated 8 January 2018, to set aside terms of default judgment was called up for hearing, the trial judge raised the issue that she did not have jurisdiction to hear the application for leave to appeal the terms of the default judgment since a notice of appeal had already been filed in the Court of Appeal.

[14] The trial judge on that that day invited election and undertaking was given by Mrs. Marin- Young to withdraw the notice of appeal. The matter was then adjourned to 25 January 2018.

[15] On 23 January 2018, a notice of withdrawal of the appeal was served on the attorney for Galactic Butterfly. The said Notice of Withdrawal was only priced and not filed. The notice of appeal was still before the Court of Appeal.

[16] On the same day, 23 January 2018, the trial judge heard the application to set aside the terms of the default judgment or for leave to appeal the terms of the default judgment. The trial judge dismissed the application and a written decision was handed down on the same day, 23 January 2018, in relation to the refusal to set-aside the terms of the default judgment. (Order 4). Order 3 was also corrected and forms part of Order 4. The court reserved judgement on the issue of leave to appeal but *obiter dicta* said that the Order was a final one and no leave was needed to appeal.

[17] Mrs. Marin Young researched the issue of leave and was convinced that leave was not needed to appeal as it was an appeal as of right. Counsel thereafter wrote to the Registrar of the Court of Appeal to let her know that Tamara will proceed with Civil Appeal No. 1 of 2018.

[18] On 24 January 2018, Mrs. Marin-Young filed an amended notice of application with a supporting affidavit to withdraw the application for leave to appeal and sought a stay pending the determination of Civil Appeal No. 1 of 2018. On the same day, the trial judge

was informed by letter from Mrs. Marin Young, through the Registrar, that the notice of withdrawal of the appeal was not filed and gave her reasons for not doing so. Further, that Tamara would like to withdraw the application for leave to appeal the terms of the default judgment which was pending before the trial judge.

[19] The trial judge heard the application and ordered that (1) leave to appeal is withdrawn (2) the application for stay of proceedings is dismissed; and (3) the parties are to file submissions as to cost. The order which was perfected on the 8 February 2018 is not in the record of appeal. A copy was given to this Court by Mrs. Arzu-Torres after the hearing of the motions.

[20] On 25 January 2018, the trial judge, in open court, noted that counsel for Tamara, Mrs. Marin-Young, did not comply with undertaking to withdraw her notice of appeal. Further, senior counsel moved to withdraw the undertaking but this was refused by the trial judge. The application for a stay was also refused since it was made on the basis of the application for leave to appeal the terms of the default judgment.

[21] On 26 January 2018, a new application for stay was filed pending the determination of Civil Appeal No. 1 of 2018.

[22] On 31 January 2018, a notice of application was filed for leave to appeal the order dismissing the application to set aside default judgment (Order 2). In support of that application was a sixth affidavit of Tamara. (Page 208 of the record). The application was not heard by the trial judge.

[23] On 15 February 2018, the trial judge sought to order compliance of the undertaking given by Mrs. Marin-Young to withdraw notice of appeal and to impose sanctions. The trial judge ordered her to file an affidavit on the issue of not complying with undertaking to withdraw the appeal.

[24] On 1 March 2018, Mrs. Marin-Young was permitted to withdraw her undertaking given to the trial court on 23 January 2018 (to withdraw the appeal).

The Orders

Default Judgment signed by the Registrar – Order 1

[25] The Order which is dated 13 October 2017 reads:

> "The Defendant not having filed a Defence, IT IS THIS DAY ADJUDGED that the Court enters judgment against the Defendant **in terms to be determined** by the court."

Refusal to set aside default judgment – Order 2

[26] The Order made on 12 December 2017 and dated 24 January 2018 refusing to set-aside default judgement states:

> "UPON NOTICE OF APPLICATION dated the 21st November, 2017 for the setting aside of the default judgment dated the 13th October 2017.
>
> AND UPON HEARING … Counsel for the Defendant/Applicant and … counsel for the Respondent/Claimant.
>
> IT IS ORDERED that
>
> 1. The application to set aside the default judgment entered against the Defendant/Applicant on the 13th October 2017 is refused.
>
> 2. Cost to the Claimant/Respondent in the sum of $1,000.00.
>
> DATED the 24 day of January 2018."

Terms of Default Judgment – Order 3

[27] The terms of the default judgment states:

> "December 12th, 2017
>
> In Open Court
>
> …
>
> UPON NOTICE OF APPLICATION dated 26th October, 2017 for entry of the terms of the judgment obtained by default;
>
> AND UPON hearing Mrs. ...Torres for the Claimants;
>
> IT IS HEREBY ORDERED AS FOLLOWS:
>
> 1. The contract dated 1st May, 2017 entered between the Claimant and the Defendant for the purchase of a license to 5,574 square feet of seabed for an existing pier with one restaurant and one rental building situate between Parcels 922 and 4049, San Pedro Registration Section with certain UTM Coordinates … ("the property") is declared null and void.
> 2. The Defendant and/or her servants and agents are to vacate and deliver up possession of the property with immediate effect.
> 3. Cost to the Claimant in the sum of $3,100.00.
>
> Dated the 19 day of December 2017."

Refusal to set-aside Terms of Default Judgment - Order 4 which includes correction of Order 3

[28] The refusal to set aside the terms of the default judgment state:

> "January 23rd, 2018
>
> In Open Court
>
> …
>
> **UPON NOTICE OF APPLICATION dated 8 January 2018 for the setting aside of the default judgment dated 13th October 2017;**

AND UPON hearing Mrs. Magali Marin Young, SC Counsel for the Applicant/Defendant and Mrs. Deshawn Arzu Torres, Counsel for the Respondent/Claimant;

IT IS HEREBY ORDERED AS FOLLOWS:

1. The application to set aside the terms of the default judgment dated 12th December, 2017 is dismissed.
2. The Order dated 12th December, 2017 is corrected pursuant to Rule 42.10 to read

   It is **Declared:**

   The contract dated 1st May, 2017 entered between the Claimant and the Defendant for the purchase of a license to 5,574 square feet of seabed for an existing pier with one restaurant and one rental building situate between Parcels 922 and 4049, San Pedro Registration Section with certain UTM Coordinates … ("the property") has been rendered null and void."

3. The Determination of the applications for leave to appeal and a stay of execution of the Order dated 12 December, 2017 is adjourned to 25th January, 2018.
4. Costs shall be considered on the adjourned date.

   Dated the 8 day of February, 2018."

Decision dated 23 January 2018 refusing to set aside terms of default judgment

[29] The written decision of the trial judge concerns the application by Tamara to set aside Order 3, the terms of the default judgment. Counsel urged the court to set aside the terms of the default judgment on the basis that it was granted contrary to law. The judge after the hearing on 23 January 2018 dismissed the application to set aside the terms of the default judgment and gave a written decision on the said day. The judge also amended Order 3.

[30] The issues determined in this judgment were (a) Whether the court granted relief on the statement of case which is contrary to law; (b) whether the court had an inherent jurisdiction to set aside its own judgment which it gives relief which is contrary to law; (c) should leave to appeal be granted and (d) should stay of execution be granted.

[31] The trial judge having considered the statement of claim and the affidavit evidence before her found that (i) Tamara had not made the payment of US$300,000 by 3 June 2017, as agreed; (ii) Galactic Butterfly had declared the agreement null and void by sending written communication to Tamara on 5 June 2017; and (c) the contract had thereby been rendered null and void. As a result, the trial judge concluded that Galactic Butterfly could and did declare the contract null and void. Further, this was not by operation of law and issues of illegality did not arise since this is specified in the contract between the parties. The judge stated that for clarity she would remove the word 'declared' in Order 3 and substitute 'has been rendered'. This was done under the slip rule. The judge found that there was no reason to hold that the terms of the order is contrary to law and ought to be set aside. The court also found that it was not contrary to law to grant possession of the premises to Galactic Butterfly.

[32] In relation to the issue as to whether the judge had an inherent jurisdiction to set aside its own default judgment, if it was contrary to law, the trial judge found that this would be akin to the court having second thoughts on a matter of substance and as such the appropriate avenue would be an appeal.

[33] It was for those reasons that the application to set aside the terms of the default judgment was dismissed. The leave to appeal the terms of the default judgment, and stay of execution of the Order dated 12 December 2017 was adjourned to 25 January 2018.

The conundrum

[34] On 12 December 2017, the trial judge refused to set aside the default judgment (Order 2). The judge proceeded to determine the terms of the default judgment immediately (Order 3) after refusing to set-aside the default judgment.

[35] Tamara filed her notice of appeal on 8 January 2018 against Order 3, perfected on 19 December 2017. The appeal is in relation to the terms of the default judgment and not the default judgment.

[36] The Order refusing to set-aside the default judgment (Order 2) was perfected on 24 January 2018, some five days after the terms of the default judgment was perfected (Order 3). This is two weeks and two days after an appeal was filed in relation to the later order 3.

[37] An application was made to set aside the terms of the default judgment by Mrs. Marin Young. This was heard by the trial judge and dismissed (Order 4). The record shows that this hearing took place because the trial judge was given an undertaking that the appeal filed by Tamara would be withdrawn. This was not done. Counsel was later given permission to withdraw her undertaking to the court.

[38] On 31 January 2018, a notice of application was filed for leave to appeal order 2, dismissing the application to set aside the default judgment. In support of that application was a sixth affidavit of Tamara. The notice shows that the application would have been heard on 8 February 2018. But, this was never heard by the court below because of the view of the court that Order 1 and Order 3 merged into a final order. In my view, this is the crux of the matter before this Court.

Issues to be determined by this Court

[39] Tamara has filed a notice of motion on 1 June 2018, for permission to amend her grounds of appeal and to adduce further evidence in relation to the terms of the default

judgment. On 17 August 2018, she filed an amended notice of motion for permission to add an alternative ground to her previous grounds. That is, (a) leave to appeal the order of the trial judge dated 12 December 2017 refusing to set aside the default judgment entered by the Registrar of the Supreme Court on the 13 October 2017 (b) if leave is granted, permission to amend the notice of appeal dated 8 January 2018 and (c) permission be granted to adduce further evidence. The application was made pursuant to Order II rule 1 sub-rule (5) of the Court of Appeal Rules.

[40] The issues to be determined are:

(1) Whether the application should be granted to amend grounds of appeal and adduce further evidence;
(2) Whether the pending application for leave to appeal the refusal to set aside the default judgment order should be heard by the court below.

Whether the application to amend the grounds of appeal should be granted

[41] It can be seen from the Notice of Appeal that it concerns the terms of the default judgment, Order 3 and not the default judgment entered by the Registrar. The application heard by this Court concerns the amendment of the grounds of appeal and to adduce fresh evidence. In my view, a determination on this application cannot properly be made by this Court since there is a pending application before the lower court for leave to appeal the refusal to set-aside the default judgment.

[42] The default judgment is dated 13 October 2017, for failure to file a defence and this was signed by the Registrar. This order is considered an administrative process since there was no determination of the claim itself. Part 12 of the Supreme Court (Civil Procedure) Rules 2005, contains provisions under which a claimant may obtain judgment without trial where a defendant (a) has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or (b) has failed to file a defence in accordance with Part 10. This judgment is called a "default judgment". In this case,

the failure was to file the defence and a default judgment was obtained by Galactic Butterfly against Tamara.

Nature of the default judgment

[43] Rule 12.10 provides for the nature of default judgment. In the instant matter, the applicable rules are Rule 12.10 (4) and (5) since it was not a claim for money. It provides"

> "(4) Default judgment where the claim is for some other remedy shall be in such form as the court considers the claimant to be entitled to on the statement of claim.
>
> (5) An application for the court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit …"

Steps taken after default judgment entered

[44] As shown above, Order 1 which was signed by the Registrar states that "*the Court enters judgment against the Defendant in terms to be determined by the court."* An application was made by Galactic Butterfly to determine the terms of the default judgment. Also, Tamara filed an application to set aside the default judgment pursuant to Rule 12.13 of the CPR.

The law on set aside of a default judgment

[45] Rule 12.13 of the CPR provides for the rights of a defendant after a default judgment had been entered. It provides:

> "Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are –

(a) costs;

(b) the time of payment of any debt;

(c) enforcement of the judgment; and

(d) an application under Rule 12.10(2)'

Refusal to set aside default judgment order

[46] By the notice of application dated 18 October 2017, Tamara applied to the court for an order, that the "Judgment entered in default of defence dated the 13th day of October, 2017 be set aside and the defendant be at liberty to file a defence herein within such time as may be fixed by the Court." The application was amended and filed on 21 November 2017, to include an additional ground for the application. The application was supported by the affidavit of Tamara and she exhibited a draft Defence and Counterclaim.

[47] On 12 December 2017, the trial judge heard the application to set aside the default judgment. The learned trial judge refused the application on the same day.

Interlocutory order

[48] An order refusing to set aside a judgment in default of defence is an interlocutory order. The application is not decided on the merits of the case and leave is required to appeal against an interlocutory order. It is trite principle that the test to determine whether an order is interlocutory or final is the application test. An order is interlocutory which is made on an application which would not necessarily bring an end to the proceedings. See **Othneil Sylvester v Satrohan Singh,** St. Vincent and the Grenadines Civil Appeal No. 10 of 1992. In the instant matter, the application for leave to appeal the refusal to set-aside the default judgment has been issued and placed before the trial judge, but not heard.

[49] A judgment in default of defence (or default of appearance) lacks finality so long as it is liable to be set aside. The order which the trial judge made refusing to set aside the default judgment therefore lacked finality. See **Vehicles and Supplies Ltd. et al v Financial Institutions Services Ltd.** [2005] UKPC 24. The trial judge was not given much assistance in this regard, and this was not the fault of either counsel. There was great speed in the disposal of the other application before the court in relation to the terms of the default judgment. The defendant, Tamara, in my opinion, was entitled to appeal the refusal to set-aside order (Order 2) with leave of the trial court and if it refuses, a fresh application has to be made to this Court for leave to appeal. Accordingly, it is my view that Order 3 and Order 4 (the amended Order) made by the trial judge must be set-aside.

Leave to appeal refusal to set- aside order not addressed/heard by court below

[50] On the refusal of the application to set aside the default judgment, there was no oral application made to the court for leave to appeal. The learned trial judge did not raise the matter of leave and counsel for Tamara did not raise the issue of leave to appeal the refusal to set-aside order. The trial judge proceeded immediately after making Order 2, (refusal to set aside) to hear the application dated 26 October 2017, filed by Galactic Butterfly for entry of the terms of the default judgment. No opportunity was given to counsel for Tamara to perfect the refusal to set-aside the default judgment order at that time.

[51] The record shows that the trial judge had a view that Order 1 and Order 3 merged into one Order and thereafter an appeal could be launched. This is obvious from a hearing on 15 February 2018. By this date, there was a pending application before the court for leave to appeal Order 2. This application was not heard and leave was not refused by the trial judge as submitted by Mrs. Torres to this Court. The trial judge viewed the application as unnecessary.

[52] On that day there was much discussion between the trial judge and Mrs. Marin-Young in relation to the undertaking already discussed on previous hearings. This Court do not find it necessary to comment on that aspect of the matter in the court below.

[53] At that hearing, Mrs. Torres was obviously aware that there was a pending application for leave to appeal the refusal to set aside the default judgment and she brought this to the attention of the court. She also enquired whether leave was needed in relation to the Notice of Appeal which is in relation to the terms of the default judgment. The trial judge then gave her views on the application for leave to appeal as shown at pages 358 – 359 of the record:

> "…I must say, Counsel, I think your application is unnecessary. The application that you have made for leave to appeal" (At this point Mrs. Young enquired whether it is the Form 7 – Default judgment. The judge then continued).
>
> It is unnecessary. The court will deal with everything together. If it is that the Court feels that the terms are bad, because remember they both merge. That which seem like an interlocutory order would merge when I make the terms into one judgment. One judgment, one default judgment, so there isn't terms set aside and a default judgment is still standing there.
>
> My understanding of it is that that preliminary order and the second order they merge into one order. It is a default judgment on these terms. Just as if you had a default judgment for the assessment of damages, you don't have to go and set aside the default judgment for assessment of damages, you set aside the entire thing. One judgment now."

[54] At this point, Mrs. Torres, counsel for Galactic Butterfly, present for all the hearings, (unlike Mrs. Young who had taken over from previous counsel after the refusal to set aside the default judgment) told the court that she was not clear because "*if we were to*

be in the Court of Appeal then are we in the Court of Appeal on both Orders?" To this enquiry the court responded:

> "It would be a merged thing. And I think what perhaps you need to do and I am not giving anybody advice. I think you need to just amend what is before the Court of Appeal to include if you think you are rightly there, I still have my view, but to include that the entire judgment be set aside. I don't know what your appeal says. I have not seen it."

[55] There were enquiries from Mrs. Marin-Young at this point since Form 7 was done by the Registrar and the terms of the judgment was done by the court. The trial judge then gave her views:

> "I cannot imagine that it would be two judgments. You can't have two judgments. It is one default judgment. It is just that part of it is done administratively and part of it is done by the court because the administration cannot do it. So I see absolutely no reason because we have reached final judgment in this matter that everything cannot be on one appeal. I don't see why you have to get leave to appeal from part of a final judgment because somebody made it interlocutory and now that it's final that you have to go back to the interlocutory to get leave on that. It is a final judgment at this stage."

[56] It is my opinion, that every order that was made by the trial court after the refusal to set aside the default judgment, were done in error. The default judgment, Order 1 was not final on liability since an application to set aside that order was made by Tamara. There could not have been a merger of Order 1 and 3 because of the dismissal to set aside the default judgment. This was an interlocutory matter which required leave to appeal. An application was in fact filed for leave to appeal. Hence the orders made thereafter by the trial judge are a nullity and must be set aside. It follows that the Notice of Appeal and the Motions filed in this Court to amend the notice of appeal are also a nullity and must be struck out.

Whether the pending application for leave to appeal should be heard by the court below

[57] On 12 December 2017, the trial judge refused the application to set aside the default judgment. The Order was perfected on the 24 January 2018 (Order 2). On 31 January 2018, a notice of application was filed for leave to appeal the order dismissing the application to set aside default judgment. The application was not heard by the trial judge for reasons discussed above.

[58] The application for leave to appeal that Order is therefore pending before the trial court. It cannot be said that there was a failure by Tamara to apply for leave to appeal the order. In my opinion, the application should be heard by the trial court for leave to appeal the refusal to set aside the default judgment.

Costs

[59] The conundrum in the court below, obviously resulted in the multiple unnecessary applications which culminated in an appeal and applications to amend grounds of appeal and adduce further evidence. In my opinion, Tamara should not be ordered to pay costs since her application for leave to appeal the refusal to set-aside the default judgment, an interlocutory order, is pending before the trial court. Therefore, I would propose that each party to this appeal bear its own costs.

Disposal

[60] I would propose the following orders:

(1) All orders made by the trial judge after the refusal to set aside the default judgment are struck out.
(2) The Notice of appeal and the Motions are struck out.
(3) The application for leave to appeal the refusal to set aside the default judgment filed on 31 January 2018, is to be heard by a trial judge other than Young J.

(4) Each party to bear its own costs of the appeal. This costs order is provisional, to be made final after seven days. In the event either party should apply for a contrary order within the period of seven days from the delivery of this judgment, the matter of costs shall be determined on written submissions to be filed by the parties in ten days from the date of the application.

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HAFIZ-BERTRAM JA

DUCILLE JA

[61] I had the benefit of reading the draft judgment of Hafiz-Bertram JA and I am in full agreement with the reasoning and conclusion and the orders proposed, in it. In the circumstances, I am unable to add anything else.

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DUCILLE JA

CAMPBELL JA

[62] I have read the draft judgment of Hafiz-Bertram JA, and I concur with the reasoning and conclusion in the judgment and the orders proposed, in it.

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CAMPBELL JA