

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 4 of 2023**

B E T W E E N

**BRAEDEN FOWLER (an infant)
BY BRIDGETTE SAWYER (his mother and next friend)
First Applicant/Intended Appellant**

AND

**BRIDGETTE SAWYER
Second Applicant/Intended Appellant**

AND

**DR. HORIZAL A. SIMMONS
First Intended Respondent**

AND

**EILEEN MCCLAIN
Second Intended Respondent**

AND

**DOCTOR'S HOSPITAL HEALTH SYSTEM LIMITED
Third Intended Respondent**

AND

**THE ATTORNEY-GENERAL
Amicus Curiae**

**BEFORE: The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Evans, JA
The Honourable Mr. Justice Turner, JA**

**APPEARANCES: Mrs. Bridgette Sawyer appearing pro se for both
Applicants/Intended Appellants**

Dr. Glendon Rolle for the First Intended Respondent

**Mr. Adrian Hunt for the and Second and Third Intended
Respondents**

**Ms. Olivia Nixon with Ms. Nyanne Orlander of the Office of the
Attorney General appearing Amicus Curiae**

DATES: Hearing on the papers; 29 May 2024

Civil Appeal – Costs – Extension of Time Application – Exercise of discretion to award costs – Revocation of the Rules of the Supreme Court, 1978 – Savings and Transitional provisions of the Civil Procedure Rules – Whether the proceedings continue under the Rules of the Supreme Court, 1978 by virtue of rule 4 of the Civil Procedure Rules, 2022 – Whether Order 59 r. 3(4) Rules of the Supreme Court, 1978 continues to apply in relation to the extension of time application – Rules 2, 3 and 4 of the Civil Procedure Rules, 2022 – Part II of Rule 24(5) Court of Appeal Rules, 2005 – Order 59 r.(3)(4) Rules of the Supreme Court, 1978

On 2 August 2022, a few days before he demitted office, the former Chief Justice (now retired) summoned the parties before him and informed them that he had dismissed the Plaintiffs' Supreme Court action against the Defendants. The Chief Justice advised the parties that the Plaintiffs had failed to prove negligence against the Defendants and that his written reasons for dismissing the action would shortly follow. He further ordered the Plaintiffs to pay the Defendants' costs of the action to be taxed, if not agreed.

After waiting in vain for the written Judgment the 6-week statutory deadline for civil appeals eventually expired. Thereafter, the Plaintiffs (now "the Intended Appellants") filed an application for an extension of time to appeal ("EOT") the Chief Justice's decision on the basis, *inter alia*, that the written Judgment had not yet materialized, and further the learned Chief Justice had since vacated office as Chief Justice without delivering his written Judgment.

On 25 March 2024, after numerous adjournments, the Intended Appellants' extension of time application eventually came on for hearing in the Court of Appeal. On that date, counsel for the Intended Respondents all indicated that, save for the issue of costs (to which they considered themselves entitled) they would not contest the application.

In view of the position taken by the Intended Respondents, the Court granted the extension of time application and ordered the Intended Appellants to file their intended Notice of Appeal on or before 8 April 2024.

The parties were further invited to file written submissions on costs by 8 April 2024 and were informed that the Court would consider the issue of costs of the EOT application 'on the papers' (i.e. without an oral hearing.)

Written Submissions were filed by the Intended Appellants on 8 April 2024. No submissions were filed by any of the Intended Respondents.

Held: Having considered the Intended Appellants' written submissions on costs and in the exercise of the Court's wide discretion to award costs, the Court orders the Intended Appellants to pay the Intended Respondents' costs of the extension of time application to be taxed, if not agreed.

Notwithstanding the revocation of the Rules of the Supreme Court, 1978 (“the RSC”), the Court is satisfied that these proceedings are caught within the Savings and Transitional provisions set out in rule 4 of the Civil Procedure Rules, 2022 (“the CPR”); and accordingly, the RSC, 1978 continue to govern the proceedings.

Based on the materials before the Court, the Intended Appellants’ action (2005/CLE/gen/01395) commenced in the Supreme Court by a specially endorsed Writ of Summons filed on 12 December 2005 seeking damages in negligence against the Defendants. After an inordinately lengthy pre-trial period of almost 16 years, a final trial date was fixed by the learned Chief Justice and the trial of the action eventually started on 14 March 2022 when the evidence of the parties’ witnesses was taken over several days after which the decision was reserved.

In the circumstances, on 1 March 2023, when the CPR came into force, it is evident that rule 2(1)(b) of the CPR did not apply to the proceedings and that accordingly, by virtue of rule 4 of the CPR, the RSC continued to apply.

Having considered the exercise of our discretion as to the appropriate costs order to be made in this matter, we have found no reason to depart from the long-standing rule set out in the RSC O. 59 r. 3(4) which governs the award of costs in extension of time applications. In the result, the Court is satisfied that the justice of the case requires that the Intended Appellants shall bear the Intended Respondents’ costs of and occasioned by the extension of time application, such costs to be taxed, if not agreed.

Rawson McDonald and another v. Paul R. Major (Costs Decision) SCCivApp. No. 94 of 2017 considered
Steven Omar Smith v. Commissioner of Police MCCrApp. No. 220 of 2017 mentioned
Swart et al v. Appollon Metaxides Silver Point Condominium SCCivApp. No. 78 of 2012 considered.

DECISION ON COSTS

Delivered by the Honourable Madam Justice Crane-Scott, JA:

Background

1. On 2 August 2022, a few days before he demitted office in the Supreme Court, the former Chief Justice (now retired) summoned the parties before him and informed them that he had dismissed the Plaintiffs’ Supreme Court action against the Defendants. The Chief Justice advised the parties that the Plaintiffs had failed to prove negligence against the Defendants and that written reasons for dismissing the action would shortly follow. He

further ordered the Plaintiffs to pay the Defendants' costs of the action to be taxed, if not agreed.

2. After waiting in vain for the written Judgment the 6-week statutory deadline for civil appeals eventually expired. Thereafter, the Plaintiffs (now "the Intended Appellants") filed an application for an extension of time ("EOT") to appeal the Chief Justice's decision on the basis, *inter alia*, that the written Judgment had not yet materialized, and further the learned Chief Justice had since vacated office as Chief Justice without delivering his written Judgment.
3. On 25 March 2024, after numerous adjournments, the Intended Appellants' EOT application eventually came on for hearing in the Court of Appeal. On that date, counsel for the Intended Respondents all indicated that, save for the issue of costs (to which they considered themselves entitled) they would not contest the application.
4. In view of the position taken by the Intended Respondents, the Court acceded to the EOT application and ordered the Intended Appellants to file their intended Notice of Appeal on or before 8 April 2024.
5. As the Intended Appellants requested an opportunity to be heard on the issue of costs, the Court thereupon invited written submissions from the parties to be filed by 8 April 2024 and indicated that the issue of costs would be determined "on the papers." (i.e. without an oral hearing.)
6. Written Submissions were subsequently filed by the Intended Appellants on 8 April 2024. No submissions were filed by any of the Intended Respondents.
7. In their written submissions¹ the Intended Appellants urged the Court to award them the costs of their EOT application or alternatively, make no order for costs.
8. Having considered the Intended Appellants' written submissions and in the exercise of our wide discretion as to costs, we have found no reason to depart from the usual rule governing the award of costs on EOT applications set out in O. 59 r. 3(4) of the RSC. In the result, the justice of the case is that the Intended Appellants shall bear the Intended Respondents' costs of the application, such costs to be taxed, if not agreed.
9. Below is our written decision on the costs of the EOT application.

The Governing Rules

10. As is well known, this Court's broad jurisdiction in relation to the award of costs is located in sub-rule 24(5) of the Court of Appeal Rules, 2005 ("the COA Rules") which provides:

¹ See page 6 of the Intended Appellants' Costs Submissions filed on 8 April 2024.

“24. (5) The court may make such order as to the whole or any part of the costs of an appeal as may be just, and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just.”

11. In the exercise of its discretion to award costs the Court of Appeal has generally had regard to the practice that obtains in the Supreme Court and to the rules governing the discretion to award costs located in Order 59 of the Rules of the Supreme Court, 1978 (“RSC 1978”).² The Court’s traditional approach was explained in a decision of this Court (differently constituted) in **Swart et al v. Appollon Metaxides and Silver Point Condominium** SCCivApp. No. 78 of 2012 (delivered on 22 October 2018).
12. At paragraphs 7 and 8 Isaacs JA, writing on behalf of the Court, explained:

“7. In the Supreme Court the issue of who should bear the costs of an action and/or application falls to be considered in light of Order 59 of the Rules of the Supreme Court. Moreover, section 30(1) of the Supreme Court Act provides:

‘30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.’

8. We generally have regard to the practice that obtains in the Supreme Court. In my view this makes estimably good sense.”³ [Emphasis added]

13. Since **Swart**, the RSC, 1978 (including O.59 relating to costs) have been revoked.⁴ They have been replaced by the Supreme Court Civil Procedure Rules, 2022 (“CPR 2022”) which came into force on 1 March 2023.⁵ Parts 71 and 72 of the CPR 2022 now sets out a comprehensive and differently worded regime governing the award of costs.⁶
14. That notwithstanding, by virtue of the savings and transitional provisions set out in rule 4 of the CPR 2022, the provisions of RSC 1978 (including RSC 1978 O.59 relating to costs)

² S.I. No. 48 of 1978.

³ As will shortly appear, the Court’s traditional resort to the costs rules contained in Order 59 RSC 1978 has necessarily been modified following the commencement of the Supreme Court Civil Procedure Rules, 2022 on 1 March 2023.

⁴ Supreme Court Civil Procedure Rules, 2022 (Appointed Day) Notice, 2023 S.I. No. 13 of 2023.

⁵ Supreme Court Civil Procedure Rules, 2022, S.I. No. 76 of 2022 published on 2 August 2022.

⁶ Parts 71 and 72 of the Supreme Court Civil Procedure Rules, 2022, as amended by S.I. No. 17 of 2023.

shall continue to apply in relation **to proceedings** commenced in the Supreme Court prior to the commencement of the CPR 2022 **to which the CPR in accordance with rule 2(1)(b) do not apply.**

15. In view of the above developments and before exercising our discretion in relation to the award of costs in this matter, we consider it necessary to determine whether the costs regime in RSC 1978 O. 59 (now revoked) has (by virtue of rule 4 of the CPR 2022) been saved from revocation and continues to apply.
16. The Savings and Transitional provisions are located in rule 4 of the CPR 2022 which provides:

“4. Savings and transitional.

Notwithstanding rule 3⁷, proceedings commenced in the Court prior to the commencement of these Rules, to which these Rules in accordance with rule 2(1)(b) do not apply, shall continue under the Rules of the Supreme Court (S.I. 48 of 1978).” [Emphasis added]

17. The relevant portions of rule 2 of the CPR 2022 (as amended) provide:

“2. Application of Rules

(1) Subject to paragraph (4), these Rules shall

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(a)

(b) not apply to civil proceedings commenced in the Court prior to the date of commencement of these Rules except where –

(i) a trial date has not been fixed for those proceedings; or

(ii) a trial date has been fixed for those proceedings and that date has been adjourned.

(2) In the case of civil proceedings –

⁷ Rule 3 provides: “The Rules of the Supreme Court (S.I. No. 48 of 1978) are hereby revoked.”

(a) referred to in paragraph (1)(b)(i), the claimant must fix a date, time and place for a case management conference under Part 27 after a defence has been filed and give all parties at least twenty-eight days' notice of the conference; and

(b) referred to in paragraph (1)(b)(ii), an application to adjourn a trial date is to be treated as a pre-trial review and these Rules apply from the date that such application is heard;

(3) Where in proceedings commenced before the date of commencement of the Rules, the Court has to exercise its discretion, it may take into account the principles set out in these Rules and, in particular Part 1 and Part 25.

(4) These Rules shall not apply to -

(a) bankruptcy and insolvency proceedings, including winding up of companies;

(b) family proceedings except proceedings under the Child Protection Act (Ch. 132);

(c) probate proceedings except contentious probate proceedings as provided for in Part 63;

(d) proceedings in which the Court is acting as a Prize Court;

(e) any other proceedings in the Court instituted under any enactment, insofar as rules made under that enactment regulate those proceedings.” [Emphasis added]

18. Notwithstanding the revocation of the RSC 1978, we are satisfied that these proceedings are caught within the Savings and Transitional provisions set out in rule 4 of the CPR 2022; and accordingly, the RSC 1978 continues to govern the proceedings.

19. Based on the materials before us, the Intended Appellants' action (2005/CLE/gen/01395) commenced in the Supreme Court by a specially endorsed Writ of Summons filed on 12 December 2005 seeking damages in negligence against the Defendants/Respondents. After an inordinately lengthy pre-trial period of almost 16 years, a final trial date was fixed by the learned Chief Justice and the trial of the action eventually started on 14 March 2022 when the evidence of the parties' witnesses was taken over several days after which the decision was reserved.
20. In the circumstances, on 1 March 2023, when the CPR 2022 came into force, it is evident that rule 2(1)(b) of the CPR 2022 did not apply to the proceedings and that accordingly, by virtue of rule 4 of the CPR 2022, RSC 1978 continued to apply.
21. Having established that the proceedings are still governed by RSC 1978, we have (in keeping with this Court's traditional practice⁸) had regard to RSC 1978 Order 59 governing the award of costs.
22. As this Court (differently constituted) has previously observed⁹, the usual rule that costs "follow the event", does **not** apply to "costs of and occasioned by extension of time applications." On such applications, the relevant rule (located in O. 59 r. 3(4)) provides that costs of and occasioned by any application to extend time "**shall be borne by the party making the application, unless the Court otherwise orders.**" O. 59 r. 3(4) states:

"3(4) The costs of and occasioned by any application to extend the time fixed by these Rules, or any direction or order thereunder, for serving or filing any document or doing of any other act (including the costs of any order made on the application) shall be borne by the party making the application, unless the Court otherwise orders." [Emphasis added]

Discussion

23. At the outset, there is no doubt that our wide discretion in sub-rule 24(5) of the COA Rules to award costs in respect of the extension of time application is to be exercised against the background of O. 59 r. 3(4).
24. Applying the rule, this means that the Intended Respondents' costs of and occasioned by the application are to be borne by the Applicants/Intended Appellants as the party making the extension of time application unless the Court is convinced that there are good reasons why they ought not to bear such costs.

⁸ See paragraphs [11] and [12] above.

⁹ See Rawson McDonald and another v. Paul R. Major SCCivApp. No. 94 of 2017 delivered on 8 March 2023.

25. Referencing the affidavits filed in support of the extension of time application, the Intended Appellants lay the blame for their not having appealed the Chief Justice's decision within the 6-week timeframe for civil appeals, squarely at the feet of their former attorneys-at-law who they claim completely disregarded their intention to appeal the Chief Justice's oral judgment pronounced on 2 August 2022.¹⁰
26. The Intended Appellants further point to the numerous adjournments of their extension of time application which have occurred since 18 September 2023 when it was first scheduled for hearing before the Court. They suggest that the last-minute decision by the Intended Respondents on 25 March 2024 not to resist the extension of time application has led to additional costs being incurred.
27. Regrettably, the primary focus of the Intended Appellants' written submissions¹¹ centered on their opinion that (notwithstanding that the extension of time application was not being contested) this Court ought to have embarked on a full hearing of the extension of time application and to have determined for itself whether their intended appeal had prospects of success.
28. The Intended Appellants complain that this Court did not entertain as a preliminary issue the merits of their intended grounds (based on Article 96 of the Constitution) regarding the propriety of the learned Chief Justice delivering his written Reasons for Decision after he had demitted office.
29. Most respectfully Mrs. Sawyer's written submissions on costs are completely misguided. Quite simply, there is no duty on this Court to have embarked on a substantive hearing of an extension of time application which was not being opposed.
30. Nor again was the Court under any duty to embark on a full-blown preliminary hearing of those intended grounds which raised the proposed constitutional issues. Unlike the case of **Steven Omar Smith v. Commissioner of Police** MCCrApp. No. 220 of 2017 (a magisterial criminal application cited by Mrs. Sawyer) this is a civil appeal governed by Part II of the Court of Appeal Rules, 2005. A civil appeal cannot be set down for substantive hearing by the Court unless and until the preliminaries for settling the record of appeal have been complied with and an affidavit of compliance is filed and served as required by the rules.

¹⁰ Paragraph 5 Intended Appellants' Costs Submissions filed on 8 April 2024.

¹¹ See Intended Appellants' Costs Submissions filed on 8 April 2024.

31. Notwithstanding Mrs. Sawyer's consistent indications to the Court that the Intended Appellants wished to challenge the learned Chief Justice's ability to deliver his decision after he had demitted office¹², the Intended Respondents were under no obligation to accede to the application as they had not yet been served with the Intended Appellants' revised grounds of appeal.
32. The revised proposed grounds of appeal were eventually exhibited in the Affidavit of Bridgette Sawyer filed in advance of the 25 March 2024 date which this Court had finally fixed for the substantive hearing of the EOT application.
33. Having considered the exercise of our discretion as to the appropriate costs order to be made in this matter, we have found no reason to depart from the long-standing rule set out in O. 59 r. 3(4) which governs the award of costs in extension of time applications. In the result, we are satisfied that the justice of the case requires that the Intended Appellants shall bear the Intended Respondents' costs of and occasioned by the extension of time application, such costs to be taxed, if not agreed.

Disposition and Order

34. In summary, the order of the Court is that the Intended Appellants shall bear the Intended Respondents' costs of and occasioned by the application to extend the time, such costs to be taxed, if not agreed.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Evans, JA

The Honourable Mr. Justice Turner, JA

¹² See appellate transcripts for period 18 September 2023 through 5 March 2024.