

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp No. 127 of 2019

IN THE MATTER of the Mutual Legal Assistance (Criminal Matters) Act, Chapter 98

AND

IN THE MATTER of the Banks and Trust Companies Regulation Act, Chapter 316

AND

IN THE MATTER of the Proceeds of Crime Act, Chapter 93

AND

**IN THE MATTER of the Proceeds of Crime (Designated Countries and Territories) Order,
Chapter 93**

AND

IN THE MATTER of a Request for Legal Assistance by the United States of America

AND

**IN THE MATTER of an Application by the Competent Authority of The Bahamas, i.e., the
Attorney-General**

BETWEEN

THE ATTORNEY-GENERAL

Appellant

AND

JONATHAN REID

First Respondent

AND

DAVID VALDEZ-LOPEZ

Second Respondent

AND

RUDOLPH KERMIT KING

Third Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Shaka Serville, with Mrs. Kenrah Newry, Ms. Michelle Dean, and**
Mrs. Deidre Clarke-Maycock, Counsel for Appellant
Mr. Damian Gomez, QC, with Ms. Monique Gomez, Counsel for the
Third Respondent
No appearance by or on behalf of the First and Second Respondents

DATES: **30 July 2020; 30 October 2020**

Civil Appeal – Non Compliance with Order Settling the Record of Appeal- Proper Application of Court of Appeal Rule 14- Whether dismissal is an Administrative Act or Subject to an Application to the Court-Whether Dismissal is the appropriate sanction for Non Compliance- Costs.

The appellant in this matter filed a Notice of Appeal Motion on the 31 July 2019. On the 21 November 2019 the Registrar of the Court of Appeal ordered that all of the transcripts related to the hearing of the matter before Justice Grant-Thompson be included in the Record of Appeal. However all the transcripts were not included in the Record. On 7 May 2020 the third respondent filed a Notice of Motion to strike out the appeal for non-compliance with the Registrar’s Order. The Notice by the third respondent also sought an Order discharging the existing injunction which has frozen a certain sum of money in the clients’ account of Monique V.A. Gomez & Co at First Caribbean Bank or in the alternative varying the said injunction.

The appellant asserted that they have complied with the order as best as they could and assert that the only items missing are the transcripts.

Held: Application to strike out the appeal dismissed. Unless Order given. Costs awarded to third respondent.

(1) The third respondent has lodged with the Registry of this Court, a Notice of Motion supported by an affidavit in which it is alleged that the appellant has failed to comply with the Registrar’s directions given in her order made pursuant to Rule 13. The Registrar has caused that application to be set down before us. We consider this adequate compliance with rule 14 (3) and sufficient to give life to the 3rd respondent’s application.

(2) Rule 14(3) vests the Court with a discretion as to whether to impose the sanction of striking out the appeal. The appellant submitted that their noncompliance was not willful and we note that the affidavit of Mr. Mackey discloses that some effort has been made to obtain the missing

transcripts. That may be so but as was stated in **Joseph Elkind v The Private Trust Corporation Limited et al** No. 94 of 2015:

“Rules of the Court of Appeal require full compliance with the Registrar’s order and nothing less. The Rules make no distinction between full or substantial compliance. Failure to satisfy the conditions of the Registrar’s Order is non-compliance no matter how substantial a litigant may perceive his compliance with the Court’s orders or Rules to be.”

(3) Rule 14(3) vests the Court with a discretion as to whether to impose the sanction of striking out the appeal. The appellant submitted that their noncompliance was not willful and we note that the affidavit of Mr. Mackey discloses that some effort has been made to obtain the missing transcripts. We are also aware that this appeal also has significance for this Country’s treaty obligations with a foreign state so the subject matter is not trivial. It must be acknowledged, however, that the appellant’s handling of the appeal process could have been expedited by paying more careful attention to the requirements of the Rules of this Court. It was in those circumstances that although we were not prepared to strike out the appeal on this application some sanction was necessary. It was also important to make it clear that no further delay would be tolerated thus we made the Unless Order and awarded costs to the 3rd respondent.

Joseph Elkind v The Private Trust Corporation Limited et al No. 94 of 2015 considered

REASONS FOR DECISION

Judgment delivered by The Honorable Mr. Justice Evans, JA:

1. The third respondent filed an application by notice of motion on 7 May 2020 and which was supported by an affidavit filed on 17 June 2020. The said notice was in the following terms:

"TAKE NOTICE that the Court of Appeal will be moved, so soon as Counsel can be heard on behalf of the 3rd respondent for an application to strike out the application for an Appeal of the Ruling of the Honorable Madam Justice Cheryl Grant-Thompson for non-compliance of the Order of the Registrar of the Court of Appeal dated the 21st day of November AD. 2019.

Further for an Order discharging the injunction of the client account of Monique V.A. Gomez & Co at First Caribbean International Bank, Shirley Street, Nassau, The Bahamas in the

amount of \$1,510,697.12 or alternatively a variation of the said Injunction to the sum of \$894,000.00.

Dated this 7th day of May, A.D. 2020."

2. The affidavit in support was sworn by Ms. Monique V A Gomez and in it she stated as follows:

"1. That I am Counsel and Attorney-at-Law for the 3rd respondent and I am duly authorized to make this Affidavit on behalf of the 3rd respondent.

2. I make this Affidavit in support of an application made by Notice of Motion filed herein on the 7th day of May, 2020, that the instant action be struck for failure on the part of the appellant to comply with the Order of the Registrar of the Court of Appeal dated 21st day of November, 2019 pursuant to Order 14(1) of the Rules of the Court of Appeal.

3. It was ordered that the transcripts from Madam Justice Cheryl Grant-Thompson's Court in the Supreme Court action be included in the Record of the Appeal. We heard

4. The Record of Appeal does not include all of the transcripts in the Supreme Court and the Affidavit of Compliance in paragraphs 6 states that all of the transcripts have not been included.

5. The practice of the Supreme Court requires litigants who desire transcripts of proceedings to apply for such transcripts through the Clerk of the Judge who presided over the subject proceedings. The appellants did not follow the practice and failed to obtain all of the transcripts required by the order settling the record.

6. This was confirmed by Mrs. Kenrah Newry and the Honourable Madam Justice Grant-Thompson on the 9th day of June, 2020 at a recent zoom hearing in a related matter involving the respondents herein and The Royal Bank of Canada.

7. In the premises, the appellant's appeal ought to be struck out by reason of its failure to comply with the order settling the record in this appeal.

8. The contents of this Affidavit are true and correct to the best of my knowledge information and belief".

3. We heard the aforesaid application on the 30 July 2020 and after hearing submissions for the parties an oral decision was delivered in the following terms:

“We have considered the third respondent's Notice of Motion. We hold the view that the matter ought not to be dismissed, but rather that the appellant ought to be given a further opportunity to get its house in order. To that end, the court gives the appellant until 30 September, 2020 to do what it must do to have its matter properly fixed before the Court of Appeal. The justice of this case requires that the appellant pays the costs of the third respondent up and until today's date, such costs to be taxed if not otherwise agreed. For the sake of completeness, if the matter is as it is today and as it was in May, the matter will be struck out. As Mr. Justice Evans indicated, it is an unless order. The court is not minded to vary the injunction and it remains in place until 30th September, 2020. The reasons for our decision will be put in a written judgment to be provided to the parties at a later date. Dated this 30th day of July 2020.”

4. In fulfillment of our promise to provide reasons for our decision we now do so.
5. The notice of motion of the 7 May 2020 did not specify the provision or rule under which the application to strike out the appeal was based. The appellant provided an affidavit in reply sworn by Mr. Kirkland Mackey in which he took issue with that fact. His affidavit was in the following terms:

“1. That I am Counsel and Attorney-at-Law in the Office of The Attorney-General and I am duly authorized by the Competent Authority to make this Affidavit.

2. That on the 7 day of May, A.D.,2020, the 3rd respondent, herein, filed a Notice of Motion to strike out the application for an Appeal of the Ruling of the Honorable Madam Justice Cheryl Grant-Thompson for non-compliance of the Order of the Registrar of the Court of Appeal dated the 21st day of November A.D., 2019.

3. That the Notice of Motion also sought for an Order discharging the injunction of the client account of Monique V. A. Gomez & Co. located at First Caribbean International Bank, Shirley Street, Nassau, The Bahamas in the amount of \$1,510,697.12 or alternatively a variation of the said Injunction to the sum of \$894,000.00.

4. That the 3rd respondent filed an Affidavit of Monique V. A. Gomez, dated the 17th day of June, A.D., 2020, in support of the Notice of Motion filed on the 7th day of May, A.D., 2020.

5. That this Affidavit is in response to the averments made in the aforesaid Affidavit of Monique V. A. Gomez.

6. That Counsel for the 3rd respondent at all material times was actively involved in the preparation and collation of the Record of Appeal. On several occasions Counsel for the 3rd respondent was requested by Counsel for the appellants to provide a list of documents in order for the same to be made as a part of the record of appeal.

7. Further, that Ms. Gomez was advised and did attend, on both dates scheduled for the Settling of the Record, namely the 27th day of August, A.D, 2019 and the 21st day of November, A.D., 2019.

8. That at the hearing on the 27th day of August, A.D., 2019 despite being aware of the lack of transcripts Counsel for the 3rd respondent's only reason for requesting an adjournment for the Settling of the Record Hearing was to await the written ruling of Her Ladyship Justice Grant-Thompson from the lower Court so that it could be part of the Record of Appeal.

9. That Counsel for the 3rd respondent was fully cognizant of the numerous attempts made by the appellants in obtaining the transcripts of the Supreme Court trial in the matter herein.

10. Further, Ms. Gomez was present when the Registrar of the Court of Appeal ordered that both parties were to make every effort in obtaining the said transcripts. In addition thereto, the Registrar ordered that where the records could not be obtained in anticipation of the settling of the record, to prepare an item on the "Record of Appeal" labelled collectively as "Transcripts" placing all the transcripts obtained at the time of the filing of the Record of Appeal under that item.

11. That the Registrar of the Court of Appeal on the 21st day of November, A.D., 2019 ordered Counsel for the appellant to file the Record of Appeal and Affidavit of Compliance within 90 days from that date. In essence this meant that the date of Compliance would be the 19th day of February, A.D., 2020. A copy of the said Order of the Registrar and Affidavit of

Compliance are now shown to me and exhibited hereto respectively as “K.M.1.” and “K.M.2”.

12. That due to the 3rd respondent petitioning the Court of Appeal, the Order of the Registrar was vacated and the date for the hearing of the substantive Appeal was adjourned to the 16th day of January, A.D., 2019. A copy of the said Order of the Court of Appeal is now shown to me and exhibited hereto as “K.M.3.”

13. That at no time at either of the Hearings to Settle the Record of Appeal did the 3rd respondent indicate any objections to the Registrar’s Order nor did the 3rd respondent raise any concerns regarding any particular transcript being needed or required before the Record of Appeal could be finalized.

14. That at all material times the appellants complied with the Registrar’s Order within the time specified and in the manner specified by the Registrar of the Court of Appeal. Further, the 3rd respondent failed to indicate at the hearing before the Court of Appeal on the 16th day of January, A.D., 2019 that there were any issues regarding the lack of availability of transcripts nor raise a concern for not having a particular transcript in order to advance their case.

15. That the appellants were shocked and completely surprised on the 6th day of May, A.D., 2020 before this Honorable Court of Appeal when Counsel for the 3rd respondent retorted that specific transcripts were required in order for his client’s case to be argued and that the appellants failed to obtain the same. This was the first time that Counsel for the 3rd respondent indicated that specific transcripts were required notwithstanding the fact that all parties were previously before this Honorable Court on 16th January, A.D., 2020 and the 10th day of March, 2020.

16. That the appellants appeared before the Hon. Madam Justice Cheryl Grant-Thompson, in a related matter involving the 3rd respondent and the appellants when advising the Court that efforts were made to obtain transcripts from the Court Reporting Unit. The appellants were admonished for not petitioning the Clerk of the Court of the Hon. Madam Justice Cheryl Grant-Thompson in order to obtain the same and was further ordered to compile a list of outstanding transcripts and to request the same from her Clerk.

17. That the appellant communicated with Counsel for the 3rd respondent for a list of their outstanding transcripts. Once received the appellants wrote to the Clerk of Her Ladyship the Hon. Madam Justice Cheryl Grant-Thompson on the 24th day of July, A.D., 2020 providing the compiled list of all outstanding transcripts.

18. That at no time was the appellant willfully not attempting to obtain the transcripts from the Supreme Court in this matter and in breach of the order to settle the record in this appeal.

19. That despite the recent revelation that transcripts in matters before the Supreme Court are to be obtained from the Clerk of the Judge, vigorous efforts have been undertaken by the appellant from 2018 to June 2020 through the Court Reporting Unit to ascertain all of the outstanding transcripts in this matter to ensure readiness for the hearing of the appeal in this matter. That attached and exhibited hereto and marked as “K.M.4” are numerous letters and emails transmitted to the Director of the Court Reporting Unit.

20. Further, that based upon rule 14(1) of the Court of Appeal Rules there are specific requirements that are required before an appeal can be dismissed for noncompliance. Rule 14(1) states that:

“If the appellant fails to comply with any of the requirements of rule 13(3), the Registrar shall certify such fact to a judge who shall thereupon order that the appeal stands dismissed either with or without costs, and shall cause the appellant and the respondent to be notified...”

Nowhere does this rule invite a respondent to apply for the issuance of a notice to discontinue a matter this is an administrative matter that is within the discretion of the Registrar. Further, the appellant has not received such a notice.

21. That the 3rd respondent’s Notice of Motion ought to be dismissed on the basis that Rule 14(1) has not been invoked by the Registrar and that Rule 14(3) has not complied with the requirements set forth therein therefore this application ought to be dismissed.

22. That this Honorable Court should exercise its discretion in proceeding with the hearing of the appellant’s Re-Amended Notice of Motion dated the 4th day of May, A.D., 2020 without

any further delay; as it is clear that the outstanding transcripts are unavailable or cannot be found and the 3rd respondent ought to be ordered to proceed without the same.

23. Further, that the 3rd respondent's Notice of Motion has not provided any legal or substantive grounds upon which this Honorable Court ought to discharge or vary the subject Injunction.

24. That the issues within the appellant's Re-Amended Notice of Motion filed on the 4th day of May, A.D., 2020 are all substantive and pertinent issues that ought to be properly ventilated in the interest of justice before this Honorable Court of Appeal.

25. Further, the appellant is advised by the United States Attorney for the Western District of Washington by letter dated the 24th day of July, A.D., 2020 that the investigation into the 3rd respondent: "remains active and ongoing...we request that the restraint remain in place. It is still our goal to forfeit and return those funds to the victim, The Boeing Corporation, as part of the prosecution of the case." A copy of the Prosecutor's letter is now produced and shown to me and marked as Exhibit "K.M.5".

26. That this Affidavit is true and correct to the best of my knowledge, information and belief."

6. Rule 14 of the Court of Appeal Rules provides as follows:

"14. (1) If the appellant fails to comply with any of the requirements with of rule 13 (3), the Registrar shall certify such fact to a judge who shall thereupon order that the appeal stands dismissed either with or without costs, and shall cause the appellant and the respondent to be notified in Form 3 of Appendix A of the terms of his order.

(2) Where an appeal has been dismissed under paragraph (1), a respondent who has given notice under rule 20 may give notice of appeal and the provisions of rule 10 shall apply as if the appeal were brought under that rule.

(3) If the respondent alleges in writing addressed to the Registrar that the appellant has failed to comply with a part of the requirements of rule 13 (3), a judge, if satisfied that the appellant has so failed, may dismiss the appeal for want of due prosecution or make such order as the justice of the case may require.

(4) An appellant whose appeal has been dismissed under this rule may apply to the court by motion that the appeal be restored.

(5) The court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it thinks fit.”

7. Mr. Gomez. QC asserted from the bar that a letter was written to the Registrar pursuant to rule 14(3) and he was advised to file a formal application to the Court. Mr. Serville was prepared to accept that assertion although he had not seen the letter and that letter was not produced to us. However, the 3rd respondent has lodged with the Registry of this Court a Notice of Motion supported by an affidavit in which it is alleged that the appellant has failed to comply with the Registrar’s directions given in her order made pursuant to Rule 13. The Registrar has caused that application to be set down before us. We consider that adequate compliance with rule 14 (3) and sufficient to give life to the 3rd respondent’s application.
8. Notice of Appeal in this matter was filed since the 31 July 2019 and the Registrar’s order relative to the settling of the record was made on the 21 November 2019. Since that time the parties have appeared before this Court on a number of occasions but as of the date of the hearing of the application to strikeout, the appellant has not been able to be fully prepared to proceed.
9. It is significant that a part of the issue between the parties is the freezing order made against certain sums of monies in the client’s account of Ms. Monique Gomez .Co attorneys at law. It follows that this matter requires expedition. The appellant none the less has foreshadowed the need to amend the notice of appeal which to date they have not done. Against this delay is the reality that if the appeal is dismissed the restraint order will fall away without the merits of the appeal being determined.
10. The appellant asserts that they have complied with the order as best as they could and assert that the only items missing are the transcripts. That may be so but as was stated in **Joseph Elkind v The Private Trust Corporation Limited et al** No. 94 of 2015:

“Rules of the Court of Appeal require full compliance with the Registrar’s order and nothing less. The Rules make no distinction between full or substantial compliance. Failure to satisfy the conditions of the Registrar’s Order is non-compliance no matter how substantial a litigant may perceive his compliance with the Court’s orders or Rules to be.”
11. It is clear however, that Rule 14(3) vests the Court with a discretion as to whether to impose the sanction of striking out the appeal. The appellant submitted that their noncompliance was not willful and we note that the affidavit of Mr. Mackey discloses that some effort has

been made to obtain the missing transcripts. We are aware however that the delay in this matter has been significant. The need to amend the Notice of Appeal was nothing new and ought not to have played a significant role in the delay.

12. We are also aware that this appeal also has significance for this Country's treaty obligations with a foreign state so the subject matter is not trivial. It must be acknowledged, however, that the appellant's handling of the appeal process could have been expedited by paying more careful attention to the requirements of the Rules of this Court. It was in those circumstances that although we were not prepared to strike out the appeal on this application some sanction was necessary. It was also important to make it clear that no further delay would be tolerated thus we made the Unless Order and awarded costs to the third respondent.

The Honorable Mr. Justice Evans, JA

The Honorable Mr. Justice Isaacs, JA

The Honorable Mr. Justice Jones, JA