In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2021: No. 007

BETWEEN:

HILLCREST PROPERTIES LTD

Appellant

-and-

IAN ROBERT MCDONALD SMITH

Respondent

Before: **The Hon. Assistant Justice Elkinson**

Representation: **Mr Paul Harshaw, Canterbury Law for the Appellant**

Mr Christopher Swan, Christopher E. Swan & Co for the Respondent

Date of Hearing: **26 June 2023**

Date of Judgment: **6 July 2023**

JUDGMENT

ELKINSON J

THE APPLICATION

1. A Notice of Appeal was filed by Canterbury Law Limited on behalf of the Appellant on 9 February 2021 in respect of a Judgment handed down by the Magistrate on 26 November 2020. As this was an appeal on costs, leave was required pursuant to section 3 of the Civil Appeals Act by the Magistrates Court and that was granted. In that Judgment, the Magistrate determined that he was *functus officio* in relation to dealing with an application for costs made by the Plaintiff in respect of a Judgment which the Magistrate had handed down on 13 March 2019. As that trial was nearing its conclusion, the Plaintiff applied for indemnity costs and the Magistrate refused to give those. The costs applied for by the Plaintiff, now the Appellant, were the costs of a lengthy trial, 7 days of hearing according to the Magistrate's Judgment. Subsequently, the Plaintiff, now Appellant, brought an application under the Liberty to Apply provision in the Judgment of March 2019, for costs. The Magistrate determined that he was *functus officio,* that he had already dealt with the issue of costs. He specified in paragraph 16 of his Judgment of 26 November 2020 that both parties had the opportunity to address the court on costs and that they had done so. He expressed that the court's view to deny the Plaintiff indemnity costs remained unaltered.

THE BACKGROUND

2. The relevant history of the matter is that there was a dispute between the parties relating to non-payment by the Respondent of maintenance fees and costs for renovations in circumstances where the Respondent claimed a breach of a repair covenant and monies owed to him as project manager on planned renovations at the condominiums owned by the appellant and where the Respondent lived. The Magistrate awarded the Appellant the amounts claimed and also made an award to the Respondent for the work he carried out as project manager of the Appellant. At the time, both parties argued for their costs and Appellant asked for indemnity costs as against Respondent.

3. In his Judgment of 13 March 2019, the Magistrate determined that *"The application for costs, on an indemnity basis, by the Plaintiff, for the seven day trial is denied."*

4. Leaving aside the issue as to whether a Magistrates Court could ever award indemnity costs, which I consider highly unlikely given the statutory nature of the Magistrates Court and that there is no provision in the establishing statutes or the rules made thereunder for such an award, the Magistrate refused the application. It would appear no further argument was made to him in respect of any other order for costs.

5. The Appellant relied on the provision in the Order that there would be "liberty to the parties to apply" to raise the issue of an award of costs again before the Magistrate.

6. The Respondent did file an appeal against the Judgment of 13 March 2019 and the record of appeal was prepared and Directions given for that but Respondent abandoned this appeal on 10 December 2019. Subsequently, the Appellant applied to be heard on the issue of costs pursuant to the liberty to apply provision.

7. On 2 November 2020, the Magistrate heard argument from the parties on this issue and on 26 November 2020 determined that he was *functus officio* and could not make any order as to costs. It is that Judgment which the Appellant appeals. Mr Harshaw on behalf of the Appellant argued that the Magistrate gave Liberty to apply in his 13 March 2019 Judgment which meant that he reserved to himself the power to deal with the award of costs as it his obligation to do so; If he was not awarding them to the successful party, he needed to explain why he exercised his discretion otherwise. The Appellant's fundamental complaint is having refused indemnity costs, the Magistrate never went on to deal with costs at all. The Judgment of 13 March 2019 only recites his refusal to give indemnity costs.

8. If this was an appeal of the Judgment of 13 March 2019 I could consider whether or not the Magistrate had properly exercised his discretion in circumstances where Mr Harshaw would no doubt argue that he did not do so at all, let alone properly. However, the focus has to be on the Judgment appealed and, in so far as the Magistrate some 18 months later was being asked to exercise his discretion as regards the costs of the

hearing in March 2019, the only issue before this court is whether he was correct in determining that he was *functus officio*.

DISCUSSION

9. I was referred by Mr. Swan to case law in which the issue of the jurisdiction of an administrative body to reconsider its decisions was contrasted with that of a judicial body. Mr Swan had made these submissions to the Magistrate in November 2020. In Hiram Edwards v Minister of Finance and the Attorney General [2016] BDA LR 45 the focus was on the exercise of an administrative power where a decision had been made by the Accountant General who subsequently revisited his decision. Mr. Justice Hellman cited the decision of Smith v Minister of Culture and Rehabilitation [2011] BDA LR 7 and he quoted Mr Justice Kawaley on the principle of *functus officio*

> *" The principle of functus officio, the rule that a body which has discharged its statutory functions in respect of a particular decision has no jurisdiction to further consider the matter having rendered its decision (unless the decision is set aside by a higher court or tribunal), only applies in relation to judicial or quasi-judicial tribunals."*

10. In that case it was held that the Accountant General was acting pursuant to a statutory power and there was nothing in the nature of that power which precluded him from making a new decision in respect of the withholding or not of an overpayment. This is to be contrasted with the position in relation to matters before a judicial body.

11. In the case of Lydia Caletti v Ralph DeSilva and anor. [2017] BDA 76 Civ Mr. Justice Hellman considered the argument that a party was entitled to set aside a consent judgment in the same action in which the consent judgment was made rather than in a separate action. The judge considered the general rule which is that once the court has entered judgment or drawn up an order, the trial judge is *functus officio* and, in his capacity as trial judge, has no further power to consider or vary his decisions. Clerical mistakes in judgments or orders or any errors arising from an accidental slip or omission may at any time be corrected by the court on motion or summons without an appeal.

The error must be a mistake in expressing the manifest intention of the court but the expression does not give the court the power to correct a mistake of its own in law or otherwise, even on the face of the order.

12. The appeal before me is whether the Magistrate was correct to determine in November 2020 that he was *functus officio.* There is no option available to this court as regards opening up the decision of 13 March 2019 which is the Appellant's true source of grievance. Mr Harshaw referred me to the authority of re Elgindata Ltd. (No.2) [1992] 1WLR 1207 and the principle of costs following the event i.e. that the winner gets his costs is a rule that if the judge decides that the costs should be awarded otherwise, that it must be made clear on what basis the judge is exercising his/her discretion not to give costs to the successful party. That is an issue which solely relates to the Judgment of March 2019.

CONCLUSION

13. The Judgment which is appealed is the Magistrate's determination in November 2020 that he was *functus officio*. I find that the Magistrate was right to make that finding. The Magistrate no longer had any jurisdiction in the matter. The expression, "Liberty to apply" does not allow an application to be made to the Magistrate, once his Order has been drawn up and issued by him, for an issue to be argued again which is substantive and is beyond what is contemplated by the expression "Liberty to apply." The case law is clear and the note in the White Book of 1999, on which our Rules of the Supreme Court of Bermuda are based, explains the use of this expression succinctly as *"...to enable matters to be dealt with in the working out of an Order but not when it is final"* citing Chitty J in Penrice v Williams (1883) 23 Ch.D 353. I am satisfied that the Judgment of 13 March 2019 was final and that the Magistrate had no power to deal with an issue which had arisen to be dealt with in the 13 March 2019 Judgment, an issue which in fact the Magistrate believed had been dealt with by him.

14. As to the costs of this appeal, the costs order is that the costs follow the event that is the costs are awarded to the Respondent, unless the parties apply for a different order within 7 days of the date of this Judgment.

DATED this 6th day of July 2023

JEFFREY ELKINSON
ASSISTANT JUSTICE