IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 11 0F 2015

BELIZE SOCIAL INVESTMENT FUND Appellant

v

EMY GIHARRY RAMIREZ Respondent

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BEFORE

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

A Marshalleck SC, for the appellant.
M E Williams for the respondent.

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5 April 2016 and 11 December 2020.

SIR MANUEL SOSA P

[1] I have read the reasons for judgment of Awich JA and I concur in all of them save for the one addressed at paras **[33]** and **[34]**.

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SIR MANUEL SOSA P

AWICH JA

[2] This appeal was heard on 5 April 2016, and dismissed at the end of the hearing the same day. The Court informed the parties that, the reasons for the order dismissing the appeal would be given at a later date. On 6 July 2018, the writing of the reasons was assigned to me. These are my reasons for concurring in the orders made.

[3] The appeal arose from proceedings in claim No.496 of 2014, in the Supreme Court, brought by Ms. Gilharry-Ramirez, the claimant-respondent. It is convenient to state first what Ms. Gilharry- Ramirez, averred in her claim, to be the facts of the case, and outline the proceedings in her court claim, and then outline the appeal.

[4] On 24 May 2012, 20 June and 25 June 2012, the defendant-appellant, Belize Social Investment Fund, entered into a building contract with K&G Construction Ltd., not a party to this appeal. The defendant-appellant was a statutory corporation established by the **Belize Social Investment Act, cap. 43, Laws of Belize**. Its objects included financing small scale social projects- see **s.3 of the Act**. In the contract the Belize Social Investment Fund was the employer; K&G Construction Ltd. was the contractor. Under the contract, K&G Construction Ltd. agreed to refurbish Dangriga Town Market at an agreed contract price. The Belize Social Investment Fund agreed to pay the contract price.

[5] In the course of carrying out the contract, K&G Construction Ltd. sought funding from Ms. Gilharry-Ramirez, the claimant-respondent, to carry out the project. As part of the deal, Belize Social Investment Fund, K&G Construction Ltd. and Ms. Gilharry-Ramirez entered into a contract on 13 June 2013. It was said to be partly oral and partly in writing. Ms. Gilharry-Ramirez claimed that, in the contract, the parties agreed that, Ms. Gilharry-Ramirez would invest in the project through K&G Construction Ltd., and that, Belize Social Investment Fund would make all payments of the remaining contract price to Ms. Gilharry-Ramirez for the benefit of K&G Construction Ltd. She averred that, it was confirmed that,

the minimum payment due was $780,632.30, and that, a new date of completion of the project would be 31 October 2013.

[6] Ms. Gilahrry-Ramirez furthermore averred that, under the contract of 13 June 2013, she paid off certain bills and expenses for K&G Construction Ltd., then thereafter, by a letter dated 6 September 2013, Belize Social Investment Fund "terminated" the construction contract of 24 May 20 and 25 June 2012, between itself and K&G Construction Ltd. On 13 September 2013, it collected the keys for the market site and asked workers to leave the site.

[7] Still furthermore, Ms. Gilharry-Ramirez averred that, officials of Belize Social Investment Fund made certain statements in order to assure her that, her continued investment in the project was safe, and that, $780,000.30 was still available for her to draw from for work to be done. She acted on those statements and invested in the project. She lost $507,088.31 by making the investment. On these averments, Ms. Gilharry-Ramirez made the court claim for damages for breach of the contract of 13 June 2013, and for breach of a duty of care in the tort of negligence. She also claimed relief of several declarations, interest and costs.

[8] Proceedings commenced in the normal course. Case management conference was held and CMC orders made on 25 November 2014, including an order that, the trial of the claim would take place on 2 March 2015. The claimant-respondent did not comply with any of the CMC orders. The defendant-appellant complied with the orders to file witness statements, and to file submission. It filed one witness statement and the submission. It did not comply with other orders. Neither party applied for an order of relief from sanction under **R.26.8 of the Supreme Court (Civil Procedure) Rules, 2005,** for its failure or partial failure to comply with the CMC orders.

[9] On 2 March 2015, the date appointed for the trial of the claim, learned counsel Ms. Matura- Shepard, for the claimant-respondent and learned counsel Mr. J. Cardona, for the defendant-appellant, attended court. Ms. Gilharry-Ramirez did not personally attend.

The case was called up for trial. Ms. Matura-Shepard for Ms. Gilharry-Ramerez, was not ready to present her case; she applied for adjournment. Mr. Cardona for the defendant-appellant, reported to the trial judge that, he had agreed to a request by Ms. Matura-Shepard that, he would not oppose the application for adjournment, otherwise he went to the court ready to present the defendant-appellant's case, and would do so if required.

[10] The learned trial judge, S. Young, refused the application by counsel for the claimant-respondent for adjournment, and without an application by the claimant-respondent, granted leave to the claimant-respondent to call witnesses, although their witness statements had not been filed and served on the defendant-apellant. Ms. Matura-Shepard was unable to call the one intended witness, the claimant-respondent herself. Counsel reported that, Ms. Gilharry-Ramirez did not attend court that day. Counsel did not give any reason for the failure by Ms. Gilharry-Ramirez to attend court. It is not in the record that the judge inquired for the reason. The learned judge proceeded and ordered the claim, "struck out", and awarded costs against the claimant-respondent in favour of the defendant-appellant.

[11] Subsequently, Ms. Gilharry-Ramirez changed attorneys. Mr. Mark Williams was the new attorney. He applied under **R.39.5 of the Supreme Court (Civil Procedure) Rules, 2005**, for an order to set aside the order made on 2 March 2015, striking out the claim, and awarding costs. On 4 May 2015, Young J. granted the order setting aside the order made on 2 March 2015, striking out the claim, and awarded costs in the sum of $3,000 against Ms. Gilharry-Ramirez, to be paid before she would take steps to continue the proceedings.

[12] Belize Social Investment Fund, the defendant-appellant, was aggrieved by the court order made by Young J. on 4 May 2015, setting aside the court order that she had made on 2 March 2015, striking out the claim of Ms. Gilharry-Ramirez. It appealed from the order. It asked from this Court an order that, the order made by the judge on 4 May 2015, "be set aside". The consequence would be that, the order made on the 2 March

2015, would be restored and remain valid, the claim of the claimant-respondent would remain struck out.

[13] The grounds of appeal filed by the Belize Social Investment Fund were set out in the notice of appeal dated 22 June 2015, filed the same day. The notice and grounds of appeal are the following:

> "NOTICE OF APPEAL
>
> TAKE NOTICE that the Appellant being dissatisfied with the decision of the Supreme Court contained in the judgment of the Honorable Madam Justice Sonya Young dated the 4th day of May, 2015, doth hereby appeals to the Court of Appeal upon the grounds set forth in paragraph 2 and will at the hearing of the appeal seek the relief set out in paragraph 3.
>
> 1. The Appellant appeals against the whole decision;
> 2. Grounds of Appeal;
>
> (i) The learned trial judge erred in law in revisiting the order of 2nd March, 2015 (perfected on 17th March, 2015) as she was functus officio.
>
> (ii) The learned trial judge erred in law and misdirected herself by setting aside the order of 2nd March, 2015, on the basis that the Claimant was not present at the trial or otherwise.
>
> (iii) The learned trial judge, having struck out the claim after having proceeded to trial in the presence of counsel for the Claimant, effectively disposed of the case on its merits on the basis of a lack of evidence in support of the claim, and so erred in law and misdirected herself in thereafter proceeding to set aside her previous order pursuant to Rule 39.5, Civil Procedures Rules.

3. The Appellant will seek an Order that, the order of the trial judge appealed against be set aside.
4. …

DATED 22nd day of June 2015.

BARROW & Co. LLP
Attorneys for the appellant"

Determination

(i) The submissions for the defendant-appellant.

[14] The sum of the submissions by learned counsel Mr. A. Marshalleck S.C, for the defendant-appellant was this. **Rule 39.5 of the Supreme Court (Civil) Procedure Rules, 2005**, did not apply to the application of the claimant-respondent for an order to set aside the order which had been made by Young J. on 2 March 2015, because the rule authorised only a party who was absent from court to make such an application; Ms. Gilharry-Ramirez was, "in fact present at the trial", by her counsel; so instead the common law principle, **functus officio**, applied.

[15] Counsel's reason was that, when the judge called on counsel for Ms. Gilharry-Ramirez to present witnesses, the trial of the claim commenced; and when counsel failed to present a witness, the claimant, by her counsel, failed to prove her claim; the judge correctly ordered the claim struck out; the claim was finally concluded, subject only to the right of the claimant-respondent to appeal to the Court of Appeal. Counsel argued that, the jurisdiction of the trial judge ended on making the order striking out the claim; the trial judge was **functus officio**; she had no jurisdiction over the claim anymore; so, she had no jurisdiction to make the order of 4 May 2015, setting aside the order of 2 March 2015. According to the submissions, the order of 2 March 2015, striking out the claim remained valid.

[16] Mr. Marshalleck cited two cases in support of his submission that, a party to a claim who has not attended court must be regarded as present at the trial, if his attorney appeared in court on the day of trial. The cases are: **Kriton v Augustus Ltd. (Official Transcript 1990-19s97) Court of Appeal, England),** and **Rouse v Freeman (2002) Times 8 January, (Court of Appeal, England).**

(ii) The submissions for the claimant-respondent.

[17] The submissions by learned counsel Mr. Williams, were these. The claimant-respondent properly made her application under **R.39.5 of SC (CP) R, 2005**, for an order to set aside the court order made on 2 March 2015. Counsel drew the attention of the Court to **R.2.4 of the SC (CP) R, 2005, (Belize)** which defines a party as: "includes both the party to the claim and any legal practitioner on record for that party, unless any rule specifies otherwise, or it is clear from the context that, it relates to the lay client or to the legal practitioner only." Counsel asked the Court to accept that, "in the present context, the term party should be taken to refer to the lay client."

[18] Counsel submitted further that, **R.39.5** was intended to prevent miscarriage of justice and ensure that, litigants have opportunity to present their cases and be heard, "as a matter of procedural fairness." He argued that, the relevant rule of practice in England, Order 37.r.2 was different from R.39.5 (Belize), so Kirton v Augustus Ltd., and Rouse v Freeman should not be taken as authority (meaning, as having persuasive value) in this Court. He argued further that, in Kirton the hearing of the application could proceed anyway without the client party being present in court, because the applicant was a corporation. Counsel recommended **Pemberton v The Attorney General of Dominica and Others (HCVAP 2010/016)**.

[19] Regarding the principle of **functus officio**, counsel submitted that, "the doctrine does not operate as an absolute rule", and it did not apply to the order setting aside the order made by Young J. on 2 March 2015, because **R.39.5 SC (CP) R, 2005**, specifically provides for an order setting aside such an earlier order, especially "in the context" of this case.

[20] Mr. Williams cited a case from **S. Africa, Tp Operational Services (Ply) Ltd. v Rawuobo Ngwetsana, No. JA 7/11 (Court of Appeal of S. Africa)** in support of his submissions.

(iii) The reasons leading directly to the decision and the order of this Court.

[21] In my view, the approach adopted in the grounds and the submissions by learned counsel Mr. Marshalleck S.C. for the appellant-rdefendant, is flawed. He adopted the common law principle of **functus officio**, instead of the legislations, **R.39.4** and **R.39.5 of SC(CP)R, 2005**, as the primary base of the grounds of appeal and the submissions. The common law principle of **functus officio** became the focus of the grounds of appeal and his submissions. The legislations, **R.39.4** and **R.39.5. of SC(CP)R**, **2005,** became secondary. By that approach, the legislations would be applied only if they were not inconsistent or incompatible, in the circumstances of the case, with the common law principle of **functus officio**. This was displayed in Mr. Marshalleck's submission that, the principle of functus officio be applied, and **R.39.5** of **SC(CP) R, 2005**, not be applied.

[22] The law of statutory interpretation is, however, to the contrary; it is that, Acts (of Parliament (including Regulations and Rules) take precedence over the common law, principles of equity and any other law. Acts (legislations) are the highest form of law, so any principle of the common law or principle of equity or any other law may be applied only if it is not inconsistent or incompatible with the clear meaning of an Act. In this appeal, the common law principle of **functus officio** may be applied only to the extent that it may be compatible with **R.39 of SC (CP) R, 2005**. This law is the consequence of the principle of parliamentary sovereignty (subject to limitation by the provisions of the written Constitution in Belize)-compare **Madzimbamuto v Lardner- Burk and George [1969] 1AC 645; [1968]3 All ER 561**. A written Constitution is a special legislation; it is a higher set of laws, conventions and values than all legislations, the common law, principles of equity and any other law.

[23] In my view, the correct approach to answering the question in this appeal is to take as the primary base, **R.39.4** and **R.39.5, SC(CP) R**, **2005**, and interpret them by applying principles of interpretation of statutes, always bearing in mind the presumption that, a legislation does not abolish or modify the common law, unless it is clear from the legislation- see **Leach v Rex [1912] AC 305**. It is only within that approach that, the common law principle of **functus officio** may be applied in this appeal.

[24] The relevant provisions of **R.39** are as follows:

> 39.4 Where the judge is satisfied that the notice of the hearing has been served on the absent party or parties in accordance with these Rules-
>
> a) if neither party appears at trial, the judge may strike out the claim; or
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> b) if only one party appears, the judge may proceed in the absence of the other.
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> 39.5 (1) A party who was not present at a trial at which judgment was given or an order made in his absence may apply to set aside the judgement or order.
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> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
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> (3) The application to set aside the judgement or order must be supported by evidence on affidavit showing-
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> (a) a good reason for failing to attend the hearing; and
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> (b) that it is likely that had the applicant attended, some other judgment or order might have been given or made.
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> 39.6 (1) The judge may adjourn a trial on such terms as he thinks just.

> (2) The judge may only adjourn a trial to a date and time fixed by him or to be fixed by the court office.

[25] Both parties to this appeal accept that, under **R.39.4** the trial judge was authorized to strike out the claim, if she was satisfied that, notice of the hearing on 2 March 2015, had been served on the claimant-respondent and she was absent from the court at the hearing on 2 March 2015. The only issue under **R.39.4** to be determined is, whether as a matter of law under **R.39.4**, the trial judge should have regarded the claimant as absent from the court, or present in court because her attorney was present in court on 2 March 2015, for the purposes of the subsequent application made by Gilharry-Ramirez under **R.39.5**, for an order to set aside the order of 2 March 2015, striking out her claim.

[26] Mr Marshalleck's submission is that, the claimant-respondent was, "in fact and at law represented by counsel at trial and so was present at trial". Mr Williams' submission is that, "in the present context, and as it relates to the application of Part 39.5, the term 'party' should be taken to refer to the lay client."

[27] **The Supreme Court (Civil Procedure) Rules, 2005**, at **R2.4** defines the word 'party' as follows:

> "party" includes both the party to the claim and any legal practitioner on record for that party unless any rule specifies otherwise or it is clear from the context that it relates to the lay client or to the legal practitioner only.

[28] This definition applies to all the **Rules in the Supreme Court (Civil Procedure) Rules, 2005**, not only to **R.39**. So, I accept the submission by Mr. Williams that, the meaning of the word "party" must be taken in the context of the particular rule under consideration. That means, in the context of the subject matter and the principle of the law in the particular rule or the particular Part of the Rules.

[29] I concluded that, when the definition of the word "party" is applied to **R.39.4**, the phrase "absent party" means that the client and his attorney together are absent, or that, only the client cited in the claim is absent, depending on what is fair and consistent with the Constitution, given the facts to be considered. I shall illustrate by two examples. 1. Suppose both the claimant-client and his attorney were absent at the hearing, and there was proof that, they both had received notice of the hearing, what order would a judge make? The judge would most likely strike out the claim; it would not be unfair to the claimant-client, and it would be fair to the defendant. 2. Suppose the claimant-client alone was present in court, his attorney failed to attend although he had received notice, or had been informed by the claimant-client, what order would a judge make? It would be unlikely that, the judge would make an order striking out the claim; it would be unfair to the claimant-client, and not necessarily fair or unfair to the defendant. The judge would most likely give the claimant-client an opportunity to obtain another attorney, if the claimant-client desired, unless an opportunity had been given before, in which case the judge would most likely ask the client-party to personally present his case.

[30] So, the question may be reduced to: will it be fair, if a trial judge struck out a claim in the presence of the attorney, but in the absence of the client-party to the case? My answer is, it must depend on whether it will be fair in the circumstances of the particular case. The circumstances may include whether service of the notice of hearing was made on the attorney and the attorney did not inform his client.

[31] The examples that I have given cause me to accept the submission by Mr. Williams that, **R.39.4** and **R.39.5** were based on fairness. Therefore, I interpret the phrase "absent party" in **R.39.4** in the sentence: "where the judge is satisfied that the notice of the hearing has been served on the absent party…", to mean the "absent client-party personally." The presence of his attorney in court alone, does not change the fact that, the client-party was absent for the purposes of making the application authorized by **R.39.5** for an order to set aside an earlier order made in the absence of the applicant personally.

[32] The interpretation that I have arrived at is consistent with the constitutional fundamental right to a fair hearing protected under **s.6 (11) of the Constitution**. A comparable recent judgement in which fairness was applied by this Court is **Bernaldo Schmidt v Ephram Usher, Civil Appeal Case No. 12 of 2017**. In the case, failure by an attorney to file acknowledgment of service of a claim form "containing notice to defend", was not taken by this Court as failure by the defendant-client. He instructed his attorney nine days before the deadline to file acknowledgement of service of the claim form. He returned shortly to check on the action taken by the attorney. In the meantime, the attorney had failed to file acknowledgement of service of the claim form within time. The trial court, on the request by the claimant, entered a default judgement. This Court set aside the default judgement.

[33] Besides the above point of interpretation, one point which I also considered was not addressed by both counsel. They should have addressed the Court on the point, because it is a point arising directly from the provisions of **R.39.4**. The point is that, **R.39.4** provides for a condition precedent to the judge making an order striking out a claim for the reason that, the claimant was absent. The judge was required to be, "satisfied that, the notice of hearing [had] been served on the absent party."

[34] I cannot ignore the fact that, the evidence was lacking about whether Ms. Gilharry-Ramirez had been served with notice of the hearing on 2 March 2015. There is nothing in the record to show that, the judge made any inquiry about whether Ms. Gilharry-Ramirez had been served with notice of the hearing due on 2 March 2015 or had been notified by her attorney. In my view, a date of hearing given in a CMC order must be confirmed in a notice of hearing issued by the court and served by the relevant party, if any order might be made to the disadvantage of the parties to the proceedings or one of them. For this reason alone, the learned judge should have set aside her order made on 2 March 2015.

[35] The defendant-appellant did not raise any issues about the requirements specified in **R.39.5** in this appeal. I am therefore entitled to assume that, the application of the claimant-respondent for an order to set aside the order made on 2 March 2015, was filed within 14 days of serving the order of 2 March 2015, and was supported by evidence disclosing a good reason for Ms. Gilharry -Ramirez failing to attend court on 2 March 2015, the date for hearing, and further that, had she attended, some other order might have been made.

[36] I repeat, these are my reasons for concurring in the order that, this Court made on 5 April 2016, dismissing this appeal.

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AWICH JA

HAFIZ BERTRAM JA

[37] I concur in the reasons for judgment given by my learned brother Awich JA.

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HAFIZ BERTRAM JA