IN THE SUPREME COURT OF BELIZE A.D. 2004

ACTION NO. 494 OF 2004
Relevant to 481 of 2002

(ORLIN SMITH	PLAINTIFF
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(AND	
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(ERASMO FRANKLIN	DEFENDANT

Ms. C. Lewis for the applicant/defendant.
Ms. J. Jackson for the respondent/plaintiff.

AWICH J

JUDGMENT

1. The defendant has applied by notice of motion dated, 17.9.2004, for an order of this Court to set aside "... the decision made or to be made ..." in or following the proceeding on 8.9.2004, which proceeding, the defendant stated had been conducted "ex parte". The application was made under Order 37 rule 23 of the Rules of the Supreme Court. It was not filed late. Judgment had been reserved to 13.10.2004, so the proceeding had not come to an end. The application is in effect an application to set aside the proceeding and for a new trial.

2. Whereas O.37 r 23 provides for application to set aside "any *verdict* or *judgment* obtained where one party does not appear at the trial...", no mention is made of setting aside the proceeding itself. That should normally cause no difficulty because when a verdict or judgment is set aside the proceeding leading to the verdict or judgment becomes of no use; it must go as well. But some uncertainty is introduced into the consideration by O.40 r.1 specifically providing for a more inclusive application, namely, "every application for a new trial or to set aside a verdict, finding or judgment ..." that may be made. I think it was not unwise of Ms. Jackson, learned counsel for the respondent, to have considered both O. 37 r. 23, and O. 40 r.1. My own view is that the facts of this application call for application to set aside under O. 37 r. 23 even if the words "proceeding or trial" are not mentioned therein together with the words "verdict or judgment" obtained when one party has not attended court.

3. It was a mistake to refer to the proceeding on 8. 9.2004, as an ex parte proceeding. The case had been duly listed by the Registrar for hearing on 8.9.2004, and the Registrar had notices of hearing delivered at the chambers of attorneys for the plaintiff and for the defendant. Copies of the notices were duly signed on behalf of the chambers and returned to the Registrar. Mr. M. Chebat, learned attorney for the plaintiff, attended Court on the appointed day. Neither the defendant nor his attorney attended and no message had been received by the Court explaining their absence. In the circumstances the Court, in accordance with O.37 r 21, invited Mr. Chebat to prove the plaintiff's claim. The plaintiff and one other witness testified.

It was a case grounded on negligence in driving a motor vehicle. The Court reserved judgment to today, 13.10.2004. It was clearly a case heard on notice, not ex parte, though the defendant was absent.

4. The grounds argued by learned counsel for the applicant for the order to set aside the proceeding were that: (1) a mistake was made in the chambers of the attorneys for the defendant in that incorrect date of hearing was noted on their diary; (2) the Court made no attempt to contact attorney for the defendant to find out why the defendant or his attorney did not attend Court, the defendant had a right to be heard; and (3) the defendant intended to attend Court and had viable defence.

5. The second ground does not warrant consideration. Ms. J. Jackson rightly ignored it in her submission. It is disrespectful for an attorney to suggest that the Court should find out why an attorney has not attended Court. I expected that an attorney who knew his professional conduct would regard an inquiry made by Court as to why he has not attended Court at an appointed time as an embarrassment, and would ensure that he would not cause the inquiry in future. The notice delivered by the Registrar was sufficient to give parties opportunity to be heard. The plaintiff took the opportunity.

6. Ms. Jackson was also right in her submission that the affidavit in support of the application was an improper affidavit because it was sworn by an attorney who presented the application to Court. I have admitted the affidavit however, because I considered that it was no more than an

admission of fault on the part of the attorneys (and thus on the part of the defendant) that they noted wrong date on their diary.

7. On the other hand, the defence pleaded if proved, could be a successful defence. It charged that the plaintiff was negligent, he walked across in the path of oncoming vehicle driven by the defendant on his correct side of the road. Given the defence I considered that it would not be just to deny the defendant opportunity to present his case, because his attorney erred. I grant the application on conditions that the defendant pay costs of the hearing on 8.9.2004, in his absence, and of this application on 8.10.2004, for order to set aside, in the sum of $1,500. The sum to be paid by 15.11.2004.

8. It follows that the proceeding on 8.9.2004, will only be set aside upon payment of the costs ordered. The substantive judgment reserved to today is postponed. In the event that payment of the costs will have not been made by 15.11.2004, the judgment reserved shall be delivered on the 16.11.2004. Accordingly the case is to be listed for trial or delivery of judgment on 16.11.2004.

9. Delivered on Wednesday 13th day of October 2004.

At the Supreme Court

Belize City

Sam Lungole Awich

Judge

Supreme Court