

CANADA / JUDGMENT

Ishwarlall v. Ishwarlall

2024 BCCA 329

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 329 Ishwarlall v. Ishwarlall

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ishwarlall v. Ishwarlall,

2024 BCCA 329

Date: 20240830

Docket: CA48964

Between:

Sujay Ishwarlall

Appellant

(Claimant)

And

Shresta Ishwarlall

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Groberman

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

March 2, 2023 (Ishwarlall v. Ishwarlall, 2023 BCSC 310, Victoria Docket E203780).

Oral Reasons for Judgment

Counsel for the Appellant

(appearing via videoconference on August 30, 2024):

A. Rafuse

Counsel for the Respondent

(appearing via videoconference on August 30, 2024):

J.C. Emmond

Place and Date of Hearing:

Vancouver, British Columbia

June 28, July 23, August 26, 2024

Place and Date of Judgment:

Vancouver, British Columbia

August 30, 2024

Summary:

The appellant husband applies to reinstate an appeal that was placed on the inactive list due to his failure to file a factum in a timely manner. The respondent seeks to have the appeal dismissed as abandoned. Held: Appeal reinstated in respect of three issues only. The inordinate delay, absence of any reasonable explanation, and history of non-compliance with court orders and procedures militates against reinstatement. There are, however, three issues on which the trial judge may have made manifest errors, and it is in the interests of justice to reinstate the appeal in respect of those issues: a finding of contempt made without observing proper procedures, an apparent failure to take into account a final judgment on retroactive child support rendered by another judge of the court, and an assignment of credit for mortgage payments that appears to have been given to the wrong party. The appeal is reinstated only in respect of those issues.

[1] GROBERMAN J.A.: The husband, the appellant in this family law matter, applies to have the appeal removed from the inactive list, and for an extension of time for the filing of his appeal book and factum. The respondent wife cross-applies to have the appeal dismissed as abandoned.

[2] The issue on these applications is whether the appellant's delay in proceeding with the appeal is such that the Court should exercise its discretion against allowing it to proceed. I have concluded that the appeal should not be allowed to proceed except in a limited form.

- [3] The appellant's inordinate (and essentially unexplained) delay in proceeding with the appeal, combined with his historic disregard for the legal process strongly militates against allowing the case to proceed. Nonetheless three of the alleged errors in the trial judgment appear to be so significant that, if allowed to stand unchallenged, they might result in serious injustice. In the result, I have concluded that the appeal should be allowed to proceed, but only in respect of those three alleged errors.
- [4] For reasons that follow, I am prepared to allow the appeal to be reinstated in respect of:
- a) the finding of contempt against the appellant;
 - b) the failure of the trial judge to take support payments made by the husband between July 2020 and May 2022 into account in fixing his retroactive support obligations; and
 - c) the order that the wife, rather than the husband, receive credit for mortgage payments that the husband made prior to the trial.
- [5] I would caution the appellant that while I am reinstating the appeal in part, the panel that is ultimately scheduled to hear it may well decline to do so unless substantial efforts have been made by the husband to pay the support, and transfer property as required by the trial court's order.

Background

- [6] The parties married in 2005 and separated in 2020. There is one child of the marriage, born in 2008. The family immigrated from South Africa to Saskatchewan in 2011. They subsequently moved to British Columbia; the trial judgment indicates that occurred in 2019, though the pleadings suggest that the wife and child have been ordinarily resident here since 2015.
- [7] The husband is an anesthesiologist. The wife had a career as a teacher in South Africa but gave up that work during the marriage and worked as an assistant in her husband's medical office. Following their separation, she obtained a diploma as a medical office assistant, and she now works as a health unit clerk with the B.C. Cancer Agency.
- [8] The husband was verbally and physically abusive to the wife during the marriage and was charged criminally with assaulting her on at least two occasions, including one occasion after the parties had separated. The judge found that the husband had been physically and emotionally abusive "on an almost daily basis."

Interim Support Order

- [9] In May 2022, a judgment (2022 BCSC 794), was pronounced on the wife's application for retroactive child support and for interim child and spousal support pending trial. It was common ground that the husband had provided some financial support up to that point, through an arrangement where the wife used credit cards to pay for some expenses. The husband had also directly funded certain expenses.
- [10] The chambers judge, Justice Mayer, made the following observations:
- [33] In submissions before me Ms. Ishwarlall agreed that Mr. Ishwarlall has effectively paid \$12,788 per month, as a blended payment for spousal and child support, for the period July 1, 2020 to February 1, 2021 and has paid \$11,028 per month for the period March 1, 2021 to May 1, 2022. This is equivalent to blended payments of \$267,724 over this period.
- [35] Mr. Ishwarlall correctly points out that Ms. Ishwarlall has not sought payment of retroactive spousal support in this application. The only issue therefore is whether it is appropriate to make an order for payment of retroactive child support.
- [36] Mr. Ishwarlall contends that under any scenario, that is even if his income for the period July 2020 to April 2022 was imputed to be \$550,000, that he has made blended support payments of well over the monthly amount that would be payable for child support at this level of income. I note that the Guidelines indicate that Mr. Ishwarlall would have been liable to pay \$3,705.72 in monthly child support with earnings of \$451,242, and \$4,467 with earnings of \$550,000. Mr. Ishwarlall has paid blended monthly support payments of between \$11,028 and \$12,788 during the relevant period.
- [37] As counsel for Mr. Ishwarlall contends, it should be assumed that the support payments made to date should first be attributed to child support. Accordingly, there has been no shortfall in payment of required child support to date. It remains open to Ms. Ishwarlall to seek an order for payment of retroactive spousal support and in my view, Mr. Ishwarlall is on notice that such an application will be made.
- [11] In the result, the claim for retroactive child support was dismissed. An interim order was made for child and spousal support going forward. For those purposes, Justice Mayer found that the husband had a Federal Child Support Guidelines, SOR/97-175 [Guidelines] Guidelines income of \$451,242.
- [12] The formal order reflected the pronouncement in para. 37 of the reasons for judgment in the following language:

The [wife's] claim for retroactive child support is dismissed without prejudice to [her] ability to claim payment for retroactive spousal support at trial.

[Emphasis added.]

The Trial

- [13] The trial of this case was not a typical adversarial proceeding. There had been several instances of non-compliance with legal requirements by the husband in the pre-trial proceedings. The trial judge described them as follows:
- [2] Since the commencement of this action, Dr. Ishwarlall has repeatedly breached court orders and his obligations under the Family Law Act, S.B.C. 2011, c. 25. Examples of his non-compliance include failing to provide full and accurate financial disclosure, failing to sign the agreement for the s. 211 report and pay his half of the fee, and failing to respond to any requests to schedule an examination for discovery.
- [14] Shortly before the trial management conference, the husband's counsel withdrew. Initially, the only address he provided for the husband was "Durban, South Africa", but after an objection filed by the wife, she was provided with an email address and a physical address believed to be that of the husband's mother. The husband did not attend the trial management conference, either in person or by counsel, nor did he file a trial brief.
- [15] The trial was scheduled to commence on February 6, 2023, a Monday. On the Friday prior to trial, a lawyer filed a notice that he had been appointed as the husband's counsel, and advised counsel for the wife and the court registry that he would be seeking an adjournment at the outset of the scheduled trial. Without explanation, however, the husband did not attend for trial, nor did his then-lawyer or anyone else on his behalf. The matter proceeded in his absence, and the trial judge struck the husband's pleadings for failure to comply with the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules].
- [16] The hearing proceeded over the course of two days. The judge made a comprehensive order governing all aspects of the claim.

The Trial Judge's Order for Retroactive Support

- [17] The trial judge determined the husband's Guidelines income to be higher than the figure that Justice Mayer had found. Her conclusion was as follows:

I am satisfied based on the evidence before me, including information that was not before Mayer J., that Dr. Ishwarlall is capable of earning more than \$450,000. Considering all of Dr. Ishwarlall's sources of income, including professional and investment income, I am satisfied that he should be imputed an annual income of \$500,000.

- [18] Her order indicated that the new imputed Guidelines income applied from March 1, 2023. The \$451,242 figure fixed by Justice Mayer on the interlocutory judgment of May 22, 2022 applied until that date.
- [19] It appears that the trial judge may have misapprehended the terms of Justice Mayer's order with respect to retroactive support. As I have indicated, his order dismissed the claim for retroactive child support, but specifically reserved the wife's right to apply, at trial, for

retroactive spousal support. At para. 20 of her judgment, however, the trial judge purports to quote from Justice Mayer's order, describing that order as stating that "Ms. Ishwarlall's [claim] for retroactive child support is dismissed without prejudice to Ms. Ishwarlall's ability to claim for same at trial" (emphasis added). No explanation is provided for the departure from the words used by Justice Mayer.

- [20] Without referring to Justice Mayer's finding that all required child support obligations up to the time of the application before him had been met, the trial judge made a retroactive child support order that included that period, saying:
- [36] I am satisfied that Dr. Ishwarlall should have been paying child support since the date of separation. I order retroactive child support from July 1, 2020 to February 1, 2023 calculated on the guideline income in the Mayer order. Arrears are payable forthwith.
- [21] At para. 89 of the judgment, the judge enumerates her orders. With respect to child support, she states that the arrears are in the amount of \$107,474. A large proportion of that amount would appear to relate to the period during which Justice Mayer found there to be no arrears.
- [22] The judge also found arrears of spousal support of \$393,596, which figure does not appear to take into account the excess of the "blended payments" over the amounts payable as child support.

The Mortgage Payments

- [23] The evidence at trial was that, while the husband had not made spousal support payments, and had made few of the ordered child support payments, the mortgage on the family home had continued to be paid directly out of his accounts. The trial judge, however, made the following order (enumerated as item 33 at para. 89 of her judgment):

Ms. Ishwarlall shall receive credit of \$36,800 CAD for payments made to the Family Home mortgage (\$2,591 CAD per month), mortgage interest (\$423 CAD per month) and strata fees (\$666 CAD per month) from May 1, 2022 to February 1, 2023.

- [24] In argument before me, counsel had no explanation for that order, beyond a suggestion that the judge may have meant to say "Dr. Ishwarlall" rather than "Ms. Ishwarlall". The order has been entered, however, in the terms of the judgment, and no application has been made under the "slip rule". I can only conclude that the order may represent a misapprehension of the evidence by the trial judge.

Contempt Finding

- [25] The trial judge found the appellant in contempt of court. Her reasons were as follows:
- [75] Ms. Ishwarlall seeks to have Dr. Ishwarlall found in contempt of court for his repeated breaches of court orders, and to have a warrant issued for his arrest.

- [76] The power of the court to punish contempt of court is exercised by an order of committal or by imposition of a fine, or both: R. 21-7(1) of the [Supreme Court Family Rules].
- [77] As previously discussed, Dr. Ishwarlall has flagrantly disregarded all previous court orders. I have no hesitation in finding that he is clearly in contempt of all orders of the court issued in this proceeding. I order that a Canada-wide warrant shall issue for his arrest.
- [26] Supreme Court Family Rule 21-7 comprehensively governs the procedure for findings of contempt. Rule 21-7(11) requires the party applying for a contempt order to serve the alleged contemnor with a notice of application and all affidavits in support of the contempt application at least seven days before the application. I understand that did not occur.
- [27] Further, Rule 21-7(5) and (6) govern the procedure for bringing the alleged contemnor before the court and for disposing of the application:

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- (5) If the court is of the opinion that a person may be guilty of contempt of court, it may order, by warrant in Form F92 directed to a sheriff or other officer of the court or to a peace officer, that the person be apprehended and brought before the court.
- (6) If a person referred to in subrule (5) is apprehended and brought before the court, the court in a summary manner may adjudge the innocence or guilt of the person and punish the person for the contempt, if any, or may give the directions it thinks fit for the determination of the person's innocence or guilt and punishment.
- [28] The proceedings, while of a summary nature, allow the alleged contemnor to be heard prior to a judge making a finding of contempt. The trial judge did not follow the required procedure in finding the husband guilty of contempt.

Other Orders

- [29] The judge made a number of other orders. On appeal, the husband proposes to challenge orders apportioning property in addition to the orders I have already described. In his draft factum, the husband presents arguments to the effect that the orders were outside of the judge's jurisdiction, or were wrongly made. I do not propose to discuss those arguments in detail. I will say only that while they are not frivolous arguments, it is also not obvious that they will succeed.

The Course of the Appeal

- [30] The judge's reasons for judgment were pronounced on March 2, 2023. New counsel for the husband filed a notice of appeal on March 30, 2023. The appeal record was filed on May 26, 2023, and served on June 1, 2023. The notice of appeal may not have been properly served on the wife's counsel, and this was the first actual notice the respondent had of the appeal.

- [31] Counsel for the husband took no further steps to prosecute the appeal, and the Court advised, by letter dated April 3, 2024, that the appeal had been placed on the inactive list, and, unless an order was made re-activating it, the appeal would be dismissed as abandoned on October 1, 2024.
- [32] On June 17, 2024, almost a full year after the husband's factum should have been filed, his counsel wrote to the wife's counsel, providing copies of material he intended to rely upon to apply to have the appeal reactivated and to extend the time for filing his factum and appeal book.
- [33] There is no explanation for the lateness of the husband's filings, beyond a statement in an affidavit sworn by his counsel's paralegal stating that "because of a number of trials and applications undertaken by [the appellant's counsel], he advised me he had lost track of time in preparing and filing the factum". Given the length of the delay, it seems to me that the explanation is wanting.
- [34] The husband has not, until very recently, made any support payments to the wife, let alone complied with other provisions of the judgment. Since the commencement of the hearing of this application, there has been some movement in that regard, and an assurance that he will cooperate in allowing the wife to list two condos in South Africa for sale. This is some progress, but the husband is still far from being in compliance with the outstanding order.
- [35] It is clear to me that the husband's failure to make payments until very recently was strategic, as was his decision not to attend or be represented at trial. I do not, however, suggest that counsel's failure to file appeal materials in a timely manner was strategic.
- [36] On an application for reinstatement of an appeal, I am required to consider the extent of the delay, the explanation for the delay, and any prejudice resulting from it. I am also entitled to consider the strength of the appeal. These factors have long been considerations on applications to reinstate appeals--see *Kar Recovery, Ltd. v. KDA*, 2004 BCCA 503 (Chambers)--and have been affirmed by the Court on review applications (see, for example, *Baun v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCCA 322). The cases also confirm that the tests are not to be applied rigidly. The overriding consideration in the discretionary decision is whether the interests of justice would be served by reinstating the appeal.
- [37] In this case, I am troubled by the length of the delay, and by the lack of any reasonable explanation for it. I am also troubled by the appellant's history of failing to comply with court orders, and with his strategy of refusing to cooperate with the justice process.
- [38] Further, it is well established that the Court has the power to dismiss an appeal where the appellant is deliberately flouting a court order: *Larkin v. Glase*, 2009 BCCA 321; *Hokhold v. Gerbrandt*, 2015 BCCA 268. There are many examples of cases where this Court has refused to entertain an appeal of a support order on the basis that the appellant is not in compliance with it. A similar principle must be applied where a party is seeking an indulgence from the

Court. The Court is rightly reluctant to extend such indulgences to a party who appears to be flouting the order under appeal.

- [39] The length of the delay, the absence of an explanation, and the fact that the husband is not in compliance with the existing court order are all factors that favour dismissal of the reinstatement application. I am also satisfied that the delay is prejudicial to the wife, as she is, from a practical standpoint, impeded from enforcing the judgment. She is, of course, under considerable financial strain as a result of the husband's failure to pay.
- [40] While most of the husband's proposed arguments on appeal are arguable, it seems to me that, alone, is insufficient to overcome the factors favouring dismissal of the application.
- [41] I am concerned, however, that the three orders I have highlighted appear to be the product of patent errors. Those are the order for retroactive support that seems to be contrary to the final order made by Justice Mayer on the application before him; the order giving the wife credit for mortgage payments that appear to have been made by the husband; and the order finding the husband in contempt. In saying this, I recognize that I have heard only limited arguments, and that I may be missing something that would justify the orders. My preliminary impression, however, is that those orders are manifestly in error. In my view, the interests of justice demand that the husband be given a further chance to challenge those orders in this Court.
- [42] On the face of it, the judge should not have found the husband to be in contempt of court without him having been provided with all of the materials to be relied upon and without furnishing him an opportunity to be heard. His liberty is now at stake, as he is liable to be arrested and brought before the judge for imposition of sanctions if he sets foot in Canada. Again, while there may be some explanation for the procedure that was followed, none has been furnished on this application, and it is in the interests of justice that the appeal of this issue be allowed to proceed.
- [43] With respect to credit for the mortgage payments, counsel have suggested on this application that the judge may simply have misspoken in giving credit to the wife rather than the husband. If that is the explanation, the error should be corrected; if there is another explanation, it should be provided. Given the uncertainty as to whether the matter can still be corrected in the trial court, and the absence of any movement in that direction, the husband should also be allowed to proceed with the appeal of that issue.
- [44] The issues surrounding the retroactive child and spousal support payments are more complex, and the calculations are not without difficulty. Again, however, on the face of it, the judge made an order fixing the amounts owing that ignored an order already made by another judge of the court. While Justice Mayer's order was made on an interlocutory application, it appears in all respects to be a final order, and it is not clear on what basis the trial judge considered it not to be binding. The husband should be able to continue with the appeal from that issue, as well.

[45] I would not, however, reinstate the appeal generally. The delay and prejudice is substantial, and the husband is, in large part, responsible not only for the delay, but also the absence of submissions and evidence before the trial judge. It would not be in the interests of justice to reinstate the balance of the appeal.

[46] While there has been some division of success on this application, the application, itself, was necessitated by the husband's failure to follow proper procedures. I would award the wife her costs of the application in any event of the appeal.

[47] In the result, I am reinstating the appeal, but only in respect of the following issues:

- a) the finding of contempt against the husband;
- b) the failure of the trial judge to take into account the "blended support payments" found by Justice Mayer to have been made by the husband between July 2020 and May 2022 in fixing the husband's retroactive support obligations; and
- c) the order that the wife, rather than the husband, receive credit for mortgage payments apparently made by the husband prior to the trial.

[48] The wife shall have her costs of the application in any event of the cause.

[Discussion with counsel re: filing timelines]

[49] GROBERMAN J.A.: The time for filing and serving the appellant's factum, which may deal only with the three issues I have indicated, is extended to the close of business on September 16, 2024. Other deadlines will follow in accordance with the Rules of this Court.

"The Honourable Mr. Justice Groberman"

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