

CANADA / JUDGMENT

Olenga v. 0843641 B.C. Ltd.

2019 BCSC 2436

COURT

Supreme Court of British Columbia

DECIDED

7 November 2019

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2019 BCSC 2436 Olenga v. 0843641 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Olenga v. 0843641 B.C. Ltd. ,

2019 BCSC 2436

Date: 20191107

Docket: S193771

Registry: New Westminster

Between:

Lombadisha Aime Olenga also known as

Aime Olenga and Ankhufurha

Plaintiff

And

0843641 B.C. Ltd. dba Affordable Moving

Defendant

Before: The Honourable Mr. Justice Armstrong

On appeal from: An order of the Provincial Court of British Columbia, dated July 17, 2017 (Olenga v. 0843641 B.C. Ltd., Surrey Registry File Number S78854).

Oral Reasons for Judgment

In Chambers

Plaintiff appearing on own behalf:

L.A. Olenga

Appearing on behalf of the Defendant:

P. Lekhraj

Appearing on behalf of the Ministry of Attorney General:

S.E. Lacusta

L. Churchman, Articled Student

Place and Date of Hearing:

New Westminster, B.C.

November 7, 2019

Place and Date of Judgment:

New Westminster, B.C.

November 7, 2019

- [1] THE COURT: In reasons given by Provincial Court Judge Gill on July 17, 2017, the plaintiff, Mr. Olenga, was granted judgment for \$720 respecting certain losses that happened when the defendant's moving company transported his goods. The plaintiff is dissatisfied with this judgment and filed a notice of appeal on August 23, 2017.
- [2] This application concerns Mr. Olenga's request for an order that the defendant pay for the preparation of the transcript of the trial to allow him to perfect his appeal. He suggests that he is financially unable to pay for the cost for the preparation of a transcript of the decision.
- [3] In the alternative, Mr. Olenga seeks an order that the Minister of Justice, or in actual terms the Attorney General of BC, pay for the cost of preparing a transcript for this appeal.
- [4] On December 20, 2017, Mr. Justice Saunders ordered that the plaintiff's appeal be struck from the list for not having filed proof of having ordered transcripts and having no transcripts from the Provincial Court.
- [5] The applicant was given leave to bring his appeal once he had obtained transcripts of the Provincial Court hearing. Mr. Olenga was also granted leave to bring the appeal back once he had filed proof of ordering the transcripts. He was allowed until January 31, 2018, to file his proof of transcript and then would have had 45 days after filing the transcripts to serve them on the respondent.

- [6] It is apparent that Mr. Olenga did not obtain the transcripts by January 31, 2018. He brought an application on October 9, 2018, to require the defendant Minister of Justice to pay for the transcripts to perfect his appeal. That application was dismissed by the court on October 9, 2018.
- [7] He brought this application on August 23, 2019, seeking the identical relief claimed in October 2018. The appellant provided an affidavit in support of his application for an order requiring the defendant to pay the cost of the transcript "pursuant to natural justice and common law." In the alternative, he asked for an order that the Minister of Justice pay for the cost of the transcript necessary to advance his appeal, citing the rule of law and natural justice and the common law.
- [8] In his affidavit he said he was the chairperson of a temple in British Columbia, the Ankhufurha Temple. He appealed the decision of the Provincial Court from July 17, 2017, granting some of the relief for loss of his property that was removed from residence after he was evicted. In his affidavit he also sought indigent status.
- [9] Mr. Olenga received \$720 from the defendant as a result of the decision of Judge Gill and the order made in 2017.
- [10] On December 20, 2018, Mr. Justice Saunders dismissed an order requiring the respondent to pay for the transcript.
- [11] Mr. Olenga has said that he has not been able to afford to obtain transcripts, and he was told to contact Access Pro Bono because they could assist with paying for transcript fees for his appeal. He swears that he spoke with a manager at Access Pro Bono who told him that they do not cover those types of fees. They cover pro bono lawyer's fees but not disbursements. In fact, looking at the information from Access Pro Bono, the organization does provide an ability to obtain disbursement coverage for up to \$2,500.
- [12] The appellant exchanged some emails with Pro Bono BC. He wrote to Pro Bono BC asking them to find him a lawyer in the program, noting that he did not think they could cover the cost. Pro Bono BC responded that they do not provide disbursement coverage when their lawyers are representing clients on a pro bono basis. However, they do cover costs payable to individuals. The appellant has not made any further request of coverage.
- [13] Other than the appellant's claim that he sought indigent status due to financial circumstances, there is little evidence in his affidavit to inform the court of his actual circumstances. It is clear he received \$720 from the plaintiff in May 2018, and it is also clear this application to compel the respondent to pay for the transcript was dismissed.

- [14] The appellant provided four authorities to support his claim that the defendant or the government should pay the cost of preparing transcripts. These were *Allart v. v. Alec's Automotive Machine Shop (2003) Ltd.*, 2014 BCSC 476; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 871; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1998] 2 S.C.R. 214; and *Vilardell v. Dunham*, 2013 BCCA 65.
- [15] The Province of British Columbia objects to the application because in part the same application was dismissed in October 2018 and the matter is *res judicata*. Second, they oppose the application based on the comments made by the court in *Allart* and *Pavlis*.
- [16] I am satisfied that the claim against British Columbia must fail. This application has been argued and dismissed, and this Court is bound by the decision from October 2018 dismissing the application to seek an order against the Attorney General. There are no new facts which would support such an application or revisiting an application and this Court on that point is *res judicata*.
- [17] Further, I am satisfied that the factual foundation presented by the applicant does not sufficiently support a constitutional argument that the application cannot succeed. In any event, I accept the Court of Appeal's decision in *Allart*, and quoting at para. 23:
- [23] Because the judge found the factual foundation for the application to be inadequate she did not weigh the strengths of the constitutional argument. It should be noted, however, that if the constitutional case had been considered on its merits, the applicant would have faced the formidable obstacle of this Court's decision in *Pavlis v. HSBC* :

There is no authority in Canada supporting a general right to access to justice that might extend to transcripts, and in my view, there is no basis for Ms. Pavlis' argument that R. 20(1) engages her right to the equal protection and equal benefit of the law. No-one, as far as I am aware, is entitled to require that transcripts be prepared free of charge as a matter of right -- this is not a "benefit" given by law. Conversely, the Rule does not impose any stereotypical distinction or attribute stereotypical characteristics to any person or group; nor is it discriminatory in its effect on any of the grounds referred to in s. 15 or analogous thereto. Accordingly, this court has held in the criminal context that an appellant is not entitled to an order directing the trial court or the Crown to make a transcript of the trial available for purposes of an appeal. *A fortiori*, the same must be true in the civil context.

- [24] I am of the view that the appeal is bound to fail. The appellant Ms. Allart has not only the obstacle of showing that her case can be distinguished from *Pavlis* but also, and more significantly in my view, the insurmountable burden of proving that the trial judge was wrong to find that there was an inadequate evidentiary basis upon which to address the constitutional question posed. In my view, there is no reasonable prospect that Ms. Allart will be able to satisfy a division of this Court that the judge erred in that regard.

- [18] In reaching this conclusion, I rely on the remarks by the Court of Appeal that there is no general supporting principle of a right to access to justice that could extend to requiring the Crown to pay for transcripts of an appeal. More significantly, that principle would not have application to a case of a civil appeal from a small claims hearing.
- [19] At this hearing Mr. Olenga presented what he believes was an accurate transcription of the evidence of the Provincial Court, albeit done by a friend and not a court reporting service. He asks that he be permitted to use this document to further his appeal.
- [20] At the hearing, he had not given a copy of the transcript to the respondent. I directed that the respondent receive a copy immediately and inform the court at the next hearing if he was able to agree that this document represented a sufficiently accurate transcription of the evidence that it could be relied upon for the purposes of the appeal.
- [21] Mr. Lekhraj has had this document since October 3rd but has not made an examination of the content sufficiently to be able to advise the court today whether or not he believes it inaccurately reflects the particulars of the evidence and the hearing that is the subject matter of this order.
- [22] Rule 18-3(7) permits the court to give directions for the proper hearing and determination of an appeal. That includes making an order that:
- a) documents, transcripts or minutes be produced;
 - b) that the evidence may be tendered by way of affidavit, or that it be given orally; or
 - e) that the appeal be disposed of summarily.
- [23] In the circumstances of this case I am not prepared to order that the respondent be compelled to pay for the cost of the transcript of the hearing for the purposes of the appeal. There is no factual basis on which to exercise that inherent jurisdiction, and in my view that matter has been resolved already in this Court in the previous application.
- [24] However, it seems to me that the parties should have been able to agree that the appellant's record of what was recorded from the audio hearing of the Provincial Court trial be used as evidence at the argument on the appeal.
- [25] It would be open to the respondent to object to any particular item he believed was inaccurate, but he has chosen not to do so. At this stage, and bearing in mind the goal of the Rules being the just and speedy and inexpensive determination of every proceeding on its merits as set out in Rule 1-3, I am satisfied that the document presented by the appellant reflects minutes of the evidence and the proceedings at the Provincial Court trial. It seems to me that it is not a true or pure transcript of the evidence at that time, but in the circumstances of this case it does represent a type of minute of the evidence that was heard and received by the Provincial Court in 2017.

- [26] In the result, I will order that this appeal proceed and the appellant's transcription of events that has been produced to the respondent be available for the purposes of this appeal and relied on at the appeal subject to the discretion of the appeal judge and any issues or disagreements that might be raised by the respondent at that time.
- [27] It seems to me the respondent has not informed the appellant of any errors in the transcript, and he may choose to do that at the hearing of the appeal. I will leave that to him, but in the circumstances I will direct, in accordance with Rule 18-3(7), that the proceedings at hearing that have been prepared on Mr. Olenga's behalf be available to the judge hearing the appeal on the merits.
- [28] Ms. Churchman, anything arising from that?
- [29] MS. CHURCHMAN: Nothing arising.
- [30] THE COURT: Thank you very much. Mr. Olenga, you will be able to proceed to set the matter for the appeal hearing. Thank you.

"Armstrong J."

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