Federal Court of Appeal

Cour d'appel fédérale

Date: 20141121

Docket: A-392-13

Citation: 2014 FCA 272

CORAM: **NADON J.A.**
PELLETIER J.A.
SCOTT J.A.

BETWEEN:

PAUL ABI-MANSOUR

Appellant

and

DEPARTMENT OF ABORIGINAL AFFAIRS

Respondent

Heard at Ottawa, Ontario, on November 13, 2014.

Judgment delivered at Ottawa, Ontario, on November 21, 2014.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NADON J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] The appellant, Mr. Abi-Mansour, appeals from a decision of Mr. Justice Roy (the motions judge). While styled an order, and therefore not reported, the decision contains the reasons for decision in narrative form as well as the order disposing of Mr. Abi-Mansour's motion for an extension of time to file his applicant's record. Mr. Abi-Mansour's first attempt to file his record was refused by the Registry because it did not contain his memorandum of fact and law. Mr. Abi-Mansour then sought an extension of time pursuant to Rule 369 of the *Federal*

Courts Rules, SOR/1998-106 (the Rules) to file his memorandum of fact and law. While expressing reservations about the merits of the motion, the motions judge granted an extension but for a shorter period of time than that sought by Mr. Abi-Mansour. Relying on Rule 410(2), the motions judge ordered costs against Mr. Mansour in the amount of $250, payable forthwith. Rule 410(2) provides that unless otherwise ordered, the costs of a motion for an extension of time shall be borne by the party bringing the motion.

[2] Following the making of this order, Mr. Abi-Mansour filed a memorandum of fact and law in the time provided in the order. However, he alleges that this memorandum is incomplete and that he filed it solely to preserve his rights. He continues to seek an extension of time to file a memorandum of fact and law which more accurately reflects his position in the litigation. The matter is currently scheduled to be heard by the Federal Court on November 25, 2014.

[3] Mr. Abi-Mansour raised as a preliminary matter the fact that he wished some direction as to how to proceed with a somewhat different problem, namely his desire to appeal or have reviewed 4 interlocutory orders rendered by a judge of this Court in connection with this appeal and one other. His attempts to seize the Supreme Court of these matters failed when he was advised that he had other remedies in this Court.

[4] It is not this Court's function to provide litigants with advice as to procedural issues. As a general proposition, this Court does not sit in appeal of decisions made by a single judge of the Court sitting as a motions judge. A party may seek reconsideration of a decision under Rule 397 but the conditions of its application are relatively narrow: *1344746 Ontario Inc. v. Canada (Minister of National Revenue - M.N.R.)*, 2008 FCA 314, [2008] F.C.J. No. 1483, at paragraphs

7-10. Otherwise, the judge's order is final and not subject to review except in the exercise of the Court's inherent jurisdiction to prevent a miscarriage of justice. Since interlocutory motions deal almost exclusively with procedural matters, such cases are exceedingly rare.

[5] Counsel for respondent also raised a preliminary matter. In her memorandum of fact and law, she requested that the style of cause in this matter be amended to substitute the Attorney General for Canada as respondent in place of the Department of Aboriginal Affairs. While the request has merit, it should be pursued by way of motion returnable before the judge of the Federal Court who is to hear Mr. Abi-Mansour's application on November 25, 2014.

[6] I turn now to the merits of the appeal. Given that Mr. Abi-Mansour has filed a memorandum of fact and law as authorized by the order under appeal, this appeal is moot. One cannot get an extension of time to do that which one has already done. It may be that the memorandum does not fully address the questions which Mr. Abi-Mansour wishes to raise (a matter which was entirely within his control) but the fact remains that he was given an extension of time to file his memorandum of fact and law and he filed it. Furthermore, since Mr. Abi-Mansour's application will be heard on the merits on November 25, 2014, an extension of time to file a better memorandum of fact and law would result in an adjournment of the scheduled hearing and would further delay the resolution of this dispute on its merits. Such a delay is not in the interests of justice.

[7] Mr. Abi-Mansour argues that if his appeal is dismissed, this Court should make an order allowing him to make any argument that advances his position, whether or not it appears in his memorandum of fact and law. The purpose of a memorandum of fact and law is to allow the

Court and the opposing party to prepare for the hearing in the knowledge of the arguments that will be made. The order sought by Mr. Abi-Mansour defeats this objective. No such order will be made.

[8] The decision shows that the motions judge was not impressed by some of Mr. Abi-Mansour's representations. Notwithstanding this, he granted the application for an extension of time even though he gave the latter less time than he wished. In the face of this result, Mr. Abi-Mansour alleges that the motions judge was biased.

[9] Mr. Abi-Mansour infers that the motions judge's personal characteristics would predispose him to a certain result, given the nature of Mr. Abi-Mansour's application. He seeks to support this by reference to some of the observations made or conclusions drawn by the judge in his reasons, none of which support the conclusion which Mr. Abi-Mansour seeks to draw from them. None of this would persuade a reasonable person, viewing the matter objectively, and with knowledge of all the relevant facts, that the motions judge approached the motion with a disposition to favour one party rather than the other. This does not preclude the judge from finding that one party's arguments are more persuasive than the other's, which is what happened here.

[10] This is not the first time that Mr. Abi-Mansour has alleged bias in support of a challenge to a judge's decision. In *Abi-Mansour v. Public Service Commission*, 2013 FCA 116, Mr. Abi-Mansour alleged bias on the part of a member of this Court. That allegation was based on the fact that the judge had decided an interlocutory matter against Mr. Abi-Mansour. At that time,

the latter was cautioned against making unfounded allegations of bias: see *Abi-Mansour v. Public Service Commission, supra*, at paragraph 6.

[11] A further instance of this behaviour is Mr. Abi-Mansour's allegation that the judge whose interlocutory orders were the subject of his prelimary request is biased against him.

[12] Allegations of judicial bias cannot be allowed to go unchallenged as they attack one of the pillars of the judicial system, namely the principle that judges are impartial as between the parties who appear before them. The failure to challenge and denounce such allegations may be seen in certain circles as an implicit admission of their truth. This in turn encourages others to make them until they become common currency among those who have a limited perspective on the judicial system. The result is a loss of confidence in the judicial system in some quarters, an issue which must be taken seriously in a society committed to the rule of law.

[13] In *Coombs v. Canada (Attorney General)*, 2014 FCA 222 at paragraph 14, this Court characterized repeated allegations of bias as attacks on the "integrity of the entire administration of justice." In *McMeekin v. Minister of Human Resources and Skills Development*, 2011 FCA 165, at para. 32, Sharlow J.A. stated that unsupported allegations of improper conduct constituted an abuse of process. Such conduct comes within the ambit of the doctrine of abuse of process which, as the Supreme Court of Canada observed in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paragraph 43 focuses on "the integrity of the adjudicative functions of courts."

[14] I am therefore of the view that Mr. Abi-Mansour's repeated unsupported allegations of bias are an abuse of process. Persons who invoke the court's assistance in its capacity as an independent arbiter of disputes and who then repeatedly allege bias when the court's decisions do not meet their expectations are not using the judicial system in good faith. The Court is entitled to decline to lend its assistance to such litigants.

[15] Going forward, Mr. Abi-Mansour should know that unsubstantiated allegations of bias expose him to the dismissal of his proceedings as an abuse of process, either at the request of the opposing party or on the Court's own motion. He should govern himself accordingly.

[16] Mr. Abi-Mansour's last ground of appeal is that the motions judge erred in ordering costs against him in spite of the fact that he was the successful party. The motions judge relied on Rule 410(2) which provides that, unless otherwise ordered, the costs of a motion for an extension of time shall be borne by the party seeking the extension. Mr.Abi-Mansour points to a number of cases where no such order was made. This does not assist Mr. Abi-Mansour as each case represents an exercise of judicial discretion based on the circumstances of the particular case. Mr. Abi-Mansour was the party seeking the extension of time and was therefore, *prima facie*, within the scope of Rule 410(2). The motions judge saw no reason to depart from the award of costs contemplated by the Rule. I have not been persuaded that he erred in principle in failing to do so.

[17] Mr. Abi-Mansour argues that the effect of the combination of Rule 400 and Rule 410(2) is that a successful applicant for an extension of time, who would normally be awarded his costs,

following the usual practice that costs follow the event, is deprived of his costs by Rule 410(2). The result is that the parties bear their own costs.

[18] This is contrary to the plain meaning of Rule 410(2) which specifically provides that the costs of a motion for an extension of time "shall be borne by the party bringing the motion". The intention of the Rule is to see that respondents who are put to the trouble of responding to a motion for an extension of time because the applicant has missed a filing deadline are not subject to an order of costs if the applicant, whose own conduct made the motion necessary, is successful. *Prima facie*, the person who seeks the extension bears the burden of costs. Rule 410(2) allows the judge to make a different order as to costs, but it does not require him to make no order as to costs if the applicant is successful.

[19] Mr. Abi-Mansour objects to the fact that the motions judge ordered that the costs were payable forthwith. He relies on Rule 401(2) which allows the Court to order costs be payable forthwith if it is satisfied that a motion should not have been brought. The motions judge's comments on this issue are as follows:

> In my view, an amount of two hundred and fifty dollars ($250.00), payable forthwith, will make it clear that timelines provided for by the Rules are significant and that persuasive reasons, not merely comments that may be perceived as flippant are needed to justify departing from them.

[20] It is clear from this passage that the motions judge was not satisfied with Mr. Abi-Mansour's reasons for his failure to comply with the Prothonotary Tabib's order extending the time to file his application record. If follows that he was of the view that Mr. Abi-Mansour

should have met the deadline and that, if he had, the motion for an extension would not have been necessary. I can see no error in principle in the motions judge's exercise of his discretion.

[21] I would however qualify the motions judge's order to the following extent. This matter is set to be heard on the merits on November 25, 2014. I would stay the execution of the motions judge's order until after the hearing of the application as it is not in the interests of justice that an unpaid order for costs should prevent this matter from being heard on the merits at this late date.

[22] I would therefore allow the appeal in part and stay the execution of the order for costs payable forthwith until after the hearing of Mr. Abi-Mansour's application on its merits on November 25, 2014. In all other respects, I would dismiss the appeal.

[23] Since the respondent has been successful on substantially all issues, it is entitled to its costs. While I find that the appeal is without merit, Mr. Abi-Mansour's conduct, as regards the respondent, is not so egregious as to warrant solicitor-client costs which the respondent seeks. Mr. Abi-Mansour's unwarranted allegations of bias are not an attack upon the respondent's position but an attack on the Court itself. An award of enhanced costs to the respondent, in these circumstances, would simply be a windfall. The costs of the appeal are set at $500 payable by Mr. Abi-Mansour in any event of the cause.

"J.D. Denis Pelletier"
J.A.

«I agree
M. Nadon, J.A.»

«I agree
A.F. Scott, J.A.»

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-392-13
STYLE OF CAUSE:	PAUL ABI-MANSOUR v. DEPARTMENT OF ABORIGINAL AFFAIRS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 13, 2014
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	NADON J.A. SCOTT J.A.
DATED:	NOVEMBER 21, 2014

APPEARANCES:

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