Claim No. CFI 004/2023
CA 004/2023

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF APPEAL

BETWEEN

ZUZANA KAPOVA

Claimant/Appellant

and

(1) MILOSLAV MAKOVINI
(2) PHARM TRADE HOLDING LTD

Defendants/Respondents

ORDER WITH REASONS OF JUSTICE RENE LE MIERE

UPON the Respondents' Application Notice No. CFI-004-2023/6 dated 20 October 2023 seeking an extension of time to file their Respondents' Notice and skeleton arguments(the "Respondents' Application")

AND UPON reviewing the Appellant's evidence in answer dated 25 October 2023

AND UPON reviewing the Respondents' evidence in reply dated 26 October 2023

AND UPON reading all evidence filed and recorded on the court file

AND PURSUANT to Parts 4.1 and 44 of the Rules of the DIFC Courts

IT IS HEREBY ORDERED THAT

1. The Respondents' Application be transferred to the DIFC Court of Appeal.

2. The Respondents' Application is granted in part.

3. The Respondents shall file and serve the Respondents' skeleton argument by no later than **4pm on Monday, 6 November 2023.**

4. The Respondents' Application is otherwise dismissed

5. The costs of the Application be the Appellant's costs in the appeal, to be assessed by the Registrar if not agreed.

Issued by:
Hayley Norton
Assistant Registrar
Date of issue: 3 November 2023
At: 2pm

SCHEDULE OF REASONS

Summary

1. The Defendants/Respondents, who I will refer to as the Respondents, have applied for an extension of time to file a respondent's notice and skeleton arguments on or before 4pm on 6 November 2023.

2. For the reasons which follow it will be ordered that:

(a) The Respondents' application be transferred to the DIFC Court of Appeal.

(b) The Respondents shall file the Respondents' skeleton arguments on or before 4pm on 6 November 2023.

(c) The application is otherwise dismissed.

(d) The costs of the application be the Claimant/Appellant's costs in the appeal to be assessed by the Registrar if not agreed.

Relevant procedural history

3. On 1 August 2023 the Court issued an order of H.E. Justice Nassir Al Nasser whereby it was ordered that:

(a) The Claimant shall within 14 days of the date of this order provide security for the Defendants' costs, by paying into the Court the sum of

USD 270,000.

(b) The Claimant shall pay the Defendants their costs of the Application, to be assessed by the Registrar if not agreed.

4. On 14 August 2023 the Claimant/Appellant, who I will refer to as the Appellant, filed and served on the Respondents a permission to appeal application (which included a notice of appeal and skeleton argument).

5. On 4 September 2023 the Respondents filed their written submissions in opposition to the Appellant's permission to appeal application.

6. On 20 September 2023 the Registry issued H.E. Justice Nassir Al Nasser's order granting the Appellant's permission to appeal application.

7. Also, on 20 September 2023 the Registry requested the parties to discuss the progression of the case by 27 September 2023.

8. On 26 September 2023, the Respondents requested H.E. Justice Nassir Al Nasser to clarify as to which grounds of appeal of the Appellant were approved for appeal by His Excellency.

9. On 3 October 2023, the DIFC Court Registry informed the parties that "the judge has no further clarification as to the Defendant's correspondence. The Parties are at liberty to apply."

10. Meanwhile, on 27 September 2023, the Appellant had filed a supplementary skeleton argument. The supplementary skeleton argument stated, amongst other things:

"1 The Respondents' skeleton argument was filed on 4 September 2023.

2 The Appellant's supplementary skeleton argument was accordingly due to be filed 14 days from that date pursuant to DCR44.102, by 18 September 2023.

..

5. Under DCR44.105, which relevantly states "the Court may refuse to hear argument", the Court of Appeal in any event has a discretion to have regard to skeleton arguments filed outside the applicable time limits.

6. The Appellant seeks the grant of further time until 4pm on 27 September 2023 to file this supplementary skeleton argument."

11. On 5 October 2023, the Respondents' legal representative informed the Registry amongst other things;

(a) In accordance with RDC 44.79 and 44.80, the Respondents are to file the respondent's notice and skeleton argument within 21 days after the respondent receives a copy of the order giving permission to appeal;

(b) RDC Part 44 requires the Respondents to file their respondent's notice and skeleton argument by 11 October 2023;

(c) The Respondents' counsel need more time do so because of their unavailability due to arbitration and DIFC Court hearings;

(d) The Respondents request the Court to give the Respondents until 6 November 2023 to file the Respondents' skeleton argument and respondent's notice; and

(e) The Respondents request the Court's guidance and directions in respect of those matters.

12. On 13 October 2023, the Registry responded to the parties as follows: "Please note that the Defendant is free to file any application it deems necessary, or the parties may seek to agree directions by way of a consent order."

13. There were communications between the legal representatives of the parties, but they did not agree the Respondents' proposal to give any additional time.

14. On 13 October 2023 the Respondents' legal representatives requested the Appellant to agree to a timetable which included that the Respondents file a respondent's notice and skeleton arguments on or before 4pm on 6 November 2023.

15. On 17 October 2023, in response to that request, the Appellant agreed to the Respondents filing a respondent's notice and skeleton argument on or before 4pm on 6 November "without prejudice to the Claimant's right to oppose the Respondents' Notice and skeleton arguments on account of the Respondent's failure to file it within the time prescribed under the RDC".

16. The Respondents did not accept this position and requested the Appellant to agree to allow the Respondents to file their respondent's notice and skeleton argument by 6 November 2023.

17. The Appellant and the Respondents failed to reach an agreement.

The application

18. On 20 October 2023 the Respondents applied to the Court for orders:

(a) The Respondents shall file the Respondents' Notice and skeleton arguments on or before 4pm on 6 November 2023.

(b) The Appellant shall pay the costs of the Respondents of the application, to be assessed by the Registrar if not agreed.

19. The Respondents' application is supported by the Eighth and Ninth witness statements of Miloslav Makovini, the First Respondent.

20. The Appellant opposes the application for the reasons stated in the First witness statement of Sreehari Vadukumchery, a Legal Consultant employed with Lutfi & Co Advocates and Legal Consultants, the Appellant's legal representatives.

21. The Respondents' application has been filed before the DIFC Court of First Instance however as the lower court has already granted permission to appeal, I am of the view that the application at hand ought to have been filed before the DIFC Court of Appeal. Pursuant to my discretionary power as prescribed by rule 4.12, I order that this application be transferred from Claim No. CFI-004-2023 to CA-004-2023 for determination before the appropriate Court.

The issues

22. The first question is whether the Court has power to make the orders sought.

23. The second question is whether the Court should exercise its discretion to make the orders sought.

The Court does not have power to extend time to file a respondent's notice

24. Part 44 of the Rules of the DIFC Court (RDC) deals with appeals.

25. The respondent must file a skeleton argument in all cases where he proposes to address arguments to the Court[1].

26. A respondent may file and serve a respondent's notice applying for permission to appeal or asking the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court[2].

27. A respondent's skeleton argument may be included within a respondent's notice[3]

28. Where, as here, permission to appeal is required, a respondent's notice must be filed within such period as may be directed by the Court or where the Court makes no such direction, 21 days after the date the respondent receives a copy of the order giving permission to appeal.[4]

29. When the Court does not direct otherwise, the Respondents must file the respondent's notice by 11 October 2023, that is within 21 days after they received a copy of the order giving permission to appeal.

30. Rule 44.13 provides that when the time for appeal has expired, the appellant must file the appellant's notice and include therein an application for an extension of time and a statement of the reason for the delay and the steps taken prior to the application being made.

31. Rule 44.2(6) defines "appeal notice" to mean an appellant's or respondent's notice.

32. Rule 44.81 provides:

> "Rule 44.13 (extension for time for appeal) applies mutatis mutandis to a respondent and a respondent's notice. Accordingly, where an extension of time is required the extension must be requested in the respondent's notice and the reasons why the respondent failed to act within the specified time must be included.

33. It might be argued that rule 44.79, which provides that a respondent's notice must be filed within such period as may be directed by the Court or where the Court makes no such direction, 21 days after the date the respondent receives a copy of the order giving permission to appeal, empowers the Court to extend the time for the respondent's notice to be filed by making a direction that the respondent's notice may be filed at a later date notwithstanding that the 21 day period has expired.

34. However, an interpretation of rule 44.79 which empowers the Court to direct that a respondent's notice be filed after the 21 day period has expired, and therefore an extension of time is required, would render rule 44.81 otiose. A statutory instrument must be construed as a whole. So far as possible, a construction that gives a harmonious or coherent meaning to the various provisions is to be preferred. The construction should give meaning and effect to every word and provision.

35. A harmonious construction of rules 44.79 (1) and 44.81 is that the Court may prospectively direct the period within which the respondent's notice is to be served, but if the Court has not made such a direction and the period for the filing of the respondent's notice specified by rules 44.79 and 44.80 has expired, an extension of time must be requested in accordance with rule 44.81 which applies the requirements of rule 44.13. That is a harmonious construction which reconciles the relevant rules.

36. Rule 44.79 does not empower the Court to extend the time for the Respondents to file a respondent's notice.

37. The Respondents submit that the Court has the requisite power to make the extension of time order pursuant to rules 4.1 and 4.2 (1).

38. Rule 4.2 (1) relevantly provides that except where the rules provide otherwise, the Court may extend the time for compliance with any rule even if the application for extension is made after the time for compliance has expired.

39. However, rule 44.81 provides otherwise. Further, where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision should be read as a proviso to the general provision, and the general provision, insofar as it is inconsistent with the special provision, should be deemed not to apply.

40. Rule 44.81 is a special provision dealing with an extension of time to file a respondent's notice. It should be read as a proviso to the general provision in rule 4.2(1) to grant extensions of time. That is consistent with the qualification in rule 4.2(1) "except where these rules provide otherwise."

41. Rules 4.1 and 4.2(1) do not empower the Court to extend the time for the Respondents to file a respondent's notice

42. The Respondents further submit that:

> ". notwithstanding the RDC 44.12, 44.13 and 44.81, the Registry on 13 October 2023 issued the following directions with respect to the timetable of the appeal: "Please note that the Defendant is free to file any application it deems necessary, or the parties may seek to agree directions by way of a consent order ."

43. If the Respondents intend to submit that their application for an extension of time was authorised or encouraged by the Court Registry, that submission is erroneous. The email from the Court Registry was in response to the Respondents request of 5 October 2023 by which the Respondents requested the Court's guidance and directions in respect of matters raised in its e-mail of 5 October 2023. The Court Registry in effect declined to advise the Respondents whether and how to obtain an extension of time to file a respondent's notice and instead informed the Respondents to file any application they deemed necessary. That was the proper course for the Registry to take. It is not the function of the Registry to give legal advice or advise parties what, if any, application they should make to the Court.

44. I find that the Court does not have power to extend the time for the Respondents to file a respondents notice. Therefore, the present application for an extension of time to file a respondent's notice must be dismissed.

Power to extend time to file skeleton argument

45. Rule 44.85 provides that a respondent who does not file a respondent's notice but who files a skeleton argument must file that skeleton argument not later than 28 days after the appellant's skeleton argument has been filed.

46. There are no specific provisions governing an extension of time for filing a respondent's skeleton argument. The Court may extend the time for the Respondents to file their skeleton argument pursuant to rule 4.2(1) and may do so notwithstanding that the application for extension is made after the time for compliance has expired.

Exercise of discretion to extend time to file skeleton argument

47. Rule 4.2(1) is remedial and confers a broad power upon the Court to relieve against an injustice. A party in breach of a requirement of the rules as to time does not have an unqualified right to an extension of time. Time limits must be obeyed and in order to justify the Court granting an extension of time there must be material on which the Court can exercise its discretion.

48. In Miloslav Makovini's Eighth and Ninth witness statements, the First Respondent states the reasons for the delay in filing the Respondents' skeleton argument are that the Respondents need legal representation to file their respondent's notice and skeleton argument and the Respondents' legal representatives were unable to finalise the respondent's' notice and skeleton argument by 11 October 2023 due to their unavailability because of an arbitration hearing on 12 October 2023 and a DIFC Court hearing on 19 October 2023.

49. The timetables prescribed by the rules are not conditioned upon the availability of counsel. The unavailability of counsel of a party's choice is generally not a ground for an extension of time because if counsel cannot meet the date which is fixed by the rules for dealing with the matter, the party should engage alternative counsel.

50. However, where counsel have been retained in a matter, it would be inefficient and incur additional cost to brief new counsel in respect of an interlocutory matter or an appeal in an interlocutory matter which could not have been reasonably anticipated when counsel were retained.

51. If the time for the Respondents to file the respondent's skeleton argument is not extended they may not be able to address arguments to the Court of appeal. That is a substantial prejudice.

52. On the other hand, extending the time for the Respondents to file their skeleton argument will cause no relevant prejudice to the Appellant. The appeal is due to be heard on 15 December 2023. The Appellant and his legal representatives will have ample time to consider the Respondents' skeleton argument if it is served on them on 6 November 2023.

53. I will extend the time for the Respondents to file their skeleton argument to 6 November 2023.

Costs

54. The Court has a discretion as to whether costs are payable by one party to another, the amount of those costs, and when they ought to be paid. The general rule is that costs follow the event. Another costs principle is that when a party applies for an extension of any time fixed by the rules, that party usually pays the costs of and occasioned by the application. However, the Court's discretion should be exercised with consideration of the entirety of the surrounding circumstances.

55. In this case there is no clear winner. The Respondents have failed in their application for an extension of time to file a respondent's notice but succeeded in their application for an extension of time to file a skeleton argument.

56. Both parties were wrong in part in the positions they adopted. The Respondents pursued their application for an extension of time to file a respondent's notice when the rules prescribe that they should have filed their respondent's notice and included in it an application for an extension of time. The Appellant resisted the Respondents' application for an extension of time to file their skeleton argument when the reason for the delay had been explained and it caused no real prejudice to him.

57. In all the circumstances, considering the matters I have referred to, the appropriate order is that the costs be the Appellant's costs in the appeal to be assessed by the Registrar if not agreed.