[2007] CCJ 1 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal No CV 2 of 2006
GY Civil Appeal No. 42 of 2004

BETWEEN

GLADSTON WATSON **APPELLANT**

AND

ROSEDALE FERNANDES **RESPONDENT**

Before The Rt Honourable Mr Justice de la Bastide, President
And The Honourables Mr Justice Nelson
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Benjamin Gibson for the Appellant

Mr Lyndon Amsterdam for the Respondent

25th January 2007

JUDGMENT OF THE COURT

Delivered jointly by
The Honourable Mr Justice Adrian Saunders
and
The Honourable Mr Justice David Hayton

on the 19th day of March 2007

Introduction

[1] We heard this matter on 25th January, 2007 and at the end of the hearing we made an order allowing the appeal. We promised then to reduce our reasons to writing and we do so now.

[2] The substantive dispute between the parties relates to a claim for land. But the merits of that claim are irrelevant to these proceedings which address purely questions of practice and procedure. There are two such questions. First, is an attorney-at-law who is not "on the record" entitled to sign a notice of appeal on behalf of his client? The second question arises only if the first is answered in the negative: what consequences should follow if such an attorney does sign the notice of appeal?

[3] After examining the relevant rules of court, we have determined that the first question should be answered in the affirmative. The second question does not therefore arise. However, it was addressed by the court below and we feel that it is incumbent upon us to say whether that court gave an appropriate answer to it. Moreover, the manner in which it was addressed raises the more general issue of non-compliance with rules of court, a matter on which we think we should provide some guidance.

The factual background

[4] The appellant, Mr. Watson, had originally retained Mr. Winston Moore as his attorney-at-law to institute legal proceedings in the Land Court. Mr. Moore duly filed an authorisation from Mr. Watson to act on the latter's behalf as attorney, thus placing himself on the record. We were told that some time later, Mr. Moore took up a judicial appointment. Mr. Watson therefore retained another attorney, Mr. Martin Zephyr, who also filed an authorisation to act signed by Mr. Watson. It seems, however, that what was signed and filed was not a document authorising Mr. Zephyr to act *in place of* Mr. Moore but instead one authorising him to act as

additional attorney on the record. This was an irregularity. What should have been filed by Mr. Zephyr was a notice of change of attorney.

[5] No one drew attention to this irregularity and nothing now turns on it. Mr. Zephyr, without objection, commenced the proceedings in the Land Court. Midway through the proceedings, however, for reasons that are not now important, Mr. Watson replaced Mr. Zephyr with Mr. Gibson, his current attorney. Mr. Gibson frankly conceded before us that he was not additional to anyone previously on the record but instead had been retained in place of Mr. Zephyr. Mr. Gibson also told us that he did promise the judge in the Land Court that he would "put his house in order" but he neglected to file any document reflecting the new circumstance. Mr. Zephyr's name remained on the record. Mr. Gibson nonetheless completed the proceedings in the Land Court on behalf of his client, Mr. Watson. Judgment having been given against Mr. Watson, he decided to lodge an appeal. Mr. Gibson personally signed the notice of appeal. At the time that he did so, he still had taken no steps to file in the High Court an authority to act signed by Mr. Watson.

[6] Ms. Fernandes, the respondent, never challenged Mr. Gibson's authority to act on behalf of Mr. Watson. Her attorney, Mr. Amsterdam, said to us that during the Land Court proceedings, he had accepted Mr. Gibson's oral assurance that Mr. Gibson would file the necessary authority to act for and on behalf of Mr. Watson. In the days leading up to the hearing of the appeal the parties exchanged skeleton arguments on the substance of the appeal. At the outset of the hearing, however, the Court of Appeal of its own motion raised the issue of Mr. Gibson's alleged lack of authority. After listening to submissions on the matter, the Court ruled that the notice of appeal was a nullity because Mr. Gibson had not placed himself on the record by filing any authority to act signed by Mr. Watson. The Court held that Mr Gibson "was not authorised by the appellant to act on his behalf". The Court struck out or dismissed the appeal for breach of the rules of Court without any consideration of its merits. Mr. Gibson now appeals that ruling to this court.

[7] Of course, if Mr Gibson had not in fact been authorised by the appellant to sign the notice of appeal, the appeal would, indeed, have been a nullity, as appears from *Re American Life Assurance Co Ltd*[1] and *Heralall v Shivcharran*[2] cited by the Court of Appeal. However, the appellant was personally present at the hearing in the Land Court and in the Court of Appeal. Indeed, he was pointed out by Mr Gibson to the members of the Court of Appeal. It can hardly be disputed that Mr Gibson was acting with the appellant's actual authority. The Court of Appeal seems to have considered this immaterial.

[8] In answering the question whether an attorney-at-law not "on the record" is entitled validly to sign a notice of appeal on behalf of his client, it is necessary to examine the relevant rules of Court. Some care must, however, be taken in examining and construing these rules. They deal in terms with "barristers" and "solicitors". However, these professions have since been fused by the significant amendments made to the Legal Practitioners Act, Chapter 4:01, by the Legal Practitioners (Amendment) Act 1980. The practical effect of section 2 and the Schedule of the latter Act is that all practising lawyers are now attorneys-at-law capable of performing any functions previously restricted to barristers or solicitors and wherever in the rules one sees "barrister" or "solicitor", since 1980 one may safely substitute "attorney-at-law".

[9] One hopes that it will not be long before a thorough overhaul is made of the rules, not only to take account of the implications of that 1980 Act but also, in the light of this judgment, to rationalize the practice and procedure in the High Court and the Court of Appeal.

The High Court Rules

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[1] Civil Appeal No 8 of 1996
[2] (1958) 1 WIR 29 at 30

[10] Sections 36 and 67 of the High Court Act (Cap 3:02) provide for rules to be made regulating pleading, practice and procedure in the High Court (of which the Land Court is part). Both the Act and the rules pre-date the Legal Practitioners (Amendment) Act 1980. The rules extend not only to the High Court but also to the division of the High Court known as The Full Court of the High Court, to which some appeals may be made under sections 79 and 81. Order 1 rule 2 provides: "These rules… shall apply in the Civil and Full Court Jurisdiction of the High Court".

[11] Order 1 rule 4 of the High Court Rules defines the terms "solicitor" and "solicitor on the record". The former means "a solicitor or a barrister when acting as a solicitor". The latter is defined as "the solicitor of or for a party, and includes, and shall be deemed always to have included, every solicitor named in the authority filed under Order 3 rule 8, Order 6 rule 5 or Order 10 rule 5". Order 3 rule 6 requires a writ of summons to be prepared by the plaintiff or by his solicitor and by rule 8, if a solicitor is retained, that solicitor must produce an authority to act in writing signed by the plaintiff when presenting the writ. Order 5 rule 1 requires the solicitor to endorse on the writ and upon every notice in lieu of service of the writ, "the address of the plaintiff and also his own name and that of his firm and his place of business, and also a proper place to be called his address for service within one mile of the Registry…" This latter rule applies also to proceedings begun otherwise than by writ and notice of a writ: Order 5 rules 3 and 4.

[12] Order 6 rule 1 of the High Court rules enjoins every solicitor who shall be engaged in any action to conduct the same, if so desired by the client, until the final determination whether in the court of first instance "or on appeal" about which more will be said in due course. A party is, however, permitted to change his or her solicitor upon filing notice of such change in the Registry but until this is filed and served on the opposite party, the former solicitor shall be considered the solicitor of the party unless the court otherwise directs: Order 6 rule 2. A

solicitor is permitted to act for and on behalf of, or as agent for, another solicitor but if and when he does so, he shall state and shall add to his own name or firm or place of business the name and address of the solicitor on the record: Order 6 rule 5(4). The solicitor on the record remains responsible and liable for all acts and defaults of any solicitor acting for him or her: Order 6 rule 6.

[13] Similar obligations are placed on solicitors appearing on behalf of defendants. A defendant enters an appearance to a writ of summons either personally or by a solicitor: Order 10 rule 4. The solicitor so appearing must produce his authority to act signed by the defendant: Order 10 rule 5. Rule 6 requires the solicitor appearing for a defendant to give his place of business and an address for service within one mile of the Registry. That address for service is important because, in keeping with Order 17 rule 12 for example, where the litigant acts by a solicitor, pleadings are delivered to the solicitor at that address. Service of an order for interrogatories or discovery or inspection made against a party shall be sufficient service if served on the solicitor at that address: Order 27 rule 24. In fact, by Order 51 rule 1 "all writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings, and written communications in respect of which personal service is not required shall be sufficiently served if left within the prescribed hours at the address for service of the person to be served…" Where the litigant appears by a solicitor, the address last referred to is the one given by the solicitor as his address for service.

[14] Order 49 rule 2 states:

> "Where upon the trial of any cause or matter it appears that the same cannot conveniently proceed by reason of the solicitor for any person having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the court or judge, and which according to the practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court or judge shall think fit to award".

[15] The practice in the High Court is clear. Where a litigant does not desire personally to conduct his or her case, the litigant must have a "solicitor on the record". That

person, now called an attorney-at-law, is the person who is seen as having a special legal relationship with the client and with the court. The responsibilities that attach to the instituting, conduct, defence or discontinuance[3] of a matter all attach to him or her. Those responsibilities extend until the final determination of the matter "whether in the court of first instance or on appeal": Order 6 rule 1.

The Court of Appeal Rules

[16] Section 41 of the Court of Appeal Act, Chapter 3:01, enables rules of court to be made for (a) "regulating and prescribing the procedure and practice to be adopted on appeals….. and any matters incidental to or relating to any such procedure or practice" and (e) "regulating the right of practising before the Court of Appeal and the representation of persons concerned in any proceedings in such Court." Order I rule 1 (2) states "These rules shall apply to appeals to the Court of Appeal from the High Court" (the Full Court being a part of the High Court). The Court of Appeal Rules make no specific provision for any lawyer to be placed "on the record". Nor is there any rule providing for an address for service to be filed. However, Order I rule 9(1) states that "All documents required to be served on parties to an action who have not filed an address for service" shall be served "by personal service on the party or his authorised agent." The term "party" is defined in Order I rule 2 to mean "any party to the appeal and includes his legal representative".

[17] Nowhere in the Court of Appeal Rules is the phrase "address for service" defined or considered. This is quite unlike Order 3 rule 8 and Order 5 of the High Court Rules which ensure that no action can be instituted unless the plaintiff or the plaintiff's "solicitor" has filed an address for service within one mile of the Registry.

[18] In Order I rule 2 of the Court of Appeal Rules, the word "appellant" is defined to mean "the party appealing from a judgment … and includes his legal

[3] See Order 24 rule 3

representative". The expression "legal representative" is defined as "any barrister or solicitor admitted to practise as such in any part of Guyana".

[19] Order I rule 6 of the Court of Appeal Rules states that:

> "In all proceedings before the Court, the parties may appear in person or be *represented* [our italics]on appeal by any person who has been called to the English, Irish or Scottish Bar to practise as a Barrister and has the right of audience before the Supreme Court".

[20] Order II rule 1 of the Court of Appeal Rules requires a notice of appeal to "be signed by the appellant or his legal representative". The critical question is who exactly is an appellant's legal representative in this context.

Analysing the Rules

[21] It may be tempting to regard the High Court Rules and the Court of Appeal Rules as being required to be read in conformity with each other so as to form an integrated code of procedure; to treat the definition of "legal representative" in the Court of Appeal Rules as merely indicating who is *capable* of being *a* legal representative; and accordingly to hold that a specific litigant's "legal representative" is really none other than that litigant's solicitor (or since fusion, attorney) on record in the High Court.

[22] There are seemingly plausible reasons for coming to these conclusions. First, there is the fact that the High Court Rules clearly recognise the solicitor on record as being the definitive legal representative of the client in the High Court. Second, at first blush, Order 6 rule 1 of the High Court Rules appears to provide a link between the practice in the High Court and that in the Court of Appeal. The rule states in full:

> "Every solicitor who shall be engaged in any action shall be bound to conduct the same if desired by the plaintiff or defendant, as the case may be, for whom he shall be engaged, unless allowed by the Court or a Judge to cease from acting therein, until the final determination of the action whether in the court *or on appeal*" (emphasis added).

[23] There is judicial authority supporting such a linkage. In *Ramgobin v. Persaud*[4], Bernard J.A. (as she then was) had to decide the very questions posed in the present appeal. The learned judge interpreted the word "appeal" at the end of Order 6 rule 1 of the High Court Rules in the following way..:

> "I am of the view that a solicitor (now attorney-at-law) having been authorized to act on behalf of a party to an action continues to do so until the final determination of the action in the Court of Appeal unless he is discharged or another solicitor or attorney appointed by the requisite notice of change of solicitor. The words "whether in the court of first instance or on appeal" at the end of Order 6 rule 1 unequivocally suggests that a solicitor's obligation to represent a party continues up to the appellate stage. My view of this is reinforced by a perusal of the English Rule 62(a) Rule 1 which is even more specific as it states "whether in the High Court or the Court of Appeal".

The learned Judge then held that an attorney who was not on the record was disentitled from signing a notice of appeal. Her analysis of Order 6 rule 1 of the High Court Rules and her views about who was entitled to sign a notice of appeal were shared by the court below in the present proceedings.

[24] In *Mahabeer v. Singh*[5], Luckhoo JA gave the following rationale for the requirement that a solicitor should be placed on the record.

> "…There is good sense in this requirement otherwise the opposite party or even the court may be subjected to the whimsical or capricious assertions of a dishonest client that his legal representative did not have his authority to do what he did or that he had ceased to have any authority at all; the notice of appointment enables all and sundry to have cognizance of the client's authorized agent, until changed if at all".

Although this rationale was given in the context of proceedings in the High Court, it could easily be deemed applicable to proceedings in the Court of Appeal. It may be pointed out, however, that the filing of a document authorising the launching or defending of proceedings by a lawyer on a party's behalf, is unlikely to pre-empt allegations that the lawyer acted without authority since such allegations are usually based not on a denial that the relationship of lawyer and client existed, but

[4] Civil Appeal No. 18 of 1996
[5] (1966) 9 WIR 475

on the lawyer having acted outside the scope of his authority or contrary to express instructions given him by his client.

[25] In light of the foregoing, it is understandable how the current practice and the culture developed in Guyana so that only an attorney on the record was regarded as being entitled to sign a notice of appeal and that the High Court Rules and the Court of Appeal Rules formed one integrated code of procedure.

[26] This court would ordinarily be reluctant to depart from established culture and practice in the lower courts on a point of procedure. However, where that practice and culture are premised upon interpretation of the relevant rules of court and the matter is argued before us, we must give what we consider to be the correct interpretation of the rules.

[27] With great respect to the decisions of the courts below, we cannot agree either that the High Court Rules and the Court of Appeal Rules form one integrated code of procedure or that an attorney who is not on the High Court record is disentitled from signing a notice of appeal. As to the first of these contentions, it is important to reiterate that the High Court Rules are made pursuant to section 67 of the High Court Act. Section 67 authorises the Rules Committee to make rules regulating matters that are transacted in the High Court. Indeed, Order 1 rule 2 stipulates that the rules "shall apply in the Civil and Full Court Jurisdiction of the High Court…" When carefully examined, there is nothing in the High Court Act or in the rules to suggest that the rules are intended to extend or are capable of extending to matters of procedure and practice before the Court of Appeal for which rules have to be made under section 41 of the Court of Appeal Act. The reference to "on appeal" in Order 6 rule 1 at [21] above is a reference to the Full Court, appeals to which are provided for in Order 46 of the High Court Rules. If alternatively, Order 6 rule 1 does purport to apply to proceedings in the Court of Appeal, then it would to that extent be ultra vires and of no effect.

[28] The Court of Appeal Rules were originally made for the Federal Supreme Court in 1959 by the then Chief Justice of the West Indies and two other Judges of the Federal Supreme Court. Those rules were "continued in force in relation to the British Caribbean Court of Appeal by article 12 of the British Caribbean Court of Appeal Order in Council, 1962, and in relation to the present Court of Appeal of Guyana by section 42 of the Court of Appeal Act (Cap. 3:01)"[6]. The High Court Rules and Court of Appeal Rules are therefore quite separate and distinct and each must be construed independently of the other. The expression "attorney on the record" in the appellate practice raises the question, which record? Order I rule 2 of the Court of Appeal Rules defines "record" and it need hardly be emphasised that the High Court record and the Court of Appeal record refer to two different things altogether, although the latter will include some or perhaps even all of the documents to be found in the former.

[29] The expression "legal representative" in the Court of Appeal Rules must be given its ordinary meaning, uninfluenced by any provision contained in the High Court Rules. The expression is used not only in civil appellate proceedings but also in criminal appeals. In Order III rule 3 (1) for example, a notice other than a notice of appeal against conviction and/or sentence (eg a notice of abandonment of an appeal) must be signed "by the person giving the same or by his legal representative", while under rule 3(5) a body corporate's notices can be signed by its "legal representative". The expression "legal representative" must bear the same meaning in the civil as it does in the criminal practice and of course, there is no provision for filing an authorisation to act in criminal appeals such as there is in the High Court civil practice.

[30] As we have noted at [19] above, by Order I rule 6 of the Court of Appeal Rules, an appellant or respondent in the Court of Appeal was entitled to be represented by any person who had been called to the English, Irish or Scottish Bar to practise as a Barrister and who had the right of audience before the Supreme Court. Prior to

[6] See Footnote to Order I rule 1 of the Court of Appeal Rules

the fusion of the profession, a barrister plainly qualified to be a party's legal representative if duly authorised. As such, barristers were in our view entitled not only to appear before the Court of Appeal on behalf of their clients but also to sign the notice of appeal on their behalf. Moreover, a barrister could not, unless acting as a solicitor in the prescribed circumstances, make himself the "solicitor on record" in the High Court. Whatever might be the consequences for the High Court rules and practice of the Legal Practitioners (Amendment) Act, it would be startling if fusion had the effect of depriving a person who practised formerly as a barrister of a facility which he or she previously enjoyed, namely that of signing a client's notice of appeal even though he was not and could not in most cases be the solicitor on record in the High Court. Put simply, the effect of fusion was to remove constraints on the functions performed by lawyers, not to introduce new ones.

[31] In our judgment, when Order II rule 1 of the Court of Appeal Rules permits a notice of appeal to be signed by the appellant's legal representative, it simply means that any attorney who in fact has the authority of the appellant so to do, is entitled to sign the notice of appeal. That attorney need not have been the person authorised by the litigant in writing for purposes of being placed on the record in compliance with the High Court Rules. Nor does that person have to be the attorney who appeared for the litigant in the court of first instance. The only requirements are that the attorney must be admitted to practice in Guyana and that he or she is actually the appellant's legal representative. The client must naturally have authorised the signing of the notice of appeal. But the Court of Appeal Rules, unlike their High Court counterpart, do not require that authorisation to be formalised in any particular manner or to be filed. In relation to the appellate practice and procedure, we cannot endorse the Court of Appeal's view, at page 5 of their judgment, that "It is the authority signed by the party to an action that gives authority to an attorney-at-law". In the case before us for example, there was no suggestion that at any material time, Mr. Gibson lacked the actual authority of his client. In our view, the court below erred in finding that merely

because Mr. Gibson had not filed in the High Court an authorisation to act, there was "no evidence that the appellant ever authorised Mr. Gibson to act on his behalf". On the contrary there was every indication that at all material times Mr. Gibson was indeed the legal representative of the appellant. As such, in keeping with the Court of Appeal Rules, he was perfectly entitled to sign the notice of appeal.

[32] The Court below expressed a fear that a consequence of this interpretation may be to run the risk that, after a decision at first instance, "unscrupulous lawyers may poach or tout away [the] case" from the attorney-at-law on record. It is difficult to see how this might happen without an appellant's actual authority and ultimately remain undiscovered. More significantly, since an attorney can only validly sign a notice of appeal with the appellant's authority, the requirement that that authority be evidenced by the filing of a document such as a notice of change of attorney in the High Court, will not provide an effective protection against touting. We are sure that in the unlikely event that the fears of the court below are ever realised, upon discovery, the sternest possible measures will be taken against the unscrupulous lawyer.

The consequence of non-compliance with rules of court

[33] As indicated previously, although the second question, posed at [2] above, does not arise for determination, we feel it is necessary for us to express our views on it and generally on the consequences of non-compliance with the rules of court.

[34] Both the High Court and the Court of Appeal Rules require the interests of justice to be an overriding concern in the application of these rules. Order 54 of the High Court Rules states:

> "Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceedings void unless the court or a Judge shall so direct but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in

> such manner and upon such terms as the court or Judge shall think fit".

Order I rule 8 of the Court of Appeal Rules states:

> "Subject to the provisions of section 19(2) of the Act (relating to the time within which an appeal may be brought in a capital case to the Court) and to Order II, 3 (3) of these Rules, the court may enlarge the time prescribed by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way where this is required in the interests of justice".

[35] The court below regarded the notice of appeal that was signed by Mr. Gibson as "a nullity". The court held that Mr. Gibson could have had his client ratify his alleged unauthorised act of personally signing the notice of appeal, but any such ratification had to be done within the time limited for lodging the notice, i.e. six weeks pursuant to Order II rule 3. Since six weeks had long expired, the court dismissed the appeal. The court did so notwithstanding the fact that Mr. Gibson had argued the appellant's case at first instance and, as suggested above, there was every indication that, before the Court of Appeal as well, he remained the legal representative of the appellant.

[36] The effect of the court's decision was to deprive the appellant of a hearing of his appeal on its merits because the court considered that there had been a procedural irregularity. We consider that it should indeed be rare that such a course should be taken, especially when there are a variety of options open to the court for dealing adequately with the technical breach. The case could have been adjourned for a short period to permit the breach to be remedied and an order made that the wasted costs be paid by the appellant or Mr. Gibson personally. But to shut out the litigant entirely from arguing his appeal could not be in the interests of justice. Moreover, in light of the existing rules, where the respondent had not taken the point, apparently suffering no harm from the breach, the Court, in the light of

Krakauer v Katz[7], could have held the respondent to have waived the breach and so have proceeded to hear the case.

[37] The approach of the court below can be contrasted with the one taken in *Heeralall v. Shivcharran*[8]. In that case, Chief Justice Hallinan of the Federal Supreme Court concluded that having regard to the Legal Practitioners Ordinance then in force, the writ in that case could not properly be signed by a barrister. The Chief Justice however treated the act of the barrister in signing the writ as an irregularity that could be cured. If the barrister had no actual authority from the litigant then the issue of the writ would have been a nullity.

[38] Another example of an appropriate approach is to be found in *Mustapha Ally* v *Hand-in-Hand Fire Insurance Company Limited*[9] .The appellant there mistakenly believed he had been ordered to provide security for costs within two months. In fact, the order stipulated eight weeks, not two months. He sought to lodge security two days before the expiration of two months but after the expiration of eight weeks from the date of the order. The Court of Appeal exercised its discretion under Order I rule 8 to depart from the rules as "the only way of avoiding the perpetuation of an injustice". It considered that in the circumstances breach of the procedural rule should not deprive the appellant of the opportunity for his case to be heard on the merits.

[39] Courts exist to do justice between the litigants, though balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency, as we made clear in *Barbados Rediffusion Services Ltd v Marchandani*[10]. Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys. With great respect to

[7] [1954] 1 All ER 244, English Court of Appeal
[8] (1958) 1 WIR 29
[9] (1967) 11 WIR 202
[10] [2006] 1 CCJ (AJ) at [44],[45] and [53]

the court below we disagree that there is anything in these rules to suggest that there is a time limit on the court's ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require. The court retains that jurisdiction at all times.

[40] In *Baptiste v Supersad*[11] *C*hief Justice Wooding cautioned that "The law is not a game, nor is the court an arena. It is … the function and duty of a judge to see that justice is done as far as may be according to the merits". Indeed, as Musmanno J has said[12], "The attainment of true justice is over the highway of realities and not through the alley of technicalities".

Conclusion

[41] In all the circumstances we allowed the appeal, set aside the order that was made by the Court of Appeal and remitted the matter to that Court for hearing on the merits. The respondent was ordered to pay to the appellant the costs of this appeal agreed in the sum of $25,000.00. The costs of and incidental to the hearing in the Court of Appeal are to abide the outcome of the substantive matter.

Mr Justice Michael A. de la Bastide (President)

Justice Rolston Nelson

Justice Adrian Saunders

Justice Jacob Wit

Justice David Hayton

[11] (1967) 12 WIR 140 at 144B

[12] *Potter Title & Trust Co v Lattavo Bros Inc* 88A.2d 91 at 93 (Pennsylvania 1952)