

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **ON APPEAL FROM THE SUMMARY COURT**

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4
5 **CAUSE NO. FAM0270 OF 2017**
6 **(SMA0002/2008)**
7

8 **BETWEEN**

9 **DANIEL MCNEIL HURLSTON**

10 **APPELLANT**

11
12 **AND**

13 **CHERIAN FORREST-HURLSTON**

14 **RESPONDENT**
15

16
17 **Coram:** Honourable Justice Gunn (Actg)

18
19 **Appearances:** Miss Hayley McCall of Chapmans for the Appellant
20 Ms Sheridan Brooks QC for the Respondent
21

22 **Heard:** 5th April 2018

23 **Ex-tempore Ruling:** 5th April 2018

24 **Ruling circulated:** 23rd May 2018
25



26
27 ***Headnote***

28
29 *Summary Court Appeals – Civil Appeals – Re-hearing*
30 *Summary Court Appeals – Civil Appeals – Drawing up of Summary Court Orders*
31 *Summary Court Appeals – Grounds of appeal - Use of Form 8*
32 *Summary Court Appeals – Affidavits –GCR 0.41 – whether affidavits to be filed for*
33 *appeal hearing*
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1 **Ruling**
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- 4 1. In this matter Mr Hurston seeks to appeal against the decision of Acting Magistrate
5 Hernandez made in Summary Court proceedings (Summary Court Appeal – “the
6 SCA”).
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9 *The Proceedings to Date*
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- 11 2. For the purpose of this ruling the relevant facts are that in the course of summary
12 proceedings under the Maintenance Law (1996 Revision) (“the ML”) in 2008, Mr
13 Hurlston (“the Appellant”) and Mrs Hurlston (“the Respondent”) agreed a consent
14 order providing for the Appellant to pay child and spousal maintenance to the
15 Respondent.
16

- 17 3. In 2014 the Appellant petitioned for divorce pursuant to the Matrimonial Causes
18 Law (2005 Revision) – (“the MCL”) (see FAM0060 OF 2014). Such a petition can
19 only be heard by the Grand Court. Miss McCall represented the Appellant and Ms
20 Brooks QC the Respondent in the divorce proceedings.
21

- 22 4. In September 2016, as part of the Grand Court proceedings, the Appellant filed a
23 summons seeking a variation of the spousal maintenance to \$0. Less than a week
24 later, the Respondent filed a summons seeking to enforce arrears and that spousal
25 maintenance should continue as “previously ordered”. Both parties prepared and
26 filed affidavits in support of their respective applications.
27
28



1 5. The Grand Court matter came on for CMC before Williams J on 26th January 2017.
2 The Minute of Order for that hearing records the following statement by Williams J –

3
4 *“In regard to any arrears that exist and the enforcement my position is the*
5 *same as it has been another [sic] cases that the Summary Court arrears*
6 *should be enforced in the Summary Court.*

7 *As a consequence of the wife’s position¹, The applications to vary or*
8 *terminate the spousal maintenance prior to the final ancillary relief*
9 *hearing will need to be issued in the Summary Court – the applications in*
10 *relation to continuation of paying spousal support, a penal notice will also*
11 *have to be dealt with in the Summary Court pending the final ancillary*
12 *relief hearing.”*

13
14 6. The Appellant and Respondent filed summonses in the Summary Court mirroring
15 their applications in the Grand Court. The matter came on for hearing before Acting
16 Magistrate Hernandez on 27th October 2017. Miss McCall and Ms Brooks QC
17 appeared for the parties. No evidence was adduced. The proceedings focused on
18 whether the Summary Court had jurisdiction to hear an application to vary the
19 spousal maintenance and remit the arrears after Grand Court proceedings have
20 commenced.

21
22 7. The learned magistrate delivered her written ruling by email to counsel on 1st
23 November 2017. In summary, the learned magistrate found that the Summary
24 Court did not have the power to “retroactively suspend” the order for spousal
25 maintenance, although she did order that the maintenance order is suspended going
26 forward. She adjudged the arrears and ordered that the debt should be addressed
27 by the Grand Court as part of the final ancillary relief order.

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29 8. Counsel did not prepare an order for the magistrate to sign.
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¹ The Respondent declined to consent to the Summary Court order being dealt with as part of the Grand Court proceedings.



1 *The Appeal*

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3 9. On 15th November 2017², the Appellant submitted a document to the Registry
4 entitled "*Notice of Appeal and Stay of Execution Pending Appeal*" which was within
5 14 days of the learned Magistrate's ruling. The document is endorsed as being
6 received on 17th November 2017. I have not been provided with an explanation for
7 the discrepancy; however, it is not material to the application.

8

9 10. A hearing bundle was produced containing, amongst many documents, the
10 Appellant's three affidavits which were filed in respect of the Grand Court divorce
11 proceeding and the Respondent's affidavit filed in the Summary Court maintenance
12 proceedings.

13

14 11. At the hearing before me, Ms Brooks QC made a preliminary application for the
15 appeal to be dismissed on the grounds that -

16

17 (a) There is no order distilled from the learned magistrate's ruling from
18 which an appeal would lie;

19

20 (b) As drafted, the grounds of appeal fail to comply with section 21(1) of the
21 Court of Appeal Law, in that that did not concisely set out the facts and
22 law upon which the Appellant relies;

22

23 (c) In light of the honourable Chief Justice's decision in **Franklin v Franklin**
24 **2014(2) CILR 79**, the Grand Court (whether sitting as court of first
25 instance or as the appellate court) does not have the authority to "remit"
26 arrears ; and

26

27 (d) The Appellant has failed to adduce evidence in the Summary Court and
28 the present proceedings for the court to consider, as the Appellant's
29 affidavits all related to the divorce proceedings, which are entirely
30 separate from the SCA.

30

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1 12. In addition, the parties were at odds as to whether a SCA of civil proceedings
2 requires the Grand Court to review the Magistrate's findings of fact and/or the law
3 applied, or whether the appeal is a *de novo* hearing of the applications which were
4 before the Summary Court.

5
6 13. In the interests of expediency, I gave an ex tempore ruling, which I undertook to
7 provide in writing. I do so herewith.

8
9

10 *The Law*

11

12 14. Dealing with the fundamental question of the manner in which a civil SCA should
13 proceed; Miss McCall relied on the wording of section 38 of the Summary
14 Jurisdiction Law (2015 Revision) ("the SJL").

15

16 *"Subject to these or any other law, in any civil cause or matter an appeal shall lie to the*
17 *Grand Court -*

18

19

(a) from any final judgment or decision of the court in any proceedings; and
(b) from all interlocutory orders of the court in the course of any proceedings,
but no appeal shall lie, except by special leave of the court or of the Grand
Court, from -

20

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(i) any judgment or decision made by consent;
(ii) an award of interest only;
(iii) an order for costs only; or
(iv) any interlocutory order."

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15. Miss McCall argued that section 38(1) provides an unconditional right of appeal
from the learned magistrate's decision. The SCA should be a *de novo* hearing of the
applications give the words of O.15(3) of the Summary Court Rules 2004 ("SCR") -

"An appeal shall constitute a re-hearing".



1 16. Miss McCall also drew my attention to the passage in Deborah Barker’s textbook
2 “Civil Litigation in the Cayman Islands” (Second Edition) at 25.2.2 -

3
4 “The appeal will take the form of a *de novo* hearing, that is a full re-
5 rehearing.”
6

7 17. Ms Brooks QC drew my attention to Form 8 “Notice of Appeal” of the SCR. She
8 argued that the requirement to provide grounds for the appeal on the form
9 demonstrated that the intention was that the SCA is a review of the learned
10 magistrate’s decision/reasons, rather than a re-hearing.
11

12 18. In addition, Ms Brooks QC submitted that the learned magistrate’s decision was
13 interlocutory only, as the ML expressly provides in section 8 that any order made in
14 the Summary Court under the ML “*may be renewed, reviewed and varied at any time*”
15 by that court. Given the Summary Court’s power to revisit the order at any time, any
16 decision is interlocutory and comes within the exception of section 38(iv) of the SJL.
17 In support of this position, Ms Brooks QC pointed to the fact that there is no express
18 reference to appeals in the ML.
19

20 19. Neither party was able to produce any cases to support their contentions.
21

22 20. I rejected Ms Brooks’ argument that the learned magistrate’s decision was only
23 interlocutory: an absence of express provisions in the ML for appeal cannot negate
24 the express provisions of the SJL governing the appeal of *all* summary matters.
25 Furthermore, the fact that an order may be *renewed, reviewed or varied*, does not
26 itself change the nature of the order from a final order to an interlocutory order.
27 The parties are not permitted to re-argue the same points over and over again
28 before the same or different magistrates until they get a satisfactory result. The
29 order is final until there is a change of circumstances, at which time the Summary
30 Court can revisit the order and make such variations as are appropriate. Any
31 objection to the making or terms of the final order in the first place would require
32 an appeal in accordance with the express provisions of section 38 of the SJL.
33



1 21. I also accepted Miss McCall's submission that a civil SCA is a de novo hearing of the
2 application(s) which were before the Summary Court as the SCR expressly state so
3 at 0.15(3).

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6 *Appeal procedure*

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8 22. Counsel for both parties acknowledged that there had been procedural irregularities
9 following the distribution of the learned magistrates ruling. GCR O. 42 "Judgments
10 and Orders" applies to the Summary Court (see SCR O.14). O.42(4) provides that -

11
12 *"Subject to paragraph (2), every order of the Court shall be drawn up and*
13 *filed unless the Court otherwise directs."*

14
15 Paragraph 2 does not apply in this instance.

16
17 23. GCR O. 42, r.5, in turn, provides -

18 *"(1) The party seeking to have any judgment or order filed must draw up*
19 *the judgment or order and present it to the Clerk of Court together*
20 *with the number of copies required by paragraphs (8) and (9), as the*
21 *case may be.*

22 *(2)...*

23 *(3)...*

24 *(4)...*

25 *(5) Where more than one party has appeared in a proceeding in which a*
26 *judgment or order has been made and all those parties represented by*
27 *attorneys, the attorney for the successful party shall draw up the*
28 *judgment or order and circulate it to the attorneys for the other*
29 *parties who shall indorse it "approved as to form and content".*

30 ...
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32



1 24. Miss McCall and Ms Brooks QC conceded that they should have prepared an order
2 for signature and filing but that they failed to do so. No reason was given.

3
4 25. SCR O.15(1) provides that -

5 *"An appeal to the Grand Court shall be made by notice of appeal in Form 8*
6 *which must be filed within 14 days from the date upon which the judgment*
7 *or order appealed from is filed in accordance with GCR 0.42, r.5."*

8
9 26. Miss McCall argued that, should I now require Order 42, r.5(1) to be complied with
10 before the appeal may proceed, she would submit the order she has prepared in the
11 event of such a request forthwith. She pointed out that O. 42, r.5(1) did not provide
12 for a deadline by which an order must be filed, therefore, allowing for this particular
13 irregularity to be corrected. Ms Brooks QC concurred that an order may still be
14 filed.

15
16 27. I was mindful of the overriding objectives of the GCR – that the rules are intended to
17 enable the Court to deal with every cause or matter in a just, expeditious and
18 economical way. However, given the express provisions of GCR 0.42 and SCR
19 O.15(1), the requirement to file the order is a step that cannot be waived. The order,
20 followed by the notice of appeal, triggers the appeal process. Compliance is
21 necessary before an appeal hearing can proceed. I gave the parties leave to submit
22 the draft order during the luncheon adjournment. Fortuitously, the learned
23 magistrate was available to immediately review and sign the order prior to the
24 hearing resuming after lunch.



1 28. I rejected Ms Brooks QC's submission that the "Notice of Appeal" was defective.
2 Firstly, the Court of Appeal Law (2011 Revision) does not apply to SCAs - that
3 legislation specifically speaks to jurisdiction of the Court of Appeal, not the Grand
4 Court in its appellate jurisdiction. Secondly, although the Appellant's "Notice of
5 Appeal" was exceptionally detailed, it complied with the Form 8 template (see SCR).
6 In fact, given that a SCA is a re-hearing, simply endorsing "the learned magistrates
7 erred in fact" or "the learned magistrate erred in law" on the Form 8 would suffice.
8 Undoubtedly Miss McCall has spent significant time drafting this document,
9 however, dissecting the learned magistrates ruling and setting out alleged errors are
10 of little relevance for the re-hearing today. I concluded that it is not appropriate to
11 strike out the Appellant's notice on the grounds that it provides *too much*
12 information. However, the notice was filed before the order, and, consequently, this
13 was another procedural irregularity that needed to be rectified. Once again, in order
14 to avoid any further costs and delay, I gave leave for the same notice to be re-filed
15 (without amendments) along with the final order over the luncheon adjournment.
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18 *Evidence*
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20 29. Turning to what evidence the SCA would be able to consider; it is important to note,
21 that, although the Appellant had prepared numerous affidavits for the Grand Court
22 divorce proceedings, none of them were filed in relation to the ML application.
23 Furthermore, the learned magistrate did not hear any evidence or consider any of
24 the affidavits for the purposes of her ruling. It was not necessary for me to
25 investigate why the proceedings in the Summary Court proceeded in that manner,
26 as this is a re-hearing.
27



1 30. Ms Brooks QC submitted that because the affidavits had not been filed in the
2 Summary Court proceedings, these were not properly before the learned magistrate
3 or before me on the SCA. Miss McCall submitted that once an affidavit is filed in
4 relation to *any* cause it may be used in other proceedings in *any court*. She argued
5 that this is particularly so if the relevant proceedings are concerned with the same
6 “issue” – in this instance the variation of the existing order for spousal maintenance
7 and remission of arrears. Furthermore, she submitted that the court could grant her
8 leave to nevertheless rely on the affidavits applying GCR 0.41, r.4

9
10 *“An affidavit may, with leave of the Court, be filed or used in evidence*
11 *notwithstanding any irregularity in the form thereof.”*

12
13 31. Ms Brooks QC drew my attention to section 12.1 and 2 of the Explanatory
14 Memorandum to the GCR –

15
16 *“12.1 0.41 applies to all proceedings, including matrimonial*
17 *proceedings, winding up proceedings, bankruptcy proceedings, and civil*
18 *appeals from the summary court.*

19 *12.2 Every affidavit must comply with the formal requirements of*
20 *0.41, r.1 and 0.66, r.1”*

21
22 32. SCR 0.14 provides that GCR 0.41 applies to summary proceedings. Summary
23 proceedings are generally less formal. The use of affidavits is only mandated in
24 limited circumstances, e.g., to commence certain proceedings. The use of affidavits
25 in civil and family summary proceedings is largely confined to instances when one
26 or more of the parties are legally represented. However, if affidavit evidence is to be
27 relied upon in such proceedings, then 0.41 must be complied with. GCR 0.41, r.1
28 provides that –



1 “(1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter
2 must be entitled in that cause or matter.

3 (2) Where a cause or matter is entitled in more than one matter, it shall be
4 sufficient to state the first matter followed by the words “and other matters”,
5 and where a case or matter is entitled in a matter or matters and between
6 parties, that part of the title which consists of the matter or matters may be
7 omitted.”

8

9 33. The Appellant’s affidavits were not so entitled. Furthermore, GCR 0.41, r.9(1)
10 provides that –

11

12 “Every affidavit used in a cause or matter proceedings in the Court must be filed”.
13 (emphasis mine).

14

15 34. Reading paragraph 12.1 and GCR 0.41 together, it is apparent that any affidavits to
16 be relied upon in a SCA must be filed with the Grand Court for that purpose. If an
17 affidavit is to be used in more than one cause or matter, it must state this explicitly.

18

19 35. I rejected Miss McCall’s argument that the affidavit filed in other proceedings can be
20 used simply on the basis that it speaks to the same issue - “cause” or “matter” in this
21 instance refer to the proceedings not the “issue” to be determined.

22

23 36. Neither the Appellant’s nor the Respondent’s affidavits comply with these
24 requirements. The court’s discretion pursuant to 0.41, r.4 is with respect to
25 affidavits which are irregular as to their form, not the filing in the first instance.

26

27 37. In the interests of expediency, I gave both parties leave to file the affidavits with the
28 necessary amendments during the luncheon adjournment so that the hearing of the
29 substantive appeal can proceed in the afternoon.

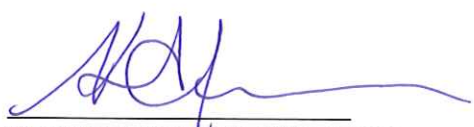
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1 38. Finally, the issue of whether the Court has the power to
2 "remit"/"pardon"/"extinguish"/"retrospectively vary" the order for spousal
3 maintenance and/or arrears is a substantive issue forming part of the re-hearing.
4 Consequently, I will rule upon that point once I have heard full submissions from
5 counsel.

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14 **THE HON. KIRSTY-ANN GUNN**
15 **ACTING JUDGE OF THE GRAND COURT**
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