

Background

2. By Claim Form filed on November 27th, 2012, the Applicant commenced proceedings against the Respondent, being the second of two Defendants. The First-Named Defendant therein is not a party to this Application or to proceedings for costs as no order as to costs was made against it.
3. By Order dated January 13th, 2015 (corrected pursuant to Part 43.10 of the Civil Proceedings Rules 1998 on January 31st, 2017), the Honourable Madame Justice Nadia Kangaloo rendered a Decision on the claim in favour of the Applicant, with the issues of interest and costs to be dealt with at a subsequent hearing. Pursuant to this Order, the Applicant filed a Statement of Costs for consideration by that Court on January 30th, 2015.
4. By Notice of Appeal filed February 24th, 2015, both Defendants appealed against the said Order dated January 13th, 2015.
5. By Order dated April 29th, 2015, the Honourable Madame Justice Nadia Kangaloo ordered inter alia:

“With respect to costs, the Second Defendant is to pay to the Claimant the sum of \$128,712.00 further to the Bill of Costs filed herein by the Claimant on January 30, 2015”
6. By Notice of Application filed July 01st, 2015, the Appellants/Defendants applied to a single Judge of the Court of Appeal for *inter alia* a stay of execution of the judgment and orders of the Honourable Madame Justice Nadia Kangaloo made on 13th January, 2015 and 29th April 2015. By Order dated July 13th, 2015 and entered July 16th, 2015, the Honourable Madame Justice Yorke-Soo Hon J.A. ordered:

1. *There be a Stay of Execution of the order of the Honourable Madam Justice Nadia Kangaloo made on the 13th January 2015 pending the hearing and determination of the appeal.*
2. *This matter is to be expedited.*
3. **Costs to be costs in the Appeal.**

7. By Order of the Court of Appeal dated April 12th, 2017 and entered April 13th, 2017 the panel comprising The Honourable Mr. Justice I. Archie, C.J, the Honourable Mr. Justice N. Breaux, J.A, and the Honourable Mr. Justice P. Rajkumar, J.A. ordered:

1. *The action against the 2nd Appellant (Magistrate) is struck out with no order as to costs.*
2. *The appeal by the first named Appellant is dismissed.*
3. ***The first named Appellant is to pay to the Respondent the costs of this appeal to be assessed by a Registrar in default of agreement as two-thirds of the costs assessed in respect of the trial in the High Court.***

8. By Notice filed on May 04th, 2017, the Applicant herein applied to the Registrar for a Certificate of Costs pursuant to the Order of the Court of Appeal made on April 12th, 2017.

9. By Certificate dated July 26th, 2017, the Registrar of the Supreme Court Ms. Jade Rodriguez certified that the amount payable to the Applicant in pursuance of the Order dated April 12th, 2017 for costs is Eighty-Five Thousand Eight Hundred and Eight Dollars (\$85,808.00), being two thirds of the costs assessed in respect of the trial in the High Court.

10. On December 08th, 2017, the Applicant filed a Bill of Costs for assessment before the Registrar, purporting to be *“pursuant to the Orders of :-*
- i. Yorke Soo Hon JA made on the 13/07/15 Exhibit A;*
 - ii. Confirmed by the Court of Appeal on the 26/07/17 Exhibit B”.*
11. Before the Assistant Registrar, Counsel for the Respondent submitted that the Bill of Costs filed on December 08th, 2017 ought to be struck out on the basis that the issues of costs in the matter had already been dealt with.
12. The matter came up for hearing on four (4) occasions before this Court. It is noted that Counsel for the Applicant, Mr. Edwin K. Roopnarine, did not attend any of these hearings neither did he or any Attorney-at-Law on behalf of the Applicant present any argument before this Court in opposition to that of the Respondent at any of the said hearings:
- a. On February 06th, 2018, there was no appearance for the Applicant;
 - b. On April 17th, 2018, Ms. Sarzano appeared holding for Mr. Roopnarine but was unable to offer an argument in response;
 - c. On June 26th, 2018, Mr. Hallpike appeared holding for Mr. Roopnarine but was unable to offer an argument in response. At that hearing, directions were given that, should the Applicant fail to present an argument in support of the matter remaining before this Court notwithstanding its history, the Bill of Costs filed December 08th, 2017 will be dismissed at the next date of hearing;
 - d. On July 17th, 2018, there was no appearance for the Applicant before this Court, neither was any document filed outlining an argument in

support of the matter remaining before the Court. The matter was struck out; the issue of costs having already been determined and certified by the Registrar of the Supreme Court on July 26th, 2017.

13. By Notice of Appeal filed July 31st, 2018 in the proceedings Civil Appeal No. P-259 of 2018, the Applicant appealed against the order of this Court made on July 17th, 2018. On November 05th, 2018 the Honourable Madam Justice Pemberton, J.A. made the following order:

1. *This matter is remitted to the Registrar for her early consideration;*
2. *There be no order as to costs.*

14. On May 01st, 2019, the Applicant filed the instant Notice of Application in these proceedings for the following orders:

1. *The Court to fix a date for hearing for the Bill of Costs filed on the 8th December, 2017;*
2. *The costs of this application be costs in the cause.*

Submissions of the Applicant

15. Further to the directions of this Court given at a hearing of this matter on November 01st, 2019 for the filing of written submissions with authorities, the Applicant filed its submissions on November 07th, 2019.

16. Counsel for the Applicant argued that there is no difficulty in this Court dealing with the Bill of Costs having regard to both the decision on costs in the application for the stay as well as the later decision on costs in relation the substantive appeal. He submitted that effect of the orders was the subject of the appeal filed "*on the 24th August, 2018*", quoting the grounds

contained in a notice of application filed on the said date for the appeal to be expedited, which identified the issue in dispute as:

“...a short and simple point as to the interpretation of the effect of the Order of Justice of Appeal Yorke Soo-Hon made on the 13th July, 2015 and the subsequent Order of the Court of Appeal made on the 27th July, 2017 and whether the Assistant Registrar possesses the authority to assess the Bill of Costs made by Yorke Soo Hon JA.”

17. Counsel, in his written submissions, further made reference to the affidavit in support of the said application for the appeal to be expedited, noting *inter alia* that the Bill of Costs:

*“...explained the factual and legal position as relating solely to the Order of the Honourable Madam Justice Yorke Soo Hon and could only be presented **after** the determination of the substantive Appeal as it was expressed to be “Costs in the Cause”.” [Counsel’s Emphasis]*

18. Counsel emphasised that the Order for costs in the application for a stay was for “costs in the cause”; that it is an independent order that is not subsumed by the later order for costs upon the determination of the substantive appeal. He contended that, in such circumstances, the successful party in the substantive appeal is entitled to costs on the earlier application and that the Registrar must therefore assess such costs.

Submissions of the Respondent

19. Counsel for the Respondent in his submissions considered the effect of both an order for “cost in the cause”, as well as the effect of the order for

costs made by the full Court in the substantive appeal, noting that his submissions were premised on the following:

- a. *“cost be cost in the cause”* has the same meaning of *“cost be cost in the appeal”*;
 - b. The intended order (on the application for a stay) was *“cost in the cause to the Respondent”*. In that regard, Counsel submitted that the order of *“costs be costs in the appeal”* must be *“...considered against the backdrop of the general rule of the successful party being awarded costs”*, noting **Part 66.6 of the Civil Proceedings Rules 1998 (as amended)** and emphasising that the Court did not indicate an intention to depart from this general rule.
20. Counsel further relied on **JT Stratford & Son Ltd v Lindley and Others (No. 2) [1969] 3 All ER 1122, 1123** for the meaning of *“cost in the cause”*, which he submitted would have entitled the Respondent to file a bill for its costs of the application for a stay (as the successful party therein) if it had been the successful party in the substantive appeal, whilst *“shielding”* the Respondent from having to pay costs to the Applicant where the Applicant is the successful party instead.
21. Counsel further submitted in the alternative and in any event that final order for costs in the substantive appeal included costs of the application for a stay, relying on **Mahadeo Persad v. Trinidad Contractors Limited Civil Appeal No. 243 of 2009.**
22. Counsel further argued that the Assistant Registrar does not have jurisdiction to assess the bill as the order for costs made in the application for a stay does not specifically direct the Registrar to assess such costs.

Issues for determination

23. The issues for determination are as follows:

- i.) What is the effect of paragraph 3 of the order of the Honourable Madame Justice Soo-Hon, J.A., dated July 13th, 2015 (“the earlier costs order”); that “***costs be costs in the appeal***”?
- ii.) What is the effect of paragraph 3 of the order of the Court of Appeal dated April 12th, 2017 (“the final costs order”), having regard to the previous order for costs made in the application for a stay?

Issue No. 1

24. I have no difficulty in accepting that “*cost in the cause*” and “*costs be costs in the appeal*” carry the same meaning for the purpose of this matter. This point was not in issue between the parties and the difference in language can be attributed merely to forum.

25. The comments of Lord Denning MR in the **JT Stratford & Son Ltd Case** are instructive in defining the term “*cost in the cause*”:

““Costs in the cause” means that the costs of those interlocutory proceedings are to be awarded according to the final award of costs in the action. If the plaintiff wins and gets an order for his costs, he gets those interlocutory costs as part of his costs of the action against the defendant. Vice versa, if the defendant wins and gets an order for his costs, he gets those interlocutory costs as part of his costs of the action against the plaintiff.”

26. The above definition was further accepted by the Court of Appeal of Trinidad and Tobago in deciding the **Mahadeo Persad Case**. Mendonça J.A., in delivering the Judgment of the Court, noted at paragraph 15 thereto:

“This Court accepts the definitions of ‘costs in the cause’ relied on by the Registrar who referred to the comments of Lord Denning MR in JT Stratford & Son Ltd v Lindley and Others (No. 2) [1969] 3 All ER 1122, 1123, that ‘costs in the cause’ means that “the costs of those interlocutory proceedings are to be awarded according to the final award of costs in the action. If the plaintiff wins and gets an order for his costs, he gets those interlocutory costs as part of his costs of the action against the defendant.””

27. Adopting this definition, “costs in the cause” would mean that **whichever party** is ultimately successful in the substantive matter would be entitled to their costs of the interlocutory proceedings **as part of their costs of the substantive matter**.

28. Clearly the successful party would only be identified at the determination of the substantive matter. In that regard, an order of “costs in the cause” is by its nature reliant upon the final judgment of the court. Only then can there be certainty and enforceability.

29. It is noteworthy that the earlier costs order provides for nothing more than **“Costs to be costs in the Appeal”**. It does not speak to any specific party’s costs. It simply says **“costs”**. There is a clear definition in law, having regard to the authorities cited above, illustrating what such an order means. In fact, in the **JT Stratford & Son Ltd Case**, Lord Denning MR distinguishes the definition he adopted from that applicable to other possible costs orders:

*“(I may add in parenthesis that "**plaintiff's costs in the cause**" means that, if the plaintiff wins, he gets the costs of the interlocutory proceedings; but, if he loses, he does not have to pay the other side's costs of them. "**Plaintiff's costs in any event**" means that, no matter who wins or loses when the case is decided, the plaintiff is to have the costs of those interlocutory proceedings. "**Plaintiff's costs**" means that the plaintiff is to have the costs of the interlocutory proceedings without waiting for a decision.”*

30. Indeed, had the earlier order included a specific reference to the “Appellant” in such a manner as contemplated by Lord Denning MR above, it would be an entirely different order. In circumstances where it did not, I am not of the view that the earlier order should be interpreted so as to imply a reference to or an intention to refer to the “Appellant”.

31. Further, the concept of the order “*shielding*” a successful party in the substantive matter from paying costs to the other side in respect of interlocutory proceedings in which it was unsuccessful (as opposed to being entitled to costs outright) is a feature of a costs order which makes specific reference to the party (see paragraph 29 above). I am not of the view that such is applicable to this matter in light of the wording of the earlier order.

32. For the above reasons, I find that the proper effect and interpretation of the earlier order is as set out above at paragraph 27 hereto.

Issue No. 2

33. I now turn to the effect of the final costs order; that “***The first named Appellant is to pay to the Respondent the costs of this appeal to be***

assessed by a Registrar in default of agreement as two-thirds of the costs assessed in respect of the trial in the High Court”, having regard to the earlier costs order.

34. It is clear from the final costs order that it is the Respondent (the first named Appellant in the appeal) who is to pay the costs of the appeal. Applying the definition set out above, the Respondent will therefore be liable for costs under the earlier costs order. What is to be dealt with here, and is in issue between the parties, is whether the sum awarded under the final costs order (*two-thirds of the costs assessed in respect of the trial in the High Court*) and already certified by the Registrar of the Supreme Court, includes the costs to which the Applicant is entitled under the earlier order; or whether it is for the Applicant to file a bill of costs to have his costs under the earlier costs order separately assessed.
35. Notably, by the definition of “*cost in the cause*” set out in the **JT Stratford & Son Ltd Case**, costs of the interlocutory proceedings are treated **as part of** costs of the action. See paragraph 25 above.
36. Further guidance can be found in the **Mahadeo Persad Case**. The Appellant therein made an application before a Judge of the High Court to amend a writ and statement of claim. The amendment was granted, with an order for “*costs in the cause*”. At trial, judgment was entered for the Appellant therein, with the Respondent therein to pay 70% of his costs agreed in the sum of \$17,500.00. The Appellant therein filed a bill of costs for taxation, purported to be pursuant to the costs order in the application for amendment. The Assistant Registrar, in dismissing the bill of costs concluded that the Appellant/Plaintiff therein would obtain the costs of the interlocutory proceedings as part of the costs of the action; and that

the specific sums awarded (in the case of the Respondent/Defendant therein, \$17,500.00) **included the costs of the interlocutory proceedings.**

37. The Court of Appeal dismissed the appeal, noting:

*“..where, as in this case, an order for costs of the action is made in favour of the Appellant, **that order will include the costs of the application to amend. The Court does not need to specifically order that those costs are included.**”*

38. Indeed, the final costs order does not provide for costs under the earlier costs order to be dealt with in another manner, neither does it differentiate such costs from the general ambit of costs of the appeal. In such circumstances, the final costs order can only be interpreted as including the costs of the application for a stay as part of the sum awarded therein.

39. Accordingly, I find that the costs to which the Applicant is entitled under the earlier costs order are included in the costs awarded under the final costs order. Such costs have already been certified by the Registrar of the Supreme Court on July 26th, 2017. The Applicant is therefore not entitled to file a bill to have costs under the earlier costs order assessed.

Order

40. The Application filed on May 01st, 2019 is dismissed with no order as to costs.

Date of Decision: January 31st, 2020

**Wrenerson G. Lochan
Assistant Registrar**