

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-01891

IN THE MATTER OF THE ESTATE OF EMELDA SAROOP
(DECEASED) WHO DIED ON THE 28TH JUNE 1975

AND IN THE MATTER OF THE ESTATE OF SONNY MOHAN
(DECEASED) WHO DIED ON THE 10TH AUGUST 1999

BETWEEN

EDMOND ALI also called EDMOND MOHAN
and HERMAN ALI MOHAN

CLAIMANTS

AND

ARANGUEZ ESTATES LIMITED
(In Voluntary Liquidation)

1st DEFENDANT

AND

JUDITH JADOO

2nd DEFENDANT

Before the Honourable Mr. Justice A. des Vignes

Appearances:

Ms. Ihueze for the Claimant

Ms. Tiwary for the 2nd Defendant

DECISION

This can only be described as a tragedy of errors:

- (1) The Claimant's former Attorney, Noel John, filed an action, CV 2008-06248, against 1st Defendant. The 2nd Defendant applied to be joined and Rajkumar J. made an Order for

joinder and directed that an Amended Claim Form and Amended Statement of Case be filed within a specified time. This Order was not complied with.

- (2) The Claimants' present Attorney, Ms. Ihueze, holding for Mr. John then appeared before Rajkumar J. on an application to extend the time to amend Claim and Statement of Case. That Application was dismissed on 20th July, 2010 by Rajkumar J. on the grounds that there was not a good explanation for the breach. The learned Judge then ordered the Claimants to pay the 2nd Defendant's costs. A transcript of the hearing of this application has been produced by the Second Defendant's Attorneys in these proceedings which reveals that Rajkumar J. directed that the payment of such costs be a condition of the filing of any further action, although the Order issued by the Court makes no mention of that condition.
- (3) In breach of this direction, Ms. Ihueze filed this action in May 2011 before the costs were paid. At paragraphs 23 and 24 of her Affidavit filed on 10th February, 2012 she annexed the application made by the 2nd Defendant but not the Order. She sought to rely on the terms of the Order (which did not include the condition that the costs be paid before any further action could be filed) and said that "paragraph 19 should be disregarded and that the Claimants are strangers to the allegation". Subsequently, the transcript was produced and annexed to an affidavit of the Second Defendant's Attorney and the accuracy of the transcript has not been challenged by Ms. Ihueze. This transcript reveals that Ms. Ihueze appeared before Rajkumar J. when the previous action was dismissed with costs and the Judge directed that the payments of the costs be a condition of any further action being filed. So, as a matter of record, Ms. Ihueze very well knew of the directions of the Judge and yet she filed a fresh action before the costs were paid. The statements made by Ms. Ihueze in her Affidavit are therefore blatantly untrue.
- (4) When this action was filed, the Claimant's Attorney failed to annex the material documents to her Statement of Case, although she had referred to them as being annexed. It is only in the second hearing of her application for a trial on 7th November, 2011 that this was pointed out to her by the Court. The Court's records do not reveal that any oral application to amend was entertained by the Court on the 3rd October, 2011. The matter was simply adjourned to 7th November, 2011 for Ms. Tiwary, who had appeared *amicus* for the Second Defendant, to take instructions. No permission was

granted to the Claimant to file an Amended Statement of Case on that date; as stated in paragraph 26 of Ms. Ihueze's Affidavit.

- (5) On 7th November, 2011 the Claimant's default in annexing the documents to her Statement of Case was brought to Ms. Ihueze's attention by the Court. In addition, it was also pointed to her that the Claimant had not properly effected service on the First Defendant. The Claimant was directed to make an application to extend the validity of the Claim Form and Statement of Case in order to effect proper service upon the First Defendant. The Second Defendant was also directed to make an application for an extension of time to serve a Defence. On that date, no oral application was made to amend the Claim Form and Statement of Case by Ms. Ihueze.
- (6) On the 10th November, 2011 the Claimant's Attorney filed an Amended Statement of Case without making an application for permission so to do which complied with Part 20 (as amended). This Amended document purported to be filed pursuant to an Order granted by this Court although no such Order had been made.
- (7) Therefore, the Amended Claim Form and Statement of Case is not properly before this Court and insofar as Ms. Ihueze has stated that she made an oral application to amend which was granted, she is also not speaking the truth.
- (8) The Claimant opposed the Second Defendant's application to strike out and/or for an extension of time to file a Defence on the grounds that the Second Defendant has failed to comply with Rule 26.7 and was not entitled to relief from sanctions. Her entire legal arguments were misconceived because the concept of implied sanctions applying to an application for an extension of time to serve a Defence has been rejected by the Privy Council in **AG v Keron Matthews [2011] UKPC**, a judgement delivered since 20th October, 2011.
- (9) Rule 26.2 gives the Court a discretion to strike out a Statement of Case if there has been a failure to comply with an Order or Direction given by the Court in the proceedings. Rajkumar J. struck out the previous action for non-compliance with his Direction that an Amended Statement of Case be filed within a specified time pursuant to Rule 26.1 (2) and (3). He imposed a condition to his Order that the costs of that action be paid by the Claimants to the Second Defendant, namely that the costs be paid before a fresh action

was commenced. His direction has been blatantly flouted by the Claimants who failed to pay the costs until 23rd March, 2012 but commenced these proceedings on 20th May, 2011.

- (10) Having regard, therefore, to
- (i) The filing of the action before the payment of costs of the previous action as ordered by Rajkumar J.;
 - (ii) The failure of the Claimants to annex the documents referred to in the Statement of Case and the failure of the Claimant to apply to amend the Statement of Case;
 - (iii) The Claimant's Attorney's untrue statements with regard to the grant of permission to amend, the joinder of the Second Defendant in the previous action and the direction for the payment of costs before the commencement of a fresh action;
 - (iv) The striking out of the Amended Claim Form and Statement of Case from the record on the grounds that the same were filed without permission;
 - (v) The failure of the Claimants to provide any explanation for their blatant breach of the direction of Rajkumar J.

I will direct that the claim be struck out with costs to be paid to the Second Defendant. These costs shall be 45% of \$14,000.00 In all the circumstances of this case, however, I am minded to make a Wasted Costs Order pursuant to Part 66.8 and 66.9 against the Claimants' Attorney, Ms. Ihueze on the following grounds:

- (1) Ms. Ihueze appeared before Rajkumar J when he gave the direction that costs be paid as a condition to the filing of any further action. She was therefore, well aware of this direction and yet she commenced this action before the costs were paid.
- (2) Ms. Ihueze, in her Affidavits deposed to facts that have proved to be untrue when she must have known them to be untrue.
- (3) Ms. Ihueze has purported to amend the Claim Form and Statement of Case without the Court's permission. She has then sought to say that the Court granted her permission on an oral application, which was untrue.

- (4) Ms. Ihueze has strenuously resisted the Second Defendant's application on a basis that was erroneously in fact and misconceived in law.

In the circumstances, I am giving Ms. Ihueze, notice that on the 21st November, 2012 at 1.30 p.m. she should attend before me to show cause why a wasted costs Order should not be made against her personally to pay the Second Defendant's costs. Should she fail to appear, whether in person or with an Attorney representing her, on that date I will proceed to make my decision in her absence.

Dated this 29th day of October, 2012

**André des Vignes
Judge**