THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2018-02918**

BETWEEN

ELVIS DAVIS

Claimant

AND

THE PUBLIC SERVICE COMMISSION

Defendant

Before the Hon. Madam Justice C. Gobin

Date of Delivery: September 16, 2020

Appearances: -
Mr. Kenneth Thompson Attorney at law for the Claimant
Mr. Duncan Byam instructed by Mr. Nairob Smart, Attorneys at law for the Defendant

JUDGMENT

1. Before me are the following two applications.
    1) The Defendant's notice of application dated 22/06/2020 under Part 40.3 CPR to set aside an order made on the assessment of damages payable by the Defendant to the Claimant in the sum of $1,184,602.08 with costs assessed on the prescribed scale in the sum of $95,752.00.
    2) The Claimant's application under S.27 (1) of the State Liability and Proceedings Act Chap 8:02 for the issuance of a certificate order for payment.

2. It is sensible to consider the Defendant's application first since if it is successful then it would follow that the Claimant's would not be granted.

The Defendant's Part 40.3 Application

3. The Defendant filed the application on 17/05/2019, and simultaneously filed a Notice of Appeal against the order which it wrongly believed I had made at the hearing on 8/4/19 on the assessment of damages in the absence of State Counsel. The appeal was struck out on the application of the claimant/respondent for non-compliance on 11/11/2019 by Justice Soo Hon JA. No State Counsel appeared at that hearing before the Appeal Judge in Chambers.

4. On the hearing of the defendant's application on 06/08/2020 I indicated my concern that the simultaneous filing of an appeal against the order and the CPR Part 40.3 application may have amounted to an abuse of the process. I believed it allowed the defendant two bites at the cherry and necessarily resulted in delay and postponement of the claimant's entitlement to enjoy the fruits of his judgment. Mr. Byam subsequently filed submissions in support of his argument that it was not. I am now persuaded on the authority relied upon by him and in particular the elucidating judgment of Lord Neuberger MR in **Bank of Scotland v Juliana Pereira and Howard and Linda Payne [2011] EWCA Civ 241** that there was no abuse of process. In appropriate circumstances, a defendant is entitled to file and pursue both applications as different considerations apply.

5. But that was not the end of the matter. In order to succeed on its application, the Defendant had to establish on evidence:-
    a) That there was a good reason for Counsel's failure to attend the hearing.
    b) That it is likely that had the applicant's attorney attended, some other judgment or order might have been given or made.

6. I have considered the evidence and find that the Defendant has failed to meet the requirements under Part 40.3 CPR.

The Evidence

7. The Defendant relied on the evidence contained in the affidavit of Mr. Nairob Smart who was at all times instructing attorney on record for the Defendant. Ms. Mary Davis was advocate. The material parts of his evidence are set out:-
    1) …
    2) ….

3) The Defendant prays to set aside the entire order/decision of the Honourable Court order made on April 8 2019 wherein it was ordered

    i. Paragraph eight of the order dated 2nd January 2019 is amended to read "the Defendant to pay the Claimant's cost on the prescribed scale in the sum of ninety five thousand seven hundred ad fifty-two dollars ($95,752.00).

    ii. The Defendant to pay the Claimant damage assessed in the sum of million one hundred and eighty four thousand six hundred and two dollars and eight cents ($1,184,602.08).nm,

    A copy of the said order is attached hereto and marked "NS1"

4) On or about February 11, 2019 at the hearing of this matter the Honourable Court ordered inter alia that this matter stands adjourned to March 27, 2019 for trial assessment of damages.

5) The Defendant's attorney received the Court notice of the order on or about February 26, 2019.

6) <u>On or about March 27, 2019 at the hearing of the matter, it was adjourned to April 8, 2019.</u> (emphasis added) The Defendant was not represented.

7) My subsequent enquires revealed that on March 25, 2019 Ms. Davis sent her filed (sic) to the Solicitor General for the urgent re-assignment of a temporary Counsel to conduct the matter. Unfortunately she had several Court files for re-assignment which resulted in the matter not being timeously re-assigned to another Counsel. This fact was not communicated to me. As such the Defendant was not represented on March 27, 2019. Ms. Davis I am informed later proceeded on leave in April 2019 and is due to return in June 2019.

8) At the material time I had a taxation matter fixed to proceed in the Taxation Court Port-of-Spain and I was also an Appellant in another Court matter been (sic) heard that day. I had communicated this fact to Counsel to indicate my unavailability on that day. Thus due to this imbroglio between the Defendant's Attorneys at law, the Defendant was not represented on March 27 2019.

9) <u>My enquiries at the Court reveal that on March 27 2019, the matter was simply adjourned to April 8 2019.</u> (emphasis added) Unfortunately the Defendant or its Attorney at law were not duly notify (sic) of the relatively

short adjournment date of April 8 2019 set for the assessment of the matter. Thus I was under the impression that the matter was duly dealt with on March 27 2019. (all emphasis added)

Reason for Non- appearance Not Good Enough

8. I do not consider that the reason for Counsel's non-appearance was good enough or at all. Almost ten years after the decision of the Privy Council in **Universal Projects Ltd v The Attorney General** [**2010] UKPC 37** The explanation is not very different from that which was rejected in that case. Once again it reflects a lack of adequate systems and internal administrative processes as well as sufficient personnel to cope with rigorous demands of civil litigation. What Mr. Smart referred to as an "imbroglio", reflected nothing more than a lack of systems and oversight.

9. Mr. Smart's evidence confirmed that both instructing attorney and Counsel were notified a month before the date of hearing of the assessment which was scheduled on 27/03/2019. Ms. Davis applied for urgent leave but did not actually proceed on leave until sometime in April. The need for urgent re-assignment when the trial was fixed to proceed and before the advocate attorney left on leave is not clear. But in any case the system failed to ensure that a matter which was assigned to Ms. Davis and fixed to proceed and which Mr. Smart, with his schedule, would have been hard-pressed to attend, was dealt with at all. What is clear is that neither advocate nor instructing attorney, nor anyone to whom files were submitted for urgent re-assignment took the trouble to enquire from the Judge's Team, what had transpired in Court on 27/03/2019.

10. The information that was conveyed to Counsel from an unidentified source that on 27/03/2019 "the matter was simply adjourned to 08/04/2019" was inaccurate. If Counsel or the person in charge of the urgent reassessment of the files, thought that the matter had been duly dealt with when it was fixed for trial, then the failure to do anything in the week that followed to enquire whether any order had been made in the absence of Counsel, points to lack of care of on the part of all concerned.

11. Had the official record of the Court proceedings (the FTR) been requested before the filing of this application, would have confirmed that the substantive hearing did in fact proceed on 27/03/2019. The matter was fixed for 9:30 am but was stood down to allow

State Counsel time to appear. When the matter was called an hour later, I confirmed that both advocate and instructing attorney had been served with notice of the fixture via email. I noted that no evidence had been filed by the Defendant when in the peculiar circumstances of the case, the Defendant was equally well placed to obtain relevant information, or so it seemed to me.

12. In the course of the hearing, Counsel for the Claimant, Mr. Thompson took me carefully through the evidence. I attached much weight of the letter of the Chief Fire Officer dated 19/02/2020 which indicated the salary and allowances of a First Division Officer. Counsel was asked questions about PAYE deductions. Allowances were made for vagaries and imponderables associated with claims for future loss. Indeed I discounted the lump sum figure submitted by the Claimant by 40%. Counsel reminded that there was to be no interest on future earnings awards. The matter was adjourned only to allow Counsel for the Claimant to submit the calculation for the final order for damages and for costs which I decided to award on the prescribed scale. I invited Counsel to email the order for my approval in Chambers, but then I decided to adjourn the matter to 08/04/2019 in order to keep track of it, and to formally receive the order and to sign off on it at a hearing.

13. In the circumstances, first of the misinformation as to what transpired on 27/03/2019 and as to what was to happen on 08/04/2019, Counsel's submission that the appearance of an attorney for the Defendant on 08/04/2019 have resulted in a different order is made on a false premise. I state emphatically that it would have made no difference. By 08/04/2019 the proceedings were well past the stage of evidence and submissions. Further, in the circumstances of what transpired in fact, there was no obligation on the part of the Court or the Claimant to notify the Defendant of the adjourned date. It was the Defendant's responsibility to follow up.

14. Mr. Byam further urged me to exercise my inherent jurisdiction to avoid the injustice that would have resulted to the Defendant from what he described as the denial of natural justice, the denial of the Defendant's right to be heard on the application. A similar appeal was made by Counsel for the appellant, the Attorney General, Mr. Knox Q.C in the ***Universal Projects*** matter before Privy Council. Lord Dyson considered whether the appellant, having failed to meet the stringent requirements of CPR Part 26.7

could rely on the residual inherent jurisdiction of the Court to prevent an abuse of process. The application was refused. Lord Dyson referred to the following passage from the case **Texan Management v Pacific Electric [2009] UKPC 46 at paragraph 57:-**

> **"[57] But the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules..."**

15. The Board rejected what is considered to be an attempt to circumvent the stringent conditions to which the relevant rule, in that case part 26.7, was subject. I think a similar approach has to be adopted here. I see no reason to depart from the guidance above, which I consider applicable in the circumstances of the Defendant's failure to meet the Part 40.3 requirements.

Disposition

1) The Defendant's Notice of Application dated 17th May 2019 is dismissed with costs to be paid by the Defendant to the Claimant to be assessed by the Court in default of agreement.
2) The Claimant's application dated 22nd June 2020 is granted. The Defendant is to pay the Claimant's costs to be assessed by the Court in default of agreement.
3) The Registrar of the Supreme Court to issue a certificate in prescribed form containing the particulars of the order for payment made by this Court on 8th April 2019.

Judge

Carol Gobin