REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011- 04918

BETWEEN

NIZAM MOHAMMED

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. F. Hosein S.C., instructed Mr. G. Mungalsingh, Mr. R. Dass and Ms. S. Bridgemohansingh for the Claimant.

Mr. A. Sinanan S.C., Mr. G. Ramdeen and Mr. V. Debideen instructed by Ms. D. Dilraj-Batoosingh and Mr. B. James for the Defendant.

RULING

1. At issue here is the costs regime applicable on the determination of an application for an administrative order and the interpretation to be placed on Part 56.14(5) of the Civil Proceedings Rules.

2. **Part 56.14(5**) of the CPR reads:

> "Where a judge makes an order as to costs he must assess them.
>
> (Part 66 deals with the court's discretion on costs)"

3. The Claimant has won his case and submits that in accordance with rule 56.14 (5) of the CPR I am required to assess costs in his favour pursuant to rule 67.12. I do not accept the submission. In my opinion in circumstances, such as these, where no cost budget has been set prescribed costs apply. In my view Part 56.14 (5) of the Rules which provides that "Where the judge makes any order as to costs he must assess them" is not to be interpreted to mean that the assessed costs regime is to apply in applications for an administrative order but rather that the costs must be assessed or quantified by the Judge who hears the case.

4. I have arrived at this position based on what I believe to be a correct interpretation of the relevant rules. This interpretation accords with what I understand to be the natural and ordinary meaning of the word "assess" and the emphasis under the Civil Proceedings Rules that as far as possible there be cost certainty at an early stage of the case. Cost certainty is one of the linchpins of the system of case management upon which these rules are based and remains one of the benefits of these rules over the 1975 rules. It would seem to me that in public law litigation it is even more desirable that litigants know from as early as possible their potential exposure in costs. That said it is clear that there have been different interpretations placed on part 56.14(5) by the High Court bench and accordingly the existing rules on costs need to be carefully examined and definitively interpreted so that the principles to be applied with respect to the award of costs are clear and unambiguous.

5. In arriving at this position I have relied on the usual and ordinary meaning of the words "assess." The New Oxford Dictionary of English defines the word "**assess**" as meaning "evaluate or estimate the nature of value or quality of"; "**be assessed**" as: "calculate or estimate

the price or value of". According to the Oxford Thesaurus of English synonyms include: value, calculate, compute, determine, fix, estimate.

6. Part 66 of the CPR deals with costs generally and in particular the principles to be adopted in determining the entitlement to costs. It is clear that, save insofar as a Court may determine that a party although entitled to costs is not entitled to its full costs, the rule does not purport to deal with the quantification of costs. Part 66 therefore merely deals with general principles on costs and the judge's discretion in this regard.

7. The manner by which costs are to be quantified is dealt with in Part 67 of the CPR. Part 67.3 identifies the four methods by which costs are to be quantified. They are:

(i) where rule 67.4 applies, fixed costs: **rule 67.3(a)**;

(ii) prescribed costs in accordance with rule 67.5: **rule 67.3(b)(i)**;

(iii) budgeted costs in accordance with a budget approved by the court under rule 67.8: **rule 67.3(b)(ii);** and

(iv) where neither prescribed nor budgeted costs are applicable by assessment in accordance with rules 67.11 and 12: **rule 67.3(b) (iii)**

8. It must be noted that unlike the other categories of costs the words "assessed costs" are not used in the rule to describe category (iv). The words are however used in Part 66 to refer to the costs regime described in rules 67.11 and 12. I shall here use the term "assessed costs" to describe that category of costs identified in rule 67.3(b)(iii).

Fixed Costs

9. Rule 67.4 refers to Appendix A Part 1. This sets out the fixed costs applicable to a claim for a specified sum of money which a defendant who does not defend a claim must pay to the claimant in addition to the judgment sum, interest and court fees in order to avoid judgment being entered against him and the additional costs payable on the entry of a default judgment or judgment on admissions. Fixed costs need not trouble us here**.**

Prescribed Costs

10. Rules 67.5 to 67.7 deal with prescribed costs. **Rule 67.5** states:

> "The general rule is that where rule 67.4 does not apply and a party is entitled to the costs of any proceedings those costs must be determined in accordance with Appendices B and C and paragraphs (2)–(4) of this rule."

11. Once fixed costs do not apply the prescribed costs regime is the first port of call with regard to the assessment or quantification of costs. It is clear that for the purpose of the quantification of costs, once a defendant defends the claim, prescribed costs is the usual means by which costs are to be quantified. It is the default position. In the absence of any other applicable cost regime therefore prescribed costs are to apply.

12. Rule 67.7 identifies the scope or work to be included in prescribed costs while rules 67.5(2) and (3) provide the means by which the actual costs are to be computed. Basically under this rule the costs are quantified or computed by reference to the value of the claim.

Provision is also made for a value to be placed on the claim where the claim is not for a monetary sum or the value not agreed or stipulated by the Court. In this regard the value is determined by either (a) applying a nominal value of $50,000.00: **rule 67.5(2)(c)**; or (b) by a party, at a case management conference, applying to the court to place a value on a case which has no monetary value or, where there is a monetary value, to direct that the prescribed costs be calculated on the basis of some higher or lower value: **rule 67.6**. Interestingly it would seem that assessed costs do not apply in the Court of Appeal since unless the Court of Appeal makes an order for budgeted costs the costs of an appeal are to be determined by reference to prescribed costs: **rule 67.14**.

Budgeted Costs

13. Rules 67.8 to 67.10 deal with budgeted costs applications. **Rule 67.8** provides that a party may apply to the court to set a cost budget for the proceedings. This application is to be made at the first case management conference. By the rule a party may apply to vary the terms of the cost budget at any time prior to the commencement of the trial but if the party seeks an order increasing the cost budget the court must be satisfied that there has been a change in circumstances which became known after the budget was set. The operation of the budgeted cost regime is at the option of a party. A party may therefore opt to take the case out of the general rule, prescribed costs, and seek to have the judge set a cost budget. While in practice this generally results in greater costs it is not necessarily so. The emphasis here is on the value of the work rather than the value of the claim. It must be noted however that such an application must be made at or before the first case management conference. In practice it is not unusual for applications for budgeted costs to be made in applications for administrative orders.

Assessed costs

14. Part 67 deals with two types of assessed costs: the assessed costs of procedural applications: **rule 67.11** and assessed costs generally: **rule 67.12**. With respect to procedural applications the rule is straightforward. This arises where the judge is required to determine a procedural application outside of a case management conference or pre-trial review. The reason for this is clear. Prescribed costs and, unless the judge specifies otherwise, budgeted costs include the cost of applications made at a case management conference or pre-trial review: **rules 67.7 and 67.10**. Rule 67.11 therefore will apply only in circumstances where the procedural application is dealt with outside of those two hearings as, for example, applications dealt without a hearing or applications for permission to enter a default judgment.

15. Rule 67.12, assessed costs generally, applies where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings other than a procedural application. This rule will apply, for instance, with respect to applications for injunctions or applications under rule 26.2. It may also apply in some instances on an application for leave to apply for judicial review as for example where leave is contested. Or it may apply where a particular rule or enactment specifies that the cost regime to be applied to certain proceedings is the assessed cost regime or taxed costs. This in my opinion accords with the wording of rule 67.3 and 67.5(1). As indicated I am not of the view however that rule 56.14(5) specifies that with respect to applications for an administrative order the cost regime to be applied must be assessed costs.

Applications for Administrative Orders- Part 56

16. Part 56 deals with applications for administrative orders. For clarity and to distinguish from applications made within the action I shall refer to such claims as administrative actions. In this regard applications for judicial review fall within the purview of Part 56. Rule 56.13 deals with applications made during an administrative action and provides that such applications must be made to the judge who heard the case management conference unless that judge otherwise directs. In my opinion this rule, drafted before the implementation of a docket system, has been rendered unnecessary by the docket system now in operation.

17. **Rule 56.13** comes immediately after the rule dealing with case management conferences in administrative actions and states:

> "Any application during a claim for an administrative order must be made to the judge who heard the case management conference unless that judge otherwise directs."

18. **Rule 56.14** is headed "Hearing of application" and states:

> (1) At the hearing of the application the judge may allow any person or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not he has been served with the application.
>
> (2) Such person or body must make submissions by way of a written brief unless the judge orders otherwise,

(3) The judge may grant any relief that appears to be justified by the facts proved before him whether or not such relief should have been sought by an application for an administrative order

(4) The judge may however make such orders as to costs as appear to him to be just including a wasted costs order.

(5) Where the judge makes any order as to costs he must assess them.

(Part 66 deals with the court's discretion on costs)"

19. It cannot be disputed that Rule 56.14 is not the best drafted of rules. It would seem to me that the words "the application" in the rule could refer either to applications made "during a claim for an administrative order": **rule 56.13**, or applications for administrative orders generally. If it deals only with applications made during a claim for an administrative order then rule 56.14 (5) cannot be interpreted as to provide for the costs of the whole action to be assessed costs in the context of Part 67. Using this interpretation the rule only deals with how a judge is to treat applications made within a claim for an administrative order and in particular claims by interested parties. In such a situation the judge may allow a person with a sufficient interest to participate in the hearing and may grant the appropriate relief. With respect to the costs on such an application the judge may make such order for costs as appear to the judge to be just, including a wasted cost order and, in accordance with rule 56.14(5) must assess these costs.

20. In these circumstances rule 56.14(5) will in fact allow the judge to assess or quantify the costs in accordance with Part 67.12. This interpretation however is not as a result of any specific reference to assessed costs but is in keeping with the cost regime established by Part

67 of the rules. Part 67 deals with the quantification of costs of parties to the action. In particular it does not make provision for the quantification of costs of persons who are not parties but seek audience and who may or may not obtain relief. On this interpretation therefore Rule 56.14 (5) provides that in such a case, if an order for costs is made pursuant to 56.14(4) with respect to applications made during the claim, then the costs are to be assessed or quantified by the judge. In truth and in fact in this particular instance the cost regime will be assessed costs in accordance with Part 67.12 because it will in fact be a situation "where costs fall to be assessed in relation to any matter or proceedings, or part of a matter or proceedings other than a procedural application." Using this interpretation the reference to Part 66 makes sense. The reference is to the manner by which the Judge is to exercise the discretion whether or not to award costs and to whom.

21. Even if the words "the application" refer to administrative actions generally, and in my opinion this seems the more likely position given the generality of rules 56.14 (3)(4)and(5), then it seems to me that, even if the rule applied across the board to all applications for administrative orders, the use of the word "assess" does not identify the cost regime to be applied. In the first place to interpret rule 56.14(5) as establishing assessed costs to be the only way that costs may be quantified in administrative actions means that budgeted costs have no place in applications for administrative orders. It follows therefore that with respect to administrative orders there can be no cost certainty. Further if the intention is to specify the cost regime to be applied then in my view the reference would be to Part 67, quantification of costs, rather that Part 66.

22. In my opinion the word "assess" here must be given its natural and ordinary meaning in the context it is used that is "to calculate or compute". It would seem to me that rule 56.14(5), like rule 56.13 is a relic of pre-docket times. In other words all that Part 56.14 does is provide that the judge hearing the case must compute or calculate the costs. The reference to Part 66 here is merely to direct the user to where the manner in which the judge's discretion as to the entitlement to costs is to be exercised may be found.

23. While I accept that there are differences of opinion among the High Court bench with respect to how part 56.14(5) is to be interpreted this, in my view, is not determinative of the interpretation to be placed on the rule. I have also been referred by the Claimant to the case of **Public Service Commission v Ashford Sankar and others**[1]. In my opinion this case does not assist as it does not seem that the issue of the costs regime to be applied was argued before the Court of Appeal. Reference is also made to the decision of the Judicial Committee of the Privy Council in the case of **Randolph Toussaint v the Attorney General of St Vincent and the Grenadines**[2]. In my opinion this case also does not assist the Claimant. Rule 56.13(5) of the Eastern Caribbean Civil Procedure Rules is not on all fours with our part 56.14(5) in that the Eastern Caribbean rule makes specific reference to rules 65.11 and 65.12. These being the rules dealing with assessed costs in that jurisdiction. That is not the position in Trinidad and Tobago. Indeed the fact that all our Civil Procedure Rules emanated from the same source suggests to me that there is some reason for the difference. It may very well be that the drafters of our rule specifically determined that the word "assess" used in part 56.14(5) was not to be equated with assessed costs under Part 67.11 and 67.12 and drafted the rule accordingly.

[1] CA Civ 162 of 2006 and 163 of 2006.
[2] Privy Council Appeal No 28 of 2006

24. In the circumstances I am of the opinion that Part 56.14(5) does not mandate that the only regime applicable in the award of costs for administrative orders is the assessed costs regime. In my opinion Part 67.3 applies to administrative orders as it does to other actions. Further rule 56.14(5), if of general application, merely confirms that in administrative actions only the judge hearing the action shall quantify or compute the costs. Accordingly I am of the opinion that in the absence of a budgeted costs order prescribed costs apply. In the circumstances the Claimant is entitled to his cost quantified on the basis of prescribed costs.

Dated this 20th day of March, 2013.

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Judith Jones
Judge