

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA S-851 of 2005

BETWEEN

ANNETTE RAMLAL
(As Legal Personal Representative of the Estate of Curtis Ramlal
& Guardian and Next friend of Candace Ann Ramlal)

TARA RAMLAL

Plaintiffs

AND

MAURICE KOON KOON

First Defendant

CAPITAL INSURANCE LIMITED

Second Defendant

DION REMY

Third Defendant

N.E.M. (West Indies) INSURANCE LIMITED

Fourth Defendant

Before: Master Alexander

Appearances:

For the First Plaintiff: Mr Shastri Maharaj

For the Second Plaintiff: Mr Rennie Gosine

For the First and Second Defendants: Mr Reshard Khan

REASONS

1. The first plaintiff filed a summons on 2nd November, 2011 seeking leave to file the witness statement of Naieem Khan after the agreed deadline (hereinafter “the Khan witness statement”). The summons was supported by the affidavit of Shastri Maharaj. The deadline for the filing and service of all witness statements was 16th September, 2011. The application for an extension was made 6 weeks later. There was no application for relief from sanctions.

2. A brief history of the matter is required to put the first plaintiff's application in context. Full directions inclusive for the filing of witness statements in this assessment of damages were given on 17th June, 2011. The first plaintiff filed witness statement on 7th September, 2011 and subsequently an application to strike out parts of the evidence was filed. There was no assessment date set in this matter. From the outset, it was made clear to parties that this matter was proceeding by way of witness statements.
3. It is necessary to set out the witness statement that the first plaintiff now seeks leave to be allowed to file, which is as follows:

Witness Statement of Mr. Naieem Khan

I, Naieem Khan, General Manager, Naisa Brand Products Limited, Cunupia, Trinidad say as follows:

1. As manager I hereby certify that Curtis Ramlal was employed as a driver of Naisa Brand Products Limited at a monthly salary of \$2,279.99 at the time of his death on the 12th July, 2004.
2. On the 1st February, 2008 I did sign the attached letter providing details of Mr. Curtis Ramlal's salary.

Certificate of Truth

The witness, Naieem Khan, hereby certifies that the contents of this witness statement are true and correct.

Dated this 21st day of October, 2011

.....

Naieem Khan

4. Counsel for the first plaintiff has argued that this application should be granted because of the following reasons:
 - (i) The Khan witness statement relates to a letter dated 1st February, 2008 from Naisa Brand Products Limited which provides the deceased, Curtis Ramlal's salary (hereinafter "the Naisa letter").

- (ii) The Naisa letter was included in the first plaintiff's list of documents filed and served on 11th July, 2011, ahead of the deadline date for discovery. The first and second defendants (hereinafter "the defendants") have filed no notice challenging the authenticity of any of the documents contained therein. See Order 27(4) Rules of the Supreme Court, 1975 ("RSC").
 - (iii) The RSC provide for the maker of a document to be called as a witness, where the document is not agreed, so Naieem Khan can be called as a witness to further verify the deceased's salary.
 - (iv) The first plaintiff's witness statements were filed and served 9 days ahead of the deadline and exhibited the Naisa letter, which is authentic so Naieem Khan can be called as a witness.
 - (v) The first plaintiff has complied with the RSC by filing the salary statement of the deceased well ahead of the deadline dates and the objection of the defendants to the granting of leave for the witness statement is merely to delay the assessment of damages and ought to be dismissed as an abuse of process with costs.
 - (vi) The first plaintiff relies on the established principle that the object of the court is to decide the rights of the parties and not punish them for mistakes they make in conducting litigation. See *Joseph George v The Attorney General HCA 1861 of 2001*. Further, the overriding objective of the court is to deal with cases justly.
 - (vii) The Khan witness statement was not filed on time due to extenuating emergency circumstances faced by the first plaintiff's attorney who was called out of the jurisdiction and only returned on 31st October, 2011, as outlined in the supplemental affidavit of 17th January, 2012. The application was made promptly on 2nd November, 2011 so the defendants, who already had the document in their possession, suffered no prejudice.
5. Counsel for the defendants has argued that this application should be dismissed for the following reasons:
- (i) The first plaintiff's application came **after** directions and **after** witness statements were filed and served. It was also **after** counsel for the defendants had evaluated the plaintiffs' case; marshalled and allocated its resources to meet that case; assessed the potential strengths and weaknesses of the evidence proffered by the plaintiffs;

employed its strategies and prepared its case and in so doing filed its own application to strike out certain evidence.

- (ii) The first plaintiff's application is an abuse of the process of the court, coming as it did after the application to strike out evidence was made and in a bid to plug holes in the evidence that was left gaping by the first plaintiff.
- (iii) The application fails to comply with Part 26.7 of the Civil Proceedings Rules, 1998 as amended ("CPR") by not seeking an order for relief from sanctions. In the absence of a witness statement, the witness cannot be called to give evidence.
- (iv) Further, the application has disclosed no sufficient grounds to allow the court to act to extend time for filing the Khan witness statement. The arguments advanced by counsel for the first plaintiff that its list of documents and witness statement were filed ahead of time and that the documents may be deemed authentic are of no consequence in the consideration of this application. Of similar consequence is the argument that a maker of a document can be called to give evidence where a document is part of an unagreed bundle. The first plaintiff failed to comply with the rules and sought to do so belatedly only when she had sight of the defendants' evidential objections and solely in a bid to fill the loophole in her evidence.

Analysis

6. From the outset, it must be noted that this is a matter that falls under the RSC (old rules) however, the power to order witness statements in such matters is pursuant to Practice Direction dated 18th July, 2007.¹ This issue was explored by Shah J in *Bissoondaye v Monica Thirbhawan Lewis*² who noted that certain parts of the CPR, "have been wedded to the RSC. This joinder however, has not always resulted in nuptial bliss." In that case, Shah J considered the proper application to be made i.e. an extension of time under the RSC or a relief from sanctions application under the CPR and concluded that both provisions must be read together.
7. In my view, orders for witness statements to be filed and served are made pursuant to Parts 26, 27 or 39, CPR and must comply with and their use governed by Part 29 rules 4 to 5 and 7

¹ Part of this Practice Direction reads, "[A]ny application to the court (for example to extend time) in relation to the filing or service of witness statement as ordered by a Judge in circumstances mentioned in (1) above, shall be made in accordance with the RSC 1975 and not under the CPR 1998.

² HCA No S-0671 of 2002 and CA Civil 271 of 2008 where appeal was dismissed on 3rd October, 2011

to 14, CPR (inclusive). Pursuant to Part 29.13, CPR³ an expressed sanction applies to every such order made for witness statements. The effect is that where a witness statement is not filed then the witness cannot be called to give evidence, unless the court so permits. Counsel for the first plaintiff's argument that there was no sanction imposed by the court when the order was made is without merit. The date for the witness statement having expired, the first plaintiff was required to seek relief from sanctions. To date this has not been done and on this basis alone this matter must be dismissed. See Part 26.6 (1) & (2)⁴ which must be read with Part 29.13. Further, the affidavit in support of the application filed on 2nd November, 2011 does not support an application for relief from sanctions as it cannot surpass the threshold test as laid down in *Trincan Oil Limited v Chris Martin CA No 65 of 2009*. In the event that I am wrong, I will look at the other issues raised by the parties.

8. Litigation is not conducted in a muddled or chaotic manner but is governed by rules of court. Thus, whilst I accept counsel for the first plaintiff's argument that a maker of a document can be called to give evidence, there are rules of court to comply with for so doing. There are also rules that govern and/or set out the procedure(s) to be followed where the maker of a document is not being called to admit it into evidence. Counsel for the first plaintiff has contended that the document is authentic, formed part of the discovery process and was served on the defendants ahead of the deadline date. The mere fact that a document is authentic does not of itself automatically transport it into evidence as counsel for the first plaintiff has suggested in his submissions. A plaintiff must comply with the rules of evidence to have the documents admitted into evidence. I am satisfied that in the instant matter, the first plaintiff has not complied with the rules of evidence in these material respects and/or for seeking an extension of time. I note further that counsel for the first plaintiff has pointed me to no specific part of the RSC, 1975 to bolster his argument that he can ignore Part 26, CPR and call a witness to give evidence when the order for witness statement was not complied with and in the absence of an application for relief from sanctions.

³ Part 29.13(1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.

(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not seeking relief under rule 26.7 earlier.

⁴ Part 26.6 (1) Where the court makes an order or gives directions the court must when ever practicable also specify the consequences of failure to comply.

(2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction and rule 26.8 shall not apply.

9. Further, counsel's argument that the Naisa letter serves as the "principal witness statement" and was filed ahead of time in the list of documents so what he now seeks leave to file is a supplemental witness statement to verify the Naisa letter is "clever" but finds no favour with this court and cannot be supported by the rules on witness statements, see Part 29.5(1). If that were the case then there would be no need to file witness statements and litigants can produce their evidence in the form of letters or notes. Further, it is to be noted that it is not labelled supplemental witness statement, as counsel is seeking to have this court believe, but as the "Witness Statement of Mr. Naicem Khan". It is thus my view that the submissions of counsel for the first plaintiff are of little or no import to the present application.
10. In addition, it is to be noted that the Naisa letter is dated February, 2008. The existence of this document would have been known to the first plaintiff before directions for witness statements were given in 2011 and, in any event, counsel would have had in his contemplation the evidence needed to be adduced to support his case. It is also to be noted that the Khan witness statement consists of two sentences (separated into 2 paragraphs) as outlined above and there is no sufficient explanation as to why this could not have been filed earlier, if he was intended to be called as a witness. I was, therefore, minded to accept the argument of counsel for the defendants that this was an afterthought and that the first plaintiff never intended to file this witness statement until the application to strike out evidence was filed and to fill the gap in her evidence. In any event, a court cannot exercise its discretion contrary to the clear provisions of the rules. The uncontroverted fact is that the CPR imported a sanction where witness statements are not filed within the deadline date and there is no application for relief from sanctions before me.
11. The application for leave to file the witness statement of Naicem Khan outside the time for so doing is refused with no order as to costs.

Dated 19th October, 2012

Martha Alexander
Master