

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**1025 of 2001**

**IN THE ESTATE OF HIGGINS CARDENAS ALSO CALLED  
HIGGINS JOSEPH CARDENAS ALSO CALLED JOSEPH HIGINS CARDINAS (deceased)**

**BETWEEN**

**CHANKA BHIM**

**Plaintiff**

**AND**

**PHILOMEN DEAN**

**Defendant**

**Before: Master Margaret Y Mohammed**

**Appearances:**

**Mr Khemraj Harrikissoon for the Plaintiff**

**Mr S Marcus SC for the Defendant**

## **DECISION**

1. The plaintiff, Chanka Bhim (“Chanka”), is the executor of the estate of Higgins Cardenas also called Higgins Joseph Cardenas also called Joseph Higin Cardenas (“the deceased”). On June 14, 2011 the plaintiff’s attorney filed an application (“the instant application”) under the Rules of the Supreme Court 1975 (“the RSC”) for leave to be granted to

Chanka to access the sum of \$600,000.00<sup>1</sup> from the estate of the deceased in order to defend an appeal which is now pending before the Judicial Committee of the Privy Council ( “the PC”). In support of the instant application was an affidavit of Chanka.

2. On July 25, 2011 I heard the submissions by the parties and on July 28, 2011 I dismissed the instant application on the basis that I had no jurisdiction to deal with it. I also ordered Chanka to pay the costs of the application.
3. A brief history of the substantive matter is important in order to appreciate the basis of the instant application. This action was commenced under the RSC on April 20, 2001 by Chanka against the defendant Philomen Dean (“Philomen”) in contentious probate proceedings whereby Chanka requested the court to pronounce for the deceased’s will dated February 22, 1999 (“the February will”) in solemn form.
4. On May 9, 2007 the Honourable Mr Justice Hosein pronounced for the validity of the February will and on June 18, 2007 Philomen appealed the said decision. On November 2, 2009 the Court of Appeal consisting of Justices of Appeal, Kangaloo, Jamadar and Soo Hon dismissed Philomen’s appeal.
5. On November 20, 2009 Philomen filed a notice of motion for an order of conditional leave to appeal to the PC.
6. On the November 30, 2009 the Court of Appeal granted conditional leave to Philomen to appeal to the PC against its judgment of November 2, 2009, subject to the following conditions namely:
  - (a) That Philomen do within ninety (90) days from the date hereof enter into good and sufficient security for the sum of Five Hundred Pounds Sterling (£500.00) to the satisfaction of the Court for the prosecution of the appeal and for the payment of any costs which Philomen may be ordered to pay.

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<sup>1</sup> At the hearing of the instant application on July 25, 2011 the plaintiff’s attorney sought and was granted leave to amend the instant application to read the sum of “\$600,000.00” instead of “\$500,000.00”.

- (b) That Philomen do within ninety (90) days of the date hereof take out all appointments that may be necessary for the settling and preparation of the record in the appeal to enable the Registrar of the Supreme Court to certify that the said record has been settled and that the provisions of this order on the part of the defendant have been complied with and that the said record, which Philomen proposes will be printed in the United Kingdom shall be transmitted by the Registrar of the Supreme Court to the Registrar of the PC within sixty (60) days from the date of such certificate.
- (c) That Philomen do apply at any time within one hundred and twenty (120) days of the date hereof for final leave to appeal to the PC on production of the certificate from the Registrar of their compliance with the conditions of this order.
- (d) That the costs of this application be costs in the appeal.
- (e) That each party be at liberty to apply.

7. On March 26, 2010 Philomen filed a notice of motion for an order of final leave to appeal to the PC. On April 26, 2010 the Court of Appeal granted the order and also ordered that the costs of the March 26, 2010 application do abide by the final determination of the appeal.
8. According to the affidavit of Chanka he is a pensioner and while he is interested in defending the appeal in the PC, he is financially unable to do so. In this regard, he has identified cash in certain bank accounts which form part of the estate which can be used for this purpose.
9. Before the substantive application could have been addressed Mr Marcus, counsel for the defendant raised a preliminary objection to the instant application. He submitted that I had no jurisdiction to deal with the substantive application since the matter was now seized before the PC and as such the local courts are functus and the proper forum to determine the substance of the instant application is the PC. In support of this

preliminary objection Mr Marcus referred me to the authorities of **McKnight v McKnight**<sup>2</sup> and **All Trinidad Sugar and General Workers Trade Union v Caroni (1975) Ltd**<sup>3</sup>.

10. In response, Mr Harrikissoon attorney for Chanka contended that the Master had the jurisdiction to deal with the substance of the instant application since funding was necessary to move the matter forward in the PC. In support of this proposition he referred me to **Tristram and Cootes**. He also submitted that the instant application can be distinguished from a stay of execution since the funds are required to continue the action and that section 6 of the **Wills and Probate Act** Chapter 9:03 (“the Act”) bestows on an executor or administrator the rights, actions and powers of the estate of the deceased and the responsibility for the actions, suits and liabilities in respect of the estate of the deceased. In this regard he also referred me to **Halsbury’s Laws of England 4<sup>th</sup> ed Vol 17 paragraph 729**.

11. The issue which I had to determine was whether I had the jurisdiction to deal with the instant application given the stage of the proceedings.

12. The jurisdiction of the Master under the RSC is set out in Order 32 Part 1A. The Master is bestowed with the same powers of a High Court Judge sitting in Chambers save and except for certain types of applications namely criminal proceedings or applications which deal with the liberty of a person, injunctions, judicial review applications, habeas corpus applications, committal proceedings, appeals from a Registrar, review of a taxing officer’s decision, any applications where there is statutory direction or specific rules which specifically directs a Judge to deal with it and where the Chief Justice directs.

13. However, this power and authority of the Master must be taken in the context of the stage of the proceedings. In **McKnight v McKnight**<sup>4</sup> it was held that the effect of the

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<sup>2</sup> (1994) 44 WIR 349

<sup>3</sup> (1985) 37 WIR 407

filing of a notice of appeal with the Registrar of the Supreme Court rendered the judge who made the order *functus officio* in relation to the matter, without prejudice to the judge's inherent power to correct clerical errors and mistakes under Order 20 rule 11 RSC. In **All Trinidad Sugar and General Workers Trade Union v Caroni (1975) Ltd**<sup>5</sup> it was held that the jurisdiction to grant a stay of execution after an appeal was filed vested exclusively in the Court of Appeal and the Industrial Court (like the High Court) had no jurisdiction to make an order for a stay.

14. Having considered the submissions, I agreed with Mr Marcus that I did not have the jurisdiction to deal with the substance of the instant application for the following reasons:

(a) Section 6 of the Act goes to the heart of the substance of the instant application and bears little relevance to the preliminary objection of my jurisdiction to deal with the instant application.

(b) The effect of the notice of appeal filed on July 18, 2007 of the decision of Hosein J rendered the jurisdiction of the High Court *functus*.

(c) In **Eugene Lopez v TSTT and anor**<sup>6</sup> Hamel-Smith JA sitting in the Chamber Court of the Court of Appeal dealt with an application for pre-emptive costs before the substantive appeal was considered by the Full Court. He granted the order since he was not persuaded that the appeal was not without merit. In **re Motor and General Insurance Company Limited v Gail Sanguinette and ors**<sup>7</sup> Ventour J made an award of interim costs before dealing with the substantive application which was before him. I have noted that in both cases the court which was dealing with the substantive matter also dealt with the application for the interim costs orders. Despite my search I was not able to unearth any authority where a lower court determined an application for interim costs to fund proceedings in a higher court.

(d) Based on the information from both parties it appears that the appeal is now before the PC. The PC would be apprised of the issues and the law involved and would be

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<sup>4</sup> (1994) 44 WIR 349

<sup>5</sup> (1985) 37 WIR 407

<sup>6</sup> Civ Appeal No 166/2000 decision of Hamel-Smith JA dated October 2, 2002

<sup>7</sup> HCA S 1446/2001

able to determine the appropriate costs. In my opinion the PC is therefore the proper forum to deal with the substance of the instant application since it is best placed to determine the merits of the application and quantify any costs which should be paid out from an estate either to prosecute or defendant the litigation before it.

Dated the 24 day of August, 2011

Margaret Y Mohammed  
Master (Ag.)