

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2018-02103

IN THE MATTER OF THE WILLS AND PROBATE ACT CHAPTER 9:03

AND

IN THE MATTER OF THE ADMINISTRATION OF ESTATES ACT CHAPTER 9:01

AND

**IN THE MATTER OF THE ESTATE OF ALBERTHA WAITHE, DECEASED
(late of No. 275 Mary's Hill Junction, Plymouth Road, Tobago)**

BETWEEN

ELVIS WAITHE

**(Administrator ad litem of the Estate of Albertha Waithe, deceased, By order of
the Honourable Mr. Justice Devindra Rampersad dated 21st March, 2018)**

Claimant

AND

LESLIE WAITHE

Defendant

Before the Honourable Mme. Justice Jacqueline Wilson

Date of Delivery: March 25, 2019

APPEARANCES:

Ms. Safiya Charles Attorney at law for the Claimant

Mr. Lennox Phillips Attorney at law for the Defendant

REASONS FOR DECISION

1. On 17 December 2018 I made an order striking out proceedings brought by the claimant and gave oral reasons for the decision. The written reasons are now provided.

2. By fixed date claim form and statement of case filed on 12 June 2018 the claimant, in his capacity as administrator ad litem of the estate of Albertha Waithe (deceased), brought proceedings against the defendant. Among other things, the claimant seeks a declaration that he is entitled to apply for the grant of letters of administration of the deceased's estate and a declaration that the defendant holds certain lands on trust for the estate (the said lands). The claimant states that the authority to bring the proceedings was conferred by the order of Mr. Justice Rampersad dated 21 March 2018.
3. On 1 October 2018 the defendant filed an application to strike out the statement of case as disclosing no grounds for bringing the claim and as an abuse of process. The defendant's application was supported by the affidavit of Myrna Walters, Attorney-at-law, which set out the history of the proceedings.
4. Ms. Walters' affidavit states that prior to the commencement of the proceedings the claimant brought proceedings against the defendant seeking the same relief as in the present proceedings (the First Action). Although purporting to bring the First Action in the capacity as administrator of the estate of the deceased, the claimant was not so appointed, and by order of Mr. Justice Aboud dated 30 September 2014 the claimant was granted permission to discontinue the First Action. The claimant was ordered to pay the defendant's costs to be assessed in default of agreement. The costs have not been paid.
5. The claimant filed further proceedings against the defendant seeking the same relief as in the earlier proceedings (the Second Action). The Second Action was withdrawn by the claimant on 16 January 2018 and, by order of Mr. Justice Mohammed dated 30 January 2018, the claimant was required to pay the defendant's costs in the sum of \$7,700.00.

6. On the 16 January 2018, the very date of withdrawal of the Second Action, the claimant filed further proceedings against the defendant seeking the same relief as before (the Third Action). On 21 March 2018 Mr. Justice Rampersad made an order appointing the claimant as administrator ad litem of the deceased's estate subject to the payment of costs of the Second Action by 22 March 2018.
7. The claimant's Attorneys attempted to pay the costs by way of an uncertified cheque dated 22 March 2018 that was sent to the defendant's Attorneys by ordinary post on the same date. The defendant's Attorneys returned the cheque to the claimant's Attorneys by TT Post Courier Service under cover of a letter dated 23 April 2018.
8. The Fourth Action came on for hearing before me on 3 October 2018. At the hearing Counsel for both parties made representation on the defendant's application to strike out the proceedings. Quite understandably, no affidavit in response to the defendant's application was filed by the claimant, the defendant's application having been filed just two days before. However, I gave the parties an opportunity to address me on the matter.
9. Counsel for the claimant submitted that she posted the cheque for the payment of costs to the defendant's Attorneys on 22 March 2018 and that she was surprised to learn that the cheque was not received until sometime in April. Counsel indicated that by posting the cheque on 22 March 2018, the claimant had complied with the order for payment of costs on 22 March 2018. This notwithstanding, Counsel sought an extension of time for compliance with the order to the date that the cheque was received by the defendant.

10. Counsel for the defendant asserted that the claimant had not complied with the order and that the order was clear in its terms that the claimant's appointment as administrator ad litem was subject to the payment of costs by 22 March 2018. Therefore the claimant was required to file an application for relief from sanctions before taking any further action against the defendant. Counsel contended that the cheque was received on 20 April 2018, a month after the deadline set by the court. Counsel stated that the claimant lived in Tobago and could simply have paid the costs at the defendant's offices in Tobago to ensure compliance with the order. Counsel asserted that as a result of the claimant's failure to comply with the order, the claimant did not have the legal authority to bring the Fourth Action and the proceedings should be struck out.
11. Having heard the representations by Counsel and having expressed the view that the claimant did not have the requisite authority to bring the proceedings, I adjourned the proceedings to 17 December 2018 to allow the Counsel for the claimant to file such application as she considered necessary.
12. The parties filed two further affidavits in the intervening period. On 24 October 2018 Counsel for the claimant filed an affidavit in response to Ms. Walters' affidavit filed on 1 October 2018 and on 30 October 2018 Ms. Walters filed an affidavit in response to Counsel for the claimant's affidavit.
13. Counsel for the claimant's affidavit reiterated the matters that were discussed at the hearing on 3 October 2018. Counsel added that the cheque for the payment of costs was sent by post to the offices of Counsel for the defendant as a result of indications by him that the cheque should not be deposited into a bank account but should instead be sent by post. This assertion was firmly denied by Ms.

Walters in her affidavit in response, in which she contended that Counsel for the defendant had suggested to Counsel for the claimant that the claimant should make the payment at the firm's offices in Scarborough as the claimant resided in Tobago.

14. At the hearing on 17 December 2018 Counsel for the claimant repeated the assertion that the claimant had complied with the order of 21 March 2018 having regard to the posting of the cheque on 22 March 2018. When pressed by the court on the matter, Counsel was unable to identify any rule or other authority to support her position. Counsel submitted further that the order of 21 March 2018 imposed a condition and not a sanction and that no application for relief from sanctions was required. Counsel submitted that the court had the power to extend the time that was previously granted for compliance with the order and that such an extension ought to be granted.
15. Counsel for the defendant re-iterated that the order of 21 March 2018 imposed a sanction and that in the absence of an application by the claimant for relief from the sanction that was so imposed, the claimant did not have the authority to bring the Fourth Action. Counsel submitted that even if the order did not impose a sanction, no application for an extension of time for compliance with the order had been filed by the claimant and that, in all the circumstances, the claim should be struck out as an abuse of the process of the court.

DECISION

16. Notwithstanding the obvious concerns with the history of developments giving rise to the Fourth Action, the sole issue that arises for determination in these proceedings is whether the court order of 21 March 2018 imposed a sanction on the claimant.

17. In the *Attorney General v Keron Matthews* [2011] UKPC 38, the Privy Council discussed the nature of sanctions and gave examples of sanctions imposed by the rules:

“Rule 26.7 provides for applications for relief from any sanction imposed for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, “any sanction for non-compliance imposed by the rule....has effect unless the party in default applied for and obtains relief from the sanction”(emphasis added). In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply. Examples of such rules are to be found in rule 29.13(1) (which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits); rule 28.13(1) (consequence of failure to disclose documents under an order for disclosure); and rule 33.12(1) (consequence of failure to comply with a direction to disclose an expert’s report).

....Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.” (See paras. 15 and 16)

18. Under the court order of 21 March 2018, the claimant was appointed as administrator ad litem of the estate of the deceased subject to the payment of the outstanding costs by 22 March 2018. The objective of the order was to vest the claimant with the requisite legal authority to bring proceedings on behalf of the deceased’s estate, provided that the costs were paid by the given deadline. The costs were not so paid. As a consequence of such failure, the claimant was

not vested with authority to bring proceedings on behalf of the deceased's estate. In the absence of such authority, any proceedings brought by the claimant would stand to be dismissed by the court, if not previously withdrawn by the claimant. The outcome of the First, Second and Third Actions filed by the claimant clearly demonstrates this result.

19. Notwithstanding the clear indications that were given by this court at the hearing on 3 October 2018, Counsel for the claimant did not use the opportunity granted by the adjournment to file an application for relief from sanctions.
20. In the circumstances, the defendant's application to strike out the Fourth Action was granted. The claimant was ordered to pay the defendant's costs assessed in the sum of \$6,900.00.

Jacqueline Wilson

Judge