REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 136 of 2006

BETWEEN

REPUBLIC BANK LIMITED **PLAINTIFF/APPELLANT**

AND

HOMAD MAHARAJ
KOWSIL MAHARAJ
JASSODRA MAHARAJ **DEFENDANT/RESPONDENTS**

PANEL:

I. Archie, C.J.
M. Warner, J.A.
W.N. Kangaloo, J.A.

APPEARANCES:

Mr. Bisnath and Ms. Ramiyad for the Appellant.
Mr. Seunath S.C., Mr. Neebar and Ms. Gopeesingh for the Respondents.

DATE OF DELIVERY: 10TH JULY 2009.

I have read the judgment of Kangaloo, J.A. and agree with it.

I. Archie
Chief Justice

I, too, have read the judgment of Kangaloo, J.A. and agree with it.

M. Warner
Justice of Appeal

Judgment

Delivered by W.N. Kangaloo, JA

1. This is an appeal from a decision of the learned judge below dated 3rd November 2006 wherein he ordered that the judgments in default of appearance entered against the respondents in H.CA S-310 of 1989, HCA S-319 of 1989 and HCA S-320 of 1989 (which proceedings were subsequently consolidated) and all subsequent proceedings be set aside. The issue to be resolved is whether it can be said that the learned judge was plainly wrong in the exercise of his discretion to set aside these judgments. This is the test to be applied by the Court of Appeal when reviewing the exercise of a discretion by a judge of first instance: **Fishermen and Friends of the Sea v The Environmental Management Authority and BP Trinidad and Tobago LLC.**[1]

2. This appeal has its genesis in three specially endorsed writs filed on 7th March 1989 wherein the appellant sought to recover certain sums of money which it claimed had been loaned to Mr. Homad Maharaj and guaranteed by the other respondents. Judgments in default of appearance were entered on 18th April 1989, 24th April 1989 and 2nd May 1989. By three motions, one filed on the 19th May 2004 and two filed on 1st June 2004, the respondents applied to have these judgments set aside on the basis that they were irregularly entered owing to the non-service of the writs or in the alternative that they had a good defence on the merits. These motions succeeded and the decision of the learned judge was handed down on 3rd November 2006. At page 4 of his judgment, the learned judge indicated that the principal factor in his decision was that the appellant had not produced any evidence to displace the burden placed on it to show that the process servers had satisfied themselves that the persons they had served were indeed the intended recipients of the writs.

[1] Civ. App. No. 106 of 2002 per Nelson J.A. (as he then was) at para. 38-39

3. By notice of appeal dated 17th November 2006, the appellant appealed the decision of the learned judge which it contends is at odds with the manifest weight of the evidence. The three prongs in the appellant's appeal are:

a. that the learned judge erred in law in reconsidering the issue of service in his judgment after coming to a different decision on this matter at the hearing on 5th May 2005;

b. that the learned judge erred in law in deciding the issue of service by applying English principles on personal service which only became part of our **Rules of the Supreme Court (RSC**) in 1991; and

c. that the learned judge erred in law as he failed to consider the fifteen year delay on the part of the respondents in applying to set the judgments aside.

On 12th December 2006 the respondents filed a cross-appeal wherein they contend that the orders of the learned judge should be varied to include an order that the judgments are also set aside on the basis that the respondents have shown a good defence on the merits. Each of these arguments must now be examined in turn.

4. The appellant challenges the learned judge's findings on the issue of non-service of the writs which it contends is at variance with the decision previously intimated on 5th May 2005 during the hearing of the respondents' motions. At this hearing the learned judge indicated that the issue of non-service was to be disposed of first. The evidence in relation to this matter consisted of three affidavits from the process servers, Mr. Shastri Girwar, Mr. Mandrilal Paul and Mr. Eric Raghunanan. They all deposed to the fact that

they had personally served each respondent with copies of the writs on 13th, 16th and 17th March 1989, whereupon the requisite endorsements as to service were completed. There was no application for cross-examination and none of these men was subjected to cross-examination. With this state of affairs the learned judge indicated that the respondent's challenge to the judgments on the basis of non-service of the writ could not succeed. He then proceeded to hear arguments on the merits of the defence and reserved his judgment. In his judgment of 3rd November 2006, the learned judge dealt with the issue of service and ruled in favour of the respondents and omitted to deal with the issue of a defence on the merits.

5. The appellant takes issue with this aspect of the decision arguing that the learned judge was *functus* concerning the issue of non-service, having previously made a ruling on this matter. However I am of the view that this argument cannot succeed as it has always been within the power of a judge to alter his decision at any time before final judgment is handed down and perfected. This principle was recently expressed in **Taylor v Williamsons (A Firm):**[2]

> *"… judges frequently revisit judgments, whether delivered orally or handed down in writing. They do so, or may do so, when requested to review the decision. They do so in circumstances which are not limited to cases where there is fresh material placed before the court for reconsideration. Judges also do so simply because they are invited to change their minds on points actually addressed to them and referred to in the judgment or to consider matters which it is submitted the judge overlooked in coming to a decision."*

6. The appellant has also challenged the learned judge's conclusion on the issue of non-service on the basis that it was determined in accordance with

[2] [2003] C.P. Rep. 20 by Ward L.J. at para. 43

English rules on personal service. In dealing with this issue the learned judge rightly held that the affidavits of the process servers complied with the requirements of **Order 65 rule 8**.[3] He then went on to consider the question of whether the right persons were served. In this regard he held that the appellant had produced no evidence to displace the burden placed on it to show that the process servers satisfied themselves that the persons they served were in fact the respondents. In coming to this conclusion the learned judge placed express reliance on a passage from the **Supreme Court Vol. 1 Or65/2/1.** In so doing he fell into error. The principle which is expressed in the aforementioned passage only became part of our **RSC** in 1991[4] when **Order 65 rule 8** was amended to read thus:

> *"An affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served, the precise place and address where it was served and the manner in which it was served, and in the case of personal service, how the person served was identified by the person who served the document."*

7. This 1991 amendment cannot represent the standard by which the service of a writ in 1989 falls to be adjudged. The appellant did all that was required of it in accordance with **Order 13 rule 7(1)** which provides that the affidavit of service constitutes sufficient proof of service upon which judgment in default of appearance can be entered. To the extent that the respondents have sought to challenge these judgments, the onus fell on them to show that they had not been served. In practice the usual course is via cross-examination of the process servers.[5] However that was not done here. Instead the respondents sought to argue that the burden of proof did not lie

[3] See pages 4-6 of the judgment
[4] LN 67/1991
[5] The Agricultural Development Bank of Trinidad and Tobago v Kelvin Boodoo and Alfred Boodoo HCA No. 1099 of 1986 is an example where there was cross-examination.

with them but in fact rested solely on the shoulders of the appellant who had to disprove the respondents' contention that they were not served. This is a submission which must be rejected. First there is no authority to support it and secondly it is at variance with the express provisions of **Order 13 rule 7(1).** In the case of **Chief Leo Degreant Mgbenwelu v Augustine N. Ojumba**,[6] V.A.O. Omage, JCA sitting in the Nigerian Court of Appeal reiterated the general principle that the affidavit of service creates a presumption of service which can be rebutted by the defendant. He goes on to note that in the absence of any evidence by the defendant the trial court has no option but to accept as correct and true the affidavit of service as proof of service of the writ. Similarly in this appeal the affidavits of Mr. Girwar, Mr. Paul and Mr. Raghunanan, which the learned judge held as complying with **Order 65 rule 8** as that rule stood pre-1991, create a presumption of service which has not been displaced by any evidence produced by the respondents. The evidence of the respondents remained on affidavit only as was the affidavits of service. The learned judge could not properly accept the former over the latter without cross-examination. It follows that the judgments entered against the respondents could not have been set aside on the basis on non-service of the writ as the same has not been demonstrated. This is sufficient to dispose of the appeal.

8. However, I will examine and comment upon the impact of the delay of fifteen years between the entry of the judgments and the respondents' motions to set aside the same. In this matter, the respondents' challenge to the judgments rested in part on their contention that the judgments were irregular owing to the non-service of the writs. This argument triggers the operation of **Order 2 rule 2(1)** which reads thus:

> *"An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein*

[6] Unreported, Appeal No. CA/P/H/273/2002

shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."

This rule must be read in conjunction with **RSC Order 13 rule 8** which vests the court with jurisdiction to set aside or vary any judgment entered in default of appearance.[7]

9. The respondents' actions in this appeal clearly fall afoul of the requirements of **Order 2 rule 2(1)**. The requirement that the application be made within a reasonable time is so strictly construed that not even an unexplained three-month delay has been allowed.[8] In **Republic Bank Ltd. v Charles Horrell Shoes (Trinidad) Limited and Edmun Karkour**,[9] Master Best (as he then was), in dealing with a 2 year and seven month delay in applying to set aside a judgment entered in default of appearance, had this to say:

"I have been led to the view…the defendant showed an utter disregard of his affairs, and that such procrastination cannot commend itself to this court so as to influence it to exercise its discretion to allow this defendant to come in and to defend the action."

Similar criticisms can be advanced regarding the respondents' inertia in applying to the court for relief after the entry of judgment against them. From the affidavit of Windra Williams filed on behalf of the appellant in opposition to the motions to set aside the judgment,[10] it became clear that the respondents knew of the existence of the judgments for several years. At paragraph 12 of Williams' affidavit the deponent says that a levy of execution was carried out

[7] The Supreme Court Practice 1979 Vol. 1 para. 13/9/1.
[8] Singh v Atombrook Ltd. [1989] 1 ALL E.R. 385, CA
[9] HCA No. 1615 of 1985 at page 5
[10] See pg. 572 ROA

on the 31st October 1991 pursuant to the judgments and the sale was advertised in a national newspaper on the 26th November 1991.

At paragraph 12 it is also deposed that in a defence filed by the appellant since the 16th April 1993, in litigation instituted by the respondents, the appellant pleaded the judgments which were obtained.

And finally again in paragraph 12 it is deposed that the appellant's attorney wrote to the respondents' attorney a letter of the 7th June 1993 in which the judgments are set out.

It is therefore abundantly clear on the evidence that the respondents knew for approximately 11 years that the judgments were entered against them and took no steps to set them aside.

10. The Court of Appeal cannot grant its imprimatur to such a state of affairs. It is of fundamental importance to the maintenance of public confidence in the administration of justice that there be finality of litigation. This series of applications so late after the respondents knew of the judgments for over 11 years strikes at the heart of the principles of fairness and justice which must characterise all aspects of civil litigation. There is merit in this aspect of the appeal, but it is not necessary to base my decision on this aspect having regard to what I have said earlier.[11] The appeal is therefore allowed and the orders of the learned judge setting aside the judgments and all subsequent proceedings must be set aside.

11. In their cross-appeal the respondents contend that the judgments should also be set aside because they have a good defence on the merits and that the orders of the learned judge should be varied as necessary. The issue of merits was addressed before the learned judge but he made no findings on

[11] See paragraph 7, ante.

this matter. The parties have agreed that if the Court were to accede to the appellant's appeal on the issue of non-service, the matter ought to be remitted to the learned judge for him to decide the issue of a defence on the merits.

12. This appeal is therefore allowed. The matter is remitted to the learned judge to deal with the issue of the defence on the merits. The respondents are to pay to the appellant the costs of the appeal to be taxed. The order for costs below is set aside. Those costs ought to be reserved until the determination of the motions to set aside the judgment, but I would think that the appellant would be entitled to the costs of the application to set aside on the ground of non-service of the writs.

W.N. Kangaloo
Justice of Appeal