REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P038/2015
CV2013-04097

BETWEEN

INDAR CHANDI RAMJIT

Appellant

AND

SOOKBIR DEODATH

Respondent

PANEL:

P. MOOSAI, JA

C. PEMBERTON, JA

M. HOLDIP, JA

DATE DELIVERED: 22nd October, 2021

APPEARANCES:

Mr. N. Ramnanan instructed by Mr H. Chase for the Appellant.

Mr. A. Manwah for the Respondent.

I have read the judgment of Moosai JA and agree with it.

C. Pemberton

Justice of Appeal

I too, agree.

M. Holdip

Justice of Appeal

REASONS

<u>Delivered by Moosai JA</u>

I. Introduction

[1] This appeal lies against the decision of the trial judge dismissing the application of the appellant/defendant for relief from sanctions filed 27 January 2015 and ordering, *inter alia*, that the respondent/claimant is the owner and entitled to possession of the disputed lands situate at Mc Bean Village in the Ward of Couva. The Order also restrained the appellant from entering and/or trespassing on the disputed lands, by himself or his agents or workmen or whomsoever and further required that his trucks and trailers and motor vehicles be removed from the said lands.

II. Background

[2] On 30 September 2014, in an exercise of the court's case management powers, directions were given to the parties to file and exchange witness statements on or before 11 December 2014. A pre-trial review (PTR) was fixed for 15 December 2014, at which time the trial judge proposed to examine the witness statements of the parties to ascertain the relative strengths of their respective cases, and to determine whether the matter could

be resolved at an earlier stage or if a trial was warranted. The respondent, but not the appellant complied with these directions.

[3] On the day of the PTR, the appellant, it appears, was present, but without his attorney at law. No reason was given for the failure to comply with the directions regarding the filing and exchanging of witness statements, nor was an application for an extension of time made. The trial judge then proceeded to exercise his discretion under Part 26.2(1)(a) of the CPR to strike out the appellant's defence and counterclaim for failure to comply with the court's directions. Directions were then given for the matter to be heard as an undefended claim and a trial date set for 27 January 2015.

[4] At the hearing of the undefended claim, the appellant made an application for relief from sanctions pursuant to Part 26.7, seeking to set aside the order of the court and reinstating his defence and counterclaim. He also sought an extension of time for the filing of his and other witness statements and for a new trial date to be set for the adjudication of the respondent's claim and the appellant's counterclaim.

[5] In ruling on the appellant's application, the judge made the following observations. Firstly, he noted that the appellant in bringing his application for relief violated Part 11.10 of the CPR which requires that seven days' notice be given to the other side of any application to be made. The failure to comply denied the respondent the opportunity to reply by way of affidavit to the application. He also noted that to have adjourned the hearing of the application at that point would have only served to delay the management and conduct of the trial. Secondly, and of greater concern to him, was the fact that there was no defence or counterclaim to manage as both had already been struck out. As I understand the judge's rationale, having elected to exercise his discretion to so strike out and thereby circumventing the application of the express sanction set out in the rules for a failure to file a witness statement,[1] the court was now without jurisdiction to entertain an application for relief from sanctions. The proper course for the appellant lay in an appeal of his earlier decision to strike out, or, arguably, in an application to set aside under Part 11.17. The judge expressed doubt as to the viability of the latter option as the order had

[1] Part 29.13.

been made in the presence of the appellant, albeit in the absence of his attorney. These deliberations led him to conclude that the application for relief was a "non-starter and a plain attempt to circumvent the lawful process of an appeal. It was itself an abuse of process."[2]

[6] The judge nonetheless proceeded to consider the application for relief from sanctions on its merits. He concluded that there was no reason to grant relief or extend the time for the filing of the witness statements as the appellant had failed to meet the threshold requirements for the grant of relief under Part 26.7. He concluded that the application had not been made promptly, no good reason had been advanced for the breach of the court's directions, and there was a lack of general compliance with the court's orders and rules.

III. Discussion & Analysis

[7] This appeal is against the exercise of the judge's discretion. The approach of the court of appeal to such matters is now well settled. A most apt statement of this approach can be found in the judgment delivered by Mendonca JA in the matter of ***Roland James v The AG of T&T***.[3]

> "*[29] The Court will not interfere with the exercise of the Judge's discretion unless it can be shown he was plainly wrong. Unless therefore it can be demonstrated, for example, that the Judge erred in principle or took into account irrelevant considerations or failed to take into account relevant considerations or that his decision is against the evidence or cannot be supported having regard to the evidence, or that his decisions is (sic) beyond the ambit within which reasonable disagreement is possible, the Court of Appeal will not interfere.*"

With all due respect, I am of the view that this is a case in which the trial judge not only erred in principle, that is, in the interpretation of the law, but that the decision was also against the weight of the evidence. For these reasons, the decision ought to be set aside.

[2] Trial Judge's Reasons dated 27 January 2015 [5].
[3] CA 44/2014.

A. Striking Out and the High Court's Jurisdiction

[8] The following sections of the CPR are apposite:

> *26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court—*
>
> *(a) that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings;*
>
> *…*
>
> *Court's powers in cases of failure to comply with rules, orders or directions*
> *26.6 (1) Where the court makes an order or gives directions the court must whenever 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] The trial judge struck out the appellant's defence and counterclaim pursuant to Part 26.2 (1) (a). The rule itself falls under the stated heading of "Sanctions – striking out statement of case" and is undoubtedly the most powerful weapon in the court's case management arsenal.

[10] It is my view that inasmuch as the judge purported to strike out the appellant's defence and counterclaim pursuant to the aforestated rule, a sanction was indeed being imposed for his failure to file witness statements by the date specified in the judge's order. That the judge chose to impose the ultimate sanction as opposed to the express sanction outlined in the rule relative to witness statements,[4] does not serve to place the matter outside of the rules dealing with the imposition of sanctions and the steps required if a party seeks to be relieved from the resultant consequences of a breach. Technically, it is true that the appellant could have approached the court of appeal with respect to the trial judge's decision to strike out. This course though, may have been premature and undoubtedly the appellant would have faced the question of why an application for relief was not sought before the trial judge before invoking the appellate jurisdiction of the court.

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[4] See Part 29.13.

[11] On a plain reading of both Part 26.2 (a) and 26.6 (2) specifically, it is difficult to appreciate how the question of jurisdiction arose, far less how the conclusion was arrived at that upon the striking out of the defence and counterclaim, the High Court's jurisdiction was no more. Part 26.6(2) clearly states that any sanction (of which the power to strike out surely is) imposed by rule or court order has effect until the party in default applies and obtains relief from the sanction. Therefore, the trial judge was plainly wrong to conclude that the application for relief was an abuse of process, that the court did not have the jurisdiction to entertain the appellant's application for relief from sanctions and that the proper avenue for recourse lay in an appeal against the decision.

[12] Part 26.6(1) requires the court, whenever practicable, to specify the consequences of a party's failure to comply with rules, orders or directions. The trial judge's reasons do not reveal that the intention to employ the ultimate sanction of striking out for a failure to comply with the court's directions for the filing of witness statements was ever communicated to the parties. There is also, however, no means by which it can be determined if this failure to so specify was as a result of it having been impracticable at the time to do so. The record does not reveal that the appellant repeatedly flaunted the rules of court or disobeyed the trial judge's orders, nor does it disclose any justification for the employment of this "nuclear option". Without more, the reasonable inference cannot be drawn that based upon what the trial judge stated he had hoped to accomplish at the PTR, and the witness statements' undoubtedly integral role in this, the appellant's failure to comply without notice or explanation amounted to a flagrant disregard of the court's orders in all the circumstances.

[13] In my view, the imposition of the ultimate sanction of striking out of the appellant's defence and counterclaim, particularly in the apparent absence of prior indication and without having invited submissions from both sides, was unduly harsh and disproportionate. It is worth remembering that the Constitution guarantees the right to a fair trial, and where CPR rules and practice directions leave important aspects of

procedure untouched, resort may be had to the due process and protection of the law clauses which underpin fundamental procedural rights.[5]

B. Relief from Sanctions

[14] As stated above, the trial judge nonetheless proceeded to assess the application made by the appellant for relief from sanctions. Rule 26.7 sets out the criteria to be satisfied.

> *(1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.*
> *(2) An application for relief must be supported by evidence.*
> *(3) The court may grant relief only if it is satisfied that—*
> > *(a) the failure to comply was not intentional;*
> > *(b) there is a good explanation for the breach; and*
> > *(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.*
>
> *(4) In considering whether to grant relief, the court must have regard to—*
> > *(a) the interests of the administration of justice;*
> > *(b) whether the failure to comply was due to the party or his attorney;*
> > *(c) whether the failure to comply has been or can be remedied within a reasonable time; and*
> > *(d) whether the trial date or any likely trial date can still be met if relief is granted.*

<u>Promptitude</u>

[15] On the issue of promptitude, the trial judge determined that the application was not made promptly. This conclusion was based on the following facts. The defence and counterclaim of the defendant was struck out on 15 December 2014. The application for relief was made on the date of trial, that is, 27 January 2015, more than one month later and without having given the requisite notice to the other side. In the trial judge's view, the appellant ought to have been aware of the need to act with expedition given the closeness of the trial date. From the tenor of the reasons, it seems that the trial judge was of the opinion that the appellant ought not to have waited until the date of hearing to make his application. Finally, notwithstanding the unfortunate circumstances of the

[5] See *Zuckerman on Civil Procedure*, para 2.1; See also *CA T080/2014 Kenton Richards v Patrick Des Vignes*; See also *Fundamentals of Caribbean Constitutional Law,* 276 para. 6-019.

appellant's attorney, no explanation was given as to why nothing was done between 15 December 2014 and the date of trial.

[16] The surrounding circumstances of the case are central to the issue of promptitude. This was recognised by the trial judge and is evidenced by reference to ***The AG v Miguel Regis Civ App 079/2011***, where it was stated that the issue of promptitude was "fact driven and contextual" and is to be determined in the "circumstances of each case". The circumstances of this case will be more fully explored later in this judgment when examining the requirement of a good explanation for the breach. Suffice it to say that I cannot agree with the trial judge that the appellant did not advance any explanation for the failure to act between the date of striking out and the date of trial.

[17] Both the breach of the court's directions and the failure to make an application for relief from sanctions immediately following the breach lay solely at the feet of counsel for the appellant, Mr R. This much is immediately apparent from the extensive affidavit deposed to by him on behalf of his client and filed in support of the application. In this affidavit, Mr R disclosed that in the first week of December 2014, he suffered internal injuries because of a vehicular accident.[6] This rendered him unable to work for the entire month of December as he was still experiencing lingering pain, at least until the time of the preparation of the affidavit in January 2015. This ought to have been considered alongside the other events deposed to, including an attempt on Mr R's life, the effects of which restricted his ability to return to work fully until 12 January 2015.[7] If these reasons are accepted, there remains only an unexplained period of approximately 15 days between Mr R's full return to work and the date of the filing of the application (12-27 January). It is my view therefore, that it cannot be reasonably advanced that the application was not made promptly in the context of this case.

[18] With regard to the lack of notice given to the other side, I agree that the appellant ought to have communicated the intention to apply for relief. In all the circumstances of the

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[6] Affidavit of Mr R filed 27 January 2014 [12].

[7] This attempt on his life was in connection with another matter in which two other persons, including an attorney at law, were murdered. See affidavit of Mr R filed 27 January 2014 for detailed particulars.

case however, I am of the view that a cost award in favour of the respondent would have been sufficient to penalise this failure to comply.

Intentionality

[19] The trial judge cited Jamadar JA (as he then was) in ***Trincan Oil Ltd v Keith Schnake***[8] on the issue of intentionality. In summary, for the purposes of Part 26.7(3)(a), what must be established is a deliberate and positive intention to avoid compliance with, as in this case, the directions issued by the court. Where an explanation for the breach is given, though it may not be a 'good explanation', it will satisfy the purpose of this Part if it is consistent with an intention to appeal. The trial judge went on to conclude that there was nothing to suggest on the evidence that the failure to comply was intentional and I agree.

Good Explanation for the Breach

[20] Jamadar JA (as he then was) in ***Trincan Oil*** made the following observations:

> *[44] … What is required by the rule is not simply an explanation, but a good explanation.*
> *[45] The Court of Appeal has been consistent in stating that,* ***except in exceptional circumstances, default by attorneys will not constitute a good explanation for noncompliance with the rules of court.*** (Emphasis mine)

Having closely perused Mr R's affidavit evidence (together with annexures thereto) I am satisfied that this is a case which falls squarely within the ambit of exceptional circumstances referred to in the above cited case, the circumstances of which offer a good explanation for non-compliance with the court's directions.

[21] Mr R deposed to having suffered from, among other things, mental depression, insomnia and a general loss of appetite following the murder of his youngest daughter in April of 2012. It was his evidence that he continued to suffer from the aforementioned conditions, which said conditions were exacerbated following tributes paid to his deceased daughter at the wedding of another of his daughters in October 2014. I note that these expressed conditions were not supported by any medical evidence.

[8] CA 91/2009.

[22] The court does not exist however, in an ivory tower far removed from the vicissitudes of life. This forms part of the court's duty in dealing with cases justly. Modern courts must display emotional as well as academic intelligence. The court is mandated in fact to keep in touch with, and be sensitive to the vagaries of life experienced by the public it serves, including attorneys-at-law. The court of appeal therefore appreciates that the type of deep personal challenge undergone by Mr R would reasonably have been expected to produce the type of trauma alluded to.

[23] Mr R further deposed that in the last week of October 2014, whilst in the car park of a supermarket near his residence, he was involved in a shooting incident. It was his evidence that certain parties involved in either one of two cases, made express threats on his life. Mr R deposed that the attempt made on his life was due to his involvement in those cases as an attorney at law. As a result, Mr R no longer felt safe and took certain steps to limit his exposure and risk, including the cancelling of all client meetings and a prolonged absence from his offices.[9] Stated otherwise, according to Mr R, the event majorly disrupted his usual way of life and legal practice.

[24] As already mentioned above, in December of 2014 Mr R was involved in a vehicular accident in which he suffered internal injuries. The medical evidence annexed to his affidavit discloses that for the period 3 December to 17 December 2014, he underwent treatment for hyperglycaemia and a respiratory infection, and further recommended a period of sick leave for at least 14 days. This would have been around the time that the trial judge had directed for the filing of the appellant's witness statements, which he failed to do, and that the PTR was held, which he did not attend. At the time, there was no explanation given for the failure to file and the trial judge proceeded to strike out the appellant's defence and counterclaim on this basis.

[25] In light of the cumulative effect this series of unfortunate events would undoubtedly have had on Mr R, it is my view that it cannot be concluded that he did not proffer a good reason for his failure to file the ordered witness statements on behalf of his client. The

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[9] Mainly for the months of November & December 2014, however he asserts that he did not return to full practice until January of 2015

trial judge correctly recognised several avenues that were open to Mr R, which, if utilized, could have led to an avoidance of the breach, including either communicating with the court or the other side, and/or passing the brief to another attorney at law.

[26] The law does not however require a perfect explanation, nor one that is completely devoid of fault to satisfy the test of a "good explanation". The explanation put forward must be one which is good and acceptable.[10] The trial judge, in my view, failed to acknowledge sufficiently the impact of these events occurring one after another in relatively close proximity, on an individual still suffering from the effects of a singularly traumatic experience. Given the general upheaval and disruption in Mr R's life at the relevant time, a degree of empathy would have been useful in assessing the circumstances in this case and would have provided a proper context for fairness in decision-making. That the facts stated satisfied the criteria that there was a good explanation for the breach would have been self-evident. It must also be borne in mind that the CPR in its philosophy embraces flexibility in achieving the overriding objective, and to mandate rigid application would only serve to defeat its purpose.

[27] Before concluding this issue, the court noted that opposing counsel, at the hearing of the appeal, quite properly did not dispute that what was contained in Mr R's affidavit amounted to a good explanation for the breach in all the circumstances.

[28] For the reasons outlined above, the explanation proffered by Mr R was to my mind both good and acceptable.

<u>General Compliance</u>

[29] The trial judge found that the failure of the appellant to file his witness statements in accordance with the directions given was evidence of a lack of general compliance with the orders and directions of the court throughout proceedings. This conclusion is in itself difficult to justify as it appears to be based upon an interpretation of the rule that would render hopeless at this stage, any application for relief from sanctions. It cannot be that by itself, the very act warranting the application for relief can be evidence of an attitude

[10] See *Reed Monza (Trinidad) Ltd. v Pricewaterhouse Coopers Ltd CA 015/2011*; *Rawti Roopnarine v Harripersad Kissoo CA 52/2012*.

of non-compliance. As it appears from the record before this court, the failure to file his witness statements was the appellant's sole infraction against the court's orders and directions. Even if the trial judge viewed it as an egregious one, an isolated incident is surely inconsistent with a determination of a lack of **general** compliance when the word, in the context it is used is given its plain and ordinary meaning.

The Part 26.7(4) Factors

[30] The interests of the administration of justice is not limited to justice between the immediate parties to the particular litigation. Their needs are of course to be considered, but this must be done alongside the needs and interests of other court users and the public at large. The interests of the administration of justice will also be best served by the court being consistent in its approach to ensuring that its rules, directions and orders are complied with. These principles will not be undermined however, if, in an appropriate case, a party is granted a reprieve from the strict consequences of his failure to meet the expected standards. The CPR itself recognises this and includes provisions which allow for same.

[31] In this matter, the appellant's case in answer to the claim not only asserts his own interest by way of adverse possession, but also totally rejects the title that the respondent seeks to enforce, alleging that any such entitlement was the product of fraudulent conduct by the said respondent. These are very serious counter-allegations that are not on its face bare or bald denials, but are grounded in a statement of defence and counter-claim which are themselves comprehensive in nature.

[32] Further, the fraudulent conduct alleged impacts upon not only the appellant, but also members of the immediate family of both parties (who are related) and whose estates and heir entitlements will be affected depending on the outcome of the litigation. It would, in my opinion, be wholly against the interest of the administration of justice in all the circumstances, to debar the appellant from meeting this claim, the effect of which would be to allow the respondent to succeed and reap the contingent rewards without any real challenge to his case.

[33] As was mentioned above, responsibility for the breach of the court's directions lay exclusively within the bosom of Mr R, counsel for the appellant. As already opined, his full and frank disclosures reveal a most unfortunate series of events, the cumulative effect of which places him squarely within the category of exceptional cases in which the circumstances of the attorney's culpability ought not to deprive the appellant from satisfying the requirement of a "good explanation" for the breach.

[34] In making his application for relief from sanctions, the appellant also sought an extension of time to file his witness statements, which at the time of the application had still not been prepared. In concluding that the breach of the directions would be irremediable within any reasonable timeframe, the trial judge found that the appellant himself was inconsistent and unclear in appraising the court of his readiness for trial, which was compounded by what he viewed as a belated indication of the appellant's desire to introduce expert evidence. With regard to the alleged inconsistency, the judge referred to a statement of the appellant that he required 28 days for the filing of the witness statements of himself and his other witnesses. This was followed by the appellant's request for an additional 6 to 8 week period to facilitate the examination of the Will in question by his expert. These seemingly inconsistent timelines were the focus of the court's angst in assessing the appellant's ability to timeously remedy the breach.

[35] In my opinion, the proposed timeline ought not to have been viewed as being inconsistent. As I understand it, the 28 day extension was specific to the appellant and his other witnesses, excluding the expert witness, who it was anticipated would require more time to conduct his examination, an additional period of 6 to 8 weeks.

[36] In the circumstances of this case, the request for an additional 28 day period to allow for compliance was not unreasonable. With respect to the expert witness, the rules clearly establish that the purpose of any such witness is to aid the court firstly, regardless of who sought to introduce same. Even without this, it ultimately lay within the discretion of the court to allow the proposed timeline as it stood, amend same, or reject the proposal outright if it held the view that the progression and adjudication of the matter did not require the services of an expert. It should be recognized that the belated

indication of proposed expert involvement, coupled with the absence of the appellant's witness statements, placed the trial judge at a disadvantage and he may not have been well positioned to make a determination as to the need for expert evidence. Nonetheless, it was at least open to the trial judge to grant the 28-day extension, and it is my view that that ought to have been done. Any decision with regard to the expert could have been subsequently made, with the appellant, as an option, being put on advanced notice that if such was required, he ought to be prepared to have that evidence placed before the court within a much condensed timeframe.

[37] A successful relief from sanctions application would have had the effect of reinstating the appellant's defence and counterclaim, obviating the need for a hearing of the undefended claim. The relevance therefore of 27 January 2015 to any assessment as to the impact of the grant of relief on any set trial date is tenuous at best. Given the very close timelines set following the deadline for the filing of the witness statements, the PTR and even the date set for the adjudication of the undefended claim however, it is apparent that the trial judge favoured an aggressive approach to case management. In the reasons given, the trial judge readily acknowledged that to grant the application for relief and subsequent extension would have had a negative impact upon the timeline set for the management and conduct of the case. Given my already expressed views however, this would nonetheless have been a justifiable outcome when weighed against the appellant's interests and what the justice of the case demanded.

The Overriding Objective

[38] The trial judge was of the view that even if he was minded to consider the overriding objective, it would not be "proportionate nor economical nor maintain the party's (sic) on equal footing to grant relief".[11] He did not elaborate beyond this.

[39] A helpful approach to the assessment of the overriding objective in relation to the Part 26.7 factors can again be found in the judgment of ***Roland James***. In considering that, as far as practicable, the parties are on equal footing, the court's aim is to ensure that there

[11] Trial Judge's Reasons [31].

is a level playing field between litigants of unequal finances or resources.[12] There is nothing in the record which attests to either of the parties in this case being challenged in this regard, and it therefore does not appear to me that this factor is of relevance. Given the broad statement of the trial judge, I am unsure as to how this may have been factored into his conclusion.

[40] The trial judge's reference to it not being "economical" clearly relates to the saving of expense. It cannot be denied that had the witness statements been filed on time, the costs associated with the application for relief from sanctions and to extend time would not have been incurred. As against this however, the costs incurred because of the failure to grant the applications may be considered. It was more likely than not that an appeal would be lodged, this being the appellant's last resort if he hoped to avoid the consequences of the orders entered against him. The costs associated with an appeal would, to my mind, have significantly outweighed the costs incurred because of the applications, a fact which warranted greater consideration.

[41] On the issue of proportionality, immediately relevant are considerations related to the amount of money involved, the importance of the case and the financial position of each party. As set out above, the issues raised by the appellant in his defence and counterclaim are significant and the implications far reaching. In light of this, it would be disproportionate to allow the respondent to succeed in his claim in the manner occasioned by the trial judge's decision to strike out the appellant's defence and counterclaim for his breach. As it relates to the financial position of each party, the respondent could have been effectively compensated in costs for the application. The delay in the adjudication of the matter that would have flowed because of the grant of relief and extension of time would not, in my opinion, have incurred disproportionate outcomes impacting upon the financial position of the parties.

[42] Notwithstanding the impact of the applications to any timeline for adjudication, it is my view that this matter could still have been dealt with expeditiously, especially considering the approach of the trial judge to case management as evidenced. Having been subjected

[12] ***Roland James*** [40].

to appeal however, the adjudication of this matter has undoubtedly been negatively impacted. More than 5 years have now elapsed from the time of the decision to the hearing of the appeal, a timeframe that stands to be further inflated if it is remitted to the High Court for completion.

[43] My views relative to the remaining factors of prejudice, an allotment of an appropriate share of court resources and any consideration as to the merits of the defence can be gleaned from all that has already been said above and do not bear repeating.

[44] As stated in ***Roland James***, the aim of the overriding objective is to deal justly with cases. It follows therefore that I am of the view that dealing justly with this case requires the application for relief from sanctions to be granted and an extension of time given for the filing of the witness statements.

IV. Disposition

[45] The appeal is allowed.

[46] The order of the trial judge striking out the appellant's defence and counter claim is set aside.

[47] The case is remitted to the High Court for further hearing and is to be heard speedily.

[48] We will hear the parties on the question of costs.

P. Moosai

Justice of Appeal