

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. P078 of 2017**

**Claim No. CV 2015-03645**

**Between**

**MAHARAJ 2002 LIMITED**

**Appellant**

**And**

**PAN AMERICAN LIFE INSURANCE COMPANY OF TRINIDAD AND TOBAGO  
LIMITED**

**Respondent**

**PANEL:**

**A. Mendonça J.A.**

**P. Rajkumar J.A.**

**M. Dean-Armorer J.A.**

**Date of delivery: May 6, 2021**

**Appearances:**

**Mr. A. Manwah appeared on behalf of the Appellant**

**Mr. M. Daly SC and Mr. K. Garcia instructed by Ms. A. Bissessar appeared on  
behalf of the Respondent**

I have read the judgment of Mendonça J.A. I agree with it and have nothing to add.

/s/ P. Rajkumar J.A.

I have read the judgment of Mendonça J.A. I agree with it and have nothing to add.

/s/ M. Dean-Armorer J.A.

## JUDGMENT

**Delivered by A. Mendonça J.A.**

1. This is an appeal from the order of the Judge striking out the Appellant's statement of case pursuant to rule 26.2(1)(c) of the Civil Proceedings Rules 1998 (the CPR). That rule provides as follows:

"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 –

- (c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim".

2. The Appellant is a limited liability company incorporated under the laws of Trinidad and Tobago. The Respondent is also a company incorporated under the laws of Trinidad and Tobago and was at all material times the insurer of the Appellant.
3. In the statement of case the Appellant pleaded that the Respondent on November 10, 2013, as insurer for the Appellant, issued a policy of insurance on the life of a Tulier Persaud for the sum of \$19,800,000.00. According to the Policy Specification Schedule to the policy, the owner of the policy was said to be the Appellant. The Appellant was also the named beneficiary under the policy. The Appellant further alleged that on July 29, 2014 Tulier Persaud died a natural death and thereafter it demanded payment of the sum insured of \$19,800,000.00 from the Respondent. The Respondent, however, denied liability. As a consequence, the Appellant commenced these proceedings claiming payment from the Respondent of the sum of \$19,800,000.00.
4. The Respondent filed a defence and denied any liability to the Appellant for the sum claimed. It did so on two grounds:
  - (i) By an assignment dated April 23, 2014 the Appellant passed and transferred the legal right to the proceeds of the policy of insurance

and all legal and other remedies for the same to Oojagaree Jagoo by reason of which the Appellant is not entitled to bring and/or maintain the claim. A copy of the form of assignment is annexed to the defence. There is no dispute that the assignment is in regular form and, if valid, is effectual to create an assignment of the policy.

- (ii) The policy was terminated by virtue of the non-payment of premium and was not reinstated.

- 5. The Appellant did not file a reply to the defence.
- 6. By notice of application dated May 10, 2016 the Respondent applied for an order pursuant to rule 26.2(1)(a) of the CPR that the claim form and statement of case be struck out as disclosing no grounds for bringing the claim. The grounds as set out in support of the application focused on the Respondent's pleaded case that the policy was assigned to Oojagaree Jagoo, the main thrust of which was contained in the grounds at (6) to (9), which are as follows:

- “(6) The [Appellant] having assigned its rights under the policy, the right to recover the proceeds thereof no longer belongs to the [Appellant] who cannot sue for same, that right being taken from it by virtue of the assignment. The right to the proceeds under the policy no longer belongs to the [Appellant] who cannot take proceedings to recover such proceeds.
- (7) As a matter of law, the [Appellant] cannot maintain this claim and this claim is liable to fail. By virtue of the Assignment, the [Appellant] has no ground for bringing and no right to bring this action.
- (8) The [Respondent] is being made to incur unnecessary costs in defending this claim against it.
- (9) For these reasons the claim form and statement of case filed herein should be struck out.”

7. The application was supported by the affidavit of Kamani Mohammed, the Regional Sales Manager of the Respondent. At paragraph 4 of the affidavit he deposed to the undisputed fact that the Respondent issued a policy of insurance on the life of Tulier Persaud for the sum of \$19,800,000.00. With specific reference to the assignment, he stated:

“(5) By an assignment dated April 23, 2014 (the assignment) made in accordance with Form B in the Third Schedule to the Insurance Act (Assignment as Security), the [Appellant] in consideration of the sum of \$2,300,000.00 loaned by one Oojagree (*sic*) Jagoo to the [Appellant] assigned and transferred as security all rights, title, and interest in and to the Policy to the said Oojagree (*sic*) Jagoo ....[A copy of the form of assignment is annexed to the affidavit].

(6) I am advised by Counsel and I verily believe that [Appellant] having assigned its rights under the policy, the right to recover the proceeds thereof no longer belongs to the [Appellant] who cannot sue for same, that right being taken from it by virtue of the assignment. The right to the proceeds under the policy no longer belongs to the [Appellant] who cannot take proceedings to recover such proceeds.

(7) I am advised by Counsel and I verily believe that the claimant cannot maintain this claim and that this claim is liable to fail as a matter of law as by virtue of the Assignment the [Appellant] has no ground for bringing and no right to bring this action.

(8) The [Respondent] is being made to incur unnecessary costs in defending this claim against it.”

8. The Appellant did not file an affidavit in opposition to the application although being given permission to do so by the Judge.

9. Before the Judge the Appellant submitted that the assignment was not valid and could not be relied upon by the Respondent. The Appellant advanced three reasons or grounds in support of that contention namely:

- a. the signature on the assignment form by which the Respondent contends the policy was assigned to Oojagaree Jagoo was not that of the Appellant, the owner of the policy, or anyone on its behalf;
- b. stamp duty was not paid on the assignment. As a consequence, pursuant to section 77 of the Stamp Duty Act the assignment confers no rights on the assignee; and
- c. there was no consent by the Respondent to the assignment of the policy.

10. The Judge was of the view that the grounds advanced by the Appellant in opposition to the Respondent's application required proof of certain facts, namely that the signature appearing on the assignment form was not made by anyone authorised by the Appellant to do so on its behalf; that stamp duty was not paid on the assignment; and that the Respondent did not consent to the assignment. The Appellant, however, made no mention of the assignment in its statement of case and did not plead any facts in the statement of case to support the grounds it advanced to challenge the assignment. The Appellant also did not file a reply or an affidavit in opposition to the Respondent's application. The Judge stated that if the Appellant wished to challenge the validity of the assignment, it was required to do so in its pleadings, more particularly in a reply to the Respondent's defence. As there were no facts set out in the pleadings that put in issue the validity of the assignment or for that matter any affidavit evidence that disputed the evidence of the Respondent that there was an assignment of the policy to Oojagaree Jagoo, the assignment remained unchallenged in the eyes of the court. The Judge further stated that in view of the Appellant's failure to file a reply or an affidavit, the Court could only take into account the following evidence in relation to the assignment:

- (a) The affidavit of Kamani Mohammed stating that there was a valid assignment and therefore the claimant was no longer entitled to the proceeds under the policy; and
- (b) The copy of the assignment with a signature above the words “policy owner” along with a stamp from the Registrar at the bottom right of the document which states:

“A duplicate of this assignment has been filed with the company on 23<sup>rd</sup> May 2014 Pan-American Life Insurance Company of Trinidad and Tobago Limited ”.

- 11. The Judge was of the opinion that that evidence established on a prima facie basis that the assignment was signed by the policy owner. The burden was then placed on the Appellant to advance a contrary case which it failed to do on the application and failed to advance anything to demonstrate that it could do so.
- 12. The effect of the assignment meant that the Appellant could not sue on the policy as it no longer belonged to the Appellant. Accordingly, the Judge concluded that the Appellant “has no locus standi to bring this claim as it no longer has any rights or interest under the policy by virtue of the Assignment. Such a conclusion means that, pursuant to Part 26.2(1)(c) of the CPR the claim is doomed to fail and ought to be struck out as the statement of claim discloses no grounds for bringing the claim.”
- 13. The Judge also dealt more specifically with the points raised by the Appellant with respect to section 77 of the Stamp Duty Act and the absence of the Respondent’s consent to the assignment of the policy (see paragraph 9 of this judgment). The Judge found no merit in them, saying that they were misconceived. As they have not been raised on this appeal I will say no more of them.

14. The Judge therefore struck out the statement of case pursuant to rule 26.2(1)(c) of the CPR on the basis that it discloses no grounds for bringing the claim. He further ordered that the Appellant pay the costs of the application to be assessed.
15. Before this court Mr. Manwah for the Appellant emphasised that the Respondent's application was made pursuant to rule 26.2(1)(c) of the CPR. That rule, he submitted, addresses two situations namely, (1) where the contents of the statement of case are defective in that even if every factual allegation contained in it were proven the party whose statement of case it is cannot succeed; and (2) where the statement of case no matter how complete and apparently correct it may be will fail as a matter of law. No evidence, he contended, is considered under this rule. The focus is on the statement of case that the application is seeking to have struck out. The Judge was therefore wrong to consider the affidavit evidence filed by the Respondent and he was also wrong to consider the Respondent's defence. Consideration was to be given only to the statement of case.
16. Mr. Manwah further argued that on a proper consideration of the statement of case it was not defective and will not fail as a matter of law. The Judge therefore erred in striking it out and this claim should proceed to trial. Mr. Manwah also submitted that insofar as the Respondent's defence relied on an assignment of the policy to defeat the claim of the Appellant, it was for the Respondent to prove the assignment at the trial. The Respondent, he contended, would have to adduce evidence that the assignment was a valid one, in that it was signed by the Appellant as the policy owner. It was not for the Appellant to disprove that it was not signed by the Appellant. The Judge was wrong in finding that it was necessary for the Appellant to file a reply to the defence in order to disprove the validity of the assignment.

17. Mr. Daly for the Respondent did not agree that in this case the Judge could not consider the Respondent's defence. The question before the Judge was whether the Appellant's case as presented was doomed to fail without further investigation of the facts. The court had to be convinced that it was just to stop the proceedings. The Appellant's case as presented necessarily included its pleadings. By the Respondent exhibiting the assignment the burden was on the Appellant to set out its challenge to its validity. On the statement of case, the Appellant had no case in relation to the assignment. The Appellant did not file a reply. On the pleadings, therefore, the Appellant had no case in relation to the assignment. Further, the Judge was correct to consider the affidavit of the Respondent in support of its application and to ask that the Appellant file an affidavit in response. The Appellant however failed to do so. In the absence of an affidavit in response or a reply setting out facts that raised a case challenging the validity of the assignment, the Appellant's claim was doomed to fail since by virtue of the assignment the Appellant had no locus to bring any claim on the policy. The Judge was therefore correct to strike it out.
18. Under rule 26.2(1) the court has a discretion whether or not to strike out a statement of case or part thereof. It may do so if it appears that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim. Since the rule gives the court a discretion, an appellate court will only interfere with the exercise of that discretion if it is satisfied that the judge has gone plainly wrong. Circumstances where it may be said that a court in the exercise of its discretion was plainly wrong include where the judge misdirected himself in law or where he took into account irrelevant considerations or failed to take into account relevant considerations or give insufficient weight to them or that the decision cannot be supported having regard to the evidence or is otherwise fundamentally wrong.
19. The rule enables the court to dispose of cases that do not need full investigation at trial. This is an aspect of the court's jurisdiction and duty to

actively manage cases by deciding which cases need full investigation and accordingly disposing summarily of the others (see rule 25.1 of the CPR). It is important however to emphasise that the rule is discretionary; the court “may” strike out a statement of case. In **Real Time Systems Limited v Renraw Investments Limited & anor** [2014] UKPC 6 Lord Mance at paragraph 17 speaking on behalf of the Privy Council focussed on that aspect of the rule and noted that the court must consider any alternative to striking out the statement of case and that rule 26.1(1)(w) enables the court to “give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective”. The court therefore should only strike out a statement of case where it is certain that the claim or defence is bound to fail.

20. Mr. Manwah in view of his submissions has argued that the Judge was plainly wrong in the exercise of his discretion for essentially two reasons: (1) he failed to consider only the statement of case of the Appellant and was wrong to consider other pleadings and the affidavit evidence in support of the Respondent’s application to strike out the statement of case; and (2) the Judge failed to recognise that the onus is on the Respondent to prove the validity of the assignment and there is no obligation on the Appellant to disprove its validity. In those circumstances, the matter should proceed to trial for the Respondent to prove the validity of the assignment.

21. In addressing Mr. Manwah’s submission it is convenient to bear in mind that there has been no challenge to the Judge’s conclusions on the stamp duty point raised by the Appellant in the court below or in relation to the argument that the Respondent did not consent to the assignment. Neither is there any challenge to the Judge’s finding as to the effect of the assignment of the policy. Indeed, it is common ground between the parties that if the assignment is valid, the Appellant could not have properly commenced these proceedings and cannot maintain them.

22. I turn to the first issue raised by Mr. Manwah, whether the Judge was wrong to consider the Respondent's defence and its affidavit in support of the application.
23. I have already set out the main parts of the affidavit of Kamani Mohammed which was filed in support of the Respondent's application. Germane to the application is paragraph 5 of the affidavit which refers to the assignment and annexes a copy of it. The following paragraphs are essentially legal argument and need not have been included in the affidavit. The question therefore is whether the judge was wrong to consider the evidence of the assignment contained in the affidavit.
24. Mr. Manwah's submission that no evidence is considered in respect of an application under rule 26.2(1)(c) seems to be a nod to a similar rule under the previous rules of court i.e. Rules of the Supreme Court 1975 (RSC) (see O.18 r.19(1)(a)). The RSC however specifically provided that no evidence shall be admissible on an application to, *inter alia*, strike out any pleading on the basis that it discloses no reasonable cause of action or defence as the case may be (see O.18 r.19(2)). There is however no corresponding provision in the CPR.
25. Part 11 of the CPR which deals with "General Rules About Applications For Court Orders" provides at rule 11.5(3) that evidence in support of an application is not needed unless it is required by (a) a rule, (b) a practice direction, or (c) a court order. Rule 11.8 provides that where evidence in support of an application is required it must be contained in an affidavit unless a rule, practice direction or court order otherwise provides. In relation to an application under rule 26.2(1)(c) there is no rule or practice direction that requires evidence in support of the application. But there is no rule or practice direction that prohibits it nor was there any court order that prohibited it. Indeed, to the contrary the Judge had entertained the Respondent's affidavit

evidence and gave permission to the Appellant to file affidavit evidence in response.

26. Mr. Manwah's submissions that evidence is not to be considered under rule 26.2(1)(c) was not supported by any authority. The best he could do was to refer to the Caribbean Civil Court Practice 2011 at note 23.24 where it says that the rule addresses two situations namely, (1) where the contents of a statement of case are defective in that if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; and (2) where the statement of case no matter how complete and correct it may be will fail as a matter of law. However, nothing in that, in my view, necessarily prevents the court admitting evidence in support of an application and the court considering such evidence. Granted in many cases – perhaps the vast majority of them – it would be pointless to file affidavit evidence in support of an application under 26.2(1)(c) but in appropriate cases evidence may be required and should be considered by the court. There is in my view no legitimate basis that a court in the discharge of its duty to actively manage cases referred to earlier should not in appropriate cases admit and consider evidence that may demonstrate that a statement of case no matter how complete on its face will fail as a matter of law.

27. The Respondent's argument is that this is just that type of case. The contention is that although the statement of case on its face discloses a proper claim for the payment of the sum insured on the death of Tulier Persaud, it will fail since the Appellant has no title to the policy because it has been assigned to Oojagaree Jagoo. It seems to me that this is an appropriate case for the Judge to have admitted and considered the affidavit evidence of Kamani Mohammed and cannot be faulted for so doing.

28. In view of my conclusion as above, it is not necessary that I consider as a separate issue whether a Judge on an application to strike out a statement of

case under the rule may consider a defence filed by a defendant as the affidavit of Kamani Mohammed incorporates the Respondent's defence to the claim on the basis of the assignment and annexes a copy of it. However, I may say that I know of no authority or principle that prevents the court on an application under the rule from considering the defence where the application may be to strike out the statement of case. In many cases this point probably would not arise since an application under the rules to strike out a statement of case is usually made before the defence has been filed. But where it is made after the defence has been filed the defence may serve to elucidate and clarify the issues between the parties and I can see no objection to it being considered by the court.

29. Having in my view correctly admitted and considered the Respondent's affidavit evidence on the application to strike out the statement of case, the Judge was also correct to say that the only available evidence with respect to the assignment that the court could take into account was that of Kamani Mohammed stating that there was an assignment of the policy and annexing a copy of the assignment which was regular on its face. The Judge in the exercise of his case management powers gave the Appellant permission to file an affidavit setting out its case on the assignment. The Appellant however declined to do so. There was therefore no evidence that contradicted the evidence of Kamani Mohammed that there was an assignment of the policy. But not only was there not any evidence that contradicted the Respondent's evidence that the policy had been assigned, the Appellant had not set out a case on its pleadings that challenged the validity of the assignment. As I mentioned, the Appellant had made no reference to the assignment in the statement of case and did not file a reply.
30. There was no dispute between the parties that the consequence of the failure to file a reply was correctly stated by Jones J (as she then was) in **Nanan v Toolsie** CV2011-04210 at para 27 as follows:

“In the absence of any specific rule with respect to the effect of a failure to file a reply, in my opinion, the fact that the claimant has not filed a reply to a defence while not amounting to an admission of new facts raised in the defence will prevent the claimant from raising at trial any facts, other than those already contained in the statement of case, in challenge of those new facts raised in the defence...The effect of the failure of the claimant to file a reply is that the claimant has not sought to challenge by way of the provision of alternate facts any of the new facts raised by the defendants in their defence.”

Quite simply, as the Appellant has not filed a reply and has not dealt at all with the assignment in the statement of case, while not admitting the assignment, cannot raise a positive case to challenge its validity should the matter proceed to trial. As Jones J (as she then was) put it, the Appellant cannot raise any facts at the trial other than those in the statement of case. There is nothing there that challenges the assignment. Mr. Manwah is of course correct to say that the onus is on the Respondent to prove the assignment. But as Mr. Daly pointed out, the burden of proof may shift, it is not a static thing. That is correct for although the legal burden remains constant, the evidential burden may shift. The evidence of the Respondent in support of the application demonstrated at least on a prima facie basis that the policy had been assigned with the legal consequence that the Appellant had no title to the policy and could not maintain this claim. That evidence shifted the onus onto the Appellant. Not only was it not answered by any opposing evidence to put the burden back on the Respondent, but the Appellant on its pleadings had not given any indication that there was any answer to the assignment and would not be able to provide an answer were the matter to proceed to trial.

31. As things stand now, and as they stood before the Judge, this case does not require any further investigation. There is simply no challenge to the allegation that there has been an assignment of the policy and that as a consequence the Appellant has no title to it.

32. However, as I mentioned above, before striking out a statement of case, the court should consider any alternatives, and it has been pointed out that the rules of court enables the court to give any other direction and make any other order for the purpose of managing the case and furthering the overriding objective. There is no indication in his judgment that the Judge considered other alternatives to striking out the statement of case and it falls on us to do so now.
33. The obvious alternative would be to give leave to the Appellant to file a reply. But this course will not produce any outcome that is useful. Mr. Manwah in the course of the hearing has not even from the bar table mounted any positive case to challenge the assignment. Indeed, when asked pointedly about the possible alternatives to striking out, his response was that the Respondent should be required to prove the validity of the assignment at the trial. That, it seems to me, is a clear indication that the Appellant has no positive case to mount and that likely informed the Appellant's refusal or failure to file affidavit evidence although given permission to do so in opposition to the Respondent's application, as well as the failure to file a reply. So the question is should this matter be allowed to proceed to trial for the Respondent to prove the assignment where it would do so on the same evidence it has put forward in relation to its application and to which the Appellant has no challenge. That in my view would not be a proper use of the resources of the court and is not a course that gives proper effect to the overriding objective.
34. When the statement of case is considered in the light of the unanswered evidence and the pleaded defence of the Respondent, to which there has been no reply, in my view the statement of case is bad in law and discloses no ground for the bringing of this claim. The court's duty to actively manage cases referred to earlier mandates that this case goes no further. The Judge was

therefore correct to make the order striking out the statement of case.  
Accordingly, this appeal is dismissed.

35. The court will hear the parties on the issue of costs.

**A. Mendonça J.A.**