The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P377 of 2018
Claim No. CV2018-00447
HCA 3133 of 2003

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant/Respondent

And

OSWALD ALLEYNE & 152 OTHERS

Respondents/Claimants

PANEL:

N. BEREAUX J.A.
G. SMITH J.A.
R. BOODOOSINGH J.A.

Date of delivery: June 22, 2021

APPEARANCES:
Mr. R. Martineau S.C., Ms. M. Smith, Mr. A. Cole and Ms. C. Alexander instructed by Ms. A. Niles and Ms. D. Katwaroo, Attorney-at-law for the appellant

Mr. R.L. Maharaj S.C. and Ms. V. Maharaj instructed by Ms. N. Badal Attorney-at-law for the respondents

DISSENTING RULING ON COSTS

Delivered by Bereaux J.A.

(1) I find myself, once again, in this appeal, unable to agree with the majority; this time on the issue of costs. The majority have decided that the respondents are entitled to their costs, discounted to thirty-five percent, even though they allowed the appellant's appeal in part.

(2) The appellant appealed against the award of compensation made by Kokaram J (as he then was). The specific part of the order appealed was:

> ***"that part of the order in which the honourable judge held that:***
>
> ***(i) the defendant do pay to the claimants damages assessed as set out in the tables below".***

The tables which formed part of the order, set out in their entirety, all the sums payable to the respondents.

(3) The relevant grounds of appeal were:

(a) The award was inordinately high.

(b) The judge was wrong to award each of the respondents' respective sums for non-pecuniary loss in the range of one hundred thousand dollars ($100,000.00) to one hundred and fifty thousand dollars ($150,000.00) and the awards were inordinately high.

(c) The judge was wrong in awarding each of the respondents three hundred thousand dollars ($300,000.00) as vindicatory damages and the award was inordinately high.

(d) The judge was wrong in awarding each of the respondents an

additional award and the award was inordinately high.

Grounds (e) and (f) are not relevant to the issue of costs.

(4) As can be gleaned from the notice of appeal, the appellant was aggrieved by the granting of individual awards to each of the respondents in respect of non-pecuniary loss, vindicatory compensation as well as the additional compensatory award directed by the Privy Council to be made for the breach of the Court of Appeal's order ("the additional award(s)"). The appellant's case was that one award should have been made in respect of each head of compensation. The appellant was also aggrieved by the grant to each respondent, for non-pecuniary loss, of awards ranging from $100,000.00 to $150,000.00. In respect of each of the awards however, the appellant also complained that the awards were inordinately high.

(5) This court, by a majority, allowed the appeal in part. They affirmed Kokaram J's order for compensation with respect to loss of salary, housing and meal allowances, but reassessed the respondents' compensation with respect to loss of pensions and loss of gratuities pursuant to the 2015 regulations. They also varied the judge's orders with respect to:

(a) the vindicatory awards made to each respondent; and
(b) the additional awards made to each respondent.

The vindicatory awards were reduced as follows:

(i) With respect to the distress and anguish suffered by the respondents, from a range of one hundred thousand dollars ($100,000.00) to one hundred and fifty thousand dollars ($150,000.00); to a range of sixty thousand dollars ($60,000.00) to one hundred thousand dollars ($100,000.00).

(ii) With respect to prolonged and shoddy treatment of the respondents, from three hundred thousand dollars ($300,000.00), to a range of between seventy-five thousand dollars ($75,000.00) to one hundred and twenty-five thousand dollars ($125,000.00) based on the respondents' length of service between 2000 and 2015.

The additional awards were reduced from eighty thousand dollars ($80,000.00) to twenty-five thousand dollars ($25,000.00). In reducing the vindicatory and additional compensation the majority found these awards to be *"excessive."*

(6) This reduced the overall compensation the appellant would have to pay from eighty-eight million nine hundred and nineteen thousand five hundred and sixty-two dollars and ninety-four cents ($88,919,562.94) to fifty-one thousand six hundred and seventy-nine dollars and ninety-four cents ($51,679.94), a reduction of thirty-seven million two hundred and thirty-nine thousand nine hundred and eight dollars (37,239,908.00). A substantial reduction. The main complaint of the appellant was that the award was inordinately high.

(7) In effect, the appellant's complaint about the inordinately high nature of the respective awards, was upheld and this includes the reassessment of the respondents' compensation in respect of loss of pension and gratuity. The appellant has succeeded on three grounds of his appeal. Further, with respect to the respondents' compensation for loss of pension and gratuities, he was partly successful, albeit on a basis different from that which he argued. With the reduction of the award by thirty-seven million two hundred and thirty-nine thousand nine hundred and eight dollars (37,239,908.00), the appellant has been vindicated in pursuing its appeal.

Yet, the appellant finds himself having to pay the respondents' costs. However much those costs are discounted, I can find no justification for such an outcome.

(8) Part 66.6(1) of the **Civil Proceedings Rules 1998 (as amended)**("CPR") provides that *"if a court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party"*. Part 66.6(2) and (3) then provide for the court to depart from that principle in circumstances which are not applicable here.

(9) There can be no gainsaying that the appellant is the successful party. Mr Maharaj, on behalf of the respondents, stoutly defended the judgment and resisted any reduction in the quantum. The respondents filed no counter notice of appeal and were quite content to defend the award in its entirety. They made no concessions. The appellant's appeal was considered by this court and was allowed in part. Costs must follow the event. At highest, all that the respondents may be entitled to is a discount of the appellant's costs with regard to the grounds on which it did not succeed but I do not agree that any such discount should be made in this case.

(10) The decision of the Privy Council in **Seepersad v. Persad [2004] UKPC 19** cited by Mr Martineau is apposite. Indeed I find myself in complete agreement with his submission. **Seepersad v. Persad** was a decision on costs under the old Rules of the Supreme Court but the principles remain applicable to the award of costs under part 66.6 (1) of the CPR. At paragraph 24 Lord Carswell stated:

"The Court of Appeal gave the appellant only half costs of his

appeal and the cross-appeal brought by the respondents against the amount of the award for pain and suffering and loss of amenity. In so ordering it must have treated the assessment of damages under this head as if it were a separate issue on which the appellant had lost, while succeeding on the other issues. In the Board's view this was an erroneous approach. The award of costs in Trinidad and Tobago is in the discretion of the court, as is usual in most common-law jurisdictions. The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed on one or more issues, particularly where consideration of those issues has occupied a material amount of hearing time or otherwise led to the incurring of significant expense, the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs; see, for example, Re Elgindata (No 2) [1992] 1 WLR 1207. The Court of Appeal's order was predicated upon the proposition that the assessment of damages for pain and suffering and loss of amenity was a separate issue from the assessment of the other heads of damage. This was an incorrect assumption. An issue for these purposes must be something so distinct and separate in itself that the decision of it constitutes an 'event'. The 'event' was the quantum of damages to which the appellant was entitled and he succeeded on his appeal in obtaining a higher award than Lucky J had given him; even though one head was decreased, another was increased and one which the judge had omitted was added to the total. The

Board accordingly consider that the Court of Appeal had insufficient ground for reducing the award of costs made to the appellant and that he should have been awarded full costs in that court, without separating out any element attributable to the cross-appeal, which was only a means of putting in issue the quantum of all the items of damage in the judge's award."

(11) This is precisely the point in this case. The *"event"* is the quantum of compensation which the appellant would have been called upon to pay and about which he complained in his notice of appeal. The vindicatory awards and the additional awards were significantly decreased. The awards for loss of pension and gratuity were also reduced albeit on a basis not put forward by the appellant. But in my judgment, even though the appellant won this reduction on an argument it did not raise, it has still succeeded. Moreover, the respondents' arguments justifying the award were also not accepted by the majority.

(12) The majority are of the view that *"given the nature of this appeal, this claim favours an issue by issue analysis on whether costs should be awarded and to which party"* (see paragraph 39 of the majority judgment). They conclude that the respondents were the more successful party. They make the same error corrected by the Privy Council in **Seepersad v. Persad**. The issues on which the majority regard the respondents as being successful were all part of the same event, the quantum of compensation to which the respondents were entitled.

(13) In my judgment, the appellant has succeeded in his appeal. The respondents sought unsuccessfully to justify an excessive award and have failed. The payment of costs must follow the event. There is no proper basis for

reducing the appellant's costs. I assess the appellant's costs at one million and ninety-eight thousand dollars ($1,098,000.00) as claimed by the appellant in his written submissions.

Nolan Bereaux
Justice of Appeal

I agree with the ruling of Boodoosingh JA.

Gregory Smith
Justice of Appeal

RULING ON COSTS

Delivered by Boodoosingh J.A.

(14) On 30 April 2021 the court by a majority of 2 to 1 allowed certain aspects of the appellant's appeal and made orders accordingly. The parties were asked to make written submissions on costs which they did.

(15) The appellant has submitted the State is entitled to its costs since it was successful in having the award of damages of the judge reduced substantially. The appellant has accordingly submitted on an appropriate figure considering time spent and other factors.

(16) The respondents submit that they succeeded on the appeal given that the judge's order was upheld in certain respects and the appellant did not

succeed in respect of the arguments which were advanced.

(17) The amended grounds of appeal were as follows:

(a) The award of damages was inordinately high.

(b) The judge was wrong to award to "each of the Respondents" the respective sums awarded for non-pecuniary loss in the range of $100,000.00 to $150,000.00 "and the awards were inordinately high".

(c) The judge was wrong in awarding to "each of the Respondents" the sum of $300,000.00 as vindicatory damages "and the award was inordinately high".

(d) The judge was wrong to award to "each of the Respondents" the sum of $80,000.00 as an additional award "and the award was inordinately high".

(e) The judge was wrong in awarding costs in the sum of $902,258.00 "which was inordinately excessive without giving any reasons for that award".

(f) The judge was wrong to refuse permission to the appellant to cross-examine the Respondents' witnesses.

(18) The use of a 60% loss of chance to calculate the pecuniary loss was also challenged as a finding of fact on appeal. The judge's determination, as a matter of law, that a duty of candour was owed by the State in the assessment of damages was also raised in the Notice of Appeal. It was not necessary, however, to deal with this matter in the disposition of the appeal.

(19) At paragraph 5 of the judgment of Smith JA the majority (Smith JA and Boodoosingh JA; Bereaux JA dissenting) made the following order:

(i) With respect to the compensatory awards, the trial judge's assessments of the direct pecuniary losses (hereafter referred to as the

"monetary awards") were correct save for the following two matters: (i) an error in calculating one aspect of the pensions and gratuities for retired/resigned MPOs; and (ii) the trial judge also assessed what he termed as non-pecuniary loss under the compensatory award. This should have been considered under the 'vindicatory' awards.

(ii) With respect to the vindicatory awards: (a) the award for the non-pecuniary losses of the Respondents (which the trial judge considered under the compensatory award), was excessive and ought to be reduced from the trial judge's range of $100,000.00 to $150,000.00 to a range of between $60,000.00 to $100,000.00; and (b) the separate vindicatory award of $300,000.00 for each of the Respondents was excessive and somewhat disproportional. I would reduce this special award for the Respondents to a range between $75,000.00 to $125,000.00.

(iii) The additional award of $80,000.00 for each of the Respondents was excessive and somewhat disproportional. I award the sum of $25,000.00 for each of the Respondents under this head.

(20) The total award of the first instance judge was reduced to $51,679,654.94 from his total award of $88,919,562.94.

(21) The appellant made written and oral submissions to the court. In its written submissions the following matters were raised:

1. The judge in finding a 60% chance of success did not take account of the collective bargaining process including the options of utilizing the Industrial Court or the conciliation process.

2. In respect of non-pecuniary loss, the judge wrongly took account of the Respondents' inconvenience and distress due to the failure to make Regulations dealing with promotion. The range of awards under this head was not correct and should be reduced to take account of the lack of promotion prospects, discipline and misconduct. It was submitted that the awards should not exceed $60,000.00 and should be pro-rated downwards according to the period of the breach of the constitutional rights.
3. On vindicatory damages it was submitted the awards should be prorated for each claimant and reflect the length of the breach. The awards were more like punishment and were excessive in all the circumstances. A figure was not suggested.
4. On the additional award for the failure of the State to obey the order of the Court of Appeal the judge ought to have adopted a lump sum approach and pro-rate it for each claimant. It was submitted there should be one award. The award was excessive. The suggestion was made that an appropriate award should be guided by recent cases where fines for contempt or failure to comply with court orders were in the range of $5,000 to $15,000.00.

(22) There were no submissions on appeal on the costs order of the judge made. From this, it appears that the appellants abandoned this ground of appeal.

(23) In oral submissions, the appellant submitted that for distress and anguish the sum of $35,000.00 was the appropriate award scale and that not every party should receive this award. This depended on when the person retired or if they had passed away.

(24) The respondent resisted the appeal and submitted that the judge's awards were not wrong in principle and should not be disturbed by the appeal court.

They also submitted that the submissions being raised on appeal were not made before the trial judge in the manner they were now being framed. The respondents submitted that the judge did give individual consideration to the status of the different claimants as far as pecuniary awards were made. Having regard to the breach of the constitutional rights in question, they submitted the judge was correct in making the awards that he did under the various headings.

(25) The judgment of Smith JA upheld the judge's 60% percent chance figure. However, the method of calculating lost pension and gratuity was varied to the extent that the respondents received 60 % of the pension and gratuity and not 100% as awarded by the judge. This was not directly dealt with in the submissions of the appellant. In effect, this was the Court of Appeal correcting an error of the judge.

(26) Regarding vindicatory damages, the judge's award for distress and anguish was reduced. The breach of the constitutional aspect for the prolonged and shoddy treatment was also reduced. The majority disagreed with one corporate award for all of the respondents as contended by the appellant.

(27) The additional award was also reduced to $25,000.00. The appellant had contended that this should not apply to all of the Respondents and this should only compensate for the failure to make Regulations for the two year period between September 2012 and October 2014. The court disagreed with the submission that those who left the service before September 2012 should not benefit from this award.

(28) The court further found that this was not an appropriate case for pro-rating the awards. This was a case of 133 independent claimants who had brought

a case together for convenience and in keeping with the objectives of the CPR. They were each entitled to compensation being considered separately.

(29) A successful party is generally entitled to its costs. In dealing with costs, the **Civil Proceedings Rules, as amended**, allows for a party to pay only a specified portion of another party's costs: **Part 66.6 (3).** In deciding who is liable to pay costs the court may consider the conduct of the parties; whether a party has succeeded on particular issues, even if not on the whole of the proceedings; the reasonableness of raising a particular issue; the manner in which the case or issues are pursued; whether a party who had won claimed an unreasonable sum and has defended it. Where there are several issues, a party may win on one issue, partially succeed on another or lose on yet another issue. Given the nature of this appeal, this claim favours an issue by issue analysis on whether costs should be awarded and to which party. It is not a clear case where it can be said that one party won the appeal completely.

(30) On this issue by issue analysis, what emerges is that in the appellant's favour, the awards of damages under the vindicatory head and the additional awards were reduced significantly. They were not however reduced to the levels contended by the appellants. The awards were also not reduced on a pro-rated basis. This was a central plank of the appeal and had the appellant succeeded in their submissions, the awards would have been substantially lower than they actually were. The bulk of the awards made were compensatory in nature and rested on the 60% loss of chance award made by the judge. As indicated above, the judge's methodology was not disturbed except for the correction of an error regarding the pensions and gratuity.

(31) The appellant won on the reduction, but not to the extent it argued and not on all of the principles it argued. The respondents also succeeded in defending substantial portions of the award but lost in the sense of having a decrease in substantial portions of the award. At the end of the appeal, however, the respondents can still be said to have benefitted from a substantial award. Accordingly, the respondents were the more successful party in the appeal. This was not a case where the only issue was a straightforward reduction in damages on the basis that they were excessive. The principles and basis for each category of award was disputed. Any reduction in the awards could not lead to the appellant being considered to have won the appeal simpliciter.

(32) The court must however take account of the fact that that the awards were substantially reduced and in that sense the appellant has succeeded in realising a smaller overall award. The appellant is entitled to be credited for this particularly since the respondents had not conceded on this.

(33) Taking account of that partial success, but also partial failure, on balance, the appellant should pay the respondents a portion of the costs of the appeal. A fair portion in the circumstances would be 35 % of the costs. The order therefore is that the appellant must pay to the respondents 35% of the costs of the appeal to be assessed by the Registrar in default of agreement.

Ronnie Boodoosingh
Justice of Appeal