

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

APPLICATION NO: P-027/2018

DIVORCE/FAMILY NO. FH 00284 OF 2017

BETWEEN

AL ASSAD HANIF

APPELLANT/ RESPONDENT

AND

ABBY-GAIL NELSON

RESPONDENT/PETITIONER

Before:

Pemberton J.A.

APPEARANCES:

For the Appellant: Mr. T. Cunningham instructed by Mr. Mungalsingh

For the Respondent: Ms. D. Ramnarine instructed by Ms. A. Ward

DATE OF DELIVERY: December 4, 2018

DECISION

- [1] These are on-going proceedings in the Family Division of the Supreme Court between Abby-Gail Nelson (AGN) and Al Assad Hanif (AAH). This particular application arose from an Order for Costs awarded to AGN on an application, which was filed for interim relief.
- [2] There is no dispute that before any appeal may be filed on the award of costs, the aggrieved party must seek leave of the court.¹ This aggrieved party sought such leave from the trial judge but the application was refused. Application is now made to this Court for such leave, utilizing the second of the two chances offered by the law.

BACKGROUND

- [3] I have taken the background to this matter as stated by the trial judge in the Reasons in the interest of time, since the original file is not available for my perusal, neither did AAH provide Notes of Evidence or a transcript of the proceedings for my perusal. In fact, AAH has not to date, filed an office copy of the Order appeal against or a copy of the Order of May 7, 2018 or May 25, 2018. On that ground alone, I could have refused to hear the matter. However, I shall deal with the merits of the Application.

[4] **WHY DID THE TRIAL JUDGE REFUSE LEAVE TO APPEAL?**

I agree with AAH that the trial judge's Reasons as supplied did not address the reasons for the refusal of the application for leave. It is now left to this

¹ See Section 38 (2)(b) **SUPREME COURT OF JUDICATURE ACT**. Chap 4:01, which provides:
(2) No appeal shall lie, except by leave of the Judge making the order or of the Court of Appeal from—
(a)...
(b) an order as to costs;

court to consider that application for leave afresh. This observation is not helpful or fatal to this application.

[5] **FACTORS WHICH INFLUENCE THE GRANT OF LEAVE TO APPEAL**

There are no stated guidelines in any written law – whether substantive or procedural - for the grant of leave. The grant of leave to appeal an order costs is left to the discretion of the court. There are however, certain principles which may be observed to guide the exercise of that discretion to grant leave. This is that there is a realistic prospect of success on appeal. This must be examined against the backdrop of the overriding objective, which mandates the court to deal with cases justly.

[6] **ISSUE 1**

DOES THE APPEAL IF FILED HAVE A REALISTIC PROSPECT OF SUCCESS?

According to Weekes JA (as she then was)² this entails that the party must be able to advance a case capable of being advanced, or for some other compelling reason, which includes the public interest or elucidation in a point of law which needs to be advanced. The onus is on the Applicant to demonstrate, with evidence in support, that this is satisfied.

[7] **THE RELEVANT LEGAL PRINCIPLES: FAMILY PROCEEDINGS RULES, COSTS PROVISIONS – PART 36**

Part 36 of the Family Proceedings Rules deals with the award of costs: the general rule in relation to the award of costs; when there may be departure from the general rule; and the factors to be taken into account in making an award for costs. Part 36.3 speaks to the court’s “power” to make a costs order. Part 36.6 sets out the general rules as to the award of

² **OCEAN DEVELOPMENT LIMITED v. MAHABIR DEONATH AND ANOTHER. CIV. APP. NO. 129 of 2008** as applied in **CIV. APP. NO. P005 of 2017. MARGRET FLETCHER & ORS. v. SAMPSON PHILLIP AND ORS.**

costs,³ and speaks to the court's discretion in the award of costs,⁴ the general rule about the award of costs itself and the power of the court to order a successful party to pay all or part of the costs of an unsuccessful party.⁵

[8] Part 36.6(6) mandates the court to have regard to all circumstances in deciding who is liable to pay costs. In particular, Part 36.6(7) outlines the factors which the court must have regard to, including the conduct of the parties; party's success on particular issues "even if he has not been successful in the whole of the proceedings"; whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and the manner in which the party has chosen to pursue its case. Conduct to be examined spans before and during proceedings.⁶

[9] As stated above, the burden is on AAH to demonstrate that the trial judge did not observe the provisions of Part 36 and that he has a reasonable prospect of success on the appeal of the costs order.

[10] **JUDGE'S REASONS**

On hearing the application filed on 22 May 2018, the trial judge on May 21, 2018 deemed the hearing of the application urgent as requested by AGN. The trial judge gave a detailed background to the matter in her charge, highlighting AAH's conduct in relation to certain aspects of the case. These are salient facts as culled from the trial judge's Reasons:

- (1) On March 7, 2018 AGN issued a witness summons to six (6) companies for them to provide nine (9) items of

³ Part 36.6(3)

⁴ Part 36.6(1)

⁵ Part 36.6(4)

⁶ Part 36.6(8)

specific information given AAH's role in these companies as Director and/or Shareholder. This summons was returnable on April 27, 2018.

- (2) On the returnable date, suffice it to say that AAH appeared in his personal capacity but the six (6) companies did not appear.
- (3) Hearing was adjourned to May 7, 2018 - and designated a Production hearing.
- (4) On May 7, 2018 both AAH and the six (6) companies appeared and were represented by Attorney-at-Law. The trial judge noted that the Attorney-at-Law for the company informed the court "*rather circuitously*" that the companies did not "*furnish the information outlined in the witness summons because that information was not forthcoming from the Respondent*". The trial judge noted that the reason was that AAH experienced difficulty in retrieving documents from an ongoing High Court Civil Action involving the companies.
- (5) The Attorney-at-Law and AAH informed the trial judge of a date on which AAH would be able to provide the financial information requested by ABN. As a result the following order of the court was entered.
- (6) The order reads as follows:

*The Respondent shall on or before **15 May, 2018** make full disclosure with proof thereof of all debts he currently holds whether in his name or in the names of any company, business or entity of which he is the primary shareholder, incorporator or*

owner, and provide full particulars of all creditors and/or financial institutions.

There is no indication from the trial judge's Decision that this was a consent order. It was clear from the order that the mandated date was May 15, 2018 for AAH to provide the financial information.

- (7) May 15, 2018 came and passed with no fulfillment of the trial judge's order.
- (8) On May 22, 2018, this application - the subject of these proceedings was filed.
- (9) The relief prayed comprised that the order that the hearing be deemed urgent, and other orders seeking prohibitive and mandatory relief.
- (10) On May 25, 2018 - the hearing date - trial judge took submissions from both parties, made findings and gave a decision.

[11] Paragraph 14 of the trial judge's Reasons is instructive and I quote:

(11) The Court made a finding that the Respondent's non-compliance with the court order of the 7th May 2018, necessitated the filing of the Petitioner's application of the 22nd May 2018. I further stated that the Respondent's noncompliance with the court order made on 7th May 2018 is hampering the court's ability to determine the application for financial relief. The first step in the process of determining an application for ancillary relief is that of identifying the matrimonial assets and liabilities. After fifteen (15) months and seven (7) hearings this is nowhere being completed.

It is to be noted, that the trial judge focused on AAH's non-compliance with the order of the court dated May 7, 2018.

- [12] The trial judge then considered both Counsel's submissions on costs. AAH submitted that the application of May 22, 2018 was misconceived and that the he, AAH was entitled to his costs on the basis that two of the reliefs sought in the application were not granted and that the relief granted could have easily been dealt with through a letter of request from AGN to AAH, since AAH would not have objected to providing a list of the proceedings against him.
- [13] The trial judge, in answer to that submission found that the application of May 22, 2018 was not misconceived. The trial judge also noted that it was an urgent application, hence the expedited hearing. Although the court did not grant two of the reliefs sought on the application, the trial judge held that *"it was reasonable for the Petitioner to seek such relief, given the factual matrix of the case.... The respondent was not entitled to legal costs because his noncompliance with the court order of May 7, 2018 was the reason for the Petitioner's application of May 22, 2018"*.
- [14] This was the trial judge's explanation for the exercise of her discretion to make the award in favor of AGN and not AAH. She continued that had AAH complied with the court order of May 7, 2018, *"there would have been no need for the Petitioner to incur the cost of the application of 22nd May 20, 2018 seeking alternate relief."* The trial judge stated categorically, that she considered the decision just in these circumstances. As I said above, there is no reason advanced for decision not to grant leave to appeal the order.

[15] **APPLICANT'S EVIDENCE**

AAH filed an affidavit in support of his application for leave. By paragraph 4 of his affidavit AAH is seeming to recount the events of May 25, 2018 between attorney-at-law for AGN and the trial judge. That to me, is irrelevant. At paragraph 5 he seeks to excuse his non-compliance with the order by stating that *"I never had any problem providing any documents from me, once I had control of the documents requested and they were relevant to the proceedings."* Again that statement does not take his request for leave very far. Whether AAH had a problem or not is of no moment to his obligation and duty to satisfy the terms of the court order. If he could not satisfy those terms within the time stipulated, his Attorneys ought to have advised him that the order would have been varied. In other words AAH had no choice but to comply with the stated terms of the order. The problems or non-problems experienced by his good self would only be of concern if they were brought before the court in accordance with established procedure.

[16] AAH further questioned AGN's *modus operandi* for obtaining the information as ordered by the court. Again that does not advance his case for leave to appeal. AAH makes further mention that *"In order to assist the court process, I agreed to provide these documents pursuant to the application and instructed my attorneys to consent to this portion of the Application."* This is not borne out by the trial judge's note as contained in the decision as outlined above. The trial judge's note revealed that AAH through his Attorney provided a date by which the information requested by AGN would have been supplied. When that was done, the court ordered that he supply that information on or before May 15, 2018. I say no more.

[17] Thereafter, AAH opined that the judge erred in granting AGN her costs on the application and he outlined the grounds that he intended to rely on in his notice of appeal. In effect, the grounds as filed questioned: the judge's case management function; the fact that the reliefs sought on the application were not in his view granted on all occasions before this one; the fact that AGN had never written to him requesting the information which, to him, could have avoided the application; the consent order; and the fact that he thought that the judge failed to consider that the application was misconceived and had caused unnecessary incurrence of time and expense.

[18] AAH made further comments about what he perceived as the judge's bias and resorted to give incidents of this bias. I must comment though that these allegations have no place in whether the appeal has a reasonable prospect of success. They are irrelevant to the issue at hand and I am disregarding them.

[19] The respondent on this application, gave no evidence.

[20] **SUBMISSIONS AND ANALYSIS**

I thank both counsel further submissions which were of assistance to me. However I will not reproduce them unless I find necessary as I continue my analysis.

SUBMISSIONS

Counsel submitted that one of the three grounds contained within the notice of application which was before the trial judge was successful yet the trial judge saw it fit make an order compelling the Applicant to pay the Respondent's costs. This reasoning as stated in the Judge's Reasons dated May 25, 2018 that showed that the trial judge "*clearly erred in principal in*

*granting such costs*⁷. He recognized that the award of costs is discretionary and carefully outlined Part 36.6 and sought to locate his client's case within it. Counsel first attacked the certificate of urgency, without providing the court with a copy of same. In any event these submissions are attempting to give evidence and that is not allowed. He then seeks to attack the fact that he was successful on its use regarding the dismissed relief. That formed no part of the trial judge's order. There is no evidence that the trial judge specifically ruled on the relief requested. That contention is rejected.

[21] Counsel states that the court failed to consider the reasonableness of the application. That was specifically dealt with in the trial judge's decision at paragraph 17 where the judge remarked unambiguously on the course of these proceedings. Counsel further remarked that the trial judge did not take into account the manner in which the Applicant or the Respondent has conducted the case. Again, no evidence of this was supplied and the Applicant will not be permitted to introduce this as evidence through the backdoor. It is apparent thus far that he has not discharged his onus of proof as required under an application of this nature. In any event, those grounds above to me do not enjoy a realistic prospect of success on appeal.

[22] In Counsel's mind, the trial judge's reasons were based on a false premise. He seeks to say that the non-compliance with the court order was refuted by the certificate of urgency. I have already dealt with that. There is no evidential basis before me for that claim thus, I cannot accept Counsel's assertion that the trial judge operated under a false premise.

⁷ Submission in Support of Application. Para. 3.3

- [23] It was pointed out by Counsel for AGN that AAH *“appears to be aggrieved only by the Court’s order for costs and seeks the indulgence of the Appellate Court where it is convenient to him while some evading his duty of disclosure to the High Court and the complete disregard for and even disobedience of the orders of the court that have thus far been careless towards identifying the assets, a process that is not yet complete although the process of property settlement was commenced by (AGN’s) application filed in February 2017, such considerable delay due solely to AAH’s truculence.”*.
- [24] I am in agreement with that assessment of the trial judge’s reasons. In fact the premise upon which the entire reasons was based was conduct and that of AAH in particular. Counsel further attacked the trial judge’s assertion that had AAH complied with the court order the application and the relief prayed would have been unnecessary. His attempt at justifying his position is untenable. The undeniable fact is that AAH did not comply with the terms of the order of May 7, 2018.
- [25] The trial judge applied the provisions of Part 36.6. The general rule at Part 36.6(3) is that the unsuccessful party must pay the costs of the successful party. The trial judge invoked the discretion provided for in Part 36.6(4) which allows for departing from the general rule. By this provision a trial judge may make an order for the successful party to pay the costs of the unsuccessful party. In exercising the discretion to make the order, for AAH to pay AGN’s costs, the trial judge looked at all of the circumstances of the case as mandated by Part 36.6(6). The trial judge examined AAH’s conduct, the reasonableness of AGN’s application and the overall manner in which AAH has conducted his case throughout, as provided for in Part 36.8(a). Overall, AAH’s is flouting the May 7, 2015 order will not stand him in good

stead in furthering his assertion that he has a realistic prospect of success on appeal. From the above I do not see how this application for leave could satisfy the basis that there is a realistic prospect of success

[26] In the premises I can do nothing but dismiss AAH's application for leave to appeal the trial judge's order on the bases that -

1. he has not discharged his evidential burden to prove to the court that the appeal has a realistic prospect of success and
2. the arguments raised do not satisfy the requirement that the grounds of appeal have a realistic prospect of success.

ORDER:

- 1. The Notice of Application filed on June 11, 2018 be and is hereby dismissed.**
- 2. The Applicant shall pay the Respondent's costs assessed in the sum of \$3,600.00.**

/s/ C. Pemberton, J.A.