THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL
PORT OF SPAIN

Civ. Appeal No. P206 of 2018
Claim No. CV. 2015-00495

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

AND

SUSAN BERNADETTE MARRISON
As Administrator Ad Litem of the Estate of Christopher Gerald Devereux, Deceased

Respondent

<u>Before:</u>
Pemberton J.A.

<u>APPEARANCES:</u>
For the Appellant: **Mr. S. Jairam, S.C. instructed by Ms. A. Alleyne**
For the Respondent: **Mr. K. Bengochea instructed by Ms. K. Persad**

DATE OF DELIVERY: **November 28, 2018**

DECISION

INTRODUCTION

[1] On February 13, 2015, the Respondent, Susan Bernadette Marrison ("SBM"), as Administrator Ad Litem of the Estate of Christopher Gerald Devereux, filed an action against the Attorney General of Trinidad and Tobago's ("AG"), for breach of an employment contract. On October 3, 2016, Dean-Armorer, J. ordered that,

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2. *Time is extended for the filing and service of a defence on behalf of the defendant on or before 3rd November 2016;*
3. *Unless there is compliance with the extended deadline the defendant is precluded from filing a defence;*

4…[1]

On November 3, 2016, the AG filed its Defence to the action. On November 10, 2016, SBM filed an application for judgment in default of defence on the grounds that the defence was served on November 4, 2016.[2] This application was filed pursuant to Part 12.2(2) of the **CIVIL PROCEEDINGS RULES ("CPR")**. Thereafter, on November 11, 2016, the AG filed an application for Extension of Time and Relief from Sanction. The trial judge accepted written submissions from both parties on the AG's application for Relief from Sanction. On June 14, 2018 the trial judge refused the AG's application and proceeded to enter judgment for SBM against the AG.

[2] On June 27, 2018 the AG filed its Notice of Appeal against the order of the trial judge. On June 28, 2018 the AG filed an application for a Stay of Execution of the trial judge's order, pending the hearing and determination of the Notice of Appeal. On July 13, 2018 the AG then filed a Notice of Application to Convert the Notice of Appeal to a Notice of Procedural Appeal, together with an Affidavit in support of this Application.

[3] On October 8, 2018, in a Chamber Court hearing, the Attorney for SBM, Mr. Bengochea, indicated that he was not objecting to,

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[1] Record of Appeal. P. 51. Aug. 6, 2018.
[2] Id. at p. 43.

a. the Appellant's application for a Stay of Execution; and

b. the conversion of the Appellant's Notice of Appeal from substantive appeal to a procedural appeal.

[4] SBM's objection is rooted in the application for the extension of time to file the procedural appeal. Consequently, the sole question for my deliberation is, ***whether the AG's Application for an extension of time to file the procedural appeal ought to be granted***.

[5] In this case, that deadline was missed since the Attorney for the AG was of the view that an appeal against the order of the trial judge, which denied their application to file their defence out of time, was in the nature of a substantive appeal.

SUBMISSIONS

SBM'S SUBMISSIONS

[6] Mr. Bengochea's arguments did not discuss the approach taken by the Court in **ROLAND JAMES**, but chose instead to rely on dicta in **TRINCAN OIL LIMITED v. KEITH SCHNAKE**[3], which he felt was more appropriate to his case. The main principles relied upon were, (i) that the AG had not demonstrated good and compelling reasons for filing the appeal out of time; and (ii) that the AG presented no good explanation for the breach.[4]

[7] Counsel submitted that the explanation provided for the late filing of the procedural appeal amounted to an attorney default, which does not constitute a good explanation. He relied on Jamadar J.A.'s dicta in **TRINCAN** which stated at paragraph 45,

[3] Civ. App. No. 91 of 2009.

[4] Submissions of the Respondent. Paras. 6-8. Nov. 8, 2018.

The Court of Appeal has been consistent in stating that, except in exceptional circumstances, default by attorneys will not constitute good explanation for non-compliance with the rules of the court.[5]

[8] Counsel submitted that this principle was endorsed by the Court of Appeal in **NATIONAL LOTTERIES CONTROL BOARD v. MICHAEL DEOSARAN[6].** In **NATIONAL LOTTERIES CONTROL BOARD**, the learning in the decision in **DERYCK MAHABIR v. COURTNEY PHILLIPS[7]** was approved. The dicta in **DERYCK MAHABIR** stated,

All these authorities now speak with one voice and it is that unless there is a real prospect of a miscarriage of justice occurring from the Court's denial of a litigant to proceed further with a matter, when the reason for delay is solely a matter dealing with the competence, negligence, inadvertence or otherwise of his legal representatives, the matter will not be allowed to proceed.[8]

This learning indicates that the law no longer accepts attorney default or misapprehension to be a good and compelling reason for the breach.

[9] Counsel further submitted that this breach by the AG was the most recent in a long list of defaults. He indicated the AG committed the following breaches:

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[5] *Op. cit* at fn. 3.
[6] Civ. App. No. 132 of 2007.
[7] Civ. App. No. 30 of 2002.
[8] Id. at para. 22.

1. The AG entered a late appearance in the matter on August 5, 2015. The deadline for the appearance was set at July 6, 2015.
2. The defence was originally due on August 6, 2015, however, the AG did not file the application for an extension of time until two weeks past the defence due date.
3. The AG sought further and better particulars under Part 58.4 of the **CPR**. This application was filed on August 6, 2015 one month after the time for filing an appearance and outside the time allotted for these applications.
4. The AG was ordered to file its defence on January 7, 2016. The AG failed to comply with this order.

In light of all of these occurrences, the application for an extension of time to file the procedural appeal ought to be denied.

AG'S SUBMISSIONS

[10] Counsel for the AG, Mr. Jairam, SC, referred the Court to Part 64.5[9] of the **CPR**. He indicated that in the Rules based on the event of a breach, Counsel opined that this type of application must be governed by the provisions of Rule 10.3(5)[10]. Counsel relied on **ROLAND JAMES,** which determined that the Court ought to exercise its discretion in the, whilst having regard to the Overriding Objective. Further, this case indicated that though Part 26.7(1), (3) and (4) would general be of relevance to the application, they *"are not to be treated as threshold factors"*[11]. Additionally, again relying on **ROLAND JAMES**, the prejudice to the parties should also be considered.

[9] *Op. cit.* at para. 4.
[10] Part 10.3(5) of the **CPR** provides, *"A defendant may apply for an order extending the time for filing a defence".*
[11] Appellant's Reply Submissions. Para. 7. Nov. 15, 2018.

[11] Counsel indicated that in considering Part 26.7(1), promptitude, the Notice of Procedural Appeal instead of being filed on the June 22, 2018 was filed on June 27, 2018, five (5) days out of time. The error was realized on July 11, 2018 and upon discovery of the error, the application for the extension of time to file the Notice of Procedural Appeal was filed on July 13, 2018. In the circumstances, the application was made promptly.[12]

[12] Counsel submitted under Part 26.7(3)(a) the AG's failure to comply was unintentional and there was good explanation for the breach.[13]

[13] Under Part 26.7(3)(b)(sic) the explanation for the failure to comply was that Junior Counsel was under a misapprehension as to the correct test to be employed in determining whether to file a procedural or substantive appeal.[14]

[14] Further, Counsel distinguished the case of **TRINCAN**[15], indicating that this was a substantive appeal from a trial in the matter. In these circumstances where there was no trial or final determination of rights, the court ought not to drive a litigant from the judgment seat. Mr. Jairam indicated that the cases relied on by SBM, deal with situations in which the default of the attorney resulted in a substantial breach.[16]

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[12] Id. at para. 9.
[13] Id. at paras. 10-11.
[14] Id. at para. 11.
Counsel referred to **DOC'S ENGINEERING WORKS (1992) LTD ET. AL. v. FIRST CARIBBEAN INTERNATIONAL BANK (TRINIDAD AND TOBAGO)** at paragraphs 21 and 24, which states the test to be applied in determining whether the appeal is a substantive or procedural appeal.
[15] Civ. App. No. 91 of 2009.
[16] *Op. cit.* at para. 15.

[15] Counsel also distinguished the case of **NATIONAL LOTTERIES CONTROL BOARD,** in which the court indicated that the inordinate delay of fourteen (14) months with unacceptable explanations would be specially weighed among the factors that a court must consider in the applications for extensions of time.[17] Counsel submitted that in this matter there was no inordinate delay, as the application was made only five (5) days out of time.

[16] Counsel rejected the submission that the AG had not generally complied with the orders of the trial court. Counsel accepted that the only breach committed by the AG in the proceedings was its failure to enter a defence within the timeframe. An application for an extension of time was made to correct this breach.[18]

[17] SBM contended that the AG was late in requesting further and better particulars. However, Counsel submitted that this contention is unfounded as the proposition that Part 58.4[19] of the **CPR** requires that a request for further and better particulars be made within a specific time is incorrect. Counsel submitted that Parts 58.4 (2) and (3)[20] of the **CPR** provide a benefit to the State if the request for further and better particulars is made before the time for entering the appearance has expired, but by no means does it prevent the AG from making the request after the expiration of the time

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[17] Id. at para. 17.

[18] Id. at para. 19.

[19] This Part provides,

> *(1) Where a claim is made in proceedings against the State the claim form or statement of case must contain reasonable information as to the circumstances in which it is alleged that the liability of the State has arisen and as to the government department and officers of State involved.*
> *(2) At any time during the period for entering an appearance under rule 9.3(1) the defendant may request information under rule 35.1.*
> *(3) The defendant's time for entering an appearance is then extended until— (a) 4 days after the defendant gives notice in writing to the claimant that he is satisfied with the information supplied; or (b) 4 days after the court on the application of the claimant decides that no further information is reasonably required.*

[20] Id.

for filing the appearance. Counsel submitted that the request for further and better particulars was made pursuant to Parts 58.4 and 35.1[21] of the CPR, which have the combined effect of allow the AG to request further and better particulars at any time during the proceedings.[22] Counsel relied on the learning in **REAL TIMES SYSTEMS v. RENRAW INVESTMENTS LIMITED AND ORS.** in order to buttress this submission.[23] In the matter at bar, the AG sought further and better particulars in order to properly defend the claim, as SBM excluded the contract document, the nexus of her claim, from her Statement of Case.[24] Contrary to the SBM's submissions, the request for further and better particulars was not an attempt by the AG to stop time from running for the filing of its defence.

[18] Counsel also submitted that the AG did not breach the order of November 5, 2015 by failing to file its defence on that date. There was in fact an extension of time granted until January 7, 2016 for the filing of the defence. On January 7, 2016 the AG then made an application for security for costs and another application for an extension of time to file its defence. As such, no breach occurred.[25]

[19] Counsel submitted that in the interest of the administration of justice, under Part 26.7(4), the AG must be given the opportunity to be heard.[26] The claim for damages under the breach of contract exceeds the award of

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[21] This Part of the **CPR** provides,

(*1) This Part enables a party to obtain from any other party information about any matter which is in dispute in the proceedings.*
(2) To do so he must serve a request for information that he wants on that other party.
(3) He must state in his request precisely what information he wants.

[22] *Op. cit.* at fn. 11. Para. 22.
[23] Privy Council App. No. 56 of 2012 (unreported) at para. 13.
[24] *Op. cit.* at fn. 11. Para. 23.
[25] Id. at para. 25.
[26] Id. at para. 27.

damages that ought to be made on the pleaded case. As such, a judgment in default would allow SBM to benefit unfairly at the expense of the State.

[20] Counsel reiterated that SBM would not suffer any prejudice and in order to deal with matters justly under the overriding objective, the extension of time ought to be granted.[27]

[21] Mr. Jairam concluded that, (i) the application was made promptly; (ii) there was no intention to ignore the relevant rule; (iii) there was good explanation for the breach; and (iv) there was general compliance with the rules. Counsel buttressed his submission that, "*the greater the delay the greater the weight to be attached to the absence of a good explanation*"[28].

LAW AND ANALYSIS

CPR PART 64.5

[22] Part 64.5 of the **CPR** provides,

> *The notice of appeal must be filed at the court office—*
> *(a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;*
> *(b) in the case of any other appeal, within 42 days of the date when the judgment was delivered or the order made; or*
> *(c) where leave is required, within 14 days of the date when such leave was granted.*

The general Rule is that Notice of Appeal, in the case of a procedural appeal, must be filed in the Court office within 7 days, of the date of the

[27] Id. at para. 28.

[28] Id. at para. 29.
In **ROLAND JAMES**, the court indicated that the delay was not significant, and ought not to outweigh considerations that favour the grant of the application.

decision appealed against. This Rule does not mandate a period in which the application for an extension of time for filing, may be made before the Court.

[23] Under the Court's general powers of management, provided for at Part 26.1(d), the Court may exercise its discretion to, *"extend or shorten the time for compliance with any rule, practice direction or order or direction of the court".* In determining whether the AG's Application for an extension of time to file the procedural appeal ought to be granted, I take guidance from Mendonca J.A. approach in **ROLAND JAMES** and examine the application in light of the overriding objective *"to deal with cases justly"*[29].

ROLAND JAMES v. THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO[30]

[24] In this matter, the appellant appealed the decision of the trial court to allow the respondent the opportunity to file a late defence to the matter. The appellant filed an application for judgment in default of defence. The respondent filed an application for an extension of time in which to file its defence, citing administrative error as the reason for her late receipt of the matter. On appeal, Mendoca J.A. referred to the Overriding Objective, Part 1.1(2) of the **CPR**, and the relevant factors which must be considered when dealing with a case justly. Further, Mendonca J.A. indicated that the criteria of Part 26.7 of the **CPR** must be satisfied and the weight to be attached to each factor would be determined based on the circumstances of the case. Mendoca, J.A. determined that to allow the appeal would not be just in the circumstances. The appeal was dismissed with costs.

[29] **CPR** Part 1.1(1).

[30] Civ. App. No. 44 of 2014.

[25] In our case, this exercise will be done using Part 26.7 factors as a guide, in exercising the discretion given to the Court under Part 1.1(2) of the **CPR** and I shall examine them in relation to the circumstances of the case at bar. The AG's Application as mandated by Part 26.7(2), was supported by an Affidavit sworn by Ms. Kadine Matthew. This satisfied the evidential requirements of the **CPR** under this part.

CPR, PART 26.7(1), (2), (3) and (4)

[26] Part 26.7 provides as follows:

Relief from Sanctions

(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.

It is imperative to note that the factors under Part 26.7 are not **threshold requirements** and serve only as a guide to the exercise of the Court's discretion.

[27] The most telling issues here are promptitude. When the other cases are examined, for instance **TRINCAN**, a 23 day period elapsed between the due date for performing the required act and the date of the application for an extension of time and relief from sanction. In **NATIONAL LOTTERIES CONTROL BOARD**[31], the lapse of time was fourteen (14) months.

[28] Under Part 26.7(1) of the **CPR**, the question is whether the failure to file, being five (5) days, satisfied the promptitude requirement. I do not believe that the time lapse here, five (5) days, approaches those cases. It is therefore not sufficiently material to disallow the application for an extension of time.

[29] Part 26.7(3) contains three prongs.

a. THAT THE FAILURE TO COMPLY WAS NOT INTENTIONAL

In order to assess whether this ground has been met, the court must look to the evidence provided. Again, this was not specifically addressed by the SBM. Attorney error has been cited as the reason for the failure to comply. In the Affidavit in support, Ms. Matthew stated,

8…Junior Counsel has informed me…that she applied the test of whether the order of the Honourable Madame Justice Dean-Armorer finally determined the rights of the parties and finding that she did, she operated thereafter on the basis that

[31] *Op. cit.* at fn. 6.

the order was a final order and the appeal was, therefore, a final appeal rather than a procedural appeal…

10…she conducted further independent research and, after reading the case of ***Doc's Engineering Works…****she recognized that she had applied the wrong test…based on the said appellate decision, she is now of the opinion that the correct test is whether the decision of the Honourable Madame Justice Dean-Armorer directly dealt with the substantive issues in the claim and that an application of that test leads to the inevitable conclusion that the appeal is procedural in nature…*

11…she immediately contacted Mr. Seenath Jairam S.C., by speaking with him on the telephone on 11th July 2018, informing him of the error and seeking instructions to make this application. The application was drafted on 11th July 2018; vetted by Senior Counsel on 12th July 2018; and filed on 13th July 2018.[32]

I have accepted the evidence from the AG. I am therefore satisfied that the failure to comply was not intentional.

b. WHETHER THERE WAS A GOOD EXPLANATION FOR THE BREACH

[30] SBM relies on **TRINCAN** and **NATIONAL LOTTERIES CONTROL BOARD,** which deal with Attorney fault, and I agree that when dealing with breaches of procedure, Attorney fault may not always constitute a good explanation. In the **RAWTI ROOPNARINE**[33] case, this Court, citing the Privy Council, opined that, *"a good explanation does not mean the complete*

[32] See Affidavit of Kadine Matthew. Jul. 13, 2018.

[33] **RAWTI ROOPNARINE ET. AL. v. HARRIPRASHAD also called HARRIPRASHAD KISSOO ET. AL.**

absence of fault"[34]. According to Mendonca, J.A., the explanation must render the breach "*excusable*". I would prefer that there is a distinction therefore between the types of attorney errors, which may or may not form the basis of a "good explanation". One type is error when it comes to ignoring the rules simpliciter, or another type, error based on technical reasons, not speaking to attorney incompetence or negligence.

[31] I now examine the explanation proffered by the AG. Ms. Matthew attributed the error to Counsel's misapprehension of the test to be applied to determine whether the AG ought to have filed a substantive or procedural appeal. This misapprehension was largely responsible for missing the mandated time limit.

[32] I am not of the view that this misapprehension leading to missing the stipulated time in the **CPR** ought to be treated as inadvertence, incompetence or ignoring the provisions of the Rule. It is of a technical nature, involving the application of legal principles, which to me satisfies the requirement that an applicant must have and provide to the Court a "good explanation" for the breach of the Rules. These circumstances therefore, do not deter an application for an extension of time to file the appeal.

c. GENERAL COMPLIANCE

[33] SBM set out a list of instances in which she claims, the AG has been non-compliant. The AG countered these assertions and indicated that its only breach was the failure to enter the Appearance in defence within the stipulated timeframe. The other instances of breach claimed by SBM have been addressed by the AG and I agree with the AG's submissions. Under

[34] Appellant's Written Submissions. Para. 16. Oct. 5, 2018.

Part 35.1 of the **CPR**, a request for further and better particulars is not time barred and the AG was entitled to make this request after the time for entering the appearance, if it found it necessary to do so. I am guided by Mendonca, J.A., in **RAWTI ROOPNARINE**[35], at paragraph 41 of the Judgment which stated,

> *The Judge noted that the Appellants were in breach of a previous order with respect to the amendment of their defence and counterclaim, but made no finding that they had not generally complied with all relevant rules, directions and orders. I think he was right to do so. What rule 26.7 (3)(c) of the CPR requires is general compliance and not absolute compliance. On the facts of this case it cannot reasonably be concluded that there was not general compliance.*

[34] Therefore, whilst the AG failed to file the appearance within the timeframe required by the Rules, the learning indicates that general compliance with the rules is required. In other words, a litigant's first failure to comply will not bar the litigant from seeking justice. In any event, this matter has not gone far enough for this Court to determine there has not been general compliance with the Rules. I say no more on this.

THE OVERRIDING OBJECTIVE AND THE USE OF PART 26.7(4) FACTORS PART 26.7(4)(a) - THE ADMINISTRATION OF JUSTICE

[35] In **ROLAND JAMES,** Mendonca, J.A. examined the overriding objective and whilst I do not wish to re-invent the wheel, I must say that the reasoning as appeared at paragraphs 43 to 47[36] is instructive in this matter.

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[35] *Op. cit.* at fn. 33.

[36] Paragraphs 43–47 of the **ROLAND JAMES** case state,

> *I think the focus when having regard to these matters should be on the impact the failure to file the defence in time has had on these factors. The first of*

[36] In so far prejudice is concerned, the fact that the AG was not allowed to defend resulted in SBM obtaining a default judgment without testing the merits of her case. This is to me a very pressing point and I am guided by Mendonca, J.A.'s dicta in which he opines that,

> *The prejudice to the defendant if the application were refused is clear. As I have mentioned earlier, if the time for the filing of the defence is not extended the claimant would be able to enter judgment against the defendant.* ***The defendant would be liable to pay damages to the claimant, which of course will be met from public funds. The claimant would succeed without a trial and without having his allegations tested.*** *Correspondingly, the defendant would lose without a trial and without the opportunity to put forward his defence no matter how strong it might be or how unfounded or weak the claim may be.*[37] (Emphasis mine)

A delay as a result of procedure is not considered to be prejudicial unless some harm was caused by the delay, which resulted in for instance, the loss of evidence germaine to the substantive matter. This is not the case in the matter at bar. Moreover, no trial has been fixed in this matter and no issue of wavering from the certainty of trial date arises.

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them is ensuring, so far as is practicable, that the parties are on equal footing…
The next is saving expense…
The next factor is dealing with cases in ways which are proportionate to, (i) the amount of money involved; (ii) the importance of the case, (iii) the complexity of the issues; and (iv) the financial position of each party…
The next factor is ensuring that the case is dealt with expeditiously…
Next is allotting to cases an appropriate share of the Court's resources while taking into account the need to allot resources to other cases.

[37] *Op. cit.* at fn 1. Paras. 48.

[37] In reference to Part 26.7(4)(b)(c) and (d), used as aides in applying the principles laid out in the Overriding Object, again I adopt the learning of the **ROLAND JAMES** case which states,

> *As regards whether the failure to comply was due to the party's attorney,* ***the defendant in this case is the Attorney General.*** *He is sued under the provisions of the State Liability and Proceedings Act, which allows for the naming of the Attorney General as a party where the State is sued...In these circumstances I do not think the dichotomy between attorney and client is applicable and I would regard the failure as being due to the party.*[38]

[38] In this case however, given the type of action under review, this can only be regarded as Attorney at law error, but of such a nature, the technicality of which, if not taken into account, may very well defeat the overriding objective of dealing with cases justly. Further, as in **ROLAND JAMES**, there is evidence that the defence had been filed, so that what was required was an enlargement of time to bring the defence into compliance with the Rules. This readily satisfies the requirement that the breach could be remedied within a reasonable time. Further, as so eloquently put by Mendonca J.A., *"a trial date has obviously not been fixed so the question whether it can still be met if the extension of time is granted does not arise."*[39] In keeping with this reasoning, in the circumstances of the case, I find this "failure" to be of little consequence.

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[38] Id. at para. 41.

[39] Id. at para. 42.

CONCLUSION

[39] This matter ought not to have detained the Court's attention since the more substantive parts of the application were agreed. Parties should observe the guidance offered by Mendonca, J.A. in **ROLAND JAMES**[40], which speaks to employing a more collaborative approach to applications for extension of time. In all the circumstances of this case, I see no reason for denying the Order as prayed.

I now order as follows:

ORDER

1. That there be a stay of execution of the Order of Dean-Armorer J. of October 3, 2016.
2. That the appeal filed on June 27, 2018 do now proceed as a Procedural Appeal.
3. That time be and is hereby enlarged for the Appellant to file its Notice of Procedural Appeal to June 27, 2018.
4. The Appellant to pay to the Respondent, costs of this Application in the sum of $5,000.00, in any event.
5. Matter to take its usual course.

/s/ CHARMAINE PEMBERTON
COURT OF APPEAL JUDGE

[40] Id. at para. 27.