THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-266 of 2020

Claim No. CV2019-02535

BETWEEN

NATASHA DEVICA HERCULES

LENA JOANNA PROUTE

JOHNSON JUNIOR HERCULES

PETRA DONNA HERCULES

Appellants/Defendants

AND

LYNETTE MAGGEE INNOCENT

(In her personal capacity and in her capacity as the

Executor of the Estate of Joseph Innocent, deceased)

Respondent/Claimant

Panel: V. Kokaram JA
R. Boodoosingh JA

Appearances:
Mr. Nicholas Mahadeo and Mr. Ejaaz Mohammed, Attorneys at Law for the Appellants.
Ms. Keisha J. Cook, Attorney at Law for the Respondent.

Date of Delivery: Wednesday 9th December 2020

I have read the judgment of Kokaram JA and I agree.

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Ronnie Boodoosingh
Justice of Appeal

JUDGMENT

1. This is a procedural appeal against the decision made by the learned Judge to award the Respondent's costs in the sum of $2,850.00 on the Appellants'/Defendants' application[1] to amend their Defence and Counterclaim. The Appellants contend that the learned Judge erred in law in making any order as to costs on the application to amend for two main reasons: first the application was properly made at the first Case Management Conference and second the effect of rule 67.11(1) Civil Proceeding Rules 1998 ("CPR") precludes the making of any order as to costs on an application at a case management conference.

2. Pursuant to Part 64.9(13) Civil Proceeding Rules (CPR) we dispensed with the need for an oral hearing of this appeal and indicated to the parties that our decision will be delivered in writing by e-mail.[2]

3. We have considered the Appellants' procedural appeal, written submissions and authorities. We are not convinced that the trial judge was plainly wrong in making the order of costs on the Appellants' application to amend their defence and counterclaim. There were no good reasons advanced by the Appellants why the Defence and Counterclaim could not have been amended before the first Case Management Conference or at the first hearing of that Conference. Having failed to do so, the Appellants needed the permission of the Court to change its Defence and Counterclaim at the first Case Management Conference (which was expressly preserved by the learned Judge). Rule 67.11(3) CPR provides for the general rule that the applicant must pay the respondent's costs on an

[1] Filed 23rd July 2020

[2] The Respondent failed to file its skeleton arguments in breach of 64.9 (7) CPR. Its belated attempt to file skeleton arguments on the day originally fixed for hearing without an application for an extension of time was not taken into account and disregarded. Parties must strictly comply with the rules for procedural appeals

application to amend the statement of case (Defence and counterclaim). The learned Judge had no material before him to depart from this general rule. We briefly summarise the Appellants' submissions and our reasoning below.

4. The Appellants contend that the application to amend its Defence and Counterclaim was properly made at the first case management conference. Reliance was placed on the judgment of J Jones JA in **Estate Management and Business Development Company Limited v Saiscon Limited CA 104 of 2016**. While **Saiscon** provides important guidance on what constitute the first case management conference and the type of activity that engages the court when actively managing cases at these conferences, it is no authority for the proposition that an application to amend can only be made at the first case management conference. At any case management conference the Court must actively manage the case, which would involve the determination of any application made by the parties. Part 20 CPR is pellucid. Any party may change its statement of case without permission before the first case management conference. Notably in this case the Appellants has not satisfactorily answered the question why their amendment could not have been made before the first case management conference. In any event the Appellant needed the Court's permission to change its case pursuant to Rule 20.2 CPR which was one of the reasons why the first CMC was adjourned and preserved by the learned Judge. On hearing such an application to amend the Court retains its wide discretion on the question of costs (Part 66.6 CPR).

5. The Appellants also placed heavy reliance on rule 67.11 CPR to justify its position that it was entitled to make an application to amend at the first case management conference without any exposure as to costs. However rule 67.11 CPR does not provide that the Appellants are entitled to make an application to amend without having to pay the costs of that

application. Rather it is left to the discretion of the Court to make such an order after considering all the circumstances including the general rule that the applicant on an application to amend its statement of case must pay the respondents the costs of the application unless there are special circumstances. The relevant parts of Rule 67.11 provide as follows:

> "**67.11** (1) On determining any application except at a case management conference, pre-trial review or the trial, the court must—
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> *(a)* decide which party, if any, should pay the costs of that application;
>
> *(b)* assess the amount of such costs; and
>
> *(c)* direct when such costs are to be paid.
>
> (2) In deciding what party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.
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> **3) The court must, however, take account of all the circumstances including the factors set out in rule 66.6(5) but where the application is—**
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> *(a)* one that could reasonably have been made at a case management conference or pre-trial review;
>
> *(b)* an application to extend the time specified for doing any act under these Rules or an order or direction of the court;
>
> ***(c)* an application to amend a statement of case; or**
>
> *(d)* an application for relief under rule 26.7,
>
> **the court must order the applicant to pay the costs of the respondent unless there are special circumstances.**
>
> (4) In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and

attending the hearing and must allow such sum as it considers fair and reasonable.

6. Rule 67.11(1) must be read together with 67.11(3) CPR. In considering what applications will attract an order for costs for the purpose of rule 67.11(1) CPR the Court will consider whether the nature of the procedural applications was one that was properly made at, or triggered, by a Case Management Conference or Pre Trial Review **Reynold Patrick v Orr Elaboda Liyanage & Molly Liyanage** CV2007-00334 Pemberton J (as she then was) made the following observations on Rule 67.11 (1) CPR.:

> "[8] Part 67.11 deals with procedural applications made except at a Case Management Conference or a Pre Trial Review. In reality, as in this case, the court ordered that the application be heard on the date set for Case Management Conference. The important considerations are: (a) Did the application emanate from or during or as part of a Case Management Conference or did it stand alone? or
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> (b) Was it an application that could reasonably have been made at a Case Management Conference or a Pre Trial Review?
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> [9] The nature of this application was to strike out an amended statement of case as not conforming to the Order of the Court. In the pure sense this clearly is a situation in which an application of this nature was not one that could reasonably have been made at a Case Management Conference. To my mind it was also a procedural application. Further even though it was heard on the date set for Case Management Conference it was not triggered by the Case Management event but was part of the overall management process by the court.
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> [11] My view is therefore that the application under consideration, though heard on a date set for Case Management Conference was not

one triggered by the process and was not one which could reasonably have been made at that event."

7. The intention of rule 67.11(3) CPR clearly was to provide a general rule for the applicant to pay the costs of a procedural application in two types of circumstances notwithstanding rule 67.11(1) CPR. First those that ought to have been made at a Case Management Conference or Pre Trail Review or which should have been triggered by that event. Second those applications, regardless of the stage of the proceedings at which they were made, at a Case Management Conference, Pre Trail Review or otherwise, which are made by a party in default of compliance with the rules or seeking to remedy a defect in its pleadings[2]. This application by the Appellants clearly fell into that category of applications for which the general rule is that they must bear the costs.

8. Further guidance can be obtained from **Norgulf Holdings Limited and Incomeborts Limited v Michael Wilson & Partners Limited** Civil Appeal No. 8 of 2007 where Barrow JA made the following observations of Rule 65.11, the equivalent to our Rule 67.11 CPR:

> "[6] A good starting point for appreciating this rule is not to be misled by its heading. The rule clearly applies to more than just procedural applications because paragraph (1) of the rule says that "on determining any application" other than at a case management conference, pre-trial review or at the trial, the court must: decide whether to award costs of that application and which party should pay them; assess the amount of such costs; and direct when they are to be paid. These are decisions the court must make for applications generally, and not just for procedural applications. Paragraph (2),

[2] extensions of time, relief from sanctions or amendments

similarly, is of general application in providing that the general rule is that the unsuccessful party must pay the costs of the successful party.

[7] Even paragraph (3), which mentions certain specific types of procedural applications – to amend a statement of case, to extend time, to be relieved from sanctions, or an application that could reasonably have been made at a case management conference or pre-trial review – has as its major premise the operation of a well-known requirement that is applicable to applications generally. That requirement is that the court, in deciding which party, if any, should pay costs, must take into account all the circumstances of the case. The circumstances to be so taken into account include the factors set out in rule 64.6(6), such as the conduct of the parties both before and during the proceedings and the manner in which a party has pursued allegations or issues or the case, among others.

[8] The object of mentioning the specific procedural applications in paragraph (3) is to create an exception in favour of those specific procedural applications. It is worth emphasising that the paragraph does not refer to procedural applications generally; it identifies specific procedural applications or types of applications. The exception that paragraph (3) creates is to the general rule that the successful party should be awarded costs, by providing that an applicant who makes one of the specified applications or types of applications must pay the costs of the respondent. This is to avoid the anomaly of awarding costs to an applicant whose own conduct has caused the need to apply to amend his statement of case, or to extend time, or to be relieved from sanction, or to make an application that he could reasonably have made at a scheduled hearing. The success of such an applicant on his application, which, by its very nature, will normally have been avoidable, should not be rewarded by the benefit of the general rule that costs follow success. It is, therefore, to create a different general rule in respect of such applications -- a rule that the applicant should

pay costs -- that the specific procedural applications are mentioned. That, it appears, is the sole object of referring to those specific procedural applications.

11] Rule 65.11 is often not fully appreciated and so it may be helpful to summarize its broad effects. The rule applies to all applications except for two categories of applications. One category consists of those applications that are made at a case management conference, pre-trial review and trial. There are specific rules that apply to such applications and hence they are excluded. The other category of applications to which rule 65.11 does not apply consists of the specific applications listed – to amend, to extend time and to obtain relief from sanctions – and applications that could have been made at case management or pre-trial review (and which would therefore have fallen into the first category). Rule 65.11 does not apply to the second category of applications because of the need to exclude such applications from the general rule that costs are awarded to the party who succeeds on his application."

9. The learned Judge was not therefore plainly wrong in making the costs order in this case. It falls within the Court's wide discretion to award costs and in keeping with the general rule of 67.11(3) (c) to order the applicant to pay the costs of an application to amend. While no doubt the fact that the application is being made at the first case management conference is a matter to be taken into account in determining the question of costs, there were no considerations such as the conduct of the party, other considerations mentioned in rule 66.6 CPR or special circumstance which necessitated departing from the general rule in this case.

10. We take the opportunity to remind parties and their attorneys to be mindful of their duty to help the Court to further the overriding objective

(rule 1.3 CPR) even when considering the option of filing a procedural appeal. In this case the cost exposure to the Defendant for making its application to amend was $2,800.00. Even if it was successful in this appeal, at best it may have had that costs order overturned and the costs of the appeal assessed. But in such an event would it be just that the costs of the appeal exceed $2,800.00? Further how much time and costs have been invested by this party to pursue this appeal? Does it exceed $2,800.00 in legal fees?

11. Litigation should be conducted with not only an understanding of the relative merits of legal positions but a clear assessment of the risks of taking certain procedural steps balanced with the proper allocation of the party's scarce resources, the economy of time in the orderly management of the main dispute and proportionate steps to achieve a just resolution of the claim. This appeal in the face of rule 67.11(3) CPR and having regard to the sums at stake ought not to have been filed.

12. Had there been an oral hearing of this appeal there would have been even strong reasons which would merit the Court ordering the Appellant to pay the costs of the appeal. Regrettably even the parties were not able to resolve what is essentially a simple and unnecessary, procedural dispute.

13. The Appeal is dismissed. Unless the parties file their submissions on costs within seven days of this order, there will be no order as to costs on this appeal.

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Vasheist V Kokaram
Justice of Appeal