SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.1 OF 2004

BETWEEN:

THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

Appellant

and

RANDOLPH TRUEMAN TOUSSAINT

Respondent

Before:
The Hon. Mr. Brian Alleyne, SC — Justice of Appeal

On written submissions from:
Anthony Astaphan S.C. and Jaundy Martin for the Appellant
Ramesh Maharaj S.C. and Godwin Friday for the Respondent

2004: May 12;
December 17.

JUDGMENT

[1] ALLEYNE, J.A.: This is a procedural appeal as defined in Part 62.1(2) of the Civil Procedure Rules 2000 (CPR). The Appellant was granted leave to appeal by order dated 24th February 2004 and by the same order directions were given that the matter be considered on written submissions. It comes for consideration by a single Judge of the Court pursuant to Part 62.10(3) of CPR.

[2] The appeal is against an order of the High Court that the Appellant pay costs of the Respondent in the sum of $3000.00 on an adjournment of an interlocutory application to strike out paragraphs of the fixed date claim and of the affidavit in support of the claim on 16th January 2004. On that preliminary issue the Appellant

was the Applicant, and the Respondent the Respondent, and I will hereafter refer to them respectively as the Appellant and the Respondent.

[3] The matter first came up for hearing on a fixed date claim in Chambers on 30th October 2003, at which time the Judge gave directions for the filing of written submissions and authorities. Leading Counsel for the Appellant, Mr. Astaphan, was not in attendance at the first hearing. The date which had been agreed between Counsel could not be accommodated within the time frame fixed for the exchange of written submissions and authorities, and Mr. Astaphan was not available to be consulted on an alternative suitable date. The matter was fixed by the Court for trial on 15th January 2004.

[4] On being contacted, Mr. Astaphan indicated that he had to be in the United States for medical and health reasons in the month of January and it was impossible to change those arrangements. Mr. Martin, Junior Counsel and instructing Attorney for the Attorney-General informed Dr. Friday, Junior Counsel and instructing Attorney for Mr. Toussaint, the Respondent, of this development. Counsel agreed between themselves to seek a fixture for the hearing of the case on 18th December 2003. The Registrar was contacted but informed Mr. Martin that the timetable fixed by the Judge at the first hearing would not enable that date to be accommodated.

[5] The Appellant's instructing Attorney Mr. Martin wrote to the Registrar of the High Court, copied to Dr. Friday, junior Counsel and instructing Attorney for the Respondent, detailing the circumstances and requesting that the Registrar draw the letter to the attention of the Judge and indicate to the Judge that the Appellant would seek an adjournment on the appointed date. The copy of this letter addressed to Dr. Friday was posted by registered mail to his address for service in Bequia on 16th December 2003. Neither Dr. Friday nor his senior responded to this letter.

[6] The written submissions and authorities of the Appellant were filed by Mr. Martin on 5th January 2004, in compliance with the directions given by the Court at the first hearing. The Respondent did not file his submissions until 15th January 2004, well outside the time directed by the Court and indeed on the very day fixed for trial of the matter.

[7] For some reason for which no explanation has been forthcoming, the matter was not listed for hearing on 15th January, but appeared on a list for 16th January. However, out of an abundance of caution Mr. Martin appeared in Court on the 15th and obtained confirmation that the matter was listed for the following day. There was no appearance of either senior or junior Counsel for the Respondent, or of the Respondent himself, on the 15th.

[8] It was on the 16th January, in the precincts of the Court, that senior Counsel for the Respondent first indicated to Mr. Martin that he intended to oppose the application for the adjournment. It was at that time also that he delivered his bundle of authorities in relation to the case to Mr. Martin, junior Counsel and instructing Attorney for the Appellant. It is worth repeating here that Mr. Martin had filed and served the Appellant's skeleton arguments and authorities on 5th January, in compliance with the Court's case management order. The Respondent's skeleton arguments and authorities were not only not compliant with the order, but were, so to speak, at the 11th hour, indeed on the day that the trial was scheduled to be heard in the case of the skeleton arguments, and on the day after that date, one may call it the adjourned date, in the case of the bundle of authorities.

[9] Upon the application for adjournment being made, learned senior Counsel for the Respondent objected, on the ground that he was not informed because he had been in England, and he would be greatly inconvenienced by an adjournment. The learned trial Judge granted the adjournment with costs to the Respondent, on the ground, according to Mr. Martin's affidavit, that lead Counsel for the Appellant had failed the system by not directly contacting senior Counsel for the Respondent

and agreeing an alternative date. The Appellant says that the learned trial Judge accepted that Mr. Martin had communicated the circumstances to the Court and to Dr. Friday, junior Counsel and instructing Attorney for the Respondent, on the very day of the first hearing, i.e. 30th October 2003, and had followed up in writing on 15th December 2003. Mr. Maharaj, senior Counsel for the Respondent, was party to that initial communication on 30th October.

[10] The above statement of facts is gleaned from the affidavits of Mr. Martin and Dr. Friday. In addition, Dr. Friday deposed that when he spoke with Mr. Martin on 30th October 2003, at the request of his senior he gave Mr. Martin Mr. Maharaj's telephone numbers so that Mr. Astaphan could contact Mr. Maharaj directly if he wished to fix an earlier date for the hearing. Dr. Friday says that at that point he expected that any discussions between attorneys for the parties regarding the hearing date would be between Mr. Maharaj and Mr. Astaphan directly. In late November or early December 2003, not having heard from Mr. Astaphan, Mr. Maharaj informed Dr. Friday that he had concluded that the date fixed was acceptable to Mr. Astaphan.

[11] Dr. Friday admits having received Mr. Martin's December 15th letter on December 23rd 2003. He faxed a copy of the letter to Mr. Maharaj, who was then in the United Kingdom and did not receive the fax until his return to Trinidad "a few days before the hearing of the matter".

[12] The Respondent seeks to place blame for the wasted costs on the failure of lead Counsel Mr. Astaphan to communicate directly with lead Counsel Mr. Maharaj on the issue of adjournment. According to Mr. Martin's affidavit, that position was accepted by the learned trial Judge and formed the basis of the costs award. This has not been denied or in any way addressed by Dr. Friday's affidavit. The learned Judge did not state a reason for his decision, but from the tenor of the submissions as they appear on the record of proceedings it would appear that that indeed was the reason.

[13] The ground of this appeal is that the decision of the learned trial Judge was erroneous and/or unfair in that the learned Judge failed to properly consider and/or exercise his discretion in accordance with the facts and/or law. This ground is expanded in the Notice of Appeal with the following details, listed under the rubric Legal Grounds:

> [5] In making the ruling as to costs against the Applicant his Lordship failed to;
>
> [a] give proper or any consideration to the fact that the Applicant had contacted counsel for the Respondent and the Court by telephone on the 30th October 2003 and that the Respondent and his Counsel knew from that date that the month of January 2004 was not convenient for the Applicant and her Counsel.
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> [b] give proper or any consideration to the fact that the Respondent's Attorney at Law on record was written to by Counsel for the Applicant very early in the day to confirm that the matter could not be heard in the month of January 2004.
>
> [c] give proper or any consideration to the fact that the written submissions in support of the Respondent were filed and served on the 15th day of January 2004 and that the authorities in support were served on the morning of the 16th January on the Applicant and the Court giving the Applicant no opportunity to consider them.
>
> [d] consider that the appointed date for hearing had already been vacated by the Court and that having not been informed by the Court the Applicant was surprised by the subsequent fixing of the matter for the 16th January 2004.
>
> [e] consider that even if Lead Counsel for the Applicant had been present the matter was not likely to proceed given the circumstances.
>
> [f] consider that no prejudice would have been caused to the Respondent by the adjournment as the Respondent and his Counsel made no attempt to advise the Applicant that the Respondent would be objecting to the request for an adjournment.
>
> [g] exercise his discretion in accordance with the law.
>
> [6] Further, in making the order against the Applicant His Lordship misdirected himself when he said or held that Lead Counsel for the Applicant had "failed the system" when in fact and in law there was no basis for such a statement or finding."

[14] Part 6.3 of the Civil Procedure Rules 2000 (CPR) provides that documents must be delivered or posted to a party at any address for service within the jurisdiction

given by that party. The address for service given by the Respondent within the jurisdiction is the Chambers of Dr. Friday at Port Elizabeth, Bequia, the address to which Mr. Martin posted his letter of 15th December. The Appellant was therefore in compliance with the rules in giving notice of the intention to seek an adjournment when the matter would come on for hearing on January 15th 2004. The Appellant could hardly be held responsible for the fact that Mr. Maharaj was not in Trinidad, and was not communicated with by his instructing Attorney or by his Chambers in Trinidad in a timely fashion. It seems to me that there was no obligation on Mr. Astaphan to communicate directly with Mr. Maharaj, and Dr. Friday's 'expectation' in that regard cannot be the basis of decision. It is the established practice and protocol that solicitors or instructing Attorneys communicate on matters of this nature, and that they are the proper channel of communication.

[15] The Respondent in his skeleton arguments submits, rightly, that it is wrong for Counsel to presume that because a date is inconvenient to him and he expresses that view to the Registrar, to the Court, and to the other side, that the Court would automatically grant an adjournment to suit the convenience of Counsel. Indeed the philosophy of zero tolerance for adjournments has been expressed by this Court. This, nevertheless, does not override the Judge's obligation to judicially exercise his undoubted discretion in the matter of applications for adjournments.

[16] Learned Counsel Dr. Friday in his affidavit does not deny that the Respondent's written submissions were filed and served only on 15th January and the bundle of authorities delivered on 16th January while the parties were waiting to enter the Judge's Chambers for the hearing. I take the Appellant's evidence on this to be uncontroverted. Neither the Appellant nor the learned trial Judge, therefore, had had the opportunity, to which they are entitled under present practice and in compliance with the case management order made in this case, to fully consider and apply their minds to the Respondent's case. Learned Counsel for the Appellant in his written submissions argues that these breaches of the case

management orders on the part of the Respondent were circumstances to which the learned trial Judge failed to address his mind, as he ought, in considering the Respondent's application for costs of the adjournment and in exercising his discretion in relation thereto.

[17] The Appellant contends that the fact that the matter was removed from the trial list of 15th January and listed instead for 16th January without notice to the Appellant was a fact that the trial Judge ought to have taken into account in exercising his discretion. However, it does not appear that this fact in any way prejudiced the Appellant or altered her position, and I see no merit in that submission.

[18] The Appellant further contends that, because of the Respondent's default in serving skeleton arguments and authorities at the very last moment, even had the Appellant's lead Counsel been available on the scheduled date or the date to which the Court had adjourned the matter (without notice to the Appellant), it was unlikely that the matter could have proceeded. In light of that, the Appellant argues, the learned Judge should have exercised his discretion in favour of the Appellant and against the application for costs of the adjournment.

[19] In their written submissions Counsel for the Appellant argue that the adjourned date for the matter was a regular Chambers date, on which a large number of matters are listed, and that it is unlikely that the Court would have heard this lengthy and involved matter, which, in the submission of Counsel, was likely to last more than one day. Counsel for the Respondent submitted in reply that the trial Judge might well have exercised his discretion to devote the necessary time to this matter, at the expense of all other matters listed for hearing on that date, and it is not for parties to anticipate the Judge's decision.

[20] Learned Counsel for the Appellant draws attention to the provisions of Part 64.6(5) and (6) of CPR. It is submitted that the learned trial Judge failed to consider or to

give sufficient weight to the conduct of the parties in exercising his discretion on the matter of costs of the adjournment.

[21] There is no dispute as to the principles of law on which the Court of Appeal must act in considering whether to interfere in a Judge's exercise of discretion. In addition to the general principles, Part 1.2 of CPR provides that the Court must seek to give effect to the overriding objective of dealing with cases justly when it exercises any discretion or interprets any rule.

[22] The learned trial Judge has not afforded this Court the benefit of his thinking in the exercise of his discretion in this instance, and I am left with the uncontroverted evidence on the Appellant's affidavit that the learned Judge based his decision primarily on the failure of lead Counsel for the Appellant to communicate directly with lead Counsel for the Respondent.

[23] This Court has declared a policy of zero tolerance for adjournments, but of course such a policy is subject to the inherent discretion vested in the trial Judge to be exercised in relation to the particular circumstances of each case, to grant or not grant applications for adjournment, and to award or not costs or other sanctions in respect of such orders. This discretion must be exercised judicially.

[24] It does not appear on the record that the learned trial Judge gave any or sufficient consideration to all the circumstances of the case in making an order for costs. Of particular concern ought to have been the conduct of junior and senior Counsel for the Respondent in relation to the anticipated application for the adjournment. It appears to me that junior Counsel for the Respondent was negligent in failing to effectively communicate with his senior. Further, it was the duty of senior Counsel and his office staff to maintain communication in matters of this nature notwithstanding that Counsel was away in London on vacation. I entirely agree that Counsel may not presume that an application for adjournment will be granted by the Court, but in all the circumstances of this case it appears to me that

Counsel for the Respondent were at least as responsible for the inconvenience suffered by senior Counsel on the basis of which costs were awarded, given the more than adequate notice of the situation and intentions of senior Counsel for the Appellant, and the efforts made to ensure that all concerned were informed.

[25] It seems to me, on the record that the trial Judge failed to take into account sufficiently or at all the relevant considerations in exercising his discretion to award costs to the Respondent, and I would therefore allow the appeal and set aside the order of the learned trial Judge. I make no order as to costs.

Brian Alleyne, SC
Justice of Appeal