THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2014/0018

BETWEEN:

BARBARA CAMPSELL
(also known as Barbara Daniel)

Appellant

and

DAVID SOOKWA

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

On written submissions:

Mr. Kenneth Monplaisir, QC of Monplaisir & Co. for the Appellant
No submissions from the Respondent

2016: February 19.

Interlocutory appeal – Appellant's defence struck out in court below by learned master for want of prosecution – Judgment entered for respondent in appellant's absence – Whether learned master failed to properly exercise her discretion by striking out appellant's defence and entering judgment for respondent – Whether learned master wrongly exercised discretion provided by CPR 26.2 to make orders of its own initiative – Whether learned master exceeded court's general power provided by CPR 26.4 to strike out statement of case

The appellant and respondent were friends prior to the events leading to the filing of the claim in the court below. In her defence, the appellant describes the relationship as a 'casual courting relationship' which she ended in or about 2010. However, in his reply to the defence, the respondent denies this and maintains that they were only family friends. In 2008, the respondent advanced monies totalling $62,071.71 to the appellant for her

personal use while she was a student in England. The respondent claims that the money was loaned to the appellant and that on 25th September 2009 she signed an agreement promising repayment to the respondent of the full amount. When the appellant did not repay the monies advanced to her, the respondent filed a claim against her in the High Court claiming the full amount advanced plus damages, costs and interest.

The appellant's defence to the claim is that the monies were unsolicited and given to her as gifts. She denies signing the agreement and says that her signature on the agreement was forged. The respondent filed a reply denying that the appellant's signature on the agreement was forged.

The appellant attended the case management conference ("CMC") on two occasions. On the first occasion, the CMC was adjourned because the master was ill. Neither the respondent nor his counsel was present at the resumed conference on 15th November 2012. The learned master adjourned the conference noting in the adjournment order: 'Counsel for the Claimant absent without excuse'.

The CMC was rescheduled for 18th June 2014. Neither the appellant nor her counsel attended the resumed hearing. In her affidavit in support of her application for leave to appeal, she explained that she was aware of the date of the scheduled hearing on 18th June 2014, but when she called her counsel she did not get an answer and so assumed that the date had been changed. She further explained that her counsel thought that the hearing was set for a date in July.

There is no note or transcript of the proceedings before the learned master on 18th June 2014. The only record of what transpired is the order which noted the absence of the appellant and counsel from the CMC, struck out the appellant's defence for want of prosecution and entered judgment for the respondent for the sum that the appellant allegedly owes him, together with interest and costs.

On 3rd July 2014, the appellant applied for leave to appeal against the order. Leave was granted on 24th July 2014. The appellant's attempts to obtain the notes of the proceedings before the learned master were futile, as when the notes were requested, the master indicated that the reasons for her decision on 18th June 2014 are set out in the order itself. The appellant proceeded with the appeal on the basis that detailed reasons for the learned master's decision or a note of the proceedings in her chambers would not be forthcoming.

The appellant did not follow the correct procedure for challenging an order made in the absence of a party affected by the order. Instead of making an application to set aside or vary the order pursuant to rule 11.8 of the **Civil Procedures Rules 2000** ("CPR 2000"), the appellant appealed against the order. The grounds of the appellant's application were that the decision of the learned master failed to give effect to the overriding objective**;** the

learned master failed to give reasons for her decision and/or failed to provide notes of the proceedings; the learned master failed to exercise her discretion properly; and the learned master exceeded the court's powers in CPR 26.2 and CPR 26.4 to make an order of her own initiative striking out the appellant's defence and entering judgment against her.

Held: allowing the appeal; setting aside the learned master's order of 18th June 2014; remitting the matter to the court below for case management and trial in accordance with CPR 2000; and awarding costs of the appeal to the appellant in the sum of $1,000.00 that:

1. If a judge neglects or for any reason fails to provide reasons for an order and the reasons cannot otherwise be determined, an appeal against the judge's order may be automatically allowed. In the present case, the learned master provided the reason for her decision in the body of the order. The stated reason was that the defence was struck out for want of prosecution because the appellant and her counsel did not attend the CMC on 18th June 2014. Therefore, the learned master did not fail to provide reasons for her decision as was contended by the appellant.

   Verbin Bowen and others v The Attorney General of Antigua and Barbuda and the Chief Immigration Officer ANUHCVAP2013/0016 (delivered 4th November 2013, unreported) considered.

2. Rule 26.2 of the **Civil Procedure Rules 2000** expressly provides the court with the jurisdiction to make orders of its own initiative. One of the powers that the court uses to deal with absent litigants and lawyers is the making of such orders. However, rule 26.2 also states that where this discretion is exercised, the court must give any party likely to be affected a reasonable opportunity to make representations. Nonetheless, a party can, by his conduct, lose the right to be informed of an intended order that affects him, for example, by not attending a scheduled CMC. This appears to be what happened to the appellant following her single absence from the CMC. Therefore, the learned master had the power to make an order of her own initiative under CPR 26.2 and to proceed to enter judgment without notifying the appellant.

   Rule 26.2 of the **Civil Procedure Rules 2000** applied; **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited and another** SLUHCVAP2003/0015 (delivered 24th November 2003, unreported) applied.

3. Rule 27.4 of the **Civil Procedure Rules 2000** provides that the litigant and his or her legal representative must attend CMC. However, the draconian response of striking out a party's statement of case and denying him a trial on the merits of his case should not be the first step when that party breaches any of the Rules, unless there is repeated non-compliance or his case is weak. In the case at bar, the

record shows that the learned master took account of only one factor: the single absence of the appellant and her counsel from the CMC, before exercising the draconian sanction of striking out her defence and entering judgment against her. The learned master did not consider relevant factors such as the appellant's attendance at all previous hearings, the appellant's explanation for the failure to attend the resumed CMC, the appellant's prima facie good defence to the claim and the alternative sanctions available under the CPR. In all the circumstances, the learned master did not take into consideration matters that were relevant to her decision and she therefore erred in striking out the appellant's defence and entering judgment for the respondent.

Rule 27.4 of the **Civil Procedure Rules 2000** applied; **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited and another** SLUHCVAP2003/0015 (delivered 24th November 2003, unreported) applied.

JUDGMENT

[1] **WEBSTER, JA (AG.):** This is an interlocutory appeal against the decision of the learned master contained in the order dated 18th June 2014 striking out the appellant's defence for want of prosecution and entering judgment for the respondent for the sum of $65,153.51 plus interest on the said $65,153.51 from 7th December 2011 and continuing to payment in full and prescribed costs of $5,586.00.

Background

[2] The appellant and respondent were friends prior to the events leading to the filing of the claim in the court below. The appellant described the relationship in her defence as a 'casual courting relationship' which she ended in or about 2010. This is denied by the respondent in his reply to the defence. He said that they were only family friends. In 2008, the respondent advanced monies totalling $62,071.71 to the appellant for her personal use while she was a student in England. The respondent claims that the money was loaned to the appellant and that on 25th September 2009 she signed an agreement promising '…to pay Mr. David Sookwa XCD$60,000.00 which I borrowed for my personal use during the period January –

July 2008. I have agreed to refund him the full amount and no more' ("the Agreement"). When the appellant did not repay the monies advanced to her, the respondent filed a claim against her in the High Court claiming the full amount advanced of $62,071.71, plus damages, costs and interest.

[3] The appellant's defence to the claim is that the monies were unsolicited and given to her as gifts. She denies signing the Agreement and says that her signature on the Agreement was forged. The respondent filed a reply in which he denied that the appellant's signature on the Agreement was forged.

[4] The appellant attended the case management conference ("CMC") on two occasions. On the first occasion, the CMC was adjourned because the learned master was ill. Neither the respondent nor his counsel was present at the resumed conference on 15th November 2012. The learned master adjourned the conference noting in the adjournment order: 'Counsel for the Claimant absent without excuse'.

[5] On 2nd May 2013, the learned master ordered the parties to attend mediation. Both parties attended the mediation but it was unsuccessful.

[6] The CMC was rescheduled for 18th June 2014. Neither the appellant nor her counsel attended the resumed hearing. She explained in her affidavit in support of her application for leave to appeal that she was aware of the date of the scheduled hearing on 18th June 2014 but when she called her counsel she did not get an answer and she assumed that the date had been changed. Further, that her counsel thought that the hearing was set for a date in July.

[7] There is no note or transcript of the proceedings before the learned master on 18th June 2014 and the only record we have of what transpired is the order that was made which reads in full:

"UPON the matter coming on for Case Management Conference;
AND there being no attendance of the defendant or her counsel.

IT IS HEREBY ORDERED

The defence filed herein on the 6th March 2012 is dismissed for want of prosecution. Judgment be and is hereby entered for the claimant in the sum of $65,153.51 together with interest in (sic) the sum of 62,071.71 from the 7th December, 2011 and continuing to payment in full and prescribed costs of $5,586.00.

BY THE COURT
REGISTRAR"

("the Order").

[8] On 3rd July 2014, the appellant applied for leave to appeal against the Order. Leave was granted on 24th July 2014. On 14th August 2014, the notice of appeal, skeleton arguments and list of exhibits were served on the legal practitioners for the respondent. The respondent has not entered an opposition to the appeal.

[9] The affidavit supporting the application for leave to appeal exhibits two letters from the appellant's counsel to the Registrar of the High Court dated 1st July 2014 and 4th August 2014 requesting the notes of the proceedings before the learned master, and the reply from the Registrar dated 14th August 2014 stating that: 'The Master has indicated however that the reasons for her decision on June 18, 2014 are set out in the Order itself'. Having received this letter, the appellant proceeded with the appeal on the basis that detailed reasons for the learned master's decision or a note of the proceedings in her chambers would not be forthcoming.

Procedure for Appealing

[10] The appellant did not follow the correct procedure for challenging an order made in the absence of a party affected by the order. Rule 11.18 of the **Civil Procedure Rules 2000** ("CPR 2000") provides that a party who was not present when an

order was made may apply to set aside or vary the order. The appellant was not present when the Order was made and should have applied to the High Court to set aside the Order. Instead, she appealed against the Order. The application for leave to appeal is supported by evidence explaining the failure to attend the CMC on 18th June 2014. The respondent has not filed any opposition to the appeal and no further information is forthcoming from the learned master. Therefore, it is reasonable to assume that this Court has the same material that would have been before a judge of the High Court if the application had been made to that court under Part 11. I am satisfied that this Court is fully seised of the issues and can deal with the appeal effectively. A similar procedure was used by the appellant in the case of **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited and another**[1] which is discussed in detail below. The Court of Appeal nonetheless heard and disposed of the appeal.

The Appeal

[11] The notice of appeal lists four grounds of appeal, namely:

(i) The decision of the learned master failed to give effect to the overriding objective;

(ii) The learned master failed to give reasons for her decision and/or failed to provide notes of the proceedings;

(iii) The learned master failed to exercise her discretion properly; and

(iv) The learned master exceeded the court's powers in CPR 26.2 and CPR 26.4 to make an order of her own initiative striking out the appellant's defence and entering judgment against her.

[1] SLUHCVAP2003/0015 (delivered 24th November 2003, unreported), paras. 7-8 (Byron CJ).

I will deal with these grounds though not in the same order as set out in the notice of appeal.

Failure to Give Reasons and Provide Notes (Ground 2)

[12] The appellant relied on the case of **Verbin Bowen and others v The Attorney General of Antigua and Barbuda and the Chief Immigration Officer**[2] where Mitchell, JA stated at paragraph 11:

> "If the judge neglects or for any reason fails to provide her reasons for her order and the reasons cannot otherwise be determined, the judge's order is thereby vitiated and the appeal may be automatically allowed".

I agree with this principle but I do not think that it applies to the facts of this case. The learned master provided the reason for her decision in the body of the order and so informed the registrar. The stated reason is that the appellant and her counsel did not attend the CMC on 18th June 2014 and the defence was struck out for want of prosecution. The issue for this Court is whether this was a proper exercise of the learned master's discretion.

[13] This ground of appeal fails – the reason for striking out the defence and entering judgment was given.

Orders on Court's Initiative – Ground 4

[14] The court has jurisdiction to make orders of its own initiative. The power to make such orders is necessary to ensure the proper functioning of the court and, as in this case, to preserve the dignity of its procedures. Litigants and lawyers must attend court on the scheduled dates of proceedings to assist with the smooth

[2] ANUHCVAP2013/0016 (delivered 4th November 2013, unreported) – This decision was discharged by consent by the full Court of Appeal based on the facts at a sitting of the Court in Antigua and Barbuda on 22nd January 2014. However, the legal principles in the judgment were not disturbed and still provide good guidance.

running of the system. However, absences for good reasons will generally be accommodated. One of the powers that the court uses to deal with absent litigants and lawyers is to make orders of its own initiative. The power to do so is expressly set out in CPR 26.2 which provides that:

> "(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
> (2) If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations.
> (3) The opportunity may be to make representations orally, in writing, telephonically or by any other means as the court considers reasonable".

[15] The absence of detailed reasons by the learned master for making the Order and the absence of a note of the proceedings make it impossible for us to determine whether the learned master made the Order in response to an application by the respondent, or of her own initiative. Assuming, without deciding, that the learned master acted of her own initiative, she should have given notice to the appellant pursuant to CPR 62.2 of her intention to strike out the defence. However, a party can, by his conduct, lose the right to be informed of an intended order that affects him. A good example of how the right can be lost is where the party does not attend court. This is illustrated by the case of **Saint Lucia Furnishings Limited**.[3] The claimant initiated a claim against the defendant bank for damages for trespass committed by a receiver appointed by the bank. The bank counterclaimed for the outstanding sum of $394,043.56 on the bank's loan to the claimant, plus interest. The claimant did not file a defence to the counterclaim. Neither the claimant nor its counsel attended the first CMC on 9th April 2003. The CMC was adjourned to 6th May 2003 and again there was no appearance by the claimant or its legal representative. The learned master dismissed the claim and entered judgment for the bank on the counterclaim. The claimant appealed alleging, inter alia, that it

[3] SLUHCVAP2003/0015 (delivered 24th November 2003, unreported).

was not given an opportunity to be heard before its claim was dismissed. The Court of Appeal rejected this argument. The unanimous decision of the court was delivered by former the Chief Justice, Sir Dennis Byron, who said at paragraph 10:

> "I would think that it would be more accurate to say that St. Lucia Furnishings did not avail themselves of the opportunity to be heard rather than that they did not have an opportunity to be heard".

[16] Thus a litigant's failure to attend a scheduled CMC can result in him losing the right to be given notice of an order that the court intends to make of its own initiative. This appears to be what happened to the appellant in this case following her single absence from the CMC. This is not a case of where the learned master did not have the power to make an order of her own initiative under CPR 26.2 as suggested in ground 4 of the notice of appeal. The learned master had the power to proceed to judgment without notifying the appellant. This appeal concerns the exercise of that power which I will now consider.

Exercise of Discretion and the Overriding Objective – Grounds 1 and 3

[17] CPR 27.4 provides that the litigant and his or her legal representative must attend the CMC. The appellant breached this rule by not attending the CMC on 18th June 2014 and as a result the learned master struck out her defence for want of prosecution and entered judgment for the respondent. The learned master did not specify the rule that she applied in striking out the defence but she must have been applying CPR 26.3 which states that:

> "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if to appears to the court that –
>
> (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in proceedings".

[18] The striking out of a party's statement of case thereby denying him access to the courts to determine his case on its merits is a draconian sanction that should not be resorted to immediately without exploring other options. This is how the former Chief Justice put it in the context of the overriding objective in the case of **Saint Lucia Furnishings**:

> "The main concept in the overriding objective of the new rules set out in CPR Part 1.1 is the mandate to deal with cases justly. Shutting a litigant out through a technical breach of the rules will not always be consistent with this, because the Civil Courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default. The flexible approach that should be adopted by the Court was discussed in the case of **Biguzzi v Rank Leisure plc**[3] [[*1999*] *1 WLR 1926*]. The Court has wide powers for imposing appropriate sanctions. It is therefore possible to formulate suitable sanctions for breach of rules and directions without immediately resorting to draconian responses such as striking out. I particularly mention the provisions relating to 'unless orders' which are intended to be used as a preliminary step to the imposition of sanctions".[4]

[19] I agree with the former Chief Justice's approach. The court should adopt a flexible approach and decide each case on its own facts. But this is not to be taken as a panacea for breaches of the Rules. As the former Chief Justice went on to say:

> "There will be situations, however, where striking out without the intermediate step is an appropriate order. There are two relevant concepts in the overriding objective. One is saving the litigant's expense and the other allotting an appropriate share of the Court's resources. The ultimate solution would, therefore, be a proper exercise of discretion where failure to strike out would cause a waste of expenses and resources. This means that repeated non-compliance with a rule or non-compliance combined with a weak case would justify the striking out of the case. Counsel for the Co-op Bank submitted that consideration of the merits was irrelevant to this exercise because the jurisdiction being exercised by the Court was based on non-compliance with the rules and was not a decision based on the merits. This is only partially true, because in determining the remedy

[4] SLUHCVAP2003/0015 (delivered 24th November 2003, unreported), para. 11 (Byron CJ).

that suits the breach, the merits of the case could influence the exercise of the discretion of the Court".[5] (Underlining added)

[20] The guidance from the former Chief Justice suggests that the draconian response of striking out a party's statement of case and denying him a trial on the merits of his case should not be the first step when that party breaches any of the Rules, unless there is repeated non-compliance or his case is weak. In the **Saint Lucia Furnishings** case, there were repeated breaches of the Rules (two), and the Court of Appeal found that the claim was weak.[6] In the case at bar, the appellant was absent on only one occasion and her defence is not weak. There is sufficient material in the pleadings to suggest that the monies could have been advanced by the respondent to the appellant as gifts, and the allegation of forgery should be investigated. The learned master should have explored other sanctions such as an 'unless order' or an adjournment with an appropriate costs order, before striking out the defence.

[21] The record shows that the learned master took account of only one factor: the absence of the appellant and her counsel from the CMC, before exercising the draconian sanction of striking out her defence and entering judgment against her. There is nothing in the record of appeal to suggest that the learned master considered the following relevant factors:

(i) The appellant had attended all previous hearings of the CMC and the mediation. This was her first failure to attend.

(ii) The appellant had an explanation for the failure to attend the resumed CMC as shown by her affidavit in support of the application for leave. That explanation was not considered.

[5] ibid, para. 12 (Byron CJ).
[6] ibid, para. 14 (Byron CJ).

(iii) The appellant has a prima facie good defence to the claim.

(iv) There were alternative sanctions available under the CPR.

(v) These are important factors that should have been considered by the learned master. This is not a case of '...repeated non-compliance with a rule or non-compliance combined with a weak case...',[7] nor one where '…non-attendance is plural and without explanation...'[8]. It is a case of a single breach of the Rules by a party who has otherwise complied with the Rules and has a viable defence to the claim. A more appropriate sanction would have been to adjourn the CMC and order the appellant to pay the costs of the adjournment. According to the appellant's evidence, this is what the learned master did when the respondent did not attend on the second scheduled hearing of the CMC on 15th December 2012.

(vi) In all the circumstances, I find that the learned master did not take into consideration matters that were relevant to her decision and I would set aside the Order striking out the appellant's defence and entering judgment for the respondent.

I WOULD ORDER AND DECLARE as follows:

[7] ibid, para. 12; see also para. 11 (Byron CJ).
[8] ibid, para. 15 (Byron CJ).

(1) The appeal is allowed and the Order of the learned master dated 18th June 2014 is set aside.

(2) The case is remitted to the High Court for case management and trial in accordance with the **Civil Procedure Rules 2000**.

(3) Costs of the appeal of $1,000.00 to the appellant.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Dame Janice Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal