

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

(CIVIL) -

DOMHCV2017/0256

BETWEEN:-

ALBERT THOMAS

Claimant

And

NATIONAL COOPERATIVE CREDIT UNION

Defendant

Appearances

Miss Cara Shillingford for the Claimant/Respondent

Mrs Colleen Felix Grant for the Defendant / Applicant

2018, March 2, 16

RULING

[1] **Stephenson J:** This is an application for relief from sanctions and an extension of time to file and serve witness statement filed on the 7th September 2018. The application is accompanied by an affidavit in support sworn to by Miss Michelle Matthews filed on the same date as the application.

- [2] The parties were on the 6th day of June 2017 ordered by Master Fidela Corbin Lincoln to file and serve their witness statements by the 4th day of September 2017.
- [3] This application was heard on the 9th March 2018 and not at an earlier date due to the passage of Hurricane Maria which devastated Dominica and caused a temporary closure of the High Court.
- [4] The Defendant/Applicant ('The Applicant') went ahead and filed and served its witness statements on the 14th September 2017, therefore, the Court is now concerned with whether or not to grant the application for relief from sanctions and whether or not to deem the witness statements filed out of time properly filed.
- [5] The Claimant/Respondent ('The Respondent') through his counsel objected to the application and sought costs.
- [6] At the hearing of the application, Counsel for both parties presented brief oral arguments with authorities and the Court reserved and now rules on the application.
- [7] It is the Applicant's contention that their failure to file their witness statements in accordance with the Master's Order was not intentional and that they have complied with all other orders of the Court in this matter. The reason proffered by the Applicant was that Counsel who had conduct of the matter was on leave from the 28th August 2017 to the 5th September 2017 and was therefore unavailable to discuss the issue of the finalisation of the Witness Statement with the Deponent.
- [8] The Deponent in her affidavit averred that it was anticipated that the witness statements would have been completed and filed by the 9th September 2017. It is clear that this was not to be as the witness statements were filed on the 14th September a mere 5 days later. It is noted Counsel for the Applicant indicated to the Court that the Witness Statements were also served on the Respondent. Learned Counsel Miss Shillingford did not deny this.
- [9] Learned Counsel Miss Cara Shillingford for the Claimant/Respondent opposed the application for an extension of time relying on the court's more rigorous approach to compliance with the rules in accordance with the guidance given by the Court of Appeal in the case of **Kyle David –v- The**

Attorney General of Dominica and others¹ and the judgment of Justice of Appeal Mr Don Mitchell and also to the judgment of the Court of Appeal in the case of **Michael Laudat and others –v- Danny Ambo**² particularly the dicta of Justice of Appeal Ola Mae Edwards when she said

“... Finally we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non compliance with a rule or order, or practice direction where the explanation given for the delay is misapprehension of law, mistake of the law by counsel, lack of diligence, volume of work, difficulty in communicating with client, pressure of work by solicitor, impecuniosity of the client, secretarial incompetence or inadvertence”

³.

[10] Learned Counsel Miss Shillingford submitted that there was another attorney in the Chambers of the Defence Counsel who could have prepared and filed the witness statement to meet the deadline. Further that the Defendant themselves employ an attorney at law who could have also prepared the witness statements and in the circumstances she urged this Court find the excuse proffered was not a good explanation as is required by CPR 2000.

[11] Miss Shillingford also submitted that in their application for extension of time the Applicants sought an extension of time to the 9th September 2017 which in fact was not even a date that they filed their witness statements having filed their witness statements on the 14th September 2017 and in the circumstances they would have to file another application.

[12] Miss Shillingford also submitted that the Respondent is prejudiced by the application and that based on the conduct of the Applicants which she considers to be very oppressive to the Respondent and that the Respondent is being denied his pension funds which he is in need of and in fact the Respondent is asking for a trial of his matter without delay.

[13] In her response to Miss Shillingford's objections, Learned Counsel Mrs Colleen Felix Grant submitted to this court that the application before the Court is for an extension of time and relief from sanctions

¹ DOMHAP2013/0004

² DOMHAP2010/0016 at paragraph 14

³ Justice of Appeal Edwards cited a number of decisions in support of her statement.

and that in the circumstances of this case the **Kyle David** case referred to by Miss Shillingford does not apply as in that case there was no application for relief from sanctions in that regard. Mrs Felix Grant further submitted that the **Michael Laudat** case does not apply to the case at bar either on the grounds that the list put forth as unacceptable reasons by the court does not include the reason submitted by the Applicant.

[14] In further response to Miss Shillingford's objections Mrs Felix Grant referred the Court to the Case of **Irma Paulette Robert –v- Cyrus Faulkner et anor**⁴ and to the judgment of Justice of Appeal Ola Mae Edwards where an appeal was made against a decision of the learned judge at first instance to refused to grant an application for relief from sanctions for failing to file and exchange witness statements.

Courts Considerations

[15] This is an application for relief from sanctions and for the court to deem proper the filing and service of the witness statements which have been filed and served out of time.

[16] The approach to be adopted on applications such as these, has been considered in a number of authorities and the principles which have emerged and can be stated in this way, in order for an application for a relief from sanction to succeed, the applicant must show that the failure to comply was not intentional, that there is a good explanation for the failure and that all the relevant rules, practice directions, orders and directions have been complied with.⁵

[17] The burden of proof lies with the Applicant who must prove the conditions on the balance of probabilities. The reasons proffered by the Applicant must be clear, full and cogent for the failure to comply with the order of the Master. It is also important for the Applicant to state what steps if any has been taken to comply with the order of court. Relief will not be granted unless the Applicant has satisfied all three requirements. It is noted that the Court's discretion is fettered by these requirements which are considered to be strict.

⁴ Civil Appeal number 29 of 2007 (St Lucia)

⁵ CPR Part 26 (2)

[18] In order for the Court to be satisfied as to whether the conditions have been met the Court must look at the material before it.

[19] The application in the case at bar was made promptly and was supported by affidavit evidence which stated the reasons for the Applicant's failure to comply with the Learned Master's Order. The starting point in applying the criteria set out in rule 26.8 is the promptitude of the application for relief from sanction⁶. The date of compliance was the 4th September 2017 and the application was filed on the 7th September 2017 there therefore is no question of lack of promptitude as it regards the making of the application, therefore Part 26.8(1) has been complied with and will not stymie the application being dealt with.

[20] The Court is required to conduct an examination of the evidence before it in order to decide whether the evidence satisfies the Court that the conditions as laid down in Part 26.8(2) have been complied with.

[21] The Applicant stated in their affidavit sworn in support of the application that the deponent who herself is a Solicitor and Barrister was unable to discuss the witness statements with Counsel who had conduct of the matter was on leave and therefore unavailable to finalise the witness statements. The Deponent averred that the witness statements would have been ready for the 9th September 2017. In fact it is noted and as was drawn to the Court's attention by Miss Shillingford, the witness statements were in fact filed not on the 9th but on the 14th September 2017.

[22] It is the finding of this Court that the reason proffered by Applicant is persuasive and has merit, as every trial lawyer "has a duty to fearlessly raise every issue advance every argument and ask every question ... which he thinks helps his client's case"⁷. It therefore stands to reason that Counsel who has conduct of his case ought to be able to settle, approve and finalise his witness's witness statement in preparation for presenting his case at trial. In those circumstances I do not accept the objection raised by Counsel for the Claimant that there were other lawyers in the Chambers of Defence Counsel who could have finalised the witness statements and therefore this excuse is not an acceptable one.

⁶ Re: Nevis Island Administration –v- La Copropriete Du Navire J31 and others [2006] ECSCJ No. 33

⁷ Re: Rondel –v- WOrsley [1967] ALL E R 993 at 998

[23] There is no evidence presented to this Court that the Applicant intentionally failed to comply with the Learned Master's Order. There is no evidence before this Court that the Applicant has deliberately flouted or flagrantly disregarded the said Case Management Order.

[24] It is noted further that if the Applicant is not granted relief from sanctions and if the Court refuses to deem the witness statements which have been filed and served on the Claimant the Applicant will be unable to properly defend its case and would in fact be driven away from the seat of justice.

[25] It is noted that the Applicant has partially remedied its default by filing and serving the Witness Statement. Those statements have been in the Respondent's possession since September 2017. The Trial date has not been fixed in this matter, in fact there has been no pre trial held therefore the trial has not been in anyway delayed and no prejudice has been visited on the Respondent.

[26] It is noted that Part 1.3 of the Rules states that the 'overriding objective of the rules is to ensure that the Court is accessible, fair, and efficient and that unnecessary disputes over procedural matters are to be discouraged. I have come to the conclusion that the breach having regard to all the circumstances of this case, to the Overriding Objective is too trivial to deprive the Applicant from relying on its witness statements which have already been filed and served on the Respondent.

[27] The Applicant has been generally compliant with the Court orders in this matter and it is important to note that the Respondent will not be in anyway taken by surprise by the evidence that the Applicant is seeking to adduce as he has been in possession of the Witness Statements for a while now. It would be too unjust and unfair a consequence to deny the Applicant the opportunity to adduce evidence in defence of this matter considering the circumstances of the case.

[28] It is noted that the Court has the power to rectify matters where a party has failed to comply with a rule, practice direction, court order or directions and the Court may make an order to put matters right. The Court may make an order to do so with or without the application by a party.⁸ I am of the view that this is such an case where the Court can make an order to set matters right.

⁸ Part 26.9(3) & (4) of CPR

[29] Considering the evidence, submissions and law in this matter, and having weighed all these matters in the balance, I am of the view that the Applicant has satisfied the criteria for the granting of the application for relief from sanctions and extension of time to serve their witness statements and in fact to deem the witness statements properly filed. The application for relief from sanctions and for the extension of time to file and serve the witness statement in this matter is granted and the witness statements which were filed out of time are deemed properly filed.

[30] Learned Counsel for the Respondent sought an order of Costs against the Applicant and cited Part 65.3(c) of CPR 2000 as the authority for the Court to make the order sought. Part 65.3(c) states

“...where the application is – (a) an application to amend a statement of case; (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 for relief under rule 26.8 (relief from sanctions); or (d) one that could reasonably have been made at a case management conference or pre-trial review; the court must order the applicant to pay the costs of the respondent unless there are special circumstances.”

[31] The Court of Appeal in **Adam Bilzerian –v- Gerald Lou Weiner⁹ and another** stated

“... It is the applicant who is seeking to redeem himself from his own default. Accordingly, a costs order on such an application is ordinarily made against the applicant even where the application succeeds which reflects the respondent having been put to incurring costs due solely to the applicant's default.”

[32] Therefore it is appropriate that a costs order be made against the Claimant in this matter in the sum of \$500.00.

Order

[33] In the circumstances it is ordered as follows:

- (1) The Application for relief from sanctions and extension of time to file and serve Witness statements out of time and to deem the witness statements filed on the 14th September 2017 and served as properly filed and served is granted.
- (2) This matter is set for the 19th of April 2018 for Pre trial review in preparation for trial of this matter.

⁹ SKBHC VAP2015/0015 at paragraph 20

(3) Costs shall be paid by the Applicant to the Respondent in the sum of \$500.00 within ten days hereof.

**M E Birnie Stephenson
High Court Judge**

BY THE COURT

REGISTRAR

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

(CIVIL) -

DOMHCV2017/0256

BETWEEN:-

ALBERT THOMAS

Claimant

And

NATIONAL COOPERATIVE CREDIT UNION

Defendant

Before the Hon. Madam Justice M E Birnie Stephenson
Dated the 16th day of March 2018
Entered the 16th day of March 2018

ORDER

UPON HEARING Miss Michelle Matthew holding for **Miss Colleen Felix Grant**, Counsel for the Applicant and **Miss Mary Roberts** holding for **Miss Cara Shillingford**, Counsel for the Respondent

IT IS HEREBY ORDERED THAT:

- (1) The Application for relief from sanctions and an extension of time to file and serve Witness statements out of time and to deem the witness statements filed on the 14th September 2017 and served as properly filed and served is granted.
- (2) This matter is set for the 19th of April 2018 for Pre trial review in preparation for trial of this matter.
- (3) Costs shall be paid by the Applicant to the Respondent in the sum of \$500.00 within ten days hereof.

BY THE COURT

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