

**EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2022/0283

BETWEEN:

[1] KEITH A MAZER

Claimant/Applicant

-and-

[1] ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

[2] JEHU HAND

Defendants/Respondents

Appearances:

Mr. Andrew O'kola for the Claimant

Ms. Rose-Anne Kim for the First Defendant

Ms. Luann De Costa for the Second Defendant

2023: September 19th
November 28th

JUDGMENT ON SUBMISSIONS

[1] **BYER, J.:** On a Notice of Originating Motion (the Motion) filed on the 22nd July 2022, the Applicant herein has sought certain declarations and in particular:

- a) A declaration that paragraphs (1)(a) and (2) of rule 26.8, in their present form, infringe the Constitution, except and in so far as they are read as being subject to, at the least, a proviso that relief may exceptionally be granted where their requirements are not met but the interest of Justice so require.
- b) An Order quashing the decision striking out the Claim number ANUHCv2008/0696.
- c) An Order directing that claim number ANUHCv2008/0696 be considered in accordance with the Court's declaration.

- d) Such other declarations and orders and such directions as this Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the said Declarations and Orders.
- e) Such further or other relief as counsel may advise and this Honourable Court thinks just.

[2] The Motion was supported by 3 page affidavit setting out the evidentiary basis for the filing of the motion. In essence this was i) the order of the Court by my sister Robertson J in Civil suit ANUHCV2008/0696 (the Original suit) on the 28th January 2022 striking out the claimant's statement of case was draconian in that ii) the procedural rule under the CPR 2000 regime at Part 26.8 which provided for persons to apply for relief from sanctions where they had run afoul of case management orders was in breach of the applicant's constitutional rights which established Antigua as a democratic state (section 1(1)) citizens were subject to the fundamental right to protection of the law (section 3(a)) and citizens were entitled to a fair hearing (section 15(8)) and iii) the Learned Judge therefore having no discretion under the procedural rule to grant relief once the parameters of Part 26.8 were not met, meant that the judicial function of the court was being impinged affecting the democracy of the State iv), that the effect of Part 26.8 brought into question whether the access to the relief was proportionate as to what was required to be achieved under the Rules of court and finally v) considering that the restriction on access was not in fact proportionate, that the applicant had not been given the opportunity of a fair hearing.

[3] That being said, it is imperative in this court's mind to set the context in which the order of Robertson J was made and the context of these proceedings and the claimant in particular in the conduct of these proceedings, as constitutional motions are not to be lightly filed before the court or for the purpose of circumventing legitimate and lawful orders of the court.

[4] On the 22nd July 2022 this motion was filed, some six months after the order of the court issued by Robertson J and outside the timelines for appealing her order. When this court, as presently constituted became seized of this file in May 2023, it

was discovered that this motion had been filed almost a year earlier but there was no evidence of service on the respondent parties.

[5] By order of this court on the 25th July 2023, a year after the filing of the matter, this court ordered service to be effected on the parties to the matter. It was therefore not until the 19th September 2023 that the respondents would have had notice of the contents of the said motion and on which date this court then made orders for the matter to proceed on paper as the facts were not disputed as to the existence of the order of Robertson J in the Original suit. In that order the Applicant was to file his submissions by the 16th October 2023, this court was in receipt of the same on the 20th October 2023 with no accompanying application to have the same deemed properly filed.¹ Additionally the First respondent who was served with these proceedings also filed their submissions late, namely on the 3rd November 2023 similarly failing to file any application to have the same deemed properly filed. The court therefore has to put on record that it is indeed disappointed in the conduct of the Public bar who the court places a heavy burden on to assist the court in matters in which they are a party.

[6] Be that as it may, in this court's mind this conduct on the part of the claimant is exactly what led to the order of Robertson J in the Original claim and this court has no intention and is certainly not in the position to review that order as made. Therefore the sole question for this court is therefore whether Part 26.8 of the CPR 2000 regime can be considered unconstitutional.

[7] In considering the answer to that question, this court cannot do much better than adopting the words of the Learned Chief Justice Sharma in 2006 in the Foreword to the CPR in Trinidad and Tobago as quoted in the case **Super Industrial Services Ltd and anr v National Gas Company of Trinidad and Tobago** ² and at paragraph 22 thereof where he is quoted as saying in speaking of the pre CPR regime and the changes brought by the CPR:

¹ Additionally there seems to be a trend in this jurisdiction to file submissions with no supporting authorities being provided to the court although the same are quoted from extensively by counsel.

² [2018] UKPC 17

“Undoubtedly, that system was plagued with the ‘triple evils’ of delay, costs and complexity all of which were interrelated and stemmed from the uncontrolled nature of the litigation process. The several Reports alluded to above paint a very depressing picture of the civil justice system wherein delays were endemic and often contrived and the procedures were inflexible, rule-ridden and often incomprehensible to the ordinary litigant. The system encouraged an adversarial culture which often degenerated into an environment in which the litigation process was seen as virtual battlefield rather than the arena for the peaceable resolution of disputes. The natural consequence, therefore, of this litigious culture was that the expense was often excessive, disproportionate to the value of the claim and unpredictable”....

“The CPR introduce a new landscape of civil litigation which, in essence, is a new civil procedural code governing the civil justice system. This new procedural code is a radical departure from what obtains under the 1975 Rules. It is underpinned by the Overriding Objective in Part 1 which imposes an obligation on the courts to ‘deal with all cases justly’ and which embodies the principles of equality, economy, proportionality, expedition and procedural fairness, all of which are fundamental to an effective contemporary system of justice”....

“Case management under the CPR is predicated upon a system which gives control and management of the pace and shape of litigation to the courts, removing it from the hands of the parties and their attorneys. Under the traditional adversarial system promoted by the 1975 Rules the pre-trial process was exclusively occupied with preparation for the trial and was largely controlled by the parties with minimal court intervention. In fact, the final outcome of cases was shaped not during the pre-trial stages but at the trial itself primarily because the decision-making process formed no material part of the pre-trial process. With the advent of the new system there has been a functional convergence of the pre-trial and trial process. The intense focus will be on the pre-trial stages since the adjudicative

process begins as soon as the court assumes control over the case, which is at the case management conference.”

[8] Although the Learned Chief Justice was speaking specifically to the Trinidad and Tobago experience, this was indeed the extent of the experience in the Eastern Caribbean leading to the advent, in 2000 of the CPR. However case management has been and is the crux of the regime under the CPR and one case management order usually is for the filing of witness statements, failing which there is a regime that the evidence could not be used if an application for relief from sanctions was not filed. It is with this rule that the Applicant has taken complaint.

[9] Part 26.8 states in its entirety ⁸“(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be:

- (a) Made promptly; and
- (b) Supported by evidence on affidavit
- (2) 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 failure; and
 - (c) The party in default had generally complied with all other relevant rules, practice directions, orders and directions.
- (3) In considering whether to grant relief, the court must have regard to:
 - (a) The effect which the granting of relief or not would have on each party;
 - (b) The interests of the administration of justice;
 - (c) Whether the failure to comply has been or can be remedied within a reasonable time;
 - (d) Whether the failure to comply was due to the party or the party's legal practitioner; and
 - (e) Whether the trial date or any likely trial date can still be met if relief is granted.’

But central to this application are sub paragraphs (1) and (2).

[10] I will therefore deal with each constitutional provision that the Applicant claims has been breached in relation to these two sub paragraphs.

Section 1(1) – “Antigua and Barbuda shall be a unitary sovereign democratic state.”

- [11] In the submissions of the Applicant, sub paragraphs 1 and 2 stripped the court of its inherent “judicial function” in responding to a breach of the Rules of Court and by that very act therefore impinge on the separation of powers that make up a democratic state such as Antigua. In this regard the Applicant relied on the case law where it was held that where the Legislature had purported to impinge on acts of the courts, those portions of the law were held to be unconstitutional. However it seemed to be lost on the Applicant that in those cases upon which he relied³, (copies of which were not provided to the court I might add), all dealt with provisions of the black letter law, the law that had been created by the Legislature. In those instances, this court can of course see the correlation and the need for the court to have decided on the constitutionality of those provisions. The CPR regime however came about in a clearly different manner and are not the product of a legislative act imposed on the court to undermine the tenets of a “unitary sovereign democratic state”.
- [12] Indeed when the Preamble to the CPR 2000 is considered it is clearly stated that the Rules were made pursuant to the authority conferred on the Chief Justice and two other judges by virtue of Section 17 of the Supreme Court Order Cap 422 A of the Law of Antigua and Barbuda. Section 17 states it thus:
- “(1) subject to the provision of this Order and any other law in force in any of the States, the Chief Justice and any other two judges of the Supreme Court selected by him may make rules of court for the regulating the practice and procedure of the...High Court in relation to their respective jurisdiction and powers in respect of any of the States....*
- (2) Without prejudice to the generality of the foregoing subsection such rules may be made for any of the following purposes-....*
- (d) prescribing times in which any requirement of the rules is to be complied with;”*

³ **State of Mauritius v Khoiratty** [2006] UKPC 13 ; **JT(Cameroon) v Secretary of State for the Home Department** [2008] EWCA Civ 878

- [13] In other words the judiciary was regulating its own procedures by the advent of the CPR and as Rawlins JA noted in the case of **Grenadian General Insurance Company Ltd v Janin Caribbean Construction Limited**⁴ where the Court was dealing with a challenge made by the Appellant to the applicability of the CPR regime to Grenada, “ since CPR 2000 which expressly repealed the 1970 Supreme Court Rules was made by the Chief Justice under Section 17 of the 1967 Courts Order ...as the rules to govern the practice and procedure of that common court , CPR 2000 were properly made for the Supreme Court of Grenada for the purpose of governing the practice and procedure in Civil cases in Grenada. CPR 2000 does not breach the Constitution since it does not abolish the court or substitute if for a new court **but merely makes procedural rules for the Court.**” (my emphasis added)
- [14] In this court’s mind this must be applicable to the case at bar as well. This court accepts that the CPR regime being merely procedural rules, created by the court itself does not offend the provision of Section 1(1) of the Constitution and this ground must fail.

Section 3(a) –“Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual that is to say, the right, regardless of race, place of origin, political opinions or affiliations, color, creed or sex but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely –

(a) Life, liberty, security of the person, the enjoyment of property and the protection of the law...”

Section 15 (8) “Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for such determination are instituted by any persons before such a court or other authority the case shall be given a fair hearing within a reasonable time.”

⁴ Civil Appeal No 2 of 2005

- [15] In looking at these two provisions, the Applicant determined that they should be dealt together and that the protection of law and the right to be given a fair hearing within a reasonable time were inextricably linked.
- [16] When this court considers these provisions in the context of the complaint, this court cannot agree with the applicant that the requirement under the provisions in the procedural rules that failure to do certain things would have consequences which amounts to the deprivation of the Applicant to the protection of the law or of a fair hearing.
- [17] While it is recognized by this court that the provisions of Part 26.8 (1) and (2) “in essencerestrict the court’s discretion.....”⁵ to relieve a non-compliant litigant from sanctions once they had not met the requirements under the Rule and may amount to denial of the access of the litigant to the courts, this statement and its proposition must not be taken in a vacuum.
- [18] It seems to have been lost on the Applicant that as stated previously the creation of the rules of court were done with the “...legitimate aim ...to streamline and bring about an efficient, uniform and consistent method of dealing with matters coming before the Court and ensuring an equality of arms.”⁶ Therefore the intention was clear that all litigants knew what they must provide and use as support for an application for relief from sanctions and that the court had a unified approach to those applications.
- [19] Indeed it was very unfortunate that the Applicant herein did not feel that it was necessary to provide this court with the order of the court itself so that this court may have assessed what was considered by the court in its determination, but the question in any event for this court must be whether by construing Part 26.8 (1) and (2) in its strict and unforgiving sense was disproportionate to the aim sought to be achieved.
- [20] In this court’s mind that aim as stated above could only have been done in the context of leveling the playing field fostering the continued underlying stratum to the

⁵ **The Beacon Insurance Company Ltd v Liberty Club Limited** HCVAP2010/029; **Liberty Club Limited v The Beacon Insurance Company Ltd** HCVAP 2010/030 per Pereira JA (as she then was) at paragraph 1

⁶ **The Beacon Insurance** case at paragraph 11

rules. Taking litigation out of the hands of the lawyers and dilatory clients and placing it squarely with the court to give effective meaning to the overriding objective to “enable the court to deal with cases justly”⁷

[21] Thus it must be remembered that “the right of access to the courts is not absolute but may be subject to certain limitations ; these are permitted by implication since the right of access “by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals”⁸

[22] Additionally it must also be noted that nowhere in the evidence in support of the Motion has the Applicant sought to posit that either that he failed to have the protection of law or that he was not given a fair hearing. Indeed it was not alleged that the Trial judge made the determination to strike out the Applicant’s case without giving him an opportunity to be heard. Rather the Applicant makes it clear that the order emanated from the Application filed by the second Respondent for the Applicant’s failure to obey an order of court to file their witness statements. The legitimate aim of protecting a litigant from actions of parties that have brought them to court but have failed to undertake litigation in a manner that shows that there is interest in the matter to follow the guidelines of the court and the Rules are the cornerstone of the rules of court. In this court’s mind the application of a sanction to do so is indeed proportionate in all the circumstances.

[23] In this court’s mind this ground must also fail.

[24] However before I leave this matter I wish to make some general observations from the papers that have been filed in this matter.

[25] Firstly, the Applicant’s case has been woefully and inadequately pleaded and presented to the court. It is not sufficient for an applicant to “....merely shriek(ing) breach of a fundamental right” and be allowed to “... knock on and disturb the sanctity of the constitutional door.”⁹ without laying sufficient information before the court for the court to have a realistic and broad view of the matter. Indeed as Lord

⁷ CPR 2000 Part 1.1

⁸ **Ashingdane v United Kingdom** [1985] 7 EHRR 528, 546 para 57

⁹ Per Redhead JA as reported in **Observer Publications v Campbell “ Mickey” Matthew** [2001] UKPC 11 at paragraph 51

Diplock stated in **Harrikissoon v Attorney General of Trinidad and Tobago**,¹⁰ “...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy...” which in this case was the right to appeal the decision of the Learned Judge.

[26] Secondly, the manner in which this Applicant conducted this case, primarily there having been non- service of the Motion itself for over a year and then the periodic nonappearance noted by this court as presently constituted in this court’s mind has solidified the need to have had in place the strict restrictions on the way in which evidence would be accepted where the claimant who has moved the court in the first place then flouts orders put in place to get the matter to trial. It is with great dismay that this court is in fact still in 2023, dealing with a matter that was started by the Applicant herein in 2008. Noncompliance of orders cannot be tolerated or encouraged and enforcement of the rules is to by and large “...put a stop to habitual non- compliance.”¹¹

[27] Thirdly and finally, this court is satisfied that this Motion is nothing more than a collateral attack on the order of the Learned Judge which was never appealed. It is clear from the evidence filed and the grounds stated in the Motion that the Applicant sought by and large to re litigate the making of the order, regardless of what the Applicant purported to argue in their submissions. It is in fact “well settled that a party is not permitted to re- litigate an issue or matter simply because he wished to present a different argument”¹². When one considers the dicta of Lord Shaw in the case of **Hoystead v Commissioner of Taxation**¹³ in which he stated “parties are not permitted to begin fresh litigations because of new views they may entertain of

¹⁰ [1980] A.C. 265 at page 268

¹¹ **Kenton St Bernard v The Attorney General of Grenada and ors** Civ Case 84/1999 (HCT Grenada)

¹² **Leroy King v The Attorney General of Antigua and Barbuda and anr** ANUHCVP 2017/0011 at paragraph 48

¹³ Ibid at paragraph 48

the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.”¹⁶

[28] There is no doubt in this court’s mind that this is exactly what the Applicant is seeking to do having failed to avail himself of the opportunity to have the order reviewed by the Court of Appeal, that being said this court emphatically declines to entertain this action.

Order of the court

- (i) The Originating motion is dismissed in its entirety.
- (ii) Costs to the respondents to be assessed if not agreed within 21 days of today’s order.

Nicola Byer
High Court Judge

By The Court

Registrar