

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2005/0202

BETWEEN

BEATRIX GUMBS

CLAIMANT

AND

**COLLYMORE SAMUEL Substituted by GASNEL SAMUEL of Vermont
but presently residing at 520 Williams St. Apt 2B Brooklyn, NY 11207
pursuant to an order of court dated 21st day of October, 2015
entered on the 18th day of November, 2015.**

DEFENDANT

Appearances:

Mr. Samuel Commissiong for the claimant/respondent.
Mr. Emery Robertson Snr. for the defendant/applicant.

2016: Oct. 5
Dec. 7

DECISION

BACKGROUND

[1] **Henry, J.:** This is an application¹ by Gasnel Samuel for 'costs' incurred for travelling to and from St. Vincent for trial of this case. In May of this year, Mr. Samuel travelled from Brooklyn New York to Saint

¹ Filed on 8th April, 2016.

Vincent and the Grenadines to attend the trial scheduled for May 12th. That day, the trial was adjourned on application made by the claimant Beatrix Gumbs. Mr. Samuel has applied for an order that a previous \$500.00 costs order made against him be set off against any sum awarded to him. Mrs. Gumbs has opposed the application. For the reasons outlined in this decision, Mr. Samuel is entitled to recover his reasonable travel related expenses.

ISSUES

- [2] The issue is whether Mr. Samuel is entitled to recover 'costs' and related expenses from Mrs. Gumbs in respect of the adjourned trial.

ANALYSIS

Issue – Is Gasnel Samuel entitled to recover 'costs' and related expenses from Mrs. Gumbs in respect of the adjourned trial?

- [3] Collymore Samuel deceased was the original defendant in this case. After his death in 2011, Gasnel Samuel was substituted as defendant in his place, by order dated 21st October, 2015. It appears from the record that this matter was tried on 17th July 2006.² The resultant decision was set aside by the Court of Appeal and the case remitted to the high court for re-trial.
- [4] In January 2016, a new trial date was fixed for 12th May, 2016 and directions given. Two days before the scheduled trial, Beatrix Gumbs filed an application for adjournment of the trial on the ground that her legal counsel Mr. Samuel Commissiong was ill and unable to prepare the case for trial. The application was supported by affidavit of Suzanne Commissiong, a lawyer who practices from Mr. Commissiong's law firm. She is also his daughter. Ms. Commissiong deposed that her father had sole conduct of the case. She averred that he had been under considerable stress as a result of which he took ill and was advised by his doctor to refrain from stressful activity including work 'until he was deemed clear to do so'. She exhibited a medical certificate from one Dr. Wayne Murray dated 3rd May, 2016.

² By order of the learned Master dated 11th July 2005.

- [5] The application was presented by Mr. Sten Sergeant who informed the court that he was asked roughly a half hour before to hold papers for Mr. Commissiong. Mr. Gasnel Samuel was present in court as was Mrs. Gumbs. Learned counsel Mr. Emery Robertson Snr. represented to the court that his client Mr. Samuel had arrived in the state on May 8th, 2016. He did not object to the adjournment.
- [6] In support of the present application³, Mr. Samuel provided affidavit evidence³ and oral testimony. He asserted that the trial was adjourned through no fault of his. He deposed that he purchased an airline ticket to travel from New York to Saint Vincent for the trial, at a cost of US\$740.56 or EC\$1977.00. He explained that he incurred expenses totaling EC\$135.00 for taxi fare from E.T. Joshua airport to Vermont where he stayed while in Saint Vincent and bus fare of \$10.00 to attend court on May 12th. He also claimed loss of earnings for two days at US\$300.00 per day, which he said he lost by travelling to the state for the trial. He testified that he is self-employed as a truck driver but he did not produce any documentary evidence of his income. Mr. Samuel also explained that he expended EC\$200.00 for meals on those days. He testified that he came to the country for the trial and did not know how long the trial would last. He said that he extended his time and spent almost one month in the state.
- [7] Mr. Samuel submitted that the English Civil Procedure Rules which deal with recovery of expenses in small claim proceedings apply in the present case. He referred the court to rule 27.14 (2) (c) which permits a party to recover:
- ‘expenses which a party has reasonably incurred in travelling to or from a hearing; ... loss of earnings or loss of leave and ... such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably.’
- No similar provision is contained in the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (‘CPR’) which govern the procedures and practices in this court. Mr. Samuel did not point to any binding decisions which applied the English provisions. They are not applicable to the case at bar.

³ Filed on 26th May, 2016.

[8] Mr. Samuel invoked CPR 65.11 (1) (a) (b) (c), 65.11 (5) (c), 27.5 (4) (c) and 27.5 (5) (c) in support of his contention that the CPR makes provision for assessment of costs in like manner as the referenced English rule. None of those provisions address the issue at hand and are therefore not considered. They provide respectively for the court to make costs orders in respect of legal fees and related disbursements and for the trial date to be fixed by the court. Specifically, they state:

‘65.11 (1) On determining any application except at a case management conference, pre-trial review or the trial, the court must-

- (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.

(5) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing-

- (a) ...
- (c) the disbursements incurred;

27.5 (4) The court must in any event fix the –
(c) the trial date.

(5) The court office must serve an order containing the directions made on all parties and give notice of the –
(c) the trial date or trial period.’

[9] Relying on the cases of **De Nobriga v De Nobriga**⁴, **Williams v The AG**⁵ and **Olga Appiah & Others v Winifred Hookumchand and Another**⁶, Mr. Samuel submitted correctly that costs are at the discretion of the court. He urged the court to award wasted costs on the basis of his application. The court notes however that the expression ‘costs’ refers specifically to fees payable to lawyers and recoverable in proceedings pursuant to the costs regime outlined in the CPR. None of those

⁴ (1967) 12 WIR 342.

⁵ (1959) 1 WIR 228.

⁶ (1972) 18 WIR 244.

provisions appear to contemplate an award of costs in respect of travel related expenses in the circumstances of the instant case.

- [10] Mrs. Gumbs filed an affidavit in response in which she rehearsed some of the historical background to the case including the nature of the claim and difficulties she has allegedly experienced in securing witnesses. She outlined what she described as the circumstances under which her lawyer had to be absent from the trial. In this regard, she mentioned his illness and what his doctor allegedly told him. She also indicated that a letter was sent to the registrar. The affidavit ended with the submission that counsel was unable to locate any cases in which a court awarded costs to a litigant travelling from one destination to another specifically for litigation which did not proceed due to the unavailability of counsel.
- [11] The court's file contains a letter dated April 27th, 2016 from learned counsel Suzanne Commissiong to the learned registrar in which she indicated that Mr. Samuel E. Commissiong was unable to attend court that day for the status hearing, due to medical reasons. The record reveals that this case was scheduled for hearing on that date. On that occasion, learned counsel Mr. Richard Williams held papers on behalf of Mr. Commissiong. A then outstanding decision was issued and the matter was adjourned to May 12th for trial. There are no further letters on the file regarding learned counsel Mr. Samuel Commissiong's illness. It therefore cannot be said that Mr. Commissiong alerted the court to his second bout of sickness until the application was filed on 10th May and there was nothing before the court to indicate that his suffering had lasted from April 27th to May 10th or 12th.
- [12] Mrs. Gumbs filed two sets of written submissions⁷. In the first, she submitted that it is 'fair and right that the defendant should be reimbursed his costs ... if on a fair assessment of the facts and circumstances surrounding his claim it is reasonable for the court to grant his application and justly so if she or her legal counsel had no justifiable excuse for refusing to attend court at 9.00am on the morning of May 12th 2016.' The language then switched to the first person whereby the author stated among other things '... I was ill ... and was complying with doctor's orders ...'. This account obviously

⁷ On 13th and 18th July 2016.

is that of Mr. Commissiong. In observance of the legal principle that counsel is precluded from giving evidence from the bar table it is therefore disregarded.

- [13] Similarly, the second written submissions commenced with a summary of events which allegedly transpired during the course of proceedings years before and merged into an account by learned counsel Mr. Commissiong regarding his recent illness and advice received from his doctor. For the reason provided previously, those statements are ignored.
- [14] The court must have regard to the overriding objective at all times. Litigants have a duty to assist the court in furthering the overriding objective to act justly. In this regard, parties and their legal practitioners are expected to observe the basic established principle and code of practice which obliges them to notify the court as soon as practicable after they become aware that a hearing is not likely to proceed due to their unavailability.⁸ It is also a mark of courtesy to the court and opposing counsel. Mrs. Gumbs and Mr. Samuel E. Commissiong failed in their respective duties in this regard. They waited 7 days after the letter was issued by the doctor before approaching the court. Presumably, Mr. Commissiong would have been examined on the day the letter was penned or sometime before. No explanation has been given of any difficulties they encountered in contacting the court. This conduct falls woefully short of established standards in this noble profession.
- [15] If steps were taken to notify Mr. Samuel or the court office, chances are he would have been able to make other arrangements which would probably have saved him part of the expenses he incurred unnecessarily on his trip to Saint Vincent. One imagines that he might have been able to pay a small change fee and re-schedule his trip to the state. He would not have had to miss two days at work or expended the expenses associated with his attendance at court on May 12th 2016. The manner in which this affair was handled also cost the court one full trial day which could have been utilized to dispose of another matter. Mrs. Gumbs and her legal counsel failed in their duty to the court and the opposing party in this instance.
- [16] I am satisfied that Mr. Samuel has established that he purchased an airline ticket at a price of \$1977.00, paid \$145.00 for transportation related to his attendance at court and lost two days of work

⁸ Albon v Naza Motor Trading Sdn Bhd (No. 5) [2007] EWHC 2613 (Ch).

which he would not have otherwise lost. His losses are attributable entirely to Mrs. Gumbs and her legal counsel's failure to alert the court and Mr. Samuel within sufficient time to enable Mr. Samuel to take steps to mitigate those losses. It would be unjust and unfair to expect Mr. Samuel to absorb those expenses. It is appropriate to order that Mrs. Gumbs reimburse him for his reasonable travel related disbursements.

[17] Mr. Samuel would have incurred expenses for food even if he was in New York. I make no order for that he recover any sum in respect of his meals. Likewise, in the absence of strict proof of his loss of earnings, I make no order for him to recover the amount claimed under that head. It is ordered that Mrs. Beatrix Gumbs shall pay to Mr. Gasnel Samuel the sum of \$2122.00 in respect of the cost of his transportation to and within the state.⁹ The wasted costs order of \$500.00 made against Mr. Samuel on 27th April, 2016 may be offset against this award. Mr. Samuel is also entitled to the costs of this application.

ORDER

[18] It is accordingly ordered:

1. Beatrix Gumbs shall pay to Mr. Gasnel Samuel the sum of \$2122.00 being reimbursement for the expenses he incurred by traveling to Saint Vincent in May 2016 for trial.
2. Mr. Samuel is entitled to offset against this award, the wasted costs order of \$500.00 made against him on 27th May, 2016.
3. Beatrix Gumbs shall pay to Gasnel Samuel costs to be assessed pursuant to CPR 65.11, on application to be filed and served by Mr. Samuel on or before 21st December 2016.

.....
Esco L. Henry
HIGH COURT JUDGE

⁹ Being reimbursement for his airline ticket (\$1977.00) and transportation (\$135.00 + \$10.00).