

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 104 OF 2006



BETWEEN:

BERTRAM V. MALCOLM

Claimant

v

1. ATTORNEY GENERAL
2. P.C. 307 DANIEL SAMUEL
3. P.C. 74 ECKRON ACKERS

Defendants

Appearances:

Mr. J.O.R. Martin for the Claimant
Miss J. Jack for the Defendants

2008: February 7;
March 13.

JUDGMENT

- [1] **MATTHEW, J (Ag.):** In Chambers – This is an application by the Attorney General filed on December 12, 2007 to set aside an order made on November 14, 2007 whereby the Defendants were ordered to pay the Claimant costs in the amount of \$2,500.00 when neither the Defendants nor their solicitor appeared on the said November 14, 2007, the day fixed and published for the hearing.
- [2] The application was said to be made pursuant to Parts 11.16 and 11.18 of the Civil Procedure Rules, 2000.
- [3] In support of the application were affidavits by the Attorney General, Judith Jones-Morgan and Faye James, Court Administrator, of the High Court of Justice.

- [4] In opposition to the application was an affidavit by the Claimant, Bertram Malcolm.
- [5] The affidavit of the Attorney General is based on what she was informed. More direct evidence came from the Court Administrator.
- [6] Miss James stated that on November 9, 2007 Miss Joezel Jack contacted the Court Office to confirm the trial date of this case and she informed her that the matter had been scheduled for December 20, 2007 and that she got her information from Shebby Walters, the Clerk of the Court.
- [7] It so happened that the Attorney General had a similar suit brought against herself and the police which was in fact scheduled for December 20, 2007. Miss James therefore gave wrong information.
- [8] In his affidavit in opposition the Claimant attached a typed list of matters fixed for hearing for the month of November 2007. The list stated that they were cases before His Lordship Justice Frederick Bruce-Lyle. There lies an error in the heading of the fixtures, for Justice Bruce-Lyle was doing the criminal assizes and had no civil cases for that month.
- [9] This could well be the reason why Miss Jack needed the confirmation that Miss James spoke of in her affidavit.
- [10] Mr. Malcolm in his affidavit stated that he relied on the Court fixtures for the month of November 2007 and was anxious to hear his matter and was surprised to see that neither the Defendants nor their Counsel were present.
- [11] He further stated in reply to the Attorney General's affidavit that he did not understand why in the face of the fixtures for November 2007 reliance would have been placed on a statement of a Court Office employee who as it appeared was mistaken.

[12] He also stated that the application of the Defendants was misconceived having been grounded in Part 11 of the Civil Procedure Rules. His counsel argued that the correct rule was found under Part 39.5 of the said CPR Rules.

[13] It appears to me that Rules 11.18 and 39.5 say the same thing. Part 11 deals with general rules about application for court orders and Part 39 deals with trials.

[14] Part 11.18 (1) states:

“A party who was not present when an order was made may apply to set aside or vary the order.”

Part 39.5 (1) states:

“A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.”

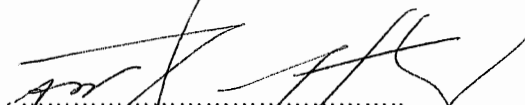
It cannot therefore be maintained that the application under Part 11.18 is misconceived.

[15] It cannot be doubted that Counsel for the Defendants was misled by the information given to her by the Court Administrator and that is the only known reason why she was absent. I gave consideration to the fact that she was in possession of a published list which clearly fixed the case for November 14, 2007 and that she should have been guided accordingly.

[16] But as I have stated, that list itself by stating that the matters were fixed before Justice Bruce-Lyle who sits at a different location of the High Court could have necessitated the reason for seeking confirmation.

[17] In my judgment the failure of the Defendants and their Counsel to attend the hearing was not deliberate or in any way contemptuous. I considered reducing the figure of \$2,500 by fifty per cent but I could not even justify that.

[18] In the circumstances I set aside the earlier order made that the Defendants should pay to the Claimant costs in the sum of \$2,500. There will be no costs in respect of this application.



Albert N. J. Matthew
HIGH COURT JUDGE (Ag.)