

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2014/CLE/qui/FP/016**

BETWEEN

**VANCE TYNES
Plaintiff**

AND

**THE ATTORNEY GENERAL
Defendant**



BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Harvey Tynes, KC, Miss Ntshonda Tynes with him
Mrs. Kenria Smith for the Defendant

HEARING DATE: March 30, 2023

Hanna-Adderley, J

RULING

Introduction

1. The parties appear before the Court on the hearing of a Notice of Motion filed on behalf of the Plaintiff on February 16, 2023, seeking the following relief:

(a) An Order that the Minister for Finance, the Honourable Philip Davis, Q.C. be found to be in contempt for his failure to pay the sum of \$119,349.72 shown to be due to the Claimant as of the 21st July, 2022 by the Certificate issued herein by the Deputy Registrar on the 5th August, 2022 together with interest accruing at the rate of \$17.80 per day until paid;

(b) An Order that the Minister of Finance, the Honourable Philip Davis, Q.C. pay to the Claimant within 7 days or such other period as ordered by the Court all sums due and owing to the 1 Claimant at the time of payment failing which he be held personally liable to imprisonment or to pay a fine or to any other punitive measure the Court deems appropriate;

(c) An Order that service of this Notice of Motion on the Office of the Attorney General at Nassau, Bahamas and on the Minister for Finance by email be deemed sufficient service on the Minister of Finance;

(d) An Order that the costs of and occasioned by this Motion be paid to the Claimant on a full indemnity basis.

2. The application is supported by the Affidavit of Mrs. G. Ingrid Tynes also filed on February 16, 2023. The Plaintiff also relies on Written Submissions filed on March 29, 2023.
3. The Defendant opposes the application. The Attorney General has not filed any evidence and relies on Submissions dated March 28, 2023.

Statement of Facts

4. The factual background asserted by Mrs. Tynes in her Affidavit has not been disputed by the Defendant and is as follows:

(a) By a Judgment of the Honourable Court of Appeal in Supreme Court Civil Appeal No. 54 of 2019 dated the September 23, 2019 it was adjudged that the Defendant pay to the Claimant full costs of the Supreme Court action herein up until September 8, 2015 and 50% of the costs herein after the September 8, 2015 and 50% of the costs of the Appeal.

(b) By a Certificate of Taxation issued on the July 2, 2021 the Deputy Registrar certified the Claimant's costs herein as agreed between the parties in the sum of \$121,000.00.

(c) By a Certificate of Taxation issued on November 4, 2021, the Claimant's costs of the Appeal were taxed and reviewed and allowed by the Registrar of the Court of Appeal in the amount of \$85,000.00.

(d) On the March 22, 2022 the Claimant received part payment in respect of the costs and interest due herein in the amount of \$121,000.00.

(e) On August 5, 2022, the Deputy Registrar of the Supreme Court issued a Certificate under her hand certifying that the balance outstanding and amount payable to the Claimant by the Defendant in pursuance of the said Judgment was \$119,349.72 inclusive of interest as of the July 21, 2022 with interest accruing at the rate of \$17.79 per day.

(f) As Counsel for the Claimant, Ms. Ntshonda Tynes wrote to Ms. Kayla Green-Smith Assistant Director of Legal Affairs in the Office of the Attorney General on July 13, 2022 and again on July 18, 2022 requesting payment of the remaining costs and interest due the Claimant. Ms. Green-Smith responded by email on July 20, 2022 advising that the matter would be reviewed and a response provided “shortly”.

(g) Again, on August 23, 2022 Ms. Tynes wrote to Ms. Green-Smith seeking payment of the remaining sums due the Claimant. Ms. Green-Smith responded by email on the August 24, 2022 advising that the Defendant would revert shortly.

(h) Up to the date of the filing of the said Affidavit Ms. Green-Smith had not communicated the results of her review to the Claimant.

(i) Mrs. Tynes further stated that up to the date of the filing of her Affidavit the Minister for Finance has failed to pay the balance of the sums due and owing to the Claimant.

5. Copies of the Notice of Motion and supporting Affidavit were served on the office of the Attorney General at Freeport, Grand Bahama on Tuesday, March 7, 2023. Also, copies of the Notice of Motion and supporting Affidavit were sent to the Minister of Finance at his email address on Wednesday the March 15, 2023.

The Hearing on March 30, 2023

6. As Miss Tynes was nearing the end of her Submissions in support of the application Miss Smith informed the Court that she had had just been informed that the balance of the sums due to the Plaintiff had been paid into the account of Tynes & Tynes. She subsequently confirmed that the sum had been deposited to the said account on March 23, 2023.

Issues:

7. The Court must determine: (1) whether the application was reasonable; (2) whether there is, due to the sequence of events, any lis between the parties; and (3) whether the costs

claimed are in a reasonable amount and were reasonably incurred and should be paid on an indemnity basis.

Submissions, Analysis and Discussion

8. Although the issue of contempt by the Minister of Finance is now moot it is necessary to discuss the merits of the application.
9. Counsel for the Defendant argues that the application is misconceived and that it is not legally possible to hold the Minister in his individual capacity in contempt, nor to take punitive measures against him in his individual capacity. Mrs. Smith relies on the Crown Proceedings Act Ch.68 of the Statute Laws of The Commonwealth of The Bahamas which states at Section 19 (4) and (5) as follows:

“(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of the court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the crown of any money or costs

(5) This section shall apply both in relation to proceedings pending at the commencement of this Act and in relation to proceedings instituted thereafter.”

10. Section 19 (1) also provides that:

“(1) Where in any civil proceedings by or against the Crown, or in connection with arbitration to which the Crown is a party, any order (including an order for costs) is made in favour of any person against the Crown, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Minister responsible for finance shall, subject as hereinafter provided, cause to be

paid to the person entitled or to his attorney the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon.”

11. The Plaintiff argues to the contrary namely, that the Minister can be held in contempt and relies on the House of Lords case of **M v Home Office** [1994] 2 A.C. 377, and, in particular, a passage from Lord Woolf’s judgement at page 424, letter H, where he opines that a finding of contempt can be made against a minister:-

“While contempt proceedings usually have these characteristics and contempt proceedings against a government department or a minister in an official capacity would not be either personal or punitive (it would clearly not be appropriate to fine or sequester the assets of the Crown or a government department or an officer of the Crown acting in his official capacity). This does not mean that a finding of contempt against a government department or minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of the contempt. A purpose of the Court’s powers to make findings of contempt is to ensure that the orders of the Court are obeyed, the body against whom the orders were made can be found guilty”.

12. The Plaintiff also relied on **MSA v London Borough of Croydon** [2009] EWHC 2474 (Admin) . In that case, at paragraph 9, Collins, J pointed out that Lord Woolf in the quote above was drawing a distinction between the ability of the Court to punish for contempt as a means of enforcement, and to make a finding of contempt, which would lead to no punitive sanction save for the payment of costs.

13. Further, as advanced by the Plaintiff, at page 425, letter D, Lord Woolf recognized the restrictions placed on execution against the Crown and concluded that a finding of contempt may be sufficient. He stated as follows:

“In cases not involving a government department or a minister the ability to punish for contempt may be necessary. However, as is reflected in the restrictions on execution against the Crown, the Crown’s relationship with the courts does not depend on coercion and in the exceptional situation when a government department’s conduct justifies this, a finding of contempt should suffice. In that exceptional situation the ability of the court to make a finding of contempt is of

great importance. It would demonstrate that a government department has interfered with the administration of justice...In accord with tradition the finding should not be made against the "Crown" by name but in the name of the authorized department (or the Attorney General) or the minister so as to accord with the body against whom the order was made".

14. When asked by the Court whether the Judgment Creditor had no other alternative but to wait indefinitely until the Crown paid him the debt due Mrs. Smith proffered that the Judgment Debtors compensation to the Judgment Creditor for any delay was the interest being charged on the outstanding debt which would come due as well, to which Miss Tynes responded that if the Plaintiff could set the rate of interest due all would be well, but that the rate of interest is set by statute and not the Judgment Creditor.

Conclusion

15. The money has been paid. The issue of contempt has therefore become a moot issue. There is no lis between the parties save, however, that costs remains a live issue. The Defendant argued that the claim of contempt and the seeking of an order to imprison the Hon. Philip Davis, KC in his personal capacity was misconceived and improperly brought and consequently no costs should be awarded to the plaintiff. On the authorities, which though not binding on this Court but which I consider very persuasive, if the money had not been paid it is possible that the Court could have considered and made an order of contempt against the Minister of Finance. This is the first Order sought in the Notice of Motion. However, the authorities do not support enforcement against the Minister of Finance individually as was also sought by the Notice of Motion. Parties are bound by their pleadings. So, at the time the action was brought the Plaintiff sought remedies which were not entirely available to him. To that extent the application was misconceived. Now that the contempt action is moot, I must dismiss the claims for relief set out in the Notice of Motion. Despite the dismissal, however, since the action was brought in good faith and at the time presented a triable issue, and having considered the sequence of events set out in the Statement of Facts above, and what occurred at the hearing, and further, being satisfied on a balance of probabilities that the balance of the sum due to the Plaintiff would not have been paid at the time it was had the application not been brought, I will go on to consider the Plaintiff's claim for costs.

Costs

16. The plaintiff claims costs on an indemnity basis in the Notice of Motion. The Plaintiff in his written submissions does not argue the point and at the hearing Miss Tynes somewhat resiled from this position but proffered to the Court a draft bill of costs which she submitted set out the Plaintiff's reasonable costs reasonably incurred herein in the sum of \$14,800.00. The Defendant claims that the costs being claimed ought not to have been incurred because the application was misconceived and furthermore, they are unreasonable. She relied on the authority of **Home Office and Lownds** [2002] EWCA Civ 365 where Lord Woolf C.J. stated the principle applicable to costs as follows:

"CPR 44.4 provides for two bases of assessment. The first is the standard basis and the second is the indemnity basis. In both cases the court will not allow the recovery of costs which have been unreasonably incurred or costs which are unreasonable in amount. The important distinction between the standard basis and the indemnity basis is that on an assessment on the standard basis the court will only allow costs which are proportionate. CPR 44.4(2) provides:

'Where the amount of costs is to be assessed on the standard basis the court will—
(a) only allow costs which are proportionate to the matters in issue; and
(b) resolve any doubt which it may have as to whether costs were unreasonably incurred or reasonable and proportionate in amount in favour of the paying party.'

17. Mrs. Smith submitted that the application is unreasonable, and therefore, no costs should flow to the Plaintiff.

18. The Civil Rules 2000 draws a distinction in substance between a standard order for costs and an indemnity order for costs. The differences are set out in Order 62 r12 of the Civil Rules 2000. In a standard Order the onus is on the receiving party to establish that the costs were in a reasonable amount and were reasonably incurred. Any doubts are resolved in favour of the paying party. In the case of an indemnity order, all costs are allowed unless it can be shown that they were unreasonably incurred and of an unreasonable amount and doubts are resolved in favour of the receiving party. By implication the onus is on the paying party to show that the costs are unreasonable and unreasonably incurred in an indemnity order for costs. Mrs. Smith has satisfied me that the Plaintiff could not have in law been granted all of the reliefs sought in the Notice of Motion. But having been satisfied

that were it not for the filing of the application the balance of the sums due would not have been paid practically on the eve of the hearing, the receiving party has established that the costs of commencing and prosecuting the application were reasonably incurred and ought to be awarded on a standard basis. I have reviewed the draft Bill of Costs and I am of the view that the sum of \$10,000.00 is a proportionate sum in the circumstances and order that the Defendant pay the Plaintiff's costs occasioned by the application in the said sum of \$10,000.00 within the next 45 days together with interest thereon at the statutory rate.

Dated this 5th day of April A. D. 2023


Petra M. Hanna-Adderley
Justice

