

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2006/0905

BETWEEN:

[1] AUGUSTIN MONTOUTE
[2] THEODORA JEAN

Petitioners

and

[1] VICTOIRE SIMON also known as VICTORIA SIMON
[2] GEORGINA ANTHONY
[3] STEPHANIE CALDERON
[4] VIRGINIA MICHAUD aka VIRGINIA MELIUS
[5] JOSEPH MONTOUTE
[6] FRANCES POLIUS
[7] ANNE HUSBANDS

Respondents

Before:

The Hon. Mr. Ephraim Georges

High Court Judge [Ag.]

On written submissions:

Ms. Andra Gokool-Foster for petitioners

Ms. Veronica Barnard for respondents

2009: February 25;

March 27.

2011: February 24.

JUDGMENT

[1] **GEORGES, J. [AG.]:** On 22nd November 2006 the petitioners Augustin Montoute and Theodora Jean filed a petition on 22nd December 2006 under Article 297 onwards of the **Civil Code**¹ for curatorship to the person and property of Anesta Montoute the spouse and mother of the first and second petitioners respectively

¹ Chapter 4:01 of the Revised Laws of Saint Lucia 2001

and the court appointed them **curator to the person of Anesta Montoute** on 8th December 2006. The respondents filed affidavits in reply opposing the petition on 7th December 2006 and 22nd December 2006. (my emphasis)

- [2] Thereafter pursuant to various orders of the court the respondents filed a number of miscellaneous documents including an application to vary on 22nd December 2006 three lists of exhibits and a number of documentary exhibits as well as two reports by caretakers (of Anesta Montoute) six witness statements two supplementary witness statements and a further list of documents spanning the period 22nd December 2006 to 24th February 2009. The respondents made no fewer than fourteen court appearances between 30th January 2007 and 24th February 2009 counsel disclosed and participated in two mediation sessions at their parents' residence all of which resulted in the expenditure of significant sums of money in their attempt to vindicate themselves against various untrue allegations which had been levelled against them by the petitioners.
- [3] The first petitioner died on 9th February 2009 aged 97 and his personal office of curator consequently ceased whereupon the second petitioner the surviving curator applied for and was granted leave on 25th February 2009 to withdraw the petition filed 22nd November 2006 following which counsel for the respondents applied for costs as a result of the discontinuance of "the proceedings". The court thereupon ordered that counsel for the respective parties file submissions on the issue of costs within 14 days, that is, by 11th March 2009 for decision by the Judge.
- [4] Counsel for the respondents Ms. Veronica Barnard filed her submissions on 10th March 2009 and a draft decision was duly prepared. I pause to draw attention to the observations of Sir Dennis Byron, CJ in **Rochamel Construction Ltd. v National Insurance Corporation**² that while as a general rule costs follow the event the court has wide discretionary powers to vary the application of the general rule. These discretions are aimed at assisting the court to further the

² Saint Lucia Appeal No. 10 of 2003

overriding objective of dealing with cases justly. Legal practitioners his lordship further enjoined should be encouraged to assist the court in making of costs orders by providing information as early as possible.

[5] As it turned out counsel filed written submissions on behalf of the petitioners opposing costs on 24th March 2009 after the decision of the court had been prepared and went on to lament the fact that the respondents had filed documents as ordered by the court however they had sometimes done so late and in breach of the rule that they should apply for leave of the court to file late documents. Here counsel for the petitioners is evidently hoisted by her own petard for her own written submissions were filed 13 days late without leave by which date the decision had already been written.

[6] The draft judgment and the petitioners' late submissions appear to have been placed in the file and then put away in the vault until a week ago when Ms. Barnard reported that she had not yet had a copy of the decision and a search revealed that it had been placed in the file which was subsequently misfiled in the vault.

[7] Be that as it may I have considered it prudent in the circumstances to write a revised judgment. As I indicated at the outset the application for appointment of a curator to the person and property of Anesta Montoute the aging and ailing wife of Augustin Montoute was instituted by her husband and their eldest child and daughter Theodora Jean by way of petition pursuant to Article 297 et seq of the **Civil Code**. The court granted the application for curatorship to the person of Mrs. Montoute to the petitioners and that evidently triggered off the wrath and displeasure of the respondents some of whom in defiance of the court order at some stage unlawfully removed Mrs. Montoute from the curatorship of her husband much to his chagrin. She was eventually restored to her home and the protective care and custody of her loving husband.

[8] The gravamen of this matter as emerges from the copious documents on file – well nigh 300 – is that Augustin Montoute and his wife had lived together from

1930 and married in 1945 and so had lived and cohabited for 75 years and had 12 children. So that by the year 2006 they could not be separated and be made live apart. It is as simple as that.

[9] She was by then in failing health diabetic both legs amputated hypertensive and in obvious need of nursing care daily medical and personal attention having suffered strokes and being partially paralysed. Her husband had by then himself grown frail and feeble and had been hospitalised on at least one occasion. With the best will in the world the time had come when he was no longer capable of properly looking after his wife properly. Home nursing care was briefly provided for Mrs. Montoute on at least two occasions but after a family meeting it was felt more expedient and appropriate that she reside with one of her daughters who with the assistance of her siblings could successfully manage their mother.

[10] That proposed plan did not however gain the approval of Theodora Jean the second petitioner who vehemently opposed it. Relations between the "two camps" continued to deteriorate. At length Augustin Montoute died and Theodora Jean applied to withdraw the petition for curatorship of Anesta Montoute which had been launched by Mr. Moutoute and herself on 22nd November 2006. The application was granted and whilst consenting to discontinuance of "the proceedings" counsel applied for costs in light of the time effort and expenditure which the respondents had spent as a result of the petitioners' action.

[11] Prior to this following a serious stroke Anesta Montoute was medically certified to be mentally impaired and incapable of signing her name whereupon further steps were taken by the respondents to remove her from her husband's custody and have bank accounts in their parents' names in at least four financial institutions altered and management and control of properties owned by the couple transferred to three of them. The acrimony between the parties further escalated and at length Madame Justice Sandra Mason QC (as she then was) who had conduct of the matter on 23rd June 2008 ostensibly used case management powers under Part 26.1(2)(w) of the **Civil Procedure Rules 2000** (CPR) to

effectively manage the matter and so resolve it by giving directions with a view to trial. Significantly amongst a host of directions the parties were required to prepare and file an agreed list of issues. Costs were directed to be prescribed costs as per the CPR and trial dates were fixed for 25th and 26th March 2009.

[12] Before the court now is a “hybrid matter” which initially started as a petition for appointment of curator under the **Civil Code** and this has now developed into a full blown contentious case for trial under the CPR but no claim or statement of case has been filed and prescribed costs have been ordered.

[13] Ms. Barnard for the respondents has staked her claim to costs on **Civil Procedure Rules 2000** Parts 37.5, 37.6(1) and 37.7(1) which state seriatim that:

Part 37.5:

- “(1) Discontinuance against any defendant takes effect on the date when the notice of discontinuance is served on that defendant under rule 37.3(1)(a).
- (2) A claim or the relevant part of a claim is brought to an end as against that defendant on that date.
- (3) However, this does not affect –
 - (a) any proceedings relating to costs; or
 - (b) the right of the defendant under rule 37.4 to apply to have the notice of discontinuance set aside.”

Part 37.6(1):

- “Unless
 - (a) the parties agree; or
 - (b) court orders otherwise;

a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued, on or before the date on which notice of discontinuance was served.”

Part 37.7(1):

“The general rule is that, unless an order has been made for budgeted costs under rule 65.8, the costs are to be determined in accordance with the scale of prescribed costs contained in Part 65, Appendices B and C.”

Part 65.5 states:

"(1) The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.

(2)(b)(iii) If the claim is not for a monetary sum – the amount of EC\$50,000 unless the court makes an order under rule 65.6(1)(a)."

[14] As the petitioners' claim falls under Part 65.5(2)(b)(iii) costs therefore are calculated in accordance with Appendix B, C. i.e. \$14,000.00.

Appendix C – (up to Pre-trial review 75%) = \$10,500.00

The petitioners should accordingly be ordered to pay to the respondents prescribed costs in the sum of \$10,500.00.

[15] Sad to relate the facts and circumstances which surround this matter are not by any means uncommon in this day and age and without a fair fund of goodwill and understanding between the parties concerned resolution of the inherent problems can prove to be well nigh impossible and are fraught with much acrimony between family members.

[16] Adverting to the nature of the application and the rights of the applicant Ms. Andra Foster pointed out in her submissions that under and by virtue of Article 297 et seq of the **Civil Code**:

"...an application can be made for curatorship to secure an order for rights of custody and control over the person and property of an individual who is incapable of handling his or her affairs and in accordance with Article 304 of the Civil Code a lawful spouse ranks first in priority as having a right and being legally entitled to and responsible for the custody, care and control of an incapacitated spouse.

In essence Augustin Montoute was rightfully granted an order for curatorship of his wife on 8th December 2006 and in that regard remained the successful party until his death."

- [17] Learned counsel went on to submit that there being clear substantive law governing applications for curatorship the procedure under the CPR do not apply as regards the hearings. Part 8 CPR it was specially pointed out stipulates that any actions to which the Rules apply must be commenced by a claim in the form specified. The court in fact adverted to this in paragraph 12.
- [18] It was clearly in my view a procedural irregularity for the judge to have made an order granting curatorship to the person of Mrs. Montoute to Mr. Montoute in the first place and later proceed to give case management directions with a view to trial in a matter which was not commenced under the Rules of Civil Procedure. All that in fact needed to be done was for the judge to inquire and assess the factual situation and make an appropriate order as she in fact did on 8th December 2006. The case management exercise undertaken by the learned judge was with respect in my judgment wholly ill-conceived and incongruous in the circumstances. Costs on the basis of the CPR and more especially prescribed costs would therefore be inappropriate and in my view punitive.
- [19] And whilst I recognise that the actions of the respondents as regards the general well being of their ailing and mentally and physically infirm mother may have been well meaning the order of the court stands and in fact stood until the death of the first petitioner.
- [20] It is my considered view that at that stage there were no "proceedings" as such to be discontinued and it was in the circumstances only appropriate and indeed pragmatic for the second petitioner to be permitted to withdraw from the matter. And finally as regards the issue of costs I would make no order and let the chips lie where they fall. In the exercise of my discretion this would I hold satisfy the justice of the matter.

Ephraim Georges
High Court Judge [Ag.]