

**IN THE COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Family Division**

**2022/FAM/div/00507**

**B E T W E E N:**

**L.M.M**

**Petitioner**

**v**

**N.G.Z.G**

**Respondent**

**Before:** The Honourable Madam Justice C.V. Hope Strachan,  
Justice of The Supreme Court of The Commonwealth of The Bahamas

**Appearances:** Krystal Rolle K.C. and Darron Cash for the Petitioner  
Robert Adams K.C. and Edward Marshall II for the Respondent

**Hearing Dates:** 7<sup>th</sup> November 2024; 22<sup>nd</sup> January 2025

*Costs – Application for discovery partially refused – Costs follow the event – Exercise of court’s discretion – Should a party receive costs on partial success- Should a partially successful party pay full cost of the other party– Factors to consider to determine which party should pay and receive costs where one party has been partially successful.*

**DECISION ON COSTS**

**INTRODUCTION**

[1.] This is a decision on costs arising from a ruling granted by this court on 22<sup>nd</sup> January, 2025 on an application for discovery. The application was made by the Respondent (“the husband”) by way of Summons filed on 21<sup>st</sup> October 2024 pursuant to Rule 23 of the

Matrimonial Causes Rules, Chapter 125. The husband's application was not successful, although he succeeded on one of the issues.

## **BACKGROUND**

[2.] The husband made an application for discovery of certain documents from the Petitioner ("the wife") in relation to allegations of abuse made towards her and the children of the family, A.D and G.G. The Court refused the application for discovery of the documents requested except for the King's College email which the Court ruled that the wife shall provide the email to the husband. At the end of the ruling, the court intended to award costs of the application to the wife, however, Counsel for the husband objected. The objection was made on the basis that the husband was successful on one of the issues in dispute, in particular, the King's College email and should be awarded costs in respect of that issue. The Court reserved its decision regarding costs and granted leave to Counsel to make submissions within seven (7) days. Both Counsel submitted written submissions to the Court on 30<sup>th</sup> January 2025.

## **THE WIFE'S SUBMISSIONS**

[3.] Counsel for the wife submits that the wife has succeeded on the application and the husband has undoubtedly failed. Therefore, there is no basis for the Court to depart from the usual rule that costs should follow the event and that such costs be awarded to the wife.

[4.] Counsel further submits that the husband is seeking to utilize the fact that he had to file the application for the King's College email. The application itself did not involve an argument on the King's College email and therefore the husband did not succeed on this application. Counsel contends that even if the King's College emails were treated as a success, such limited success in the context of the exceedingly wide nature of the requests is not sufficient to deprive the wife of the costs of the application nor enable the husband to recover costs when the application has overwhelmingly failed.

[5.] In other words, the Court ought not make an Issue Based Costs award, awarding the husband the costs of the King's College component of the application in circumstances where the wife agreed to provide the documents, thus obviating the need for the husband to advance the application and where the recovery of the documents without argument is too de minimis in relation to the entirety of the failed application to warrant an Issue Based Costs award.

[6.] The case of **Commonwealth Franchise Holdings Limited v Casual Dining Restaurants Ltd. and another [2022] 1 BHS J No. 80** was relied on by the wife's Counsel which stated that an "issue based costs order" or a "proportionate costs order" are reserved for cases where there are "partial victories." Lack of success on a single issue is

addressed from a quantum perspective on assessment and doesn't alter the substantive costs award itself.

[7.] It is their submission that (1) the wife has succeeded on the application having prevailed on each and every issue that was argued before the Court and on the very basis she submitted in argument, (2) the King's College issue was never argued having been resolved without argument, (3) in any event the King's College issue is too minute in comparison to the application as a whole, which was dismissed, and cannot therefore warrant an issue based costs award, (4) there is no reason at all to depart from the general rule that costs follow the event, the wife should be awarded the costs of and occasioned by the husband's failed discovery application to be assessed if not agreed.

## **THE HUSBAND'S SUBMISSIONS**

[8.] Counsel for the husband submits that they sent a letter to Counsel for the wife on 6<sup>th</sup> May 2024, inter alia, requesting copies of the correspondence between (i) the wife and King's College and (ii) the wife and Dr. Kerr which contained allegations of abuse against the husband by the wife against the minor children of the family and herself.

[9.] The wife chose not to respond to the husband's letter requesting documents and remained silent while addressing other matters in this and other related actions. Consequently, some five (5) months after the request for the documents was made, the husband filed the Summons seeking an order directing the wife to produce, by way of specific disclosure, copies of the documents he had requested as well as copies of other documents he reasonably believed to be in the wife's possession, custody and power based on references made to such documents in other correspondence he already possessed.

[10.] The Summons was heard by this Honourable Court on 7 November 2024. During that hearing, and only after Counsel for the husband had completed his oral submissions in support of the summons, in reply Counsel for the wife conceded that the correspondence exchanged between the wife and King's College containing allegations of abuse against the husband was relevant to the husband's allegations against the wife and ought to be disclosed to him on that basis.

[11.] On 22 January 2025, this Honourable Court delivered its written Ruling to the parties, dismissed all of the requests for discovery save the correspondence between the wife and King's College. The wife was directed to disclose the correspondence between her and King's College to the husband with the costs of and occasioned by the summons to be determined.

[12.] As of the date of these submissions, according to the husband's counsel, the wife has still not produced for the husband's inspection any of the documents the wife has been ordered to produce by this Court.

[13.] Counsel for the husband has relied on various authorities including **CR (nee G) v GR [2022] 1 BHS J. No. 81, HG v LG [2016] 2 BHS J. No. 102 and JK v HK [2008] 1 BHS J. No. 26**, in which the courts have confirmed that the starting point when exercising any discretion to award costs is that costs follow the event. The exception to the rule is where it appears to the Court that in the circumstances some other order should be made.

[14.] The authority of **Elgindata Ltd. (No. 2) [1992] 1 W.L.R. 1207** provides circumstances in which a successful party may be deprived of his costs, even one who is only partially successful. This case was applied in the case of **Dawson-Damer v Grampian Trust Company Limited [2019] 1 BHS J. No. 2**. In Elgindata case, *Nourse LJ* stated at pages 1211, 1213 and 1214 that:

**"I now come to Warner J's judgment on costs. Having referred to the general rule that a successful plaintiff is entitled to his costs notwithstanding he may have failed on some issues, he said that he had to look at the realities of the case.**

...

**In order to show that the judge erred, I must state the principles which ought to have been applied. They are mainly recognized or provided for it matters not which, by section 51 of the Supreme Court Act 1981 and the relevant provisions of R.S.C., Ord. 62, in this case rules 2 (4), 3 (3) and 10. They do not in their entirety depend on the express recognition or provision of the rules. In part they depend on established practice or implication from the rules. The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case, some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognized or provided**

for by rules 2(4), 3(3) and 10 respectively. The third depends on well-established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the successful party's cost. It was because of his disregard of that principle that the judge erred in this case.[Emphasis added]

[15.] The husband contends that the first and second principles identified in the Elgindata case are not controversial. The third and fourth principles outlined, requires the Court's consideration in order to determine the appropriate order for costs to be made.

[16.] The husband's counsel further contends, it cannot be reasonably asserted by the wife that the husband's application was brought improperly or unreasonably in light of (i) the wife's duty to make full and frank disclosure, (ii) the husband's request for the production of the documents made by letter dated 6<sup>th</sup> May 2024, which the wife failed to respond to; and (iii) the wife's concession, only made after the commencement of the hearing of the summons, that certain documents sought by the Respondent are indeed relevant and ought to be produced.

## ISSUES

[17.] The issues for the Court's determination are:

- a) Whether the husband is entitled to costs in relation to the King's College issue? or
- b) Whether the wife is entitled to the whole costs in relation to the discovery application?

## THE LAW

[18.] Rule 62 (3) of the Matrimonial Causes Rules, Ch. 125 provides:

“(3) In any cause or matter to which these Rules apply the costs allowed to attorneys and the taxation of such costs shall, except where these Rules otherwise provide, be in accordance with the provisions of the Rules of the Supreme Court of England so far as the same are applicable notwithstanding any provision to the contrary in the Supreme Court Rules.”

[19.] Order 62 r. 3(1) and (2) of the old revised Rules of the Supreme Court of England (1965), provide:

“3. (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court.

(2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

[20.] The Rules of the Supreme Court of England have been replaced with the Civil Procedure Rules (1998) (as amended).

[21.] The Court has a wide discretion pursuant to s. 30 (1) of The Supreme Court Act of The Bahamas, Ch. 53, to order costs in all proceedings.

"30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."

## DISCUSSION AND ANALYSIS

[22.] The general rule is that costs follow the event, however the Court has the discretion to grant the whole or part of the cost to the successful party taking into consideration all of the circumstances of the case. In her written submissions, Counsel for the wife says that the wife has been successful on all of the issues, therefore, she should receive the whole costs of the application. Counsel for the husband, however, is of the opinion that the husband was successful on one of the issues and he should be awarded costs in respect of that issue.

[23.] Whilst the Matrimonial Causes Rules are narrow as it relates to costs, the Supreme Court Act of The Bahamas gives the court a wide discretion regarding costs.

[24.] The Court found the submissions of both Counsel to be helpful. The case for the wife provided insight into how the Court is to determine costs in respect to partial victories. On the other hand, if a party is successful in his claim he may still be deprived of his costs, in whole or in part, if there has been a significant increase in the length and cost of the proceedings or if issues were raised improperly he may be ordered to pay the unsuccessful party's costs (**Elgindata Ltd. (No. 2)**, *supra*).

[25.] The Court also considered the Court of Appeal decision of **Rawson McDonald v Paul R. Major** SCCivApp No. 94 of 2017. Crane-Scott, JA made reference to the authority of **Scherer**

**and another v. Counting instruments Ltd and another** [1986] 2 All ER 529 which *Buckley LJ* at page 537 derived ten (10) guiding principles in relation to costs. The Court said:

“From the cases which we have cited and from **Ottway v Jones** [1955] 2 All ER 585, [1955] 1 WLR 706, **Baylis Baxter Ltd v Sabath** [1958] 2 All ER 209, [1958] 1 WLR 529 and **William C Parker Ltd v F J Ham & Son Ltd** [1972] 3 All ER 1051, [1972] 1 WLR 1583, which were also referred to by counsel, we derive the following propositions. (1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the court or given another party cause to have recourse to the court to obtain his rights is required to recompense that other party in costs. But, (2) the judge has under s 50 of the 1925 Act an unlimited discretion to make what order as to costs he considers that the justice of the case requires. (3) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has no right to such an order, for it depends on the exercise of the court's discretion. (4) This discretion is not one to be exercised arbitrarily: it must be exercised judicially, that is to say in accordance with established principles and in relation to the facts of the case. (5) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judge's function. (6) The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further. (7) If no such ground exists for departing from the normal rule, or if, although such grounds exist, the judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion. (8) If a party invokes the jurisdiction of the court to grant him some discretionary relief and establishes the basic grounds therefor but the relief sought is denied in the exercise of the discretion ... the opposing party may properly be ordered to pay his costs. But where the party who invokes the court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposing party could properly be ordered to pay his costs ... (9) If a judge, having relevant grounds on which to do so, has on those grounds, or some of them, made an order as to costs in the exercise of his discretion, his decision is final unless he gives leave to a dissatisfied party to appeal. (10) If, however, he has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this court can entertain an appeal without leave and can make what order it thinks fit.” [Emphasis added]

[26.] In considering the principles in **Scherer v Counting, supra**, the Court accepts that the husband requested the email to King's College from the wife by a letter dated 6<sup>th</sup> May 2024. The wife did not provide the email. Subsequently, the husband filed the Summons dated 21<sup>st</sup> October 2024 for discovery. The Court agrees with Counsel for the husband that it was only when Counsel completed his oral submissions that Counsel for the wife in her submissions agreed to provide the King's College email. Paragraph 22 of the ruling in relation to this point is outlined below:

“22. In relation to the King's College email, there is a reference in the Affidavit of the Applicant to communication between the Respondent and King's College. Therefore, there

*is a basis to suspect that there is communication that an email exists and it is not in the Applicant's possession. In the premises the necessary foundation has been met in the Affidavit of the Applicant as to the existence and relevance of this email to King's College. Counsel for the Respondent has agreed to provide this email to Counsel for the Applicant."*

[27.] In these circumstances, the wife's failure to provide the King's College email that was in her possession to the husband may have resulted in the application for discovery being made. Notwithstanding the concession made by Counsel for the wife, the Court cannot disregard the time and resources used by Counsel for the husband to file his application. Whilst Counsel was not successful on every issue, he did succeed on the King's College issue and as such he should be awarded costs in that regard. The wife, however was successful on all other issues and should be awarded her costs of these proceedings.

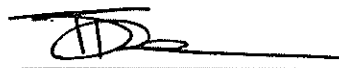
[28.] It has been brought to the Court's attention, through the husband's submissions, that following the ruling that was delivered in respect of this matter, the wife has not provided the King's College email to the husband. The Court's ruling is not to be ignored. The email is to be provided to the husband within seven (7) days of this ruling.

### **CONCLUSION**

[29.] In exercising my discretion, the court orders:

1. That the wife having succeeded in defending the application for discovery of the husband on all of the issues, except for disclosure of the document from King's College shall have Eighty-Five (85) % of her costs to be taxed if not agreed.
2. That the husband having succeeded on the application for discovery of the King's College document shall have Fifteen (15) % of his costs to be taxed if not agreed.

Dated the 15<sup>th</sup> day of May, A.D., 2025



The Honourable Madam Justice C.V. Hope Strachan  
Justice of the Supreme Court of the Commonwealth of The Bahamas