REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2008-00027

BETWEEN

SATTEE MAHASE

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

DECISION

Before the Honourable Madam Justice Pemberton

Appearances:

For the Claimant: Mr K. Sagar and Ms T.Lutchman

For the Defendant: Mr R. Singh

[1] **INTRODUCTION**

Sometime in September 2006, Ms Sattee Mahase acquired a pre-owned vehicle. Soon persons unknown relieved her of it. This was in March 2007. In April of that year, she was called by the Police to identify whether a car which they had recorded was hers. She identified the car and it was returned to her. This return was not as timely as it could have been. In fact twelve (12) months elapsed

before this event. It was during that time that the claim was filed for *interalia* damages for negligence and/or trespass and/or detinue and/or conversion.

[2] Happily, Ms Mahase abandoned much of her claim once the car was returned in May 2008, after the first Case Management Conference was held. I permitted her to change her claim, consonant with Part 20.1(3), since there was a change in circumstances arising after the first Case Management Conference making it necessary for her to change or amend her claim[1]. Judgment was entered on 30th July 2008 and the matter proceeded to assessment of Damages pursuant to the Amended Statement of Case.

[3] That Amended Claim contained a prayer for Special Damages particularized as follows:

1.	Depreciation	-	$20,000.00
2.	Loss of Use from April 2007 to date at $80.00 per day	-	
3.	Cost of mechanical Repair to date	-	$ 7,602.80
4.	Cost of painting (Labour)	-	$ 7,500.00
5.	Cost of painting (Material)	-	$ 3,596.50
6.	Adjuster's Report	-	$ 299.00.

[4] Bearing in mind the principles regarding assessment of damages and Costs, namely – proof of damage, the onus being on the Claimant, the fact that the damage alleged must flow from the tortuous act, in this case the unreasonable length of detention of the vehicle, the duty of care on the police to reasonably secure the item seized, the breach of the duty of care to secure the item and Ms Mahase's duty to mitigate her damage. I came to the conclusion that Ms Mahase had proved her claim in damages.

[1] See Warner JA in **SEEBALACK v BERNARD** (Personal Representative of the Estate of Regan Bernard (deceased) Civil Appeal No. 261 of 2008 when the learned Justice of Appeal stated that there was no difference in the words "amend" or "change" when interpreting the effect of Part 20.1(3).

[5] I shall proceed to set out my findings:

Part Name	Net Value after discount	Reason for Replacement
Cylinder & Key Set, Lock	$773.25	Breakage – therefore not recoverable
Insulator	$ 39.78	Prolonged Inactivity – recoverable
Thermostat	$173.81	Prolonged Inactivity – recoverable
Belt, P/S NETT Item	$328.31	Prolonged Inactivity – recoverable
Belt	$173.81	Prolonged Inactivity – recoverable
Battery, Miatsu 13 Plate	$892.10	Prolonged Inactivity – recoverable
Handle FR R/H Door Outlet	$322.50	Breakage – not recoverable
To make One (1) Total new pair of Registration Plates	$250.00	Non-Present – not recoverable

[6] **ORDER**

1. That the Defendant do pay to the Claimant damages assessed in the sum of $26,794.00 together with interest at that rate of 8% per annum from 1st August 2007 until 2nd May 2008; then at the rate of 6% per annum from 3rd May 2008 until 9th October 2008 and thereafter at the rate of 12% per annum until payment;
2. That the Defendant do pay to the Claimant costs prescribed in the amount of $4,822.92.

[7] **BACKGROUND**

Sometime in September 2006, Ms Sattee Mahase became the owner of a motor vehicle purchased from a car Sales Company in Port of Spain, Trinidad. Ms Mahase had the use of this motor vehicle for six (6) months before she was relieved of it by persons unknown to her. She informed the Police of this event. This was on 4th March 2007.

[8] About one month after in April 2007, Police Officers informed Ms Mahase that a motor vehicle of similar description was recovered. Ms Mahase positively identified the recovered motor vehicle as her own.

[9] Thereafter began a torturous process for the vehicle to be returned to Ms Mahase. Ms Mahase filed this action on 4th April 2008 and amended her claim on 3rd October 2008 in which she claimed under a number of heads, including damages for negligence and/or trespass and/or detinue and/or conversion.

Ms Mahase eventually settled on recovery of special damages as follows:-

1.	Depreciation on motor vehicle	-	$20,000.00
2.	Loss of use from April 2007 to date at $80.00 per day	-	-
3.	Cost of mechanical repairs to date	-	$ 7,602.80
4.	Cost of painting (Labour)	-	$ 7,500.00
5.	Cost of painting (Material)	-	$ 3,596.50
6.	Adjuster's Report	-	$ 299.99

[10] The Attorney General, as I said before did not defend either the liability claim or the quantum of damages claimed.

[11] Ms Mahase's vehicle was returned to her on 5th May 2008.

[12] The matter first came to my attention on 7th April 2008 at which time the court expressed certain views that the matter be settled by the parties. This seemed to be the general tenor since the Attorney General did not defend the action either on the basis of liability or quantum. As time progressed the possibility of settlement receded. On 30th July 2008 Judgment in default of appearance was granted against the Defendant with damages to be assessed.

Affidavits were to be filed and exchanged by the parties on or before 7th November 2008. Ms Mahase filed her affidavits in support of the assessment. The Attorney General filed none.

[13] Pursuant to Part 20.1(3) leave was granted to file an amended Statement of Case[2]. The matter proceeded on 25th November 2008 on the basis of the Witness Statement as filed and cross examination of the witnesses.

[14] Even though the Defendant put in no defence and led no evidence on the issue of quantum of damages, I take issue with Mr Sagar's contention that the Claimant's evidence was "unchallenged and ought to be accepted by the Court". Such a situation will only arise if the Defendant elected **not** to cross-examine. The duty of the court in this instance remains to assess the evidence in chief and that obtained in cross-examination, weight them, then draw conclusions. If the conclusions drawn established the Claimant's case on a balance of probabilities, then the Claimant is successful. Therefore whilst the Defendant's choice not to defend by putting in a Defence or lead evidence on the issue of quantum was detrimental, it was not fatal. It is against that backdrop that I propose to examine the evidence and consider whether the Claimant has made out her case.

[15] I shall examine the evidence in chief and cross-examination under the heads:

Cost of Repairs;
Cost of Painting;
Loss of use;
Depreciation.

[16] **COST OF REPAIRS**

Ms Mahase's evidence was that at the time of examination, which I accept is that the time of her identification in April 2007, the condition of the car was as follows:

[2] See fn 1 op.cit.

- upholstery in tact save for the stairs which pre-dated the theft;
- dashboard, radio, outside area and engine compartment remained unchanged;
- no crack on windscreen;
- engine started smoothly;
- chassis number tampered with;
- number plate changed.

The Adjuster, Mr Chai who visited the motor vehicle testified that at the time of his inspection he made certain observations to wit, that with engine and chassis numbers were tampered with and there was a crack on the windscreen.

[17] This was supported by Mr Chanardip. Mr Singh's cross-examination however was directed at the reasons for the replacement of the parts. In his Written Submissions, he tabulated the parts replaced, net value after discount and the reasons for replacement as per exhibit "B" of Mr Chanardip's testimony.

[18] **ANALYSIS AND CONCLUSION**

Ms Mahase informed that she paid Diamond Motors the sum of $7,602.80 for repairs effected on her car and this is supported by an invoice attached and marked "B" at paragraph 25 of her Witness Statement. No objection was raised on to these documents and Attorney at law for the Defendant indicated he had no objection. Again the said Attorney cross examined extensively on this document. Mr Chanardip who is the manager of the Service Department was cross examined by Mr Singh as to what parts were required for service of the vehicle as distinct from those which were replaced/repaired as a result of the detention. This witness pointed out certain parts which were required to be replaced at the regular service of the vehicle and it seems that the Defendant is claiming that these items should be disallowed. What must be noted here is that the vehicle was in the custody of the Defendant since April 2007, and was sent to Diamond Motors on the 28th May 2008. It is not clear from the cross examination of Mr Chanardip whether the parts which were to be replaced because of a service which is due, would at 28th

May 2008 needed to be replaced because of the detention/inactivity of the vehicle. In other words the cross examination only established that normally when a service is due these parts will be changed, and not whether in this particular case they had to be changed because of the inactivity of the vehicle. Ms Mahase informed that her repairs cost her $7,602.80.

[19] Mr Sagar's reading of the cross-examination of Mr Chanardip was "that it was not clear whether … because of a service … need(ed) to be replaced, because … in other words … entirety.

[20] I beg to differ. The door to that stream of thought was opened on cross-examination. It was up to Mr Sagar to re-examine on that issue to swing the pendulum in his client's favour. The onus of proof lay on the Claimant to establish her case on a balance of probability. It never shifted.

[21] In keeping with the established principle that a "Claimant is entitled to recover damages to the extent to which the value of the chattel has been reduced "through the Defendant's fault, (which in this case is established by the length of detention of the chattel[3], albeit by the Defendant not responding to the filing of the Claim). I agree that that damage visited upon the chattel for which the Claimant can be compensated must be limited to those resulting from the detention.

[22] I adopt Mr Singh's table as a true representation of the evidence. I now reproduce that table together with my findings

[3] This court was not called upon to determine whether the detention was lawful or not since the judgment was obtained through the Defendant's default (non-appearance) an administrative act.

Part Name	Net Value after discount	Reason for Replacement
Cylinder & Key Set, Lock	$773.25	Breakage – therefore not recoverable
Insulator	$ 39.78	Prolonged Inactivity – recoverable
Thermostat	$173.81	Prolonged Inactivity – recoverable
Belt, P/S NETT Item	$328.31	Prolonged Inactivity – recoverable
Belt	$173.81	Prolonged Inactivity – recoverable
Battery, Miatsu 13 Plate	$892.10	Prolonged Inactivity – recoverable
Handle FR R/H Door Outlet	$322.50	Breakage – not recoverable
To make One (1) Total new pair of Registration Plates	$250.00	Non-Present – not recoverable

Thus the amounts claimed as a result of replacement and repair of the Insulator, Thermostat, Belt P/S NETT Item, Belt and Battery amount to $1,607.81 plus 15% VAT totalling to $1,848.98. There was no evidence led with respect to the replacement cost of windscreen so no award can be made under that head.

[23] **LABOUR COSTS**

The cost claimed with the labour expended on the vehicle was $2,095.37. The entire legard reads:

Do estimate on Repairs and Belts …	-	$1,776.62
Check and Replace Disc Pads	-	$ 131.75
Service Transmission	-	$ 185.00

This was not addressed by Mr Sagar. Mr Singh submitted that the Defendant ought not to bear the cost of the items to check and replace disc pads and servicing the transmission as they form part of the normal service.

[24] **ANALYSIS AND CONCLUSION**

To my mind Ms Mahase has not provided the court with evidence to show that these labour costs would not have been incurred but for the detention. I therefore disallow those items. The allowed costs are therefore $1,778.62 plus 15% VAT, amounting to $2,045.44.

[25] **COST OF PAINTING**

LABOUR

There were two witnesses called in this area, Mr Jagroop, an experienced motor vehicle Straightener/Painter and Mr Derrick Chai, Loss Adjuster. Ms Mahase claimed the sums of $7,500.00 for labour and $3,596.50 for materials. These sums were substantiated by Mr Barath Jagroop. His cross-examination elicited that the body paint, was badly faded and this would have resulted from prolonged exposure. He also attended to the firewall area, an internal area of the vehicle. According to Mr Chai, Ms Mahase's other witness, this attention was due to the use of chemicals associated with tampering with the chassis number stamped on vehicles. This ties in with Ms Mahase's own observation that the chassis number had been tampered with.

[26] **ANALYSIS AND CONCLUSION**

Clearly those costs cannot be associated with the Defendant's holding of the vehicle and must be extricated from the amounts claimed. I therefore accept Mr Jagroop's breakdown of $2,500.00 for treating and priming the firewall. I would therefore allow the sum of $5,000.00 under this head. The total sum allowed would therefore be **$5,000.00** plus 15% VAT amounting to **$5,750.00.**

[27] **MATERIALS**

With respect to the **materials**, it is accepted that the car was painted in a different colour. The duty placed on the Defendant is to repair the chattel to bring it as near as possible to the condition it was in pre-tort. I accept Mr Jagroop's evidence that the sum of $596.00 represents the change of colour. I would

therefore allow **$3,000.50** plus 15% VAT - **$3,450.58** as the amount assessed under this head.

[28] **LOSS OF USE**

Mr Singh's witness, Mr Nazule testified that he provided hired car services to Ms Mahase and her family during the time that she did not have the use of her car. He did this over a prolonged period and charged her $80.00 per day. Mr Singh took no real issue with the provision of the service or the cost per day. Once again Mr Sagar concentrated on the Defendant's not defending or contesting Ms Mahase's or Mr Nazule's evidence. This he says disentitles Mr Singh from raising the issue of mitigation. He relies on **GEEST** plc v **LANSIQUOT**, a Privy Council decision to support his position. By Mr Sagar's calculation "from middle of April 2007 to April 2008" a total of 155 days at $80.00 per day entitles Ms Mahase to a sum of $12,400.00 under this head.

[29] Mr Singh relies on the general duty of Claimants to mitigate their damage. From there, he brought to attention what the court should be guided by in determining a reasonable period to allow for loss of use, taking into account the Claimant's duty to mitigate. Mr Singh contended that the Claimant's explanation of her claim highlighted that she indeed took steps to mitigate her losses but not for the entire period of her loss, over which her duty extends. Mr Singh's stance was that whilst a sum should be allowed for loss of use, the court ought to take into account whether Ms Mahase satisfied her duty to mitigate and whether there should be an allowance in this case for the Defendant to conduct investigations.

[30] **ANALYSIS AND CONCLUSION**

The fact of no defence by the Defendant does not gainsay Ms Mahase's duty to mitigate her loss. That duty arises as soon as the tort is committed. Thus one has to determine when this Defendant's responsibility for her loss will arise. This will

have to be extrapolated by the court on the evidence as presented as part of its fact finding mission.

[31] Mr Singh proposed that the time should be counted from August 2007 taking into account the period of unlawful detention, which he proposes as sixty days giving due regard to Ms Mahase's duty to mitigate and the steps taken to mitigate her loss. Mr Singh accepts that the sum paid daily at the rate of $80.00 was reasonable. He therefore submits that the award should be $4,800.00.

[32] The **LANSIQUOT** case has to be distinguished in that in this case the Defendant accepts that Ms Mahase took steps to mitigate her loss. The issue to be decided therefore so how is that to be factored into the assessment exercise.

[33] The evidence is that the Defendant kept Ms Mahase's car from April 2007 until 5th May 2008, when the car was returned to her. There and then their responsibility ended. It is not clear from the evidence when in April 2007 the car was recovered. Ms Mahase's evidence was that "by the first week" she got word that the car was recovered and a day or two after she and her husband determined that the recovered vehicle was hers. I shall therefore accept that the relevant date was on or around 15th April 2007.

[34] With respect to the number of days, I accept that I would be concerned with the period of unlawful detention together with the duty to mitigate and how well that duty was reflected on the evidence.

[35] Ms Mahase claimed loss of use for 170 days in her Affidavit. Mr Sagar submitted that I should use 155 days as my multiplicand. Mr Singh suggested 60 days.

[36] Given the fact that the police kept the vehicle with no explanation as to the reason for their detention over and above a reasonable period of investigation and the fact that Ms Mahase took steps to mitigate her loss, by employing other means of

transport and making several requests for the return of her vehicle, I am minded, to allow Ms Mahase the sum of $8,400.00 being 3½ months or 105 days at the rate of $80.00 per day[4].

[37] **DEPRECIATION**

Mr Sagar submitted that Ms Mahase should obtain the sum of $20,000.00 under this head. He bases this on Mr Chai's testimony which revealed:

(1) Prior to being stolen the motor vehicle's value was $85,000.00;

(2) Engine number and corrosion and faded paint job plummeted the value to $76,500.00 therefore recoverable loss $8,500.00 since this is to be attributed to wrongful detention by the Defendant;

(3) Exposure to the elements $5,000.00. Therefore recoverable amount $13,500.00;

(4) Stigma attached to stolen vehicles $10,000.00, amount $23,500.00.

These factors justify the claim which the court should allow.

[38] Mr Singh took another route and looked at Mr Chai's testimony under cross-examination which yielded that:

(1)	Pre loss accident value	-	$76,500.00
(2)	Salvage value at time of recovery	-	$65,000.00
(3)	Estimated value "as is"	-	$60,000.00

Mr Chai also stated that the motor vehicle, once repairs and repainting were effected, should regain its salvage value of $60,000.00. Ms Mahase therefore should be returned to the value of the car upon recovery should there have been a timely handing over by the police. He concluded that the Defendant is not to be saddled with the amount claimed for loss of value due to the stigma attached to stolen vehicles. Mr Singh recognizes the principle in **VOADEN v CHAMPION**[5] which states that a Plaintiff must be put as close as possible in the position he enjoyed prior to damage, even if he is ultimately better off than previously.

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[4] **ZYHD MOHAMMED**
[5] [2002] 1 LL Rep. 623

[39] One cannot but come to the inescapable conclusion that had the Defendant made a timely return of this vehicle to Ms Mahase then the expenses consequent upon the paint and the repairs associated with detention fading would not have been incurred. What is more important here, is the effect of these on the value of the vehicle once it was returned. I agree that the Defendant cannot be made responsible for the stigma attached to stolen cars. However, must they be exculpated by the finding that the car had detoriated in the normal course of events? I think the answer is No. I accept Mr Chai's figure that exposure to the elements had a detrimental effect on the car to the value of $5,000.00. The fact is that there is nothing to suggest that Ms Mahase intended to repaint her car had it been stolen. The reasonable inference to draw is that she would not have done so. I would therefore allow that figure.

[40] When all of the other evidence is examined, I do not see how the Claimant can recover any other sum.

[41] **ADJUSTER'S REPORT**

Neither Counsel spent time in discussing this head. I think that it is a sum which is recoverable. I therefore allow the sum of $299.00 as claimed.

CONCLUSION AND ORDER:

For the reasons stated above, I have concluded therefore that the damages recoverable by Ms Mahase from the Attorney General are as follows:

HEAD		**EX VAT**	**15% VAT**	**TOTAL**
COST OF REPAIRS	a. Material b. Labour	$1,607.81 $1,778.62	$241.17 $266.82	$1,848.98 $2,045.44
COST OF PAINTING	a. Material b. Labour	$3,000.50 $5,000.00	$450.00 $750.00	$3,450.57 $5,750.00
LOSS OF USE		$8,400.00		$8,400.00
DEPRECIATION		$5,000.00		$5,000.00
ADJUSTER'S REPORT				$ 299.00
TOTAL				$26,794.00

[42] **INTEREST**

Interest should be awarded at the rate of 8% per annum from August 1st 2007 until 2nd May 2008, then at the rate of 6% from 3rd May 2008 until the date of judgment being 9th October 2008 and thereafter at the rate of 12% per annum from the date of judgment until payment.

[43] **COSTS**

Costs are to be calculated on the Prescribed Costs basis. The value of the claim to the Claimant has been determined at $26,794.00. The scale of Prescribed Costs determines the costs on this amount $8,038.20 since a default judgment was entered and assessment done the costs prescribed are allowed at 60% of that figure, being $4,822.92.

ORDER:

1. That the Defendant do pay to the Claimant damages assessed in the sum of $26,794.00 together with interest at that rate of 8% per annum from 1st August 2007 until 2nd May 2008; then at the rate of 6% per annum from 3rd May 2008 until 9th October 2008 and thereafter at the rate of 12% per annum until payment;
2. That the Defendant do pay to the Claimant costs prescribed in the amount of $4,822.92.

Dated this 6th day of May 2009.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE