

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV2016-02807

BETWEEN

**MAROUF PVC PROFESSIONAL CONSTRUCTION LIMITED**

Claimant

AND

**MAJILLA MARIA MAHABIR**

Defendant

**BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER**

**APPEARANCES:**

Ms. Earla Nyack, Attorney-at-law for the Claimant

Mr. Arif Rahman, Attorney-at-law for the Defendant

**REASONS**

***Introduction***

1. On the 16<sup>th</sup> May, 2017, I delivered a *viva voce* ruling setting aside judgment, which had been entered against the Defendant on the 18<sup>th</sup> October, 2016, in default of defence. My reasons for so doing are set out hereunder.

### ***Procedural History***

2. These proceedings were instituted by Claim Form and Statement of Case filed on the 12<sup>th</sup> August, 2016. The Claimant herein sought the following relief:

a. *“the sum of One Million and Thirty Eight Thousand Nine Hundred and Forty Dollars (\$1,036,870.00) inclusive of costs and fees being the balance of money due and owing by the Defendant to the Claimant which sum is comprised as follows*

<i>Amount of debt</i>	<i>\$1,036,870.00</i>
<i>Court Fees</i>	<i>\$ 70.00</i>
<i>Attorney’s fixed costs on issue</i>	<i>\$ 2,000.00</i>

b. *interest at the statutory rate on such sums as found due to the Claimant*  
c. *Such further and/or other relief that seems just to the Court.”*

3. By Notices of Application filed on the 12<sup>th</sup> and 16<sup>th</sup> August, 2016, the Claimant sought interim relief against the Defendant. On the 18<sup>th</sup> August, 2016, Justice Honeywell dismissed both applications.
4. The Defendant entered an appearance on the 23<sup>rd</sup> August, 2016, but the Defendant failed to file a defence.
5. On the 18<sup>th</sup> October, 2016, the Claimant filed a notice of application for an order of the Court for judgment in default of defence, pursuant to Part 12.4 ***Civil Proceedings Rules (CPR)***<sup>1</sup> in the sum of One Million, Thirty-nine Thousand, Six Hundred and Thirty Dollars (\$1, 039,630.00).

---

<sup>1</sup> Civil Proceedings Rules 1998 amended

6. On the 28<sup>th</sup> October, 2016, the Claimant filed a request for writ of execution (fi fa) for the payment of the judgment debt and by Notice of Application filed on the 14<sup>th</sup> December, 2011, the Claimant sought an order, directing the Garnishee, RBC Royal Bank (Trinidad and Tobago) to pay to the Claimant the sum owed to the Defendant or the amount needed to discharge the sum owed.
7. In the interim, the Defendant filed a notice of change of attorney-at-law and appointed Mr. Arif Rahman to represent her. Mr. Rahman filed a Notice of Application on the said 13<sup>th</sup> February, 2017, seeking an order to set aside the judgment in default of defence which was entered on the 18<sup>th</sup> October, 2016. The Defendant also applied for an order that time be extended for the filing of a Defence.
8. The Notice of Application was supported by the Affidavit sworn by the Defendant, and filed herein on the 13<sup>th</sup> February, 2017.
9. On the 23<sup>rd</sup> February, 2017, the Defendant filed another Notice of Application, by which the Defendant sought an urgent order for a mandatory injunction against the Claimant to return the goods/assets levied upon at the Defendant's residence. The Defendant also requested an order for an interim injunction to restrain the Claimant from *inter alia* taking any further steps to execute the writ of execution filed.
10. On the 3<sup>rd</sup> March, 2017, the Claimant agreed to ask the Registrar of the Supreme Court to delay the sale of the subject goods until the hearing and determination of the Notices of Application. The Court directed the parties to file written submissions on the application to set aside default judgment.

## ***Facts***

11. The facts, which were relevant to the Defendant's application to set aside judgment in default of defence, were to be found in the Defendant's affidavit<sup>2</sup>. There was no opposing affidavit. Accordingly, I accepted the evidence of the Defendant, as unchallenged.
12. The uncontroverted facts in this matter began in August, 2016, when the Claimant filed these proceedings and applied for interim relief. The application for interim relief was heard and dismissed by the Honourable Justice Honeywell<sup>3</sup>.
13. It was the unchallenged evidence of the Defendant that she was told by her attorney-at-law, Ms. Shelly-Ann Rawlins that there was no further hearing.
14. On the 18<sup>th</sup> October, 2016, the Claimant obtained a judgment in default of defence against the Defendant and moved the Court, on the 14<sup>th</sup> December, 2016, for a garnishee order in respect of the funds held by the Defendant at RBC Royal Bank (Trinidad and Tobago). The garnishee order was made on the 5<sup>th</sup> January, 2017, prohibiting the garnishee from paying to the Defendant any money due or owing by the Garnishee to the Defendant. The Defendant was not present at the hearing on the 5<sup>th</sup> January, 2017 and she was unrepresented. The hearing of the application for the final order was fixed for the 16<sup>th</sup> February, 2017.
15. In the interim, the Defendant, unaware of any order which had been made against her, visited the Chaguanas Branch of RBC in order to access her funds. It was at that time that the Defendant became aware that her account was frozen.

---

<sup>2</sup> Affidavit of Majilla Maria Mahabir filed on the 13<sup>th</sup> February, 2017

<sup>3</sup> See paragraph 7 of the affidavit filed on behalf of the Defendant on the 13<sup>th</sup> February, 2017.

16. On the advice of her assistant Kevin Bissoon, the Defendant applied for office copies of the Court proceedings. On the 16<sup>th</sup> January, 2017, the Defendant obtained the office copies and for the first time became aware that a default judgment had been entered against her.<sup>4</sup>
17. The Defendant's un-contradicted narrative continues with her approach to the bank, on the 16<sup>th</sup> January, 2017. On this very day, she received office copies from the Court office. On this occasion, she was informed by an officer of the bank that she could not access her funds and that there was another court date.
18. On the following day, 17<sup>th</sup> January, 2017, the Defendant sought legal advice from her current attorney-at-law. Thereafter, there was a period of inactivity of twenty-seven (27) days. On the 13<sup>th</sup> February, 2017, Mr. Rahman filed an application to set aside judgment in default of defence, on behalf of the Defendant.
19. At paragraph 14 of her affidavit of the 13<sup>th</sup> February, 2017, the Defendant explains her delay. It was her evidence that she was only able to raise the retainer fee for her lawyer on the 9<sup>th</sup> February, 2017, since her account was frozen. The Defendant deposed that upon obtaining the necessary funding, she promptly attended her attorney's office and paid him the retainer. On the 13<sup>th</sup> October, 2017, her attorney-at-law filed the application to set aside judgment in default of defence.
20. The Defendant testified that she believed that she had a reasonable prospect of successfully defending her claim. In support of this statement, the Defendant exhibited a draft defence.<sup>5</sup>

---

<sup>4</sup> See paragraph 11 of the Defendant's affidavit, filed herein on the 13<sup>th</sup> February, 2017

<sup>5</sup> Draft Defence exhibited as "M.M.5" to the Defendant's affidavit, filed herein on the 13<sup>th</sup> February, 2017

## ***Law and Discussion***

21. Part 13.3 (1) **CPR**<sup>6</sup> identifies the circumstances in which a Court is empowered to exercise its discretion to set aside a default judgment. Part 13.3(1) provides as follows:

*“The court may set aside a judgment entered under  
Part 12 if—*

- (a) the defendant has a realistic prospect of success in the claim; and*
- (b) the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.”*

22. A Defendant who seeks to have a default judgment set aside under Part 13.3(1) **CPR**<sup>7</sup> is required to act as quickly as possible in filing his application to set aside judgment. The Defendant is also required to provide an explanation as to any delay, which separated her discovery of the default judgment and her eventual filing of an application to set aside judgment. In *Nizamodeen Shah v. Lennox Barrow*<sup>8</sup>, Mendonça JA identified two categories of cases. In the first category, one finds cases where the Court can simply look at the facts and conclude that the Defendant acted as soon as reasonably practicable. In other cases, the Defendant has an obligation to put some material before the Court on which the Court can come to the conclusion that he has acted as soon as reasonably practicable<sup>9</sup>. At paragraph 12 of his judgment, the learned Mendonça JA had this to say:

*“There are no doubt cases where the application to set aside the judgment is made  
a very short time after the judgment is entered so that, on the face of it, the Court*

---

<sup>6</sup> Civil Proceedings Rules 1998 as amended

<sup>7</sup> Ibid

<sup>8</sup> *Nizamodeen Shah v. Lennox Barrow* C.A. Civ. 209 of 2008

<sup>9</sup> *Nizamodeen Shah v. Lennox Barrow* C.A. Civ. 209 of 2008 at paragraph 12

*can say that the defendant acted as soon as reasonably practicable. In this case however the application was made at least two months after the date when the Appellant found out that judgment was taken up against him. This delay does not fall into that category of case where you can simply look at it and say that the Appellant acted as soon as reasonably practicable after finding out that the judgment was entered. In those circumstances what then is the obligation of the Appellant. The obligation to put some material before the Court on which the Court can come to the conclusion that he has acted as soon as reasonably practicable.”*

23. I considered whether the Defendant had satisfied the requirement of Part 13.3(1) **CPR**<sup>10</sup> to act as soon as reasonably practicable in seeking to set aside a default judgment, and in particular whether the Defendant provided an explanation for her delay in applying to set aside the default judgment. It was her uncontroverted evidence that she became aware of the judgment in default of defence only on the 16<sup>th</sup> January, 2017, upon obtaining the office copy of the Court’s file.
24. Having discovered on the 16<sup>th</sup> January, 2017, that judgment had been entered against her, the Defendant acted expeditiously in seeking the advice of Mr. Arif Rahman, attorney-at-law, on the following day, 17<sup>th</sup> January, 2017. According to the Defendant’s evidence Mr. Rahman had not been the Defendant’s attorney-at-law, she retained him only after she discovered the default judgment.
25. Having sought the advice of Mr. Rahman on the 17<sup>th</sup> January, 2017, the Defendant by her newly retained attorney-at-law, filed her application to set aside judgment on the 13<sup>th</sup>

---

<sup>10</sup> Civil Proceedings Rules 1998 as amended

February, 2017, some twenty seven (27) days later. The Defendant however provides an explanation for her delay.

26. The Defendant testified that she was unable to access funds because her account had been frozen, pursuant to a Court order in these proceedings. For this reason, she could not expeditiously provide the retainer for Mr. Rahman to act on her behalf. On the 9<sup>th</sup> February, 2017, the Defendant properly retained Mr. Rahman. The 9<sup>th</sup> February, 2017, was a Thursday. The Notice of Application was filed on the following Monday, that is to say, on the 13<sup>th</sup> February, 2017.
27. The Claimant has not contradicted the explanation of the Defendant, but has tested it by referring to the Defendant's affidavit of the 23<sup>rd</sup> February, 2017. At paragraph 13 of her submissions, Ms. Nyack questioned the Defendant's evidence that jewellery worth One Hundred and Fifty Thousand Trinidad and Tobago Dollars (\$150,000.00 TT) and Eight Thousand, US dollars in the sum of Two Hundred and Thirty-five Dollars (\$8,235.00 USD) had been levied upon at the Claimant's premises<sup>11</sup>. Learned attorney-at-law, Ms. Nyack questioned rhetorically whether the Defendant had the means to retain her attorney-at-law before the 9<sup>th</sup> February, 2017.
28. I considered Ms. Nyack's argument and observed firstly that Ms. Nyack indicated that the Claimant intended to contradict the evidence at a later stage of these proceedings.<sup>12</sup>
29. It was my view that it was uncertain whether the items identified, that is to say, jewellery and the foreign currency were in fact levied upon at all. Even if they had been seized from the Claimant's house, there is nothing to suggest that they belonged to the Claimant or that

---

<sup>11</sup> See the written submissions filed on behalf of the Claimant on the 17<sup>th</sup> March, 2017

<sup>12</sup> Ibid



she had the right to convert either the jewellery or the foreign currency into the funds required to pay her attorney-at-law.

30. I would have found it useful to have been informed as to the source from which the Defendant eventually located funds for the purpose of retaining Mr. Rahman.
31. However, the gap in this information did not in my view, compromise the explanation offered by the Defendant. I accepted her explanation and was of the view that the Defendant acted as soon as reasonably practicable in her peculiar circumstances. It was also my view that Mr. Rahman acted as quickly as can be expected between the 9<sup>th</sup> February, 2017, when he was retained and the 13<sup>th</sup> February, 2017, when the Notice of Application was filed.

### ***A Realistic Prospect of Success***

32. I turned to consider the second limb of Part 13.3(1) ***CPR***<sup>13</sup>, that is to say, whether the Defendant had a realistic prospect of success in the claim.
33. The Defendant who seeks to establish that she has a reasonable prospect of succeeding in the claim must prove that she has a defence which is more than merely arguable. The Court is neither required however to conduct a microscopic assessment of the evidence nor to conduct a mini trial<sup>14</sup>.
34. The Defendant is also required to provide an affidavit of merits, supplying the Court with evidence in support of both limbs of Part 13.3(1) ***CPR***<sup>15</sup>. The defence must not be a bald denial.<sup>16</sup>

---

<sup>13</sup> Civil Proceedings Rules 1998 as amended

<sup>14</sup> See the words of Moosai J (as he then was) in Knolly John v. Brenda Mahabir HCA #866 of 2005

<sup>15</sup> Civil Proceedings Rules 1998 as amended

<sup>16</sup> See the words of Jamadar JA in Ramkissoon v. Bhagwansingh S-163 of 2013

35. In determining whether a Defendant has a reasonable prospect of success for the purpose of Part 13.3 (1) **CPR**<sup>17</sup>, the Court is required to apply the same test, which is applicable in applications for summary judgment<sup>18</sup>. There is one difference however. In applications for summary judgment, the Claimant carries the burden of proving an absence of a realistic prospect of success. Whereas in applications to set aside default judgments, the Defendant carries the burden of proving that she has a realistic prospect of success. See ***Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd's Rep. 221** a decision referred to and relied upon by the Claimant.
36. In ***Copyright Music Organisation of Trinidad and Tobago v. Columbus Communications Trinidad Limited Trading as "FLOW"*** CV2009-04722, the Honourable Justice Devindra Rampersad, in the course of determining an application for summary judgment under the provisions of Rule 15 of the **CPR**<sup>19</sup>, as amended applied the test which was laid down by the House of Lords in ***Three Rivers District Council and others v. Bank of England No.3* [2001] UKHL 16**. In that case, Lord Hope considered the meaning of “no realistic prospect of succeeding”. He had this to say:
- “The important words are ‘no real prospect of succeeding’. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a discretionary power i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party If he concludes that there is*

---

<sup>17</sup> Civil Proceedings Rules 1998 as amended

<sup>18</sup> Rule 15.2 Civil Proceedings Rules 1998 as amended

<sup>19</sup> At paragraph 1 of Justice Rampersad's judgment

*‘no real prospect’, he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made ‘findings’ of fact. He did not so. Under RSC Ord 14 as under CPRT Pt 24, the judge is making an assessment not conducting a trial or a fact-finding exercise...’’<sup>20</sup>*

37. I examined the draft defence, which was exhibited to the Defendant’s affidavit in support of her assertion that she had a realistic prospect of success.
38. The draft defence was designed to answer allegations which were contained in the Claimant’s Statement of Case. The Claimant alleged that the Defendant gave herself out to be a real estate agent and purported to sell him two parcels of land. The Claimant alleged that the Defendant received several payments, but that the Defendant has failed to ensure that the lands were conveyed.
39. The Claimant also claimed payment for labour and material supplied to the Defendant for renovations at a house in St. Augustine and for repayment of a loan.
40. The draft defence, while denying allegations which were made by the Claimant, was much more than a bald denial. The draft defence asserts that the Defendant is a self-employed land developer and consultant and has never claimed to be a real estate agent.<sup>21</sup>
41. The draft defence contends that the Defendant had previously been a business partner of the Claimant and that the parties had entered into an oral agreement for which the Claimant owed the Defendant sums of money due as commissions. The Defendant alleges further that

---

<sup>20</sup> See page 567, paragraph 158 (f-h) of the judgment in *Three Rivers District Council and others v. Bank of England No.3* [2001] UKHL 16

<sup>21</sup> See paragraph 2 of the draft defence exhibited as “M.M.5” to the affidavit of the Defendant filed on the 13<sup>th</sup> February, 2017

she introduced the Claimant to a potential vendor of the land, and that an agreement for sale was entered into by the Claimant and the vendor.

42. The Defendant also alleged that she had rejected the Claimant's advances and that was his motivation for instituting these proceedings<sup>22</sup>. This allegation, in my view required an investigation by cross examination.
43. Having examined the pleadings, it was my view that the Defendant presented an arguable defence to the claim that she had wrongly received sums of money from the Claimant under the guise of being a real estate agent. The Defendant also explained why the agreement for sale was never completed.<sup>23</sup>
44. Accordingly, it was my assessment that the Defendant, by her draft defence had presented a case which was more than arguable and I was satisfied that she had a realistic prospect of success.
45. I therefore set aside judgment and extended time for the filing of the Defence.

Dated this 29<sup>th</sup> day of June, 2017.

M. Dean-Armorer  
Judge

---

<sup>22</sup> See para 16 of the draft defence exhibited as "M.M.5" to the affidavit of the Defendant filed on the 13<sup>th</sup> February, 2017

<sup>23</sup> See paragraph 8 of the draft defence exhibited as "M.M.5" to the affidavit of the Defendant filed on the 13<sup>th</sup> February, 2017