

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2007-02000

BETWEEN

**FABIAN LA ROCHE
ROGER GREENE
ANTHONY ANDREWS**

Claimant/s

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before The Honourable Mr. Justice des Vignes

Appearances:

Mr. Gerald Ramdeen for the Claimant/s

Ms. M. Smith
Instructed by Ms. R. Hosein and Mr. V. Maharaj
for the Defendant

REASONS

1. By Notice of application filed on the 8th December 2009, the Defendant applied for an extension of time for the filing and service of further witness

Statements and that the Defendant be relieved from any sanction and for costs to be costs in the cause.

2. The grounds of the application were as follows:
 - (i) The identity of the person capable of giving instructions in this matter only became known subsequent to the last date of hearing;
 - (ii) The trial dates set by the Court will not be prejudiced by any extension of time for the filing of the further witness statements.
3. The application was supported by the affidavit of Vinda Maharaj, Attorney-at-Law, also filed on the 8th December 2009.
4. On the 9th December 2009, I heard this application and dismissed same with costs to be paid to the Claimant, fit for Counsel and ordered that the assessment of the costs of the application be deferred to the trial.

History of proceedings

5. A brief history of this matter in so far as it is relevant to the filing of witness statements is important to an understanding of my reasons for dismissing this application:
 - (a) On the 13th June 2007, the Claimants filed a Claim Form and Statement of Case and on the 28th September 2007 the Defendant served a Defence. The claim arose out of an incident at the Golden Grove Prison on the 11th November 2006 in which the Claimants alleged that they were unlawfully attacked, assaulted and battered by prison officers and members of the Police service and the Regiment.
 - (b) On the 3rd October 2008, the parties appeared before Mr. Justice Best, on the fourth hearing of a case management conference. The Claimant and the Defendant informed the Court that they each had four

witnesses. Justice Best ordered the parties to file and serve their witness statements in affidavit form on or before the 26th January 2009. He also ordered the parties to file and serve statements of issues and law on or before the 26th January 2009 and the trial was fixed for the 6th and 9th March 2009.

- (c) On the 22nd January 2009, the Defendant applied for an extension of time to file and serve witness statements. The grounds of the application were that the Defendant “was experiencing difficulty in finalizing same before the deadline given by the Court. The difficulty is attributed to the fact that those individuals with knowledge of what transpired on the date in question range from officers of the Police Service, Prisons Service and the Defence Force and some officers are yet to be appointed to deliver instructions.” The application was supported by an affidavit of Vinda Maharaj.
- (d) On the 26th January 2009, witness statements of the Claimants were filed.
- (e) On the 5th February 2009, Justice Best granted an extension of time to the Defendant to file and serve witness statements to the 16th February 2009.
- (f) On the 17th February 2009, the Defendant filed witness statements of Prison Officer, Carlton Mollineau and Acting Assistant Superintendent of Prisons, Mr. Terrance Wilson.
- (g) On the 27th February 2009, the Claimants applied for a Writ of habeas corpus ad testificandum against the Commissioner of Prisons to bring the Claimants to Court for the trial on the 6th March 2009. On the 4th March 2009, Justice Best granted these applications.

- (h) On the 6th March 2009, the matter was called for trial before Justice Best. The Claimants were ready to proceed but Counsel for the Defendant advised the Court that she had given certain advice to the Defendant and she was awaiting further instructions that may result in the Defendant adopting a certain course. Counsel for the Claimants informed the Court that he had not had any discussions with the Defendant's Attorneys and he was unaware of the matters raised by Counsel for the Defendant. Nonetheless, Justice Best adjourned the matter for a case management conference on the 9th April 2009 and vacated the trial date of 9th March 2009.
- (i) On the 9th April 2009, the matter was called before Mr. Justice Rampersad. The parties informed the Court that the matter could not be settled and the matter was fixed for trial on the 4th and 5th March 2010.
- (j) In October 2009, this matter was re-assigned to my docket and on the 21st October 2009 the parties were notified of such re-assignment and of a pre-trial review on the 9th December 2009. This Notice was served upon the Claimant's Attorneys on the 29th October 2009 and upon the Defendant's Attorneys on 22nd October 2009.
- (k) On the 8th December 2009, this application was filed. Notwithstanding the late filing and service of the application, Counsel for the Claimants indicated that he was ready to proceed and therefore I heard submissions on the application on the 9th December 2009.

The Facts relied upon in support of application

6. The salient facts relied upon by the Defendant are set out in the affidavit of Vinda Maharaj as follows:
- (i) After the trial was adjourned on the 6th March 2009, Mr. Gilbert Petersen, S.C was retained by letter dated 17th March 2009;
 - (ii) By letter dated 6th April 2009, the Defendant's Attorney informed Justice Best's Judicial Support Officer that the Defendant intended to apply to have the pleading re-opened and for further directions for the filing of additional witness statements;
 - (iii) On the 9th April 2009, when the matter was called before Justice Rampersad, the learned Judge indicated to Mr. Peterson that he would not be entertaining an oral application and that the same should be done in writing;
 - (iv) The proposed evidence to be embodied in the witness statement was not available to the Defendant at the time set by the Court for the filing of the witness statements;
 - (v) The identity of persons with knowledge of the matter only became known to the Defendant subsequent to the last date of hearing. That evidence would assist the Court in resolving the issues in the case and doing justice between the parties and without the evidence will suffer severe prejudice in the presentation of its case;
 - (vi) If the time for the filing of the witness statements is extended, it will not interfere with the general conduct of the matter and the Claimants would not be prejudiced.

The Law

7. Rule 26.7 of the CPR provides as follows:

- 26.7 (1) *An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.*
- (2) *An application for relief must be supported by evidence.*
- (3) *The Court may grant relief only if it is satisfied that—*
- (a) *the failure to comply was not intentional;*
 - (b) *there is a good explanation for the breach; and*
 - (c) *the party in default has generally complied with all other relevant rules, practice direction, orders and directions.*
- (4) *In considering whether to grant relief, the court must have regard to—*
- (a) *the interests of the administration of justice;*
 - (b) *whether the failure to comply was due to the party or his attorney;*
 - (c) *whether the failure to comply has been or can be remedied within a reasonable time; and*
 - (d) *whether the trial date or any likely trial date can still be met if relief is granted.*
- (5) *The Court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.*

8. In **Civil Appeal No. 65 of 2009, Trincan Oil Limited & Ors. v. Chris Martin**, Jamadar J.A. at paragraph 13 explained the proper construction to be put upon Rule 26.7 as follows:

“13. The rule is properly to be understood as follows: Rules 26.7(1) and (2) mandate that an application for relief from sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) are distinct. Rule 26.7 (3) prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion arises. A court is precluded from granting relief unless all of these three conditions are satisfied. Rule 26.7 (4) states four factors that the court must have regard to in considering whether to exercise the discretion granted under Rule 26.7 (3) Consideration of these facts does not arise if the threshold pre-conditions at 26.7 (3) are not satisfied.”

9. Accordingly, in my consideration of this application, I firstly took into account the following factors set out in Rule 26.7 (1) to (3) before considering the matters set out at Rule 26.7 (4):

(i) Was the application made promptly?

The original deadline for the filing of witness statements was 26th January 2009. The Defendant sought and obtained an extension to the 16th February 2009. By the first trial date on the 6th March 2009, therefore, the Defendant had only filed the witness statements of Mollineau and Wilson. (Incidentally, these witness statements had been filed on the 17th February 2009, one day out of time and it was only on the 9th December 2009, when the matter was called before me that I brought this default to the attention of the Defendant's Attorneys.) Since the 6th April 2009, the Defendant's Attorneys had contemplated the necessity for additional witness statements and apparently an attempt was made to make an oral application in that regard before Justice Rampersad on 9th April 2009. The learned Judge quite properly in my opinion refused to entertain an oral

application, having regard to the requirement of Rule 26.7 (2) for an application to be supported by evidence and Rule 11.8 which expressly stipulates that “where evidence in support of an application is required it must be contained in an affidavit unless (a) a rule; ((b) a practice direction; or (c) a court order, otherwise provides. According to affidavit of Mr. Maharaj, the Defendant was advised by the Court that such an application should be in writing. Notwithstanding this advice, the Defendant took no step to make the necessary application for relief from sanctions until the 8th December 2009, a period of nine (9) months and three (3) weeks after the expiration of extended deadline of 16th February 2009 granted by Justice Best. Further, the Defendant failed to provide any explanation whatsoever for this delay. Therefore, I was not satisfied that the Defendant made this application promptly.

(ii) *Was the failure to comply intentional or not?*

The burden lay upon the Defendant to satisfy the Court that its failure to comply with the directions of Justice Best was not intentional. However, all that I have been told by the Defendant is that the identity of persons with knowledge of the matter only became known subsequent to the last date of hearing. This is a vague and unhelpful statement since it does say who these persons were, how many persons were identified and when they were identified. Further, I have not been told what efforts were made by the Defendant to locate witnesses and record statements from them after the Defence was served on 28th September 2007 and between the 3rd October 2008, the date of the Order of Justice Best and the original deadline date of the 26th January 2009 and between the 26th January 2009 and the 16th February 2009, the extended deadline date. Accordingly, I concluded that the Defendant, in its preparation of this matter for trial, has proceeded in such a manner that has inevitably led to its inability to comply

with the deadlines set by the Court. From the time the Statement of Case was served upon the Defendant and even before the Defence was served, the burden lay upon the Defendant to take instructions from persons who had knowledge of the facts so that the Defence could be settled on the basis of such instructions. Once the Defence was served, it must have been based on instructions from persons who had such personal knowledge. At the case management conference held on the 3rd October 2008, the Defendant informed the Court that it had four witnesses and they were then given until the 26th January 2009 to draft and file witness statements. It appeared to me, however, that the Defendant's preparation of witness statements was approached in a manner that logically resulted in their default in compliance. Accordingly, I was not satisfied that their failure to comply was not intentional.

(iii) Is there a good explanation for the breach?

In the circumstances as outlined before, the Defendant having failed to provide any facts concerning their efforts to comply with the original deadline and the extended deadline, the Defendant failed to provide any or any good explanation for their breach. The affidavit of Mr. Maharaj only provided the vague statement about identification of unnamed witnesses "subsequent to the last hearing". The last hearing was on the 9th April 2009. By that time, the Defendant was in default. In the absence of any facts relative to the efforts made by the Defendant to locate witnesses and to settle witness statements before the expiration of the deadlines, the Defendant failed to satisfy me that there is a good explanation for the breach.

(iv) Has the party in default generally complied with all other relevant rules, practice directions, orders and directions?

On the 3rd October 2008, Justice Best also ordered the parties to file and serve statements of issues and law on or before the

26th January 2009. As at the date of the hearing of the application, the Defendant had not complied with this order. Further, as earlier stated, the Defendant filed its witness statements on the 17th February 2009 and up to the 9th December 2009, no application had been made to extend the time and for relief from sanctions. Accordingly, I was not satisfied that the Defendant had complied with all other directions and orders in this matter.

10. In the circumstances, the Defendant failed to satisfy the requirements of Rule 26.7(1) and the three conditions precedent set out in Rule 26.7(3) and therefore, it was not necessary for me to have regard to the matters set out in Rule 26.7(4).

11. Accordingly, I dismissed the Defendant's application and, in accordance with the general rule set out at Rule 66.6 (1) and 67.11 (2), I ordered the Defendant to pay the Claimants' costs, fit for Counsel. However, I deferred the assessment of costs on the application to the trial of the action.

Dated this 15th day of January 2010.

André des Vignes
Judge