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

Claim No. C.V. 2008-00415

BETWEEN

DARON JOSEPH

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before The Honourable Mr. Justice des Vignes

Appearances:

Mr. G. Ramdeen for the Claimant/s

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

REASONS

1. On the 11th December 2009, the Defendant filed separate applications in the above-captioned matters for the following Orders:
   (i) an Order pursuant to Part 27.9(2) of the Civil Proceedings Rules 1998 (as amended) extending the time for the filing of the Witness Statements of Carlton Mollineau and Terrance Wilson on behalf of the Defendant to the 17th February 2009;
   (ii) an Order pursuant to Part 26.7(3) of the Civil Proceedings Rules 1998 (as amended) relieving the Defendant from sanctions.

2. The ground of the applications was identical, namely, that "*the Defendant herein was under a genuine mistaken belief that it had been in compliance with the direction given by the Honourable Court as regards the deadline for filing its Witness Statements*."

3. Both applications were supported by affidavits of Vinda Maharaj, also filed on the 11th December 2009.

The History

4. ***CV 2007-02000, La Roche, Green, Andrews v. The Attorney General*** (hereinafter referred to as "the La Roche action") was commenced on the 13th June 2007 by the filing of a Claim Form and Statement of Case.

5. ***CV 2008-00415, Daron Joseph v. The Attorney General*** (hereinafter referred to as "the Joseph action") was commenced on the 8th February 2008 by the filing of a Claim Form and Statement of Case.

6. Both the La Roche action and the Joseph action arose out of an incident which occurred on the 11th November 2006 at the remand section of the Golden Grove Prison. The Claimants in both actions allege that on that day masked and unmasked armed prison officers, accompanied by armed officers of the Trinidad and Tobago Police Service and members of the Trinidad and Tobago Regiment entered the remand section and unlawfully attacked, assaulted and battered the Claimants using force that was unreasonable and excessive. The Claimants allege that they sustained personal injuries and that the Defendant is liable for damages, including aggravated and exemplary damages.

7. In the La Roche action, a Defence was filed on the 28th September 2007 and in the Joseph action, a Defence was filed on the 10th April 2008. In both actions, the Defendant admitted that prison officers, police officers and members of the Regiment entered the remand section but denied the unlawful attack, assault and battery and the use of unreasonable and excessive force. According to the Defences, the officers entered the remand section to conduct a search but were met by hostile inmates and it became necessary for the search party to restore order and return the inmates to their cells. However, they met with some resistance from the inmates and they had to resort to the use of reasonable force.

8. Insofar as is relevant to the time for filing of witness statements, the directions given by my brother Justice Best reveals that by the 8th May 2008 the Claimants had decided not to pursue an amendment to their Statement of Case and both parties had informed the Court that they were ready to proceed with the trial but they were going to explore the

possibility of settlement. Accordingly, the case management conference was adjourned to the 3rd October 2008. On the 3rd October 2008, the parties advised the Court that the pleadings were closed and that the Defendant had made disclosure to the Claimants. The Claimants indicated that they had four (4) witnesses and the Defendant also intended to call four (4) witnesses. Justice Best directed both parties to file and serve witness statements in affidavit form on or before the 26th January 2009 and fixed the trial for the 6th and 9th March 2009.

9. On the 22nd January 2009, the Defendant applied for extensions of time for the filing and service of witness statements in both actions. These applications were supported by affidavits of Vinda Maharaj in which he stated, inter alia, that the Defendant was experiencing some difficulty in finalizing the instructions from the officers of the Prison Service, Defence Force and the Police Service and that it was unlikely that the witness statements would be ready before the deadline. He also referred specifically to the fact that the trial had been set for the 6th and 9th March 2009 and it was in those circumstances that the Defendant was seeking an extension of time.

10. On the 4th and 5th February 2009 respectively, Justice Best granted the Defendant's applications in the Joseph action and in the La Roche action and extended the time for the filing and service of the Defendant's witness Statements to the 16th February 2009.

11. The Claimants filed witness statements in their names on the 26th January 2009 but the Defendant filed witness statements of Carlton Mollineau and Terrance Wilson on the 17th February 2009, one day later than the time granted by Justice Best.

12. On the 6th March 2009, the matter was called for trial before Justice Best. The Claimants were ready to proceed. However, Junior Counsel for the Defendant indicated to the Court that "*these matters were sent to the Attorney General with a view to the State adopting a certain course and a response was expected shortly*." Counsel for the Claimants denied that there had been any discussions with him and that he was unaware of this situation. Justice Best decided to adjourn both matters for a case management conference on the 9th April 2009 and vacated the trial date of the 9th March 2009. There is no indication on the records that the fact that the Defendant had filed the two witness statements one day late was either observed or addressed at this hearing by either side.

13. On the 9th April 2009, the matter was called before Justice Rampersad, presumably because Justice Best was unavailable on that day. On this occasion, the Defendant was represented by Senior Counsel. Both parties informed the Court that the matter could not be settled and the trial was re-scheduled for the 4th and 5th March 2010. Once again, there is no indication on the records that the late filing of the Defendant's witness statements was observed or addressed by either side at this hearing.

14. By Notice dated 21st October 2009, the parties in both matters were notified of the re-assignment of these matters to my docket and that a Pre-Trial Review would take place on the 9th December 2009.

15. On the 9th December 2009, inter alia, I drew to the attention of the Defendant that the witness statements filed on the 17th February 2009 had not been filed in compliance with the Orders of Justice Best and that applications for relief from sanctions had not been filed. I also informed the parties that the trial dates fixed for Justice Best had to be vacated and that it would be necessary to re-schedule the trial since by the time these matters had been transferred to my docket, I had already listed another

trial for the 4th and 5th March 2010. It is in that context that the present applications for relief from sanctions were filed on behalf of the Defendant on the 11th December 2009.

The Facts in support of application

16. According to the affidavits of Vinda Maharaj, the Defendant was "*labouring under the mistaken belief that it had complied with the direction given by the Honourable Court, viz that the date for filing was on or before the 17th February as opposed to February 16, 2009. It is for this reason alone, due to a mistaken belief on our part that no application was made to the Court prior to the instant application.*" Acting on that mistaken belief, therefore, arrangements were made for the witnesses to attend upon the Defendant's Attorneys on the 16th February 2009 to verify the contents of the witness statements and to sign same. The Witness Statements were then filed and served on the 17th February 2009.

Relief from sanctions

17. In these matters, the directions given by Justice Best did not include any express sanctions for failing to file the witness statements on time. Accordingly, the relevant rule which imposes a sanction is Rule 29.13 which provides as follows:

> ***29.13 (1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.***
>
> ***(2) The Court may not give permission at the trial unless the party asking for permission has a good reason for not seeking relief under rule 26.7 earlier.***

18. This case presents a rather novel situation since, unlike other applications for relief from sanctions where the applicant has not filed any witness

statements in compliance with a direction of the Court, the Defendant has filed two witness statements one day beyond the time limited by the Court. Accordingly, I bear this important fact in mind as I consider whether the Defendant has satisfied the relevant conditions of Rule 26.7.

Was application made promptly?

19. Rule 26.7 (1) provides as follows:

> *"(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."*

20. Therefore, the first important hurdle that the Defendant has to overcome is whether the application for relief from sanctions has been made promptly in the peculiar circumstances of this case. In the recent decision of the Court of Appeal in ***Trincan Oil Limited v. Schnake, Civil Appeal No. 91 of 2009*** **(**delivered on the 3rd February 2010), Jamadar J.A. had this to say in relation to the issue of promptitude at paragraph 22:

> *"22. Part 26.7 (1) is mandatory. It requires that an application for relief from any sanction imposed must be made promptly. Promptitude in any case will always depend on the circumstances of the particular case and will thus be influenced by context and fact. "Prompt" must be considered in relation to the date when the sanction was imposed…." (Emphasis mine)*

21. In the instant case, the Defendant having failed to serve the witness statements of Mollineau and Wilson upon the Claimants' Attorneys within the time specified by Justice Best, the sanction which the Defendant faces is that those witnesses "*may not be called unless the court permits.*" This means that, since I have not yet fixed new trial dates for this matter, when this matter comes on for trial before me I will need to determine whether or

not to grant permission to the Defendant to call those witnesses. At that stage, I will be required to take into account Rule 29.13 (2) which states that I may not give permission at the trial unless the Defendant has a good reason for not seeking relief under rule 26.7 earlier.

22. Given the fact that this is a sanction which has not yet been imposed but which the Defendant may face at the trial, I am of the opinion that although the Defendant did not observe its default between the 17th February 2009 and the 9th December 2009, that lapse of time is not determinative of whether or not the Defendant has made this application promptly. Rule 29.13 gives to the Court a discretion whether to grant or refuse permission to call a witness at the trial in circumstances where a witness statement has been filed outside the time specified by the court. That discretion is not absolute, however, but is circumscribed to the extent that the court may not give permission at that stage unless the party seeking that permission has a good reason for not seeking relief under Rule 26.7 earlier. This means that if the Defendant had not made this application and had waited until the trial to seek my permission to call these witnesses, I "may not give such permission" unless the Defendant advanced some good reason for not making an application for relief from sanctions earlier. It imposes upon a party who has failed to file a witness statement in time to make an application for relief from sanctions before the trial or face the possible consequence of not being permitted to call the witness at the trial. Since this application for relief from sanctions was filed within two days of this default being brought to the Defendant's attention and well before the likely trial dates of this matter, I am of the opinion that in the peculiar circumstances of this matter, the Defendant has filed this application promptly.

Was the failure to comply intentional?

23. Once again, Jamadar J.A. in ***Trincan Oil Limited v. Schnake*** (ibid) has provided useful guidance as to the correct approach to be taken in determining intentionality at paragraph 41 of his judgment:

> "***41. In my opinion, to establish intentionality for the purpose of Part 26.7 (3) (a) what must be demonstrated is a deliberate positive intention not to comply with a rule. This intention can be inferred from the circumstances surrounding the non-compliance. However, where as in this case there is an explanation given for the failure to comply with a rule which, though it may not a "good explanation", if it is nevertheless one that is consistent with an intention to appeal, then the requirements of Part 26.7 (3) (a) will more than likely be satisfied."***

24. Applying this reasoning to the present facts, the Defendant has demonstrated its intention to file witness statements in support of its Defence by, first of all, making an application for an extension before the expiration of the first deadline and by filing the witness statements on the 17th February 2009, albeit one day outside the extended deadline. In the circumstances, I am satisfied that the failure to comply with the deadline fixed by Justice Best was not intentional.

Is there a good explanation for the breach?

25. The explanation proferred by the Defendant's Attorneys is that they were acting under the mistaken belief that they had until the 17th February 2009 to file the witness statements. The question to be answered is whether that is a "good" explanation? The Court of Appeal has made it abundantly clear in several cases and most recently again in ***Trincan Oil v. Schnake*** (ibid) that default by Attorneys will not constitute a good explanation for non-compliance with the rules of court. However, every case must be

considered on its own merits and on its peculiar facts. In this case, the Defendant's Attorneys, in compliance with the rules, applied for an extension of time to file their witness statements before the expiration of the time limited for doing so. Their application was considered and decided upon by Justice Best on the 5th February 2009. While it cannot be denied that they made a mistake as to the correct deadline date for filing and service, I cannot ignore the fact that the extent of the default is one day. In considering this particular pre-condition, the focus of my attention is on the "explanation for the breach" and not on whether there is a good explanation for not observing the default earlier or for their delay in making the application. Based on the straightforward admission of the Defendant's Attorneys, I must decide whether, in accordance with the overriding objective of the Rules to deal with cases justly, I am satisfied that there is a good explanation for the failure to file the witness statements by the16th February 2009. There are times in the practice of every Attorney that a deadline is missed or a date is overlooked. In my opinion, as much as the Court is making every effort to hold Attorneys to a higher standard of professionalism, I cannot ignore the fact that in the legal profession as in most aspects of daily life, perfection is almost always unattainable. Accordingly, I am satisfied that the explanation given for this default is a good explanation since what the Defendant's Attorneys are saying in essence is that they committed a human error.

Has the Defendant generally complied?

26. On the 3rd October 2008, Justice Best ordered the parties to file and serve witness statements on or before the 26th January 2009. Rule 26.7(3) permits me to grant relief only if I am satisfied that the "*party in default has generally been in compliance with all other relevant rules, practice directions, orders and directions.*" (emphasis mine) Focusing on the applications before me to grant to the Defendant an extension of one day under Rule 27.9(2) to file and serve the witness statements of Mollineau

and Wilson and for relief from the sanction of being unable to call those witnesses at the trial, I bear in mind that the Defendant has served a Defence and sought an extension of time to file its witness statements before the expiration of the original deadline stipulated by Justice Best. In the circumstances, I am satisfied that the Defendant has generally been in compliance although not in perfect compliance with the directions of Justice Best.

27. Having determined that the Defendant has satisfied the three pre-conditions set out at Rule 26.7(3), I now move on to consider to the matters set out at Rule 26.7(4).

The interests of the administration of justice

28. By the 17th February 2009, the Defendant had filed two witness statements. The matter was called for trial before Justice Best on the 6th March 2009 and before Justice Rampersad on the 9th April 2009. On neither occasion was the issue raised concerning the late filing of the witness statements. As much as it is true to say that the responsibility lay upon the Defendant to ensure that there had been strict compliance with the direction of Justice Best, it cannot be said by the Claimant's Attorneys that it ought not to have brought to the Court's attention on 6th March 2009, the first day of the trial that the Defendant was in default. The Claimants' Attorney, in discharge of his obligations to his clients, would have been well within his rights to submit to the Court that since the Claimants had duly complied with the Court's directions with respect to the filing of witness statements and the Defendant had not, the Defendant should not be permitted to call those witnesses at the trial. Further, since the Court only had the evidence of the Claimants and no evidence from the Defendants in support of their Defence, the Claimants were in a position to make an application to the Court for judgment, with damages to be assessed. This, however, was not the position taken by Counsel for the

Claimants. After protesting his ignorance of any discussions concerning the "adoption of a certain course" by the Defendant, the second trial date was vacated by Justice Best and the matter was adjourned to the 9th April 2009 for a case management conference. On that date, it became clear that the possibility of settling the matter had evaporated and new trial dates were fixed. Once again, it would have been within the power of the Claimants' Attorneys, in the discharge of their duties as officers of the Court and in fulfillment of their professional obligations to the Claimants to draw to the Court's attention that since the Defendant's witness statements were filed out of time, they should not be permitted to call those witnesses at the trial and that, in the circumstances, the Claimants should be given the opportunity to prove their cases. This was not done. Instead, the position of the Claimants is that since a witness statement is not evidence until the witness goes into the box to put it into evidence, the Claimants did not need to draw this default to the attention of the Defendant or to the Court until the commencement of the trial when the Defendant attempted to call Mollineau and Wilson to give evidence. This approach is quite surprising and, in my opinion, inconsistent with the new dispensation of conducting litigation openly and fairly with "all the cards of the deck facing up". While I am not persuaded by the Defendant's submissions that the Claimants' Attorneys, by their silence, should be deemed to have waived their right to object to the late filing of the witness statements, I do not consider that it will be fair and just at this stage of the proceedings to refuse the Defendant's applications for an extension of time and for relief from sanctions.

Was the failure due to the party or his attorney

29. Based on the facts recited above, the default herein was brought about by an error on the party of the State Attorneys. As already stated, this was a human error but I do not consider that error to be fatal to the exercise of my discretion on these applications.

Can the failure be remedied within a reasonable time

30. The Claimants have been served with the witness statements since the 17th February 2009. They will not be prejudiced by any extension sought because the effect of my order would be to sanction the late filing of the witness statements and to permit the matters to proceed to trial on the basis of the evidence already filed. Accordingly, once I grant the extension sought, there is nothing more that the Defendant needs to do.

Can a trial date still be met if relief is granted?

31. As earlier stated, I have not yet fixed new trial dates for these matters and the only reason that I have not done so is due to the pendency of these applications by the Defendant for relief from sanctions. Accordingly, the likely trial date will not be affected if I grant the Defendant's application for relief.

Conclusion

32. In the light of my earlier analysis of this application, I will grant the Defendant's application for relief from sanctions and I will extend the time for the filing and service of the witness statements to the 17th February 2009. Since the Defendant has accepted that it failed to comply with the direction of Justice Best, I propose to follow the general rule and award the costs of this application to the Claimants. The Defendant is to pay the assessed costs of both applications to the Claimants, fit for Counsel. The assessment of these costs will be determined after I hear submissions from both parties.

Dated this 26th day of February 2010.

André des Vignes
Judge