

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2009-03798

BETWEEN

KRISHNA KOONJAN

Claimant

AND

KAMLAWATIE MAHARAJ

Defendant

Before The Hon. Madam Justice C. Gobin

Appearances:

**Mr. E. Koylass SC instructed by Mr. H. Ramnath
for the claimant**

**Mr. G. Mungalsingh instructed by Mr. R. Mulgansingh
for the Defendant**

JUDGMENT

1. The claimant is a supplier of aggregate and the defendant operates a company, Southern Concrete Limited which is in the business of manufacturing and supplying readymix concrete. The claimant had been supplying aggregate to Southern Concrete Limited for many years while the company was run by the defendant's husband until the latter met a violent death, he was murdered. Following that tragic event, the claimant began to assist the defendant who because of his advice, support and financial assistance it seems successfully took over the running of the company on her own.

2. For the more efficient and cost effective operation of her business the defendant required a new pump truck. The one she had was not working properly. The claimant had a dump truck,

registration No. TAJ 3096 among his own fleet. Sometime in or about May to June 2004 this truck was delivered to the defendant. The tray was removed but both parties claim to have done so, and other adjustments were made to convert it. A concrete pump which the defendant had purchased was then installed on the truck. It was then referred to as a pump truck. The pump had been acquired with the proceeds of a loan taken by the claimant, but which the defendant repaid entirely. That truck has remained with her since the time of delivery in 2004 until the present time.

3. In March 2009 the business relationship between the parties ended. The last delivery of aggregate was made on the 23rd march 2009. Almost six months later the claimant's attorney wrote to the defendant demanding the return of the vehicle in its original form (that is without the pump) and claiming rent at \$1,000.00 per day "for the period 2005 to present". Mr. Ramnath's letter claimed the sum of \$1,730,000.00 representing the outstanding rent. No mention was made at this time of a part payment of \$125,000.00 on account of rent. In the claim form and statement of case no sum of arrears was specified. By a subsequent amendment to the statement of case the claimant specifically claimed rent or loss of income in the sum of \$1.4 million. The claimant insists that he delivered the vehicle under a rental agreement and admits receiving \$125,000.00 towards rent in January 2005.

4. In response to this claim the defendant filed a defence denying any agreement to rent the vehicle. She said she had purchased it on credit for a price of \$175,000.00 and had paid the full purchase price. She went on to give particulars of the mode of payment by two installments, the first on the 15th May 2007 in the sum of \$100,000.00 and the second on the 20th June 2007. She exhibited copies of two bank drafts, documentary evidence of those two payments. In his

defence to counterclaim, the claimant said that both those payments were for the supply of aggregate and nothing else.

5. Some months later the defendant amended her defence. She pleaded a completely different mode of payment of the alleged purchase price of \$175,000.00. She now claimed the sum of \$100,000.00 was paid by bankers draft of 8th June 2005 and the remaining \$75,000.00 was paid by nine cash payments on nine separate occasions when the defendant withdrew cash from her account (she supplied copies of all the cheques) gave part of the cash as payment for aggregate and the remainder of eight payments of \$10,000.00 each and the last of \$5,000.00 on the balance outstanding for the truck. This amounted to a significant shift from her original case as to the method of payment but she maintained that there was no arrangement for rental of the truck.

6. The claimant's response to this new case was to the alleged that \$100,000.00 payment on the 8th June 2005, was paid on the company's running account of aggregate. As to the other nine payments, he denied receiving any cash other than what was reflected on the aggregate account. In other words he continued to deny that there were 8 extra cash payments of \$110,000 and a final one of \$5,000.00 because there was no purchase price for the truck. He kept no record of the sole alleged rent payment because he said the defendant's rent account for the truck was running, it was easy to calculate what was due because at \$1,000.00 per day one only had to count the number of days since the delivery for several years and subtract the sole payment of \$125,000.00.

7. The factual issue which I had to decide was simply, was this a case of a sale of the truck or a rental at the rate of \$1000.00 per day. The resolution of the issue turned on the credibility of

the parties and their respective witnesses. Having considered the pleadings and the evidence as well as the demeanour of the witnesses I reject the case of the claimant. This is not to say that there were not serious weaknesses in the defendant's case and I shall deal with these in time.

8. To come to a conclusion as the true arrangement between the parties I found it necessary to probe the true relationship between them. Both of them for reasons of discretion it appears, initially chose to keep this out of the evidence. They preferred to emphasize their close business relationship to talk of assistance given and received, "arrangements" and "understanding". But it seemed obvious that this did not explain the extent of the claimant's generosity and attention to the defendant and what seemed to be her dependence on him.

9. Not only did he supply raw materials on extended credit, he assisted her with building a home, gave business advice, advanced the sum of \$200,000.00, took a loan in his own name of \$400,000.00 to assist her to complete the purchase of the pump. Out of this sum the \$200,000.00 advanced was immediately repaid. When I raised questions as to whether the relationship went beyond what the parties had chosen to describe, the defendant admitted reluctantly but truthfully that she had enjoyed an intimate relationship, he had given her presents including a TV. The claimant continued to deny it, maintaining that all of his actions were explained by a pure desire for her to succeed in business.

10. The defendant was a recently widowed lady. She was going into a business in respect of which she had had no previous experience. The claimant was attentive and generous with his time and advice, and availability of his money. I have found that the parties did in fact enjoy an

intimate sexual relationship which ended just about the time that their business relationship ended.

11. The Court would have preferred to respect the parties' decision not to raise this delicate issue at all, but I considered it relevant to the case. Without this underlying factor, quite frankly the claimant's conduct would be hard to explain. That there was a long standing business relationship between these parties until the unhappy ending in March 2009 is not in doubt. The accounts produced by both parties show several years of commercial dealings which involved a regular flow of substantial cash and other transactions for aggregate supplies. But when the defendant discovered that she was being substantially overcharged by the claimant, the claimant it seems could not simply allow a parting of their ways and to allow the defendant to purchase material from a much cheaper source (as is any businessman's right and this claimant must as an experienced businessman have recognized this). His reaction and I believe he accused her of being ungrateful and threatened to "bring her to her knees", suggested that there were currents of a different kind of relationship, that this was a man, very unhappy about what he thought was the disloyalty of a woman with whom he had more than a business association.

12. It better explains why he brought a case which from the original statement of case can only be described as both strange and vague. This case was that the defendant requested a loan of \$400,000.00 in return for which she agreed to purchase raw materials from and to rent a truck from the claimant. These alleged open ended commitments of the defendant both seemed to contemplate arrangements lasting for no fixed period, but for an eternity. It is hardly the kind of arrangement one would expect people dealing with each other on a strict commercial basis to enter into, and I have grave doubts as to their enforceability. The open-endedness and vagueness

as to the terms are more consistent with the kind of informal arrangement parties sharing a more intimate relationship might contemplate. The fact that the claimant abandoned part of the claim and pursued only the claim for arrears of rent makes no difference to my observations.

13. Quite incredibly the claimant provided a verbatim record of the conversation which took place in January 2004 which was the basis of this alleged oral agreement. The details of the conversation as alleged recalled some four years later are sufficient to cause me to reject it.

14. In any case I find the claimant's case as to the open ended rental agreement to be inherently implausible. That they entered into a truck rental arrangement as part of the loan arrangement (as pleaded) makes little sense to me or little commercial sense at all. I assess the defendant to be a woman of sufficient business acumen to immediately dismiss an invitation to rent a vehicle on these terms and for no fixed period. The size of the claim too can be described as outrageous. The same vehicle was purchased 9 years before the alleged transaction for \$80,000.00. While the defendant needed it for greater efficiency and profitability I think it inherently implausible that this would have been considered a reasonable investment in the circumstances.

15. The fact that the defendant came to have in her possession the several documents evidencing the claimant's payment to the previous owner for the vehicle, better supports her claim of a sale transaction as opposed to a rental. When I asked the claimant why he would pass those particular documents to her, he said she wanted to make sure the vehicle was really his. I do not accept this explanation. From their previous dealings the defendant must have known the vehicle to be at least in his possession. It is more probable that they were passed over because at the time she took delivery of the vehicle, she required the documentation for future licensing

purposes and because he no longer required them as an owner. On a balance of probabilities I find it more likely that since at that time there had been no transfer of ownership from the previous owner to the claimant, the defendant would have required the documents for her protection and for future licensing transactions. I believe the defendant accepted the explanation of his inability to transfer ownership at the time of delivery and that it was only in the course of these proceedings that for the first time a certified copy showing otherwise came to her attention.

16. I find it significant that the claimant at no time during this alleged rental arrangement never maintained nor insured the vehicle. This points more to a sale than a rental arrangement. The claimant claimed he delivered the truck May to June 2004. The defendant says it was in March but this discrepancy is not significant. What is however, is that the only demand for rent came in 2009, and I find that this was a written demand in the letter of Mr. Ramnath dated 9th September 2009. I find the terms of the letter to be somewhat vague in the circumstances. The absence of more specific information as to the alleged date of the commencement of the rental agreement and the fact that there is no mention in that first communication of the alleged \$125,000.00 payment on account of rent in January 2005 have been noted. These omissions support the suspicion that this claim for rent at this rate was part of the claimant's means of bringing the defendant to her knees. A claim for such an outrageous sum, if it were to succeed would have just that result. The vagueness of the terms of the alleged rental agreement suggest the entire thing was an afterthought.

17. I completely reject the claimant's answer to the court that he never made a demand, because he was allowing the defendant an opportunity to pay on the aggregate account to keep her business running. If while he was providing the support he was at the same time allowing a

truck rental account to run up to almost one and a half million dollars, then the entire objective of helping the defendant would have been defeated. The only result would have been to keep her forever in the claimant's debt. Based on what appears on the record to be regular payments of substantial sums of money I do not think it can be said that this defendant may not have been capable of making some payments for rent if such were due. She clearly treated her financial obligations to the claimant very seriously.

18. The claimant filed a witness statement of one Barrat Mangalsingh, who was not produced for cross-examination. No satisfactory explanation was given for his absence. While the claimant was not allowed to rely on the witness statement in those circumstances I have observed that Mr. Mangalsingh himself said that truck rentals for extended periods unusual. Such a statement had the potential to undermine the claimant's case. I believe in the circumstances of the absence of this witness with no good explanation for it, I am entitled to draw an adverse inference.

19. I reject the claimant's evidence as to the alleged sole rent payment of \$125,000.00 in January 2005. The defendant produced bank records that show no such sum was drawn on her account. The claimant has produced no separate record of this transaction, not even a scribble in his diary. His explanation that it was not necessary because it was the only time a payment was made and it was easy to remember makes no sense. If he was intending to keep a record of these substantial rent payments, when he received that first one as he alleged, one would have expected him to record it. He could not have anticipated then, it would be the only one.

20. It is perhaps a convenient point to indicate my findings as to the relevance and usefulness of the aggregate accounts supplied by the claimant. While it is accepted they are of less

probative value in that they were not produced to reflect any payments relating to the truck, they are relied upon to rebut the defendant's allegations as to payment generally and more critically as to whether the payment on the 8th June 2005 was in fact recorded and wrongly applied to the aggregate account. I find they assist too in the assessment of general credibility.

21. While the defendant agreed that the claimant's record appeared to match hers from the period 2006 until the close of the account and the relationship, the critical payment as it turns out was the one allegedly made on the 8th June 2005. The defendant has not supplied any detailed record for aggregate purchases for this period, and the court has not been assisted by her in this regard.

22. I have however made the following general observations about the claimant's documents. Two sets of accounts were produced before trial, photocopies of a personal diary in which he made his business records as well as a statement of account in which he tabled the information from the diary.

23. The first obvious difference between the two is that the copies out of the diary reflect no actual details of the quantities of materials but these appear in the table. When asked to account for this discrepancy the claimant said he went to the diary and worked backward to calculate the quantity and was able to do so because of the sizes of the trucks used to deliver. The claimant had different sized trucks in his business, the price of material must have varied from time to time. Even if the defendant did not seriously dispute the total figure, that he found it necessary to produce this figure must have been with a view to justify the prices he had been charging the defendant. Under cross-examination it became clear his belated attempt to work up figures as to the quantity could not properly reflect the quantities supplied. Further on the relevant page of

the diary record for 8th June 2005, there is some obliteration with white out on the original diary that would not have been obvious on the photocopied documents file in his bundle of documents.

24. When one looks at the original diary for that entry the repeated figure of \$106,000.00 following the obliteration, two figures of \$120,450.00 and \$20,450.00 at the top of the following page recorded as brought forward by the letters B/F, do suggest that there was some manipulation of the records to account for an extra \$100,000.00. This is then reduced by a payment on the 8th June 2005 of \$115,000.00. The two figures under B/F appear to be the only place in the diary where this kind of duplication appears. On what I have observed I am prepared to hold that indeed \$100,000.00 was paid on the 8th June 2005 towards the purchase price of the truck and not towards aggregate and that the claimant's records were deliberately tampered with and the obliteration made to reflect it as a payment towards aggregate.

25. Another area which has caused me to find that the claimant's records were open to manipulation was insofar as the defendant's payment of \$200,000.00 made on the 31st March 2006 was concerned. The claimant says that this all went towards aggregate. He applied \$90,550.00 of that sum to clear the balance outstanding in that as at 31st December 2005. This alleged balance was not reflected as carried over to 1st January 2006. Indeed his record shows no actual receipt of \$200,000.00 on the 31st March 2006. If he retrospectively applied some part of it to the balance outstanding at the end of December 2005, that is not reflected on his record. The attempt by him to give evidence more than almost 6 years after his records were made which appear inconsistent have to be rejected.

26. There are parts of the claimant's diary entered on the 13th March and 25th May which reflect corrections to the writing of the year of the entry so a column making 2007 to 2005

appears on the first page and a column correcting 2007 to 2008 appears on the later one. The pattern of these corrections suggests that this claimant was preparing this record whether for this case or not, from some other source which was not produced in evidence. The contemporaneity of the records is therefore called in question. Although the defendant has more or less agreed with the figures since 2006 I do believe that she has somewhat carelessly been relying on the authenticity of the claimant's records. As to the payment of \$200,000.00 on the 31st March 2006, the defendant's own record of the balance after the payment actually credits only \$100,000.00 does call into question the credibility of her own accounts.

27. As to my findings on the defendant's case I have said before that there were weaknesses in it as well. The shift in her case raised obvious and serious questions as to her credibility. One would expect that she would have been sure of the particulars of the alleged mode of payment before she provided the details to her attorneys for the ruling of the original defence. From her cross-examination she clearly understood the importance of the veracity of the instructions.

28. I am prepared to accept however, that given the true nature of the relationship between the parties, she was at first still relying on her less than careful perusal of her accounts in relation to the supply of aggregate to prepare her defence. When she was forced to review her own records against those subsequently produced by the claimant she corrected her initial instructions. She has candidly stated she was wrong or mistaken and I accept that.

29. The main question at the end of the day is, did she make a payment in June 2005 of \$100,000.00 as the first installment towards the purchase of the truck? Having regard to the observation I have made of the claimant's diary entry for the relevant date I conclude that she did

and that the claimant attempted to hide it in the aggregate account as an afterthought. This explains the obliterations and alterations to the brought forward figure.

30. While I accepted that the defendant could have been mistaken as to the modes of payment, I did consider it somewhat suspicious that she did not immediately recall the records relating to the truck payments which were prepared by Miss Reynold and which were eventually relied upon to prove the particulars of payment as amended. One would have thought that she would have referred to these entries in the first place. This obviously raises issues as to the authenticity and credibility of the record produced.

31. Whatever doubts I had as to the above were dispelled by my assessment of the Reynold sisters. I can only reject their evidence if I believe that the records they have produced are deliberately fabricated. These young women are no longer in the employ of the defendant. I therefore found that they had no continuing dependence on her for employment. They both testified that a record was kept in relation to the truck expenses. Even if information as to the payment of the installment came from the defendant or any other source, if the record was made at the time they claimed until 2005 - 2006 (and I find that they were), they provide evidence that well before this litigation was conceived, these statements were being made by the defendant. These statements are consistent with the defendant's case now. They might not be evidence as to the truth of the defendant's statement as to the payments but they show consistency in her claim that it was a sale transaction and the statements appear to be corroborated by the withdrawals for the relevant dates particularized, as shown by the bank slips. It is not hard to accept that the cash transactions between the parties included these extra payments which were not reflected on the

claimant's aggregate records. It did not seem unusual for the claimant to meet the defendant at the bank to collect cash or for cash to be dropped off to him.

32. There would still be a question as to why when she gave her instructions originally for her defence, this truck ledger was not referred to. Based on my assessment of the Reynold sisters I accept that the record was in fact made. I can only conclude that the defendant's failure to recall it had to do with the lapse of time between the final payment and the start of this litigation. This had not been a live issue for years. On both sides there was no proper record kept by the parties. She was honestly mistaken when she first gave her instructions. It was only when she accepted she made a mistake that she made a more serious effort which resulted in the location of the truck records.

33. The claimant's case is therefore dismissed. I have found that the defendant has paid the full purchase price of the vehicle by installments as alleged. There will be judgment for the defendant on the counterclaim. The claimant is ordered to do all things necessary to effect a transfer of ownership of the vehicle to the defendant. The claimant will pay the defendant's prescribed costs. There will be no order for costs on the counterclaim.

Dated this 12th day of May 2011

CAROL GOBIN

JUDGE