

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Port-of Spain (Virtual Hearing)

Claim No. CV 2019-04711

BETWEEN

**Afzal Dookie**

Claimant/Respondent

AND

**Ellis Ramdhan**

**Wendie Ramdhan**

Defendants/Applicants

**Before the Honourable Madam Justice Eleanor J Donaldson-Honeywell**

Delivered on: 14 March 2022

**Appearances:**

Mr. Matthew Gayle and Mr. Bryan McCutcheon, Attorneys-at-Law for the Claimant/Respondent

Ms. Natalia Ceasar and Ms. Cherrish John-Nelson, Attorneys-at-Law for the Defendants/Applicants

**Oral Ruling**

**A. Introduction**

1. This Ruling determines an application by the Defendants for relief from sanctions for failing to file Witness Statements within the time permitted.

2. The Court issued directions as to filing dates for Witness Statements herein at a Case Management Conference held on 14 October 2020. Parties agreed to the schedule of directions, then set with the deadline for filling and exchange of Witness Statements as being 30 April 2021.
3. On the deadline date of Friday 30 April 2021, only the Claimant complied with the directions regarding Witness Statements. The Defendants filed a Notice of Application for relief from sanctions and extended time to file the Witness Statements (“the NOA”) on the next working day, 3 May 2021. It was supported by an Affidavit by their Attorney-at-Law, Ms. Cherrish John-Nelson. They simultaneously filed Witness Statements of both Defendants but only the one by Wendie Ramdhan was signed.
4. Four days later, on 7 May 2021, the Defendants filed an amendment to the NOA explaining by Affidavit of their Attorney, Ms. Cherrish John-Nelson, that the unsigned Witness statement was filed inadvertently. A signed Witness Statement of Ellis Ramdhan was filed simultaneously.
5. The Claimant filed an Affidavit, dated 16 June 2021, objecting to the NOA.
6. For the reasons explained in this Ruling, the Court’s determination is that the Defendants have failed to establish the threshold requirements for relief from sanctions. Accordingly, the Application will be dismissed.

## **B. Issues**

7. The issues relevant to this decision are set out in the applicable rules of Court. Since the Defendants failed to file Witness Statements within the time permitted, the automatic sanction under **Rule 29.13 of the Civil Proceedings Rules 1998, as amended (“CPR”)**, is in effect. The sanction is that the Defendants may not call witnesses unless the Court permits.

8. The procedure, correctly adopted by the Defendants to seek such permission, was an application for relief from sanctions under **CPR 26.7** and for an extension of time to file Witness Statements. The application was a necessary step to obtain permission to call witnesses after failing to comply with the filing deadline.

9. **CPR 26.7** lists, at **sub-section (3)**, the threshold requirements for the Court to grant relief from sanctions. Thereafter **CPR 26.7 (4)** sets out some other matters to be considered once that threshold is met. The effect of these provisions, as explained by Mendonca JA in **Civil Appeal No. 52 of 2012 Rawti Roopnarine v Harripersad Kissoo et al**, at **para 15**, is that:

*“...Rule 26.7 (3) establishes a threshold test. In other words, the three (3) conditions stipulated in that rule must all be satisfied before the court may grant relief. If any of the conditions are not satisfied the court cannot grant relief.”*

In the instant case, it is not necessary to consider the other factors, as will be further explained herein, because there is insufficient evidence of meeting the threshold in the Defendants’ application.

10. The Privy Council and Court of Appeal’s extensive jurisprudence on the application of this rule, in cases such as **Attorney General v Universal Projects Ltd (2011) UKPC 37** and **Civil Appeal No. 52 of 2012 Rawti Roopnarine v Harripersad Kissoo et al**, provide guidance on determining whether the threshold requirements for relief from sanctions are established.

11. The threshold issues to be determined based on **CPR 26.7** are as follows:

- i. **26.7(1)** – Was the application made promptly?
- ii. **26.7(2)** - Is the application supported by evidence?
- iii. **26.7(3)**:-
  1. Was the failure to file and exchange witness statements intentional?
  2. Is there a good explanation for the breach?

3. Has the Defendant generally complied with all other relevant rules, practice directions, orders, and court directions?

**C. Analysis and Findings**

*Promptitude*

12. The Defendants filed the initial NOA on the next working day following the failure to meet the filing deadline. The amendment to the NOA was filed a few days later.
13. In these circumstances, the Defendants have established that this application was made promptly thereby succeeding on the first element of the threshold requirements. However, as all elements must be satisfied, the others will be considered in turn.

*Supported by Evidence*

14. The Defendants' NOA is supported by two Affidavits sworn to by their instructing Attorney-at-Law. However, the Affidavits do not provide sufficient evidence to prove all relevant aspects of the application.
15. Notably absent from the Affidavits is any information or evidence on whether the Defendants generally complied with all other relevant rules, practice directions and court directions. Additionally, while the Affidavits set out explanations for difficulties faced by one of the Defendants' Attorneys, Ms. Cherrish John-Nelson on 19 or 20 April 2021 when her vehicle was stolen, there is no explanation why the Attorneys' scheduled date of 26 April 2021 to file the Witness Statements was not met. In other words, there is no information in the Affidavits on what took place on 26 April 2021 regarding efforts to complete the Witness Statements or on the three working days between then and the 30 April 2021 deadline.

16. The Affidavit evidence filed on behalf of the Defendants explains that inclement weather posed problems for one of the Defendants to leave home on the deadline date. However, the Affidavit does not explain why the other Defendant did not sign her Witness Statement that day.
17. Finally, there is no explanation in the Affidavits as to whether when it was clear that the deadline of 4 p.m. on 30 April 2021 could not be kept; a timely application was not filed prior to the sanction taking effect. Information on such an attempt would be relevant as paragraph 13 of the 3 May 2021 Affidavit makes clear that a decision was made by the Defendants' Attorney not to attend at their home due, *inter alia*, to being inundated with deadlines.
18. In light of the foregoing, there is insufficient credible evidence in support of the Defendants' application.

*Intentional or Not*

19. There is no indication in this case that the Defendants deliberately failed to meet the deadline for Witness Statements.
20. The Defendants have established that the difficulties regarding the First Defendant leaving home on the deadline date and difficulties faced by their Attorneys led to the breach. These circumstances are not an indication of intentional breach. However, further consideration must be given as to whether they amount to a good explanation.

*Good Explanation*

21. The Defendants submit that there are good explanations for the breach including those highlighted at paragraphs 6 to 8 of the Affidavit of Ms. Cherrish John-Nelson filed on 3 May 2021. They cited the case of **CA No. P038/2015 Indar Chandi Ramjit v Sookbir Deedath**, at para. 26, in underscoring that the law does not require a perfect explanation nor one that is devoid of fault to

satisfy the test for good explanation. Further, in **CA No. 79/2011 AG v Miguel Regis** at para. 17, the Honourable Chief Justice Ivor Archie explained:

*“The requirement is for a good explanation, not an infallible one. Whether such an explanation has been shown is a question of fact to be determined in all the circumstances of the case, and is therefore a matter of judicial discretion.”*

22. It is in this context that the Defendants argued that the Court ought to accept as “good” their explanations as to:

- i.* The then instructing Attorney, Ms. Lopez, working from home for two months due to lack of child caretaker.
- ii.* Difficulties faced by then advocate Attorney, Ms. Cherrish John-Nelson, when her vehicle was stolen around 19 or 20 April 2021 and thereafter getting mechanical repairs done for another vehicle, as well as house hunting for a safer home location.
- iii.* Inclement weather on the deadline date affecting the ability of an elderly Defendant to leave home; and
- iv.* That one of the Defendant’s two Attorneys could not visit the Defendants, as was the usual practice, because she was inundated with deadlines and had no driver on the deadline date.

23. However, the Defendants’ Affidavits included no specific information on why the Witness Statements were not completed and signed on 26 April 2021 as planned or on the three days that followed. Additionally, there was no explanation as to why the preparation of Witness Statements could not have been finalized during the six months preceding the difficulties in April 2021.

24. There is merit to the submission of Counsel for the Claimant, citing the Privy Council dicta in **AG v Universal Projects [2011] UKPC 37**, that the Court ought not to accept the difficulties that caused the Defendants’ Attorneys to miss

deadlines as a good explanation. Instead, they amount to administrative inefficiency of the type intended to be remedied by the strict sanctions included in the modern **CPR** regime. At para. 23 of the Judgment, the Privy Council observed:

*“To describe a good explanation as one which “properly” explains how the breach came about simply begs the question of what is a “proper” explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. **Similarly if the explanation for the breach is administrative inefficiency.**”* [Emphasis added]

25. In addition, Counsel for the Claimant cited the case of **Mitchell v News Group 2013 EWCA 1537** at para 41 in contending that default due to the busy schedule of an Attorney is unlikely to amount to a good explanation. The Court made the following relevant considerations:

*“We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event.”*

26. As it relates to the explanation regarding working from home, Counsel for the Claimant underscored that, based on the current pandemic restrictions, working from home is a prevailing circumstance. It cannot be accepted as an excuse for not meeting Court deadlines.

27. Counsel cited Kokaram JA in **Civil Appeal No. S035 of 2020 Well Services Petroleum Company Limited v Darlington Francois**, who provided guidance on whether Covid-19 circumstances amount to good explanation for breach. He said:

*“34. Ultimately, the consideration of the impact, if any, the Covid-19 pandemic has had on a party in complying with particular timelines, orders or directions remain context specific. The following should be noted in relation to the impact of the pandemic on applications for extensions of time:*

*a) The Covid-19 pandemic does not relax the legal standard or test to determine an application for an extension of time under Rule 26.7 CPR.*

*b) The Court will be guided by the factors of promptitude, good explanation for the breach, intentionality, general compliance, the interests of the administration of justice, whether the failure to comply was due to the party or his attorney, whether the failure to comply has been or can be remedied within a reasonable time, whether the trial date can still be met, prejudice, (merits in the instance of a substantive appeal) and the overriding objective.*

*c) The culture of compliance and trial date certainty developed under the CPR has not been suspended by the pandemic.*

*d) The Court will expect parties to continue to make appropriate use of technology in the delivery of legal services and in meeting deadlines.*

*e) Parties ought not to rely on bald or vague statements of hardship in relation to the Covid-19 pandemic but must condescend to particulars to demonstrate how the pandemic has impacted the party’s ability to comply with the Court’s directions for the Court to properly attribute the relevant weight to that explanation. Indeed, the impact of the*



*Covid-19 pandemic may give context to an assessment of promptitude, good explanation for the breach, whether failure is due to the attorney or client. It is for the applicant to provide the details of any serious challenges and not to have the Court speculate on them. The Court must be cognisant of the real (as opposed to fanciful) challenges posed to litigants caused by the Covid-19 pandemic.*

*f) In setting deadlines during this time, the Court should work with the parties to establish realistic targets and deadlines having regard to the challenges presented with the use of technology and online services and the lack of access to it where it exists in relation to some clients.*

*g) Parties should first seek agreement and co-operate with each other when deadlines are drawing near, when the difficulties that this “new normal” has genuinely placed litigants and their representatives can be explained and appreciated. I continue to encourage a credo of procedural consensus to avoid procedural disputes to further the overriding objective.”*

28. The Claimant further argues that the Defendants’ reliance on difficulties in traveling between the home of the Defendants and the Attorneys’ locations is misplaced. It cannot be a good explanation because the Defendants’ home is in San Juan which is in very close proximity to the Attorneys’ office in Port of Spain. In this regard, the case of **Mona Sookram & ors v Vishnu Mungal CV 2012-00997; CV2017-02598** was cited. There, difficulties in communication between Trinidad and Tobago to have witnesses sign, was not considered a good reason for failing to file Witness Statements in time.

29. Furthermore, even if there were communication and travel difficulties between the Defendants and the Attorneys on the deadline date, no good explanation is provided for not seeking a timely extension of time before the sanction for failure to file Witness Statements took effect.

30. Having considered all the reasons given, it is my finding that there was no good explanation by the Defendants for the breach.

*General compliance*

31. The Defendants, as aforementioned, failed to file any evidence attesting that there has been general compliance with other rules, court orders and practice directions. However, in submissions this is argued. The Claimant, on the other hand, filed Affidavit evidence as to failures of the Defendants in meeting all deadline dates applicable from the commencement of the proceedings. These failings were itemized as follows in the Claimants submission entitled "Procedural Chronology", emailed to the Court and the other side on this hearing date. The highlights of the failings noted in the chronology are as follows:

- Filing of Defence and Counterclaim out of time
- Filing amended Defence and Counterclaim out of time and without the Certificate of Truth required by the CPR
- Filing List of Documents out of time
- Failing to cooperate with the Claimant in order to have lists of agreed and un-agreed documents filed.

32. In all the circumstances, my conclusion is that the Defendants failed in meeting the threshold requirement of proving general compliance.

**D. Conclusion**

33. The Defendants have not established meeting the threshold requirements under three of the applicable sub-sections of the rules, namely **CPR 26.7(2), 26.7 (3)(b) and (c)**. Failure to meet any one of these requirements is sufficient basis for ruling against relief from sanctions. Accordingly, the Claimant's objection to the application will be upheld.

**34. IT IS HEREBY ORDERED** that:

- i. The application filed on 3 May 2021 and amended application filed on 7 May 2021 are dismissed.
- ii. Determination of quantum of Costs on the Claimant's application, dated 18 June 2020, to strike out the Amended Defence and Counterclaim and the Defendants' applications for relief from sanctions dated 3 and 7 May 2021 reserved for Trial date.

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Eleanor Joye Donaldson-Honeywell  
Judge