REPUBLIC OF TRINIDAD AND TOBAGO

CV2017-03532

BETWEEN

TORA BORA CONSTRUCTION & CONTRACTORS LIMITED

Claimant

V

THE CEPEP COMPANY LIMITED

Defendant

****

REASONS

Before the Honourable Madam Justice Nadia Kangaloo
Dated the 9th day of April, 2018

Appearances: **Jagdeo Singh with Dinesh Rambally, Kyle Taklalsingh and Criston Williams instructed by Desirée Sankar for the Claimant/Farai Hove Masaisai h/f Philip Lamont instructed by Kevon Charles and Jameel Watch for the Defendant**

Parties: **Claimant's representative – Imtiaz Mohammed/Defendant's representative – Laura Achong**

1. This is the Court's decision on the Defendant's Notice of Application filed on February 26th, 2018, seeking to set aside the default judgment secured by the Claimant.

2. *Rule 13.3 of the Civil Proceedings Rules, 1998 as amended* ("the CPR") requires two hurdles to be overcome if a court is to set aside judgment in default. These are that the Defence has

a reasonable prospect of success in the claim and that the Defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him. It is to be noted that these are conjoint requirements of the CPR and not severable i.e. both tests must be satisfied if a party is to succeed in having a default judgment set aside.

3. The Court has reviewed the Notice of Application and the grounds therein stated. The Court has also noted the contents of the affidavits filed in support of and in opposition to the Notice of Application.

4. In particular, the Court has reviewed the draft Defence and Counterclaim exhibited to the affidavit of Keith Eddy, the Defendant's General Manager and examined the evidence in support thereof of Mr. Eddy and the Defendant's legal officer, Laura Achong.

5. The Court has also read the Submissions filed by the parties in relation to the Notice of Application and the Authorities therein referred to, both in principal and reply, which it has graciously received.

6. The Court hereby disposes of the Notice of Application in the following manner.

REASONABLE PROSPECT OF SUCCESS

7. The Court considers that the Defence has no reasonable prospect of success for the following reasons:

    a) The Defence to the claim is largely based on the misconduct of officers and employees of the Defendant company combined with pleas that the Claimant ought to have been aware of many matters involving the internal corporate governance of the Defendant. The Court cannot penalize a Claimant by denying it the fruits of its judgment. To do so would be to excuse the alleged lack of proper oversight or mismanagement on the part of this Defendant, which characteristics are, in this Court's view, highlighted by the affidavits of Mr. Eddy and Ms. Achong filed in support of the Notice of Application as well as in the draft Defence and Counterclaim.

    b) The Court notes also the Particulars contained at paragraph 18 of the Defendant's draft Defence, which are relied upon to support the averment that,

"the Claimant knew or ought to have realized that the **proper procedure was not being followed**, and nevertheless **the Claimant was complicit in acquiring the alleged contract** by these improper means (*emphasis this Court's*)"

c) A perusal of these Particulars by this Court clearly demonstrates the Defendant's significant reliance on matters which involved the internal governance of the Defendant company, which this Court, although not embarking on a mini trial, considers that have not been adequately supported by the pleaded Particulars as making out a Defence against this Claimant.

d) Rather, both the evidence in support of the Notice of Application and the draft Defence and Counterclaim focus on the alleged misdeeds of officers and employees of the Defendant and alleged political vagaries. Neither of these scenarios painted by the Defendant and held up as a Defence to the claim, can be condoned by this Court.

e) The Defendant has argued for moral turpitude and public policy in its bid to secure the opportunity to defend this claim. But surely the type of conduct described by the Defendant, if proven, that too must be against public policy, when these persons are responsible for the disbursement of public funds, ultimately taxpayers' money.

f) While this Court robustly agrees with Rampersad J.'s dicta in the ***Ronson*** case relied upon by the Defendant in its Submissions, it must also weigh in the balance the conduct of the Defendant itself and its apparent lack of internal oversight, as pleaded for in the draft Defence and Counterclaim, and finds that the same cannot in law (or indeed in equity) amount to a Defence to the Claimant's debt collection claim.

g) The Court also finds that to permit such a Defence to stand would be to accept a state of affairs allegedly occurring in the Defendant company at the material time by agreeing that these alleged facts amount to a Defence to the Claimant's claim. To take such a position would fly in the face of the commendable learning of ***Ronson***.

h) This Court also finds that the affidavits sworn in support of the Notice of Application are bereft of details which would support these alleged facts, in particular that the officer and/or employees of the Defendant company and/or that the contemporaneous

and/or relevant documents will be available in a timely manner, or at all. This lack of relevant evidence from the Defendant at this critical stage of the proceedings telegraphs to this Court that to await any evidence in support of the Defendant's alleged pleaded case would be to do so in vain. Indeed the Defendant has admittedly not even yet secured proof that the contract works were not completed (see paragraphs 14 and 19 of the draft Defence), a critical component of both the Defendant's Defence and Counterclaim.

i) The Court further finds that to accept the Defendant's invitation to, as it were, lift the "State-owned company" veil, and find that default judgment cannot be secured against this Defendant, is to misapply the dicta relied upon in the **Moonilal** case, which was founded upon a personal action in defamation and in which the State argued vociferously against being a party thereto and sought thereby to distance itself from the First Defendant therein (who also happens to be the Defendant in the instant commercial debt collection claim).

j) For these reasons, this Court finds that the Defendant's Defence and Counterclaim do not have a reasonable prospect of success against the Claimant's claim.

ACTING AS SOON AS REASONABLY PRACTICABLE

8. While having failed on the first limb of *Rule 13.3 of the CPR*, this Court proposes to deal briefly also with the second limb, on which the Defendant has also failed to persuade this Court to rule in its favour.

9. Oft described as the issue of "promptitude", this Court accepts that the Defendant has been aware of the default judgment herein since January 12th, 2018 (see paragraph 15 of the Eddy affidavit) and that the explanation for the filing of the Notice of Application on February 26th, 2018 falls short of providing material upon which this Court permit the setting aside of the same.

10. With regard to the reasons mainly relied upon by the Defendant to explain the time lapse, namely the influx of litigation and the lack of legal resources, this Court finds these to be no

satisfactory explanation on the part of the Defendant to demonstrate that it took a reasonably practicable approach to the filing of the Notice of Application.

11. The Defendant, wishing to hide behind the State's "veil", cannot now prevaricate and say that these reasons are good enough for goose and for gander. The State is plagued by these very issues on a daily basis. Does the Defendant wish this Court to accept this as a permanent state of affairs by the State and by State-owned companies and overlook the same in every instance? Surely not. In the instant case, substantial expenditure of funds is at stake and not to be cognizant of this and act responsibly and in a reasonably practicable manner, this Court finds inexcusable on the part of this Defendant.

12. This Court also therefore finds that the Defendant failed to act as soon as reasonably practicable after January 12th, 2018 when it found out that judgment in default had been entered against it for the sum of One Million, Nine Hundred and Sixty-Two Thousand, Nine Hundred and Forty-Seven Dollars and Thirty-Six Cents ($1,962,947.36) for debt, interest and costs to December 11th, 2017 (the date of the default judgment) together with interest thereon at the statutory rate of five percent (5%) per annum after the date of this judgment to the date of payment.

13. Accordingly, the Defendant's Notice of Application filed on February 26th, 2018 is dismissed with costs to be paid by the Defendant to the Claimant to be assessed by a Registrar in Chambers, in default of agreement.

14. Again, I am grateful to all Counsel for the Submissions received.

Nadia Kangaloo
Judge
April 9th, 2018