THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2010-05237

BETWEEN

MIGUEL REGIS **Claimant**

AND

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO **Defendant**

Before the Honorable Mr. Justice V. Kokaram

Appearances:

Ms A. Daisley for the Claimant
Ms Nixon for the Defendant

JUDGMENT

1. The Defendant made an application for relief from sanctions and for an extension of time for the filing of its defence. The application was made one day after the time limited for the filing of the defence had expired. The ground on which the application was made was that "the Defendant had been unable to secure the necessary instructions of the police complainant who was on sick leave in order to settle the defence." Additionally, in oral arguments made before me, Counsel for the Defendant pointed out that based on the affidavits filed in support of the application, there was a good explanation for the breach in that: (a) there were administrative difficulties in receiving the filed documents; (b) they made diligent efforts to get the requisite instructions; (c) the arresting officer was on sick leave and confined to bed rest; (d) the defence was prepared and drafted and annexed to a supplemental affidavit filed on the

morning of the hearing of the application; and (e) instructing attorney had "an urgent personal issue" and was forced to take two days sick leave to attend to it and as a result the time for filing the defence expired.

2. I dismissed the application on the basis that the Defendant did not demonstrate a good reason for failing to file the defence within the time prescribed by the rules. I relied principally on the Court of Appeal's decision in **Darren Morris v the AG CA 253 of 2009** in which an application for relief from sanction for failing to file a defence within time was refused even though the application was made one day out of time and the defence was ready for filing. I gave my reasons for dismissing this instant application orally and I repeat them below.

3. It is common ground that the implied sanction for failure to file and serve a defence within the time prescribed by the CPR is that the Defendant cannot file the defence without the permission of the Court. See **Khanhai v AG and AG v Universal Projects Limited CV 104 of 2009**

4. Rule 26.7 CPR sets out the requirements to be observed in making such an application for "relief from sanction." The requirements of rule 26.7 CPR must be strictly complied with. Rule 26.7 (1) and (3) sets out a list of pre-conditions or a threshold test that must be met before the Court can exercise a discretion whether it would grant relief having regard to the list of factors set out in rule 26.7 (4) CPR. This has been adequately explained in **Trincan Oil Limited v Martin**[1] by Jamadar JA.

5. I did explore with the parties the option of arriving at an agreement between themselves for the defence to be filed on the very morning the application was heard. However, in the absence of any agreement, I proceeded to deal with the application in accordance with the considerations of rule 26.7 CPR and the guidance on its application provided by the Court of Appeal notably in the authorities of **Darren Morris v AG and Universal Projects Limited v AG.**

6. In **Universal Projects Limited v Attorney General of Trinidad and Tobago,** Jamadar JA reminds us that:

[1] Civil Appeal No 65 of 2009 at paragraph 13 "The rule is properly to be understood as follows. Rules 26.7 (1) and (2) mandate that an application for relief from sanction must be made promptly and supported by evidence. Rules 26.7(3) and (4) are distinct. Rule 26.7 (3) prescribed three conditions precedent that must all be satisfied before the exercise of any true direction 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 direction granted under rule 26.7(3). Consideration of these factors does not arise if the threshold pre conditions at 26.7 (3) are not satisfied."

"What therefore appears from this analysis is that a fundamental principle underpinning the CPR, 1998 is that the rules of court are to be followed and court orders are to be complied with. When sanctions are imposed, that signals that non-compliance has serious consequences and there will be no relief unless the strictures of Part 26.7, CPR, 1998 are also complied with. In Trinidad and Tobago, at this time, this approach to civil litigation is considered vital to the creation of an efficient and effective civil justice system. Until there is a real change in the culture in which civil litigation is conducted in Trinidad and Tobago, it is unlikely that Part 26.7 will be applied differently. There will always be 'hard cases'. Making exceptions in such cases often only creates 'bad law'."[2]

7. **Darren Morris** is of particular importance. The end result of that case may be harsh, however, the effect of the Court of Appeal's decision demonstrates the risk parties take if, notwithstanding their knowledge that a deadline for compliance is approaching, they leave the making of an application for an extension of time or the filing of a defence for the last moment. In so doing, they forego the opportunity of making an application for an extension of time simpliciter and instead take on the more onerous burden of making an application for relief from sanctions. In the former case the party will be able to invoke the Court's general discretion to extend the time for compliance which is exercised to give effect to the overriding objective, that is, to deal with the case "justly". In doing so, the principles of equality, proportionality and economy which underpin the overriding objective come into play. Rather than leave such considerations at large, all of the rule 26.7 CPR factors are considered holistically in the exercise of the Court general discretion with the fundamental objective to deal with the case justly.

8. In the latter instance however, that is, in applications for relief from sanctions, even if the party has made the application one day "out of time", the party must satisfy the strict requirements of rules 26.7 (1) and (3), the threshold test, before resort to the rule 26.7 (4) factors. Once such an application is made, the party in breach must be prepared to condescend to particulars, without this the Court would have no material to make a proper assessment as to whether the threshold has been met.

9. The decision in **Darren Morris** also informs us that the "personal difficulty" of attorneys is no longer a good excuse for non compliance with the rules. In that case, efforts were made by instructing attorney to have one Corporal Nicholls, attend the attorney's office to sign the certificate of truth in the defence on 20th, 25th, 30th November and 4th December 2009. He did not show up. The Defendant's attorney as a last resort was

[2] See also **Lennox Persad v Tiger Tanks Unlimited CV 45 of 2010 (appeal CA 2008-00675 was withdrawn)**

prepared to file the defence on 4th December 2009, the deadline date, without Corporal Nicholls' signature. However, the attorney had been away from office on that afternoon due to an unforeseen personal emergency. By the time she had returned to her office to ensure that the defence was filed, the Court office was already closed. She immediately filed an application for relief on the next working day.

10. I am well aware of the pressures of the legal practice but the new ethos of litigation requires the attorney and the party to be vigilant. I am mindful that the proceedings here was launched before the expiration of the time set out in the pre action protocol letter of 28 days for a proposal on settlement. However, the Defendant failed to acknowledge the letter within seven days as required by PD 4.4 of the Pre Action Protocol Practice Directions. While we focus on the Defendant's plight in applications such as these, we must also bear in mind that the Claimant, too, is entitled to justice. He is entitled to a response in the pre action protocol activity and the rules once invoked have provided a time frame to make litigation predictable and efficient. See **Lennox Persad v Tiger Tanks Trinidad Unlimited**.

11. To determine whether there is a good explanation for the failure to file a defence within time, there must be proper evidence before the Court. Paragraph 4 of the Defendant's affidavit sworn on 3rd February 2011, was deficient and liable to be struck out. It was only cured by a supplemental affidavit filed on the morning of the hearing of the application, identifying the source of information and belief and containing a sick leave certificate. Even so, however, there are significant gaps in the evidence.

    (a) There is no proper explanation for the delay between the date of service of the defence on 21st December 2010 and the date the appearance was filed. The bald statement that this was "due to some administrative difficulties" is simply not good enough. One would have thought after the judgment of the Court of Appeal in **Universal Projects**, such a bald statement would be banished from affidavits in support of these applications.
    (b) The bald allegation that the attorney made "diligent efforts" is not good enough. The party must condescend to particulars. A diligent attorney, would for the very least, seek an extension of time from the Defendant's attorney-at-law by consent or seek instructions from another source.
    (c) Further, even though the police complainant was on sick leave, his sick leave expired on 27th January 2011. He then "visited" the Defendant's office on 3rd December 2011 after the deadline for the filing of the defence had already expired. Why did the attorney casually allow this deadline to lapse? What was

the party doing that allowed this deadline to lapse? This series of events suggest to me that both attorney and party was content to either leave the drafting of the defence for the last day of the deadline or allow the deadline to pass without any serious attempts to get instructions or to apply for an extension of time.

(d) There is no explanation of any attempt to secure any instructions from any other source, nor was there any effort to telephone or contact the officer in any way. Why was he "confined to bed rest"? Was it such an ailment that paralysed him from speaking on the phone? The party itself should not have allowed the deadline to pass without ensuring the attendance of all relevant witnesses at attorney's chambers. In **Lennox Persad v Tiger Tanks Trinidad Unlimited,** I referred to the judgment of Barrow J that underscored the duty of the party in situations such as these, in **Kenton Collinston St Bernard v AG of Grenada[3]:**

> "The excuse that chambers have been unable to contact the client contains the hidden premises that it is the duty of chambers to contact the client but there is no duty on the client to contact chambers. That premises is false. When a litigant is going to be or has become unreachable at his previous address or by previous methods the litigant has duty to make proper arrangements to enable his lawyer to reach him. The litigation belongs to the litigant, not the lawyer. The client needs at all times to be involved with the litigation. This truth was ignored under the old rules and practice. The new rules position that truth as a centerpiece…"
>
> The State must continue to educate its several departments of the urgency and need to follow the rules (and orders of the Court). Routine education programmes for public officers and proper follow up systems in the attorney's office are necessary to shake off the "old rules" mentality which would not have bat an eye at the thought of a client sauntering into an attorney's office after the deadline date for filing a defence had expired.

(e) There was no evidence before me to demonstrate that this party was serious in putting its instructions in the hands of its attorney.

(f) Finally the excuse that instructing attorney had an "urgent personal issue" is reminiscent of the reasons advanced in **Darren Morris** and cannot be entertained, unless further particulars are provided for the Court to assess the urgency of those personal difficulties and its impact on taking another step in the proceedings.

[3] Civil Case No 9984 of 2994 Grenada unreported

12. The application was therefore dismissed. Attorney for the Claimant asked for the costs to be reserved to be dealt with at the assessment of damages. The Claimant indicated that it will proceed to file an application to enter judgment.

Dated this 18th April 2011

Vasheist Kokaram
Judge

Post script:

1. After the date of delivering this decision the authority of **Roger Alexander v Alicia's House Limited** CV 2010-03761 came to my attention. In that judgment, Gobin J raised the concern about the application of rule 26.7:

> "I have decided that it is imperative that serious consideration be given to it as I have become increasingly concerned in recent times that certain rules including the ones relevant here (Part 26.7) are systematically preventing me as a judge from doing substantive justice. The removal of a judicial discretion in procedural matters has been forcing judges to mechanistically apply rules to shut litigants out, even while we are conscious that our inability to do otherwise results in injustice. An argument that we are depriving litigants of the right to a hearing on substantive issues and possibly depriving litigants of a fundamental right to access to the court and to justice in circumstances where such a drastic consequence is unjustifiable by any standard, can no longer be ignored."

2. I do not believe that any judicial officer relishes dismissals of cases or judgments being entered for procedural default. However, the fact remains litigation is to be conducted within the scope and pace of the rules. Judgments or dismissals for procedural default are not new. Default judgments and applications for judgments for procedural default are a routine feature of our civil litigation system. At one time automatic dismissals (Order 3 r 6 RSC) were also part of the civil landscape. Of course in an attempt to deal with a case "justly", a first option would be to encourage parties to agree extensions of time where the circumstances warrant it. The Court should also disapprove of parties who wish to "play the CPR game" for mere tactical reasons or for battles for costs. However, I do not believe the Court of Appeal authorities intended to promote a "mechanistic" application of rule 26.7

CPR. There is a threshold to be met in relief from sanctions applications. However, the Court must still consider what is a "good reason" for the breach or whether an application is "prompt". That includes a wide spectrum of factors based on the evidence and a determination of this is "the Judge's call". However, there must be proper evidence and particulars before the Court, before it is called upon to exercise its judgment to determine whether a good reason exists or not. If we are to promote a culture of efficiency under the rules, the requirement of having a "good reason" for a breach must attract the attorneys careful and scrupulous attention within the context of the philosophy of civil litigation advocated by our Court of Appeal.

3. Furthermore, if parties perceive a failure to keep apace with these rules, justice is equally available to them in utilising mediation or another suitable ADR mechanism to resolve the dispute. PD 6 of the Pre Action Protocols Practice Direction is a useful direction for parties to obtain substantive justice: "enter into negotiations with a view to settling the dispute and avoid litigation". Sadly this is underutilised in this jurisdiction, despite the fact that there are many attorneys-at-law who are certified mediators under the Mediation Act and aware of the benefits of mediation. The rules promote early settlement and encourage parties to mediate disputes[4]. The new culture of litigation in the context of the certification of attorneys-at-law as mediators, call for a transformation of the services offered by the attorney-at-law to achieve justice for their clients, not only through litigation but also mediation. Recourse to mediation, therefore, should always be a first response to any claim and fully explored by parties in pre action protocol activity. It is not a sign of weakness. It is an efficient and effective means of resolving a dispute. In this way not only do litigants get their opportunity to achieve substantial justice amongst themselves, but even if the dispute is unresolved, they have a better appreciation of their own case and the issues that must be left for judicial determination.

Vasheist Kokaram
Judge

[4] Pre Action Protocols Practice Direction and Rule 25.1 (c) CPR.