

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-00124

BETWEEN

VENTEC LIMITED

Claimant

AND

**THE TRINIDAD AND TOBAGO
SOLID WASTE MANAGEMENT COMPANY LIMITED
(SWMCOL)**

Defendant

Before The Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr. Shastri P. Parsad and Mr. Shastri V.C. Parsad Jnr. for the Claimant

Mr. Christopher Sieuchand instructed by Ms. Sashi Indarsingh for the Defendant

REASONS

1. On the 14th January 2015 the Claimant commenced its Claim against the Defendant by way of Claim Form and Statement of Case. The Claim Form and Statement of Case were served by way of registered post on the 23rd February, 2015.
2. On the 27th February, 2015, the Defendant entered a Memorandum of Appearance to the Claimant's Claim which did not include an address within three miles of the court office at which the Claim was issued and to which documents may be sent as required by **Part 9.5(7) and (8)** of the **Civil Proceedings Rules 1998, as amended ("CPR")**.
3. By letter dated the 24th March, 2015 the Defendant sought from the Claimant an extension of time for the filing of its Defence to the 22nd June, 2015 which the Claimant granted. On the 22nd June 2015, the Defendant applied to this Court for a further

extension of time for the filing of its Defence and that Application (“the Extension Application”) was supported by the affidavit of Sashi Indarsingh, the Defendant’s Instructing Attorney-at-Law (“the Indarsingh affidavit”). On the 25th June 2015, the Claimant filed a Notice of Objection to the Extension Application.

4. By Order dated the 26th June, 2015 (“the June Order”), this Court granted to the Defendant, without a hearing, an extension of time for the filing of its Defence to the 31st July, 2015 being unaware of the filing of the Notice of Objection the day before by the Claimant’s Attorney-at-Law.
5. On the 2nd July, 2015, the Claimant filed an Application to, inter alia, have the June Order set aside and to have the Extension Application be dealt with again by way of hearing. This Application was supported by the affidavit of Peter Morales (“the Morales affidavit”).
6. The Claimant’s Application of the 2nd July, 2015 came up for hearing on the 24th July, 2015. At that hearing, (“the July hearing”), the Court ordered that the Memorandum of Appearance entered on the 27th February, 2015 by the Defendant be set aside for non-compliance with CPR Part 9.5(7) and (8) having considered the UK equivalent in **UKCPR 1998 Part 10.5** and the learning thereunder at **10.5.4** which states that ***“the court must insist on strict compliance and return a purported acknowledgment which does not comply with the rule.”*** The Court, however, granted permission to file an amended Memorandum of Appearance which must comply with CPR Part 9.5(7) and (8) on or before the 31st July, 2015. At the said hearing, the Defendant, in light of the Claimant’s allegation that it was not given an opportunity to be heard, consented to the June Order being set aside and to the Extension Application being dealt with afresh by way of hearing. Counsel for the Claimant confirmed to the Court that he was “vehemently” resisting the Extension Application and sought and obtained from this Court permission to rely upon the Morales affidavit in opposition to the Extension Application.
7. At that July Hearing, Attorney-at-Law for the Defendant made an oral application (“the Oral Application”) for permission to file affidavits in reply to the Morales affidavit. The Claimant resisted the Oral Application. In accordance with the Court’s directions written submissions in support of the application for permission to file affidavits in reply were filed by the Defendant on the 28th August, 2015. The Claimant’s written submissions in response to same were then filed on the 29th September, 2015.

The Defendant's Submissions

8. In written submissions filed on the 28th August, 2015 the Defendant submitted that this Court is vested with the jurisdiction to permit the Defendant to file affidavits in reply to the Morales affidavit. The Defendant submitted that the power for such discretion to be exercised arises under the general case management powers identified in **Rule 26.1** of the **CPR** and further, may be found in the Court's inherent jurisdiction.
9. According to the Defendant, in exercising its discretion as to whether or not it should permit the Defendant to file affidavits in reply to the Morales affidavit, the Court must consider all of the circumstances of the Oral Application and determine the Application justly, as required by **Rules 1.1 and 1.2** of the **CPR**.
10. The Defendant submitted that in all of the circumstances of this case it is just for this Court to exercise its discretion in favour of permitting the Defendant to file the said affidavits in reply. According to the Defendant, the Claimant has raised several matters in the Morales affidavit for the Court to consider, namely, its allegation that the Defendant completely disregarded the pre-action protocol letter and that Counsel for the Defendant irresponsibly took on a matter when he was incapable of addressing it expeditiously. The Defendant said that it intends to submit that these allegations are utterly baseless and, in this regard, seeks an opportunity to respond to the Morales affidavit which is a natural extension of the Claimant's¹ (*sic*) right to be heard which must not be lightly cast aside.
11. The Defendant submitted that it is now seeking an opportunity to respond to factual matters raised for the first time in the Morales affidavit and it is in respect of those new matters which the Defendant wishes to be heard.
12. The Defendant contended that the Claimant's objections to the Oral Application amount to nothing more than a dangerous attempt to hide relevant facts from the Court and force the Court to determine the Extension Application on a limited factual matrix comprising the Claimant's inaccurate conjecture. The Defendant contends that this is inconsistent with the Claimant's duty to assist the Court in furthering the overriding objective. The Defendant further submitted that such an approach would actually defeat the objective of case management set out at **Rule 25.1(m)** of the **CPR** by allowing the Claimant to gain an unfair advantage by making spurious suggestions to which the Defendant has not had an opportunity to respond without full disclosure of all the relevant facts.
13. To the extent that the Claimant suggests that new facts raised in the Morales affidavit related to matters which ought to have been addressed through the Indarsingh affidavit,

¹ From the context it is clear that the Defendant's attorney wanted to refer to the "**Defendant's**" right to be heard.

the Defendant contended that that submission amounts to a collateral attack on the initial determination of the Extension Application by this Court, which saw it fit to grant the relief sought. The Defendant submitted thus that there can be no question as to the sufficiency of the Indarsingh affidavit.

14. The Defendant submitted that it is not seeking an opportunity to reformulate or supplement the evidence upon which it relied in support of the Extension Application (which was in any event granted). Rather, the Defendant contends that it is seeking an opportunity to reply to new facts raised for the first time in the Morales affidavit. According to the Defendant, the Court is entitled, in its ultimate discretion, to call for, receive and consider all such evidence which it deems necessary to properly assess the merits of the Oral Application and justly determine same. The Defendant submitted that there is and can be no fixed bar to receiving further evidence which is intended to assist the Court and that the Court should, save in the clearest case of procedural abuse, resist attempts to shut out evidence that is likely to be relevant to its exercise of judicial discretion in determining an application such as this.
15. The Defendant further submitted that the Claimant's obstinate and vehement objection to the Oral Application is inconsistent with its duty to assist the Court in furthering the overriding objective and has resulted in the Court having to allocate its resources and time in dealing with sub-procedural issues as opposed to getting on with the substantive primary application and the substantive matter. Further, the Claimant's position has exposed both parties, particularly the Defendant, to additional legal costs in the preparation of submissions on what should ordinarily be non-contentious issues.
16. The Defendant submitted that the case is a multimillion dollar lawsuit premised on what the Claimant avers is a contractual entitlement but in respect of that part of the claim valued at \$2,400,000.00, no contractual agreement is pleaded and, while there is little doubt that that inherent weakness in the claim encourages the Claimant to maintain its "vehement" objection to the Oral Application, the Court must defend the integrity of its process against such an attack. The Defendant further submitted that the matters raised in the pleadings are not complex issues of law but rather premised on the facts of what may have been agreed to between the parties and that the case is important to both parties as it is financially significant despite both parties being companies with liability limited by shares and there being no personal exposure to any of the principals. The Defendant contended that, in all of these circumstances it is perilously close to reckless for the Claimant to advocate for the Defendant being shut out from replying to the Morales affidavit.

17. The Defendant submitted that were this Court to deny it that opportunity, it will be determining the Extension Application on a factual matrix which the Defendant says is inaccurate and the Court would thereby run the risk of denying the Defendant an opportunity to defend this Claim on what may ultimately be false premises.

The Claimant's Submissions

18. In written submissions filed on the 29th September, 2015 the Counsel for the Claimant submitted that given the nature of the sub-application before the Court, namely, to obtain permission to adduce an affidavit in response to the Morales affidavit to the limited extent of responding to new matters raised therein, the question that must be asked is whether the Applicant/Defendant, by the Indarsingh affidavit, has put any moving and particularized evidence in the nature of that expounded by Mendonca J.A. in **Roland James v The Attorney General of Trinidad and Tobago**² to move the Court to exercise its discretion in the first place. The Claimant submitted that the Defendant did not. Counsel for the Claimant further submitted that it has been established in **Darren Morris v. The Attorney General**³ that personal difficulties of attorneys-at-law are no longer a good excuse in applications for extensions of time. The Claimant submitted that that must therefore be discounted from the Defendant's evidence in support of the parent application (the application for an extension of time for filing of the defence) before the Court.
19. The Claimant contended that to embark on the inclusion of an affidavit in response to the Morales affidavit to the limited extent of responding to new matters raised therein would serve no purpose or no useful purpose whatsoever to the main issue at hand, that is, the parent application for an extension of time to file the Defendant's Defence. Accordingly, the Claimant submitted that from the outset, the Defendant's sub-application should be refused.
20. Insofar as the Defendant's written submissions in support of the sub-application to file affidavits in reply place heavy reliance on both the overriding objective and the foreword to the **CPR**, the Claimant submitted that although the Court must seek to give effect to the overriding objective when interpreting any rule, this does not enable the Court to hold that provisions of the **CPR** which have a plain meaning should be construed contrary to that meaning, nor that the plain meaning should be ignored. The Claimant submitted that **CPR Part 26.7(2)** provides that an application for relief must be supported by evidence and the Applicant's plea of recourse to the overriding objective, Foreword to the **CPR** and inherent jurisdiction of the Court thus cannot act to defeat the clear and plain

² Civil Appeal No. 44 of 2014

³ C.A. Civ 253 of 2009; H.C. 1791 of 2009

meaning of CPR Part 26.7(2) read in conjunction with Roland James⁴ and The Attorney General v Keron Matthews⁵. Counsel for the Claimant further submitted that the Applicant/Defendant has proffered no moving and particularized evidence in support of the parent application and accordingly, an affidavit in response to the Morales affidavit to answer new matters raised therein would serve no or no useful purpose.

21. The Claimant further submitted that the “new matters” to which the Defendant wishes to respond deal with various pre-action correspondences from the Claimant personally and through its attorneys-at-law, informing the Defendant of the intended institution of legal proceedings. The Claimant submitted that an Applicant, in drafting an application, should act with all due reasonable and responsible diligence to be expected in the circumstances to best provide the Court with all the necessary, accurate and precise information upon which it may exercise its judicial discretion. The Claimant said that the Applicant ought to be proactive and not reactive in that regard but unfortunately this was not done in the present matter. The Claimant submitted that the Defendant failed to make mention of any sort of pre-action correspondence in the parent application (for the extension of time for filing of the Defence). The Claimant stated further that the Defendant made no assertion of any alleged failure of the Defendant to comply with the Practice Direction for Pre-action Protocols. According to the Claimant, the topic goes wholeheartedly to the issue of promptitude- an essential ingredient for consideration by the Court in relation to the learning of the Court of Appeal in Roland James.
22. It was contended by the Claimant that the Defendant, by the sub-application, is using the disguise of responding to “new matters raised” in the Morales affidavit to attempt to bolster or otherwise cure the deficiency of the parent affidavit. The Claimant submitted that such an attempt would be to defeat the purpose of the Morales affidavit itself and of the Claimant’s Application to set aside the Court’s Order of the 26th June, 2015. The Claimant submitted that that would surely amount to an abuse of process and the sub-application to file affidavits in reply should accordingly be refused.

ISSUE

23. The main issue which thus fell to be determined was as follows:

Whether the Defendant ought to be permitted to file affidavits in reply to the Morales affidavit?

⁴ Ibid

⁵ “Nevertheless, if the language of the Rules admits of only one interpretation, it must be given effect”: [2011] UKPC 38 per Lord Dyson at paragraph 20

LAW AND ANALYSIS

24. I am of the view the Court has the discretion to accept or refuse evidence in reply to evidence filed in opposition to an application, given its wide powers of case management under **Rule 26.1** of the CPR. More particularly, **Rule 26.1(1)(w)** of the CPR provides that the Court may take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective. **Rule 1.1(1)** of the CPR states that the overriding objective of these Rules is to enable the court to deal with cases justly. **Rule 1.2(1)** provides that the court must seek to give effect to the overriding objective when it exercises any discretion given to it by the Rules. **Rule 1.1(2)** of the CPR sets out a non-exhaustive list of what dealing with cases justly includes. The said list being non-exhaustive, this Court wishes to add that dealing with cases justly, in my view, would necessarily include having regard to all the circumstances of the case and considering the matter holistically, rather than viewing any particular stage in isolation from another, should the matter so require.
25. This leads me to Defendant's submission which was to the effect that the issue of the sufficiency of the Indarsingh affidavit is basically a moot point now and cannot impact upon the request to file affidavits in reply as the Court considered the said affidavit sufficient to grant the Notice of Application in the first place. Firstly, this submission appears to fail to take heed of the important fact that the decision of the Court to initially grant the Extension Application was an ex-parte one, without the Court having had the benefit of hearing arguments from the other side. In fact, it was due to the very fact that the Claimant was not given the opportunity to be heard, that the Defendant consented to the June Order (granting the extension of time) being set aside and to the Extension Application being dealt with afresh. In its written submissions filed on the 28th August, 2015, the Defendant itself admitted to such being the reason for giving its consent. Thus, having then considered submissions from both sides on the issue, it was entirely open to this Court to arrive at a different conclusion regarding the Indarsingh affidavit from that arrived at when it solely had before it for consideration one party's contentions.
26. Secondly, it cannot be as the Defendant contends, that the sufficiency of the Indarsingh affidavit is "a given" in light of the Court's earlier grant of an extension of time considering that the June Order had been set aside (with the Defendant's own consent). The setting aside of that Order necessarily places all of the circumstances of the case for fresh consideration before the Court with the former Order being extinguished through the setting aside. Facts found as they relate to the initial order by necessary implication also stand to be considered afresh, for if this were not the case, setting aside of the Order so as to allow the Claimant the opportunity to be heard would merely be of lip service only, with the Court's mind already being made up with regard to material facts affecting the outcome of the Extension Application.

27. With respect to its Application to file affidavits in reply, the Defendant stated that in the Morales affidavit, the Claimant alleges that the Defendant completely disregarded the pre-action protocol and that Counsel for the Defendant irresponsibly took on a matter when he was incapable of addressing it expeditiously. The Defendant went on to say that it intends to submit that those allegations are utterly baseless and in that regard, seeks an opportunity to respond to the Morales affidavit. The Defendant submitted that it wished to respond to “new matters” raised in the Morales affidavit.
28. As I stated earlier, I am of the view that the Court had to consider all of the circumstances of the case and the matter had to be viewed holistically. The reality is that the Defendant’s Application to file affidavits in reply to the Morales affidavit falls within the context of the Main Application for an extension of time for the filing of the Defence: the Claimant sought and obtained permission from this Court to rely upon the Morales affidavit in opposition to the Defendant’s Application to extend the time for filing the Defence. The Indarsingh affidavit was filed in support of that Extension Application. The Defendant seeks permission to reply to the Morales affidavit. In the circumstances, the Defendant’s application to file affidavits in reply to the Morales affidavit could not be viewed in isolation from the Indarsingh affidavit.
29. The Claimant alleged that in effect, what the Defendant is seeking to do through the filing of affidavits in reply to the Morales affidavit is to bolster the strength of the Indarsingh affidavit by providing details which ought to have been provided therein in the first place and that such would amount to an abuse of process. The Defendant claimed not to be seeking to do so but rather, to be responding to new matters raised in the Morales affidavit- those new matters being the allegation that the Defendant completely disregarded the pre-action protocol and that Counsel for the Defendant irresponsibly took on a matter when he was incapable of addressing it expeditiously. It was thus for the Court to determine whether in fact the Morales affidavit raised new matters which would in turn require a response thereto by the Defendant. I accordingly found a consideration of the Indarsingh affidavit to be the necessary starting point.
30. Paragraph 3 of the Indarsingh affidavit filed in support of the Extension Application of the 22nd June, 2015 states as follows:
- “I am informed by Counsel for the defendant, Mr. Christopher Sieuchand, and verily believe that upon his receipt of the Claim, he began a diligent assessment of the papers therein which, due to the volume thereof and his management and attention to his other commitments, took a considerable period of time.”*
31. The Morales affidavit responds to paragraph 3 of the Indarsingh affidavit as follows:

“As to paragraph 3 of the Indarsingh Affidavit I say that as a professional myself I believe that Counsel’s diligent assessment of the papers sent to him is what is required of him in his duty to his client. As to the allegation however that due to the volume of the documents and Counsel’s management and attention to his other commitments his assessment of the documents took a considerable period of time is not an excuse because I believe that it would be improper for any professional person to accept work unless he could handle it without undue delay⁶”.

32. In the Indarsingh affidavit Attorney for the Defendant stated why the assessment of the documents took a considerable period of time. The reasons stated for this were the volume thereof and Counsel for the Defendant’s management and attention to other commitments. There was no further elaboration by the Defendant. Responding to those reasons given by the Defendant, Mr. Morales stated in his affidavit that those reasons were not excuses for taking considerable time to assess the documents as he believed that a professional person should not accept work unless he could handle it without undue delay. I did not understand the Morales affidavit to be raising new matters in that regard. He simply provided his view on the reasons put forth by Counsel for the Defendant for taking considerable time to review the documents. This view is not one that would advance the matter further or put the Defendant at a disadvantage as it is merely an opined statement with respect to the Defendant’s reasons- that he (Mr. Morales) believes that it would be improper for any professional person to accept work unless he could handle it without undue delay. It is my view that this was not such a statement that would require a reply.
33. The Defendant stated that the Morales affidavit alleged that Counsel for the Defendant irresponsibly took on a matter when he was incapable of addressing it expeditiously and that the Defendant wanted to reply to submit that the allegations were baseless. Given that it was paragraph 3 of the Indarsingh affidavit to which the Morales affidavit was responding, any reply by the Defendant would have to be in context and in turn, countering allegations to the effect that Counsel for the Defendant acted irresponsibly in accepting the work would necessarily entail providing further details as to Counsel’s **“management and attention to his other commitments”** referred to in the Indarsingh affidavit so as to show why, in the circumstances, such factors did not lead to undue delay in the assessment of the file.
34. I am of the view that when approaching the Court for an extension of time, it is incumbent upon the Applicant to provide the Court with sufficient detailed particulars so as to convince the Court that despite best efforts being made in the circumstances, the

⁶ See paragraph 6 of the Morales affidavit filed on the 2nd July, 2015.

particular deadline could not be met and so the Court ought to exercise its discretion to extend the time for compliance with the relevant order.

35. The Foreword to the **CPR** , referring to the **Orders and Rules of the Supreme Court of Judicature 1975 (“1975” Rules)**, says that-

*“Undoubtedly, that system was plagued with the “triple evils” of **delay**, costs and complexity all of which were interrelated and stemmed from the uncontrolled nature of the litigation process.” [Emphasis mine]*

The new **Civil Proceedings Rules** thus sought to get away from that culture of, *inter alia*, delay. As the Foreword goes on to say:

“The CPR introduce a new landscape of civil litigation which, in essence, is a new civil procedural code governing the civil justice system. This new procedural code is a radical departure from what obtains under the 1975 Rules. It is underpinned by the Overriding Objective in Part 1 which imposes an obligation on the courts to “deal with all cases justly” and which embodies the principles of equality, economy, proportionality, expedition and procedural fairness, all of which are fundamental to an effective contemporary system of justice.”

36. Accordingly, under the New Rules, a laissez-faire approach to deadlines ought to be frowned upon and therefore it is for parties seeking the indulgence of the Court to do all in their power to satisfy the Court that good reasons exist for delays. Doing all in their power would of course include providing detailed particulars as are necessary to establish that best efforts were being exerted to ensure compliance, especially so when an extension of time has already been granted.
37. As I stated before, replying to the allegation in the Moralles affidavit concerning Counsel’s acceptance of work to establish that allegations concerning counsel’s irresponsibility were baseless would necessarily involve fleshing out the particulars provided at paragraph 3 of the Indarsingh affidavit. In filing the Application for an extension of time of the 22nd June, 2015, Attorneys for the Defendant would have had the full opportunity to provide the Court with details necessary to establish that it was not for want of good reason that there was delay. It was for the Defendant to avail itself of that opportunity then. I considered that with respect to the aspect concerning Counsel for the Defendant’s acceptance of work and the considerable time taken to assess same, no new matters were raised but rather, what the Defendant was seeking to do was flesh out the reasons given at paragraph 3 of the Indarsingh affidavit as to why considerable time was taken to assess the documents.

38. In the circumstances, I concluded that affidavits in reply ought not to be allowed. The **CPR** require that in exercising its discretion under the Rules, the Court deals with cases justly. Dealing with cases justly includes ensuring so far as is practicable that parties are on equal footing, saving expense, dealing with cases proportionately, ensuring that it is dealt with expeditiously and allotting to it an appropriate share of the Court's resources⁷. Replying to the Morales affidavit must be viewed within the context of the primary application for an extension of time. The matters raised to which the Defendant wishes to respond are not new matters and any reply would necessarily canvass material which could have been included in the Indarsingh affidavit. To allow a reply in such circumstances would not be compatible with the aforementioned factors and underlying principles set out in **Rule 1.1(2)** of the **CPR**.
39. It was in light of the aforementioned considerations that this Court dismissed the Defendant's Application to file affidavits in reply to the Morales affidavit of the 2nd July, 2015.

Dated this 5th day of November, 2015

Robin N. Mohammed
Judge

⁷ Rule 1.1(2) of the CPR