THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2018-01872

BETWEEN

MICKELL MARCANO

Claimant

AND

RUNEISHA SEEDARNEE

First Defendant

KHALID ALI

Second Defendant

MAYANTEE SEEDARNEE

Third Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: Friday May 21, 2021

Appearances:

Claimant: Mr. J. Sookoo

Defendants: Mr. S. Boodoo instructed by Ms. R. Balkaran

REASONS ON APPLICATION FOR RELIEF FROM SANCTIONS

CORRECTED ON TUESDAY 25TH MAY, 2021

1. These are the court's reasons for its decision to dismiss the application of the defendant of November 25, 2020 for relief from sanctions for failure to file witness statements which was determined on May 10, 2021. The claim which was filed on May 25, 2018 is for alleged breach of contract by the three defendants in relation to the purchase of three Maxi Taxi vehicles. The Statement of Case was amended on June 3, 2019. An Amended Defence and Counterclaim was filed by each defendant and the claimant filed Amended Defences to Counterclaim on September 25, 2019. After giving directions at a CMC and subsequently extending the time for compliance by both parties, the court on the December 3, 2019 gave full directions for the filing of lists, witness statements, applications pursuant to Part 33 CPR and evidential objections. Witness statements were to be filed and exchanged by May 15, 2020 and trial was set for the 19th, 24th and 25th November 2020. By order of August 18, 2020, the court made a further order for expert evidence to be led by the claimant.

2. The trial dates were subsequently vacated and relisted to November 20, 2020 to set new trial dates. At that hearing it was discovered that the defendants had not complied with the court's order to file and exchange witness statements. The court then made an unless order of its own motion in the following terms;

> *Unless the defendants file and serve an application to extend the time for the filing of witness statements by November 25, 2020, there shall be judgment for the claimant on the claim and counterclaims with damages to be assessed and costs quantified on*

the claim and counterclaim on the prescribed scale by a Master on a date to be fixed by the court office.

3. In compliance with the order of the court of November 20, 2020 the defendants filed the application of November 25, 2020 for relief from sanctions and an extension of time for the filing of the witness statements. The defendants filed witness statement without permission on November 30, 2021.

Promptitude Part 26.7(1) CPR

4. By November 20, 2020, the defendants had been in breach of the order to file the witness statements for several months, namely since May 15, 2020. The failure to file witness statements in keeping with the order of the court is one that attracts an automatic sanction under **Part 29.13 (1) and (2) CPR**. Relief from sanctions therefore becomes a requirement should the defaulting party wish to call witnesses.

5. The Covid 19 Pandemic intervened and there occurred the cessation of all filing and the stoppage of timelines by Practice Direction of March 16, 2020. By Practice Direction of April 2, 2020, gazetted on April 4, 2020, electronic filings were instituted. Yet no application was filed for relief from sanctions and extension of time. Assuming that the defendants would be credited for the month that they lost by way of the cessation of filing, the witness statement would have been due by June 14 at the latest. In that regard it must be borne in mind that deadlines are just that, the outer possible dates for filing. Parties may of course use the time prior to the deadline to file. In this case the defendants could have filed from April when filing resumed electronically. Despite this the court was willing to

consider that the last date to comply would have been August 17 after being credited for time lost as agreed by both parties at the hearing of the application.

6. Some three months thereafter, the parties appeared before the court to set new trial dates on November 20, 2020. By then no application had been made for relief from sanctions and extension of time. It was upon the court making the order set out above for the application to be brought that the application was in fact filed. The inference is that but for the intervention of the court and the making of an unless order an application for relief may have never been made.

7. In examining the issue of promptitude the court has also considered the reason provided by the defendants for not filing an application during the protracted period that they failed so to do as this may give context to what may at first appear to be a prolonged period of delay. In that regard, none of the defendants swore affidavits in support of the application but an affidavit was sworn by Shiva Boodoo Attorney at Law, the advocate attorney on record for the defendants. The court makes no comment on the perceived impropriety of this at this stage as it has not been factored into the deliberations of the court on this application.

8. Boodoo's evidence is that throughout the duration of the claim the defendants and their family have received numerous threats to their personal safety from persons purporting to be agents of the claimant. No particulars were provided save that it was stated that an attempt was made to make a report at the Toco Police Station but the report was not taken. Without any foundation whatsoever it is deposed that the reason for the report not being taken in writing is that one of the claimant's

relatives who is a police officer blocked all attempts so to do. A perusal of the claim form and the filed appearances however demonstrate that the addresses provided for and by two of the defendants is Guaico, Sangre Grande and the third, Cumuto. The defendants have also therefore not explained the relation between them and the Toco Police Station.

9. Further, Boodoo deposed that within recent times, the home of the first and third defendants was the subject of a fire that destroyed a significant portion of the house resulting in loss of some items of evidential value to the claim. It should be noted that the parties have long since filed their disclosure lists. The evidence is that the defendants believe the cause of the fire to be arson so that they fear for their safety. No documents have been attached to support these facts.

10. As a consequence in June 2020, the wife and daughter of the second defendant fled the jurisdiction because of threats. Thereafter the claimant showed up unannounced at the home of the second defendant and told him that he should be careful as he was now alone. The defendants then went into hiding and became fearful of progressing the matter. No documents have been attached in support of the contention that the claimant's wife and daughter left the country and the dates they left. In fact, the facts set out in the affidavit themselves carry very little information as to relevant dates.

11. Additionally, the third defendant is a senior citizen and has isolated because of Covid.

12. Attorney then deposed to his personal difficulties in that he is asthmatic and required treatment on nebulizer from March 2020 to the date of filing the affidavit.

13. The claimant replied by affidavit and denied threatening the defendants. He also denied that he has any relatives in the Police Service who blocked any report. He disclosed that the first defendant is in fact a Police Officer attached to the Matura Police Station and that she was previously attached to the Toco Police Station. He disputed that he had anything to do with the fire at the house and deposed that the fire in fact took place on May 23, 2019 and not 2020 as stated by the attorney for the defendants.

14. He deposed that the wife of the second defendant left to go to Canada as she acquired a lucrative job in Canada. She was formerly a Radiographer at the Eastern Regional Health Authority in Sangre Grande. He also denied visiting the defendants at their home. He states that he knows that the second defendant does not live alone but lives with his mother, father, sister and sister' daughter under one roof. He also deposed that the third defendant has not ceased all activities due to Covid as she sells detergents from the front of her house under two tents. It is his evidence that he passes in front of her home every day to get to and from his home so he has observed her interacting with customers and others on numerous occasions. Further that at no time, either in their defence or through their attorney at law did the defendants ever make such complaints before as they are untrue.

15. The court remains in doubt about the exact date that the fire at the premises of the home of the first and third defendants occurred as there is conflicting evidence on same. It is however the duty of the defendants

to satisfy the court of the bona fides of all the matters they have set out. Without deciding where the truth lies and taking the facts set out by the defendants to be true on the face of it, the court was of the view that nothing prevented the lawyers from making the application for relief and to extend the time after the breach occurred in June 2020. There is no evidence before the court that the attorneys for the defendants approached them to indicate that the time had expired and that steps had to be taken to remedy same. No evidence of any communication whatsoever between the lawyers and their clients.

16. Further, as can be gleaned from the fact that advocate attorney chose to swear the affidavit himself, he has not deposed to anything that prevented him from obtaining instructions to do the same before, save and except his unsupported evidence that he the advocate had to be on a nebulizer from March to November 2020, a somewhat untenable position devoid of supporting documents. In any event no evidence has been given of any attempts by Ms. Balkaran as Instructing Attorney to seek instructions to file an application.

17. When viewed together with the inordinate length of time that intervened between August and November 2020 and the fact that but for the court making an order for the filing of the application it appears that none may have been made, the court found that the application was not made promptly.

Intentionality Part 26.7(3)(a) CPR

18. The court was not satisfied that the failure to comply was not intentional. The defendants have not provided specific dates or even a range of dates

at which time the house was burnt or threats were made. Should these matters have occurred between the making of the directions order and the date for filing the statements it may well have been the case that a decision was taken by them intentionally not to proceed with the matter but that is not the evidence as the evidence is that the house fire occurred recently, the affidavit having been sworn on November 24, 2020.

19. In that regard the court also noted the matters deposed to at paragraph 7 of the Boodoo affidavit that is very telling namely that it was after the encounter in June 2020 (see paragraph 6) that the defendants went into hiding and were fearful of progressing the matter. It follows that the inference is that prior to the unascertained date in June 2020 the defendants (on the evidence of Boodoo) were still interested in the matter but did not give instructions to comply with the order. Additionally, the defendants have failed to inform the court of the date of travel of the wife and daughter of the second defendant in June so that it is difficult to reckon time in the blur that has become the timeline relied on by the defendants. What is of equal concern is that it is to be expected that advocate attorney would have appreciated the importance of precision in providing dates and ought to have attempted to give clear dates or time periods as far as was possible and if not he ought to have offered an explanation for failure so to do. But he has failed so to do.

20. Further, these defendants all filed separate defences so that the fact that it may have been inconvenient to obtain instructions from one does not explain the failure to obtain same from the other and the same principle applies to the issue of intention to breach the order. Ms. Balkaran submitted that the defendants were hiding therefore there was good reason for the breach. When the evidence is considered it is clear that the

allegation of hiding is one that takes place from some unascertained date after the alleged threats in June, the dates of which we are unaware. Essentially therefore there is no evidence before the court that the failure to comply was not intentional. It is for the defendants to satisfy the court and it has failed so to do.

Good explanation for the breach Part 26.7 (3)(b)

21. A good explanation is not an infallible one but is a reasonable excuse for not having complied with the court's order. In this case, there was in the court's view no good explanation for the breach. The evidence of the defendants when taken at its highest complains of threats by the claimant. In examining the reason, the court must apply a level of common sense and rationality. An explanation that is inherently improbable is not a good one. In this case, there has been no prior complaints about threats to the defendants whether in the defence or by way of letters between lawyers. These allegations of threats arise for the very first time in the affidavit in support of the application. It is reasonable to have expected complaints of threats prior to the breach by way of at least correspondence between the parties highlighting the threats and calling upon the threatening party to desist from such behavior. On the upper end one may have expected an injunction application. But in face of absolutely no correspondence thereon and no explanation for the absence of such correspondence the court was off the view the evidence of the defendants is inherently implausible so that threats did not provide a good explanation for the failure to file witness statements in this case.

22. Further, the evidence of the fire having occurred "within recent times" is equally unsatisfactory as the defendants have failed to state when the fire

occurred. Should the fire have occurred during a period that would have likely affected the capability of two of the defendants to file their witness statements, this being of utmost importance to this limb of the application, it would have been reasonable once again for the deponent to have provided the date or period of the alleged fire but he has failed so to do thereby leaving the court unsatisfied as to whether the fire occurred between the date of the order and the date for filing the witness statements. More than that, the fire at the home of the first and third defendant provides no reasonable excuse for the failure of the second defendant to file his witness statement.

23. Finally, there is the evidence that advocate attorney required medical treatment from March to November on a nebulizer. Even if the court were to accept this evidence, it provides no good explanation as to why Ms. Balkaran could not have acted to have the witness statement filed and served.

24. In the round therefore the court found that there was no good explanation for the breach.

General Compliance Part 26.7(3)(c) CPR

25. The court found that there was general compliance by the defendants.

Disposition

26. The defendants having failed to satisfy the court in relation to three of the threshold requirements it did not proceed to the discretionary

considerations at 26.7 (4) as there was no need so to do. The following order was therefore made;

a. Application of November 25, 2020 is dismissed and the witness statements of Runeisha Seedarnee, Khalid Ali, Mayantee Seedarnee and Ahmad Ali are struck out.
b. The defendants shall pay to the claimant the costs of the application assessed in the sum of $2,500.00.
c. The trial shall be heard as undefended on June 21 at 1:00 p.m. by virtual hearing.

Obiter

27. The following matters formed no part of the considerations by the court in determining the application but it would be failing in its duty to the courts and to the legal profession if it were to turn a blind eye to a feature of the proceedings that has caused much disquiet in the mind of the court as to the practice of attorneys. The court noted with much discomfort the fact that the advocate attorney saw it fit to place his personal and professional reputation on the line as it were by swearing to an affidavit in which parties had made very serious allegations against another.

28. Allegations and cross allegations of dishonesty and criminal conduct and the like are matters of fact between parties and attorneys should refrain from placing themselves into the position of swearing to the truth of facts that are in dispute between their clients especially when they have played no primary role in those facts and are unable to speak from a position of first-hand knowledge. This is quite a different matter from purely formal affidavits that are usually sworn in the course of procedural applications by Instructing Attorneys. Although the present application was procedural

in nature, attorney at law for the defendants should have been circumspect having regard to the allegations he was about to make on oath especially since there is no explanation as to why the parties themselves did not swear the affidavit. Hence the apparent ease with which this task was undertaken by attorney at law has caused the court some disquiet.

29. To the extent that appears to be a developing trend in the profession it is one that ought not to be encouraged.

Ricky Rahim

Judge