

**TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2020-02573**

**Between**

**MZSM COMPANY LTD.**

**Claimant**

**And**

**KAMLA BHAGWAN**

**Defendant**

**Appearances:**

Claimant: Annand Misir

Defendant: Zeik Ashraph instructed by Darius Emrith

**Before the Honourable Mr. Justice Devindra Rampersad**

**Date of delivery: 16 December 2021**

**RULING**

## Introduction

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1. This claim was brought for the payment by the defendant to the claimant of December of \$592,373 being monies due and owing for stock, goods and material provided by the claimant to the defendant. The sum was the balance due under a promissory note purportedly signed by the defendant on 30 October 2018 acknowledging a total debt of \$755,373 with the claimant alleging that the defendant had made payments amounting to the sum of \$163,000 on account of that promissory note leaving the claimed balance.
2. The defendant disputes the claim on the following bases:
  - 2.1. The goods which are the source of the alleged debt were delivered to the defendant's husband Basdeo Singh who carried on a business called "Survived Marketing" with which the defendant has no connection or association;
  - 2.2. The signature on the alleged promissory note and a document described as an acknowledgment of the debt purportedly made by her are fabrications and/or forgeries;
  - 2.3. The said Basdeo Singh, her estranged husband, fraudulently represented himself to be a servant and/or agent of the defendant to obtain goods on credit and to unjustly enriched himself and/or his company and she knows nothing about those goods;
  - 2.4. The returned cheques purporting to be payments made by the defendant were handed to the said Basdeo Singh and copies were not given to her despite her requests to enable her to make the necessary reports to the relevant division of the Trinidad and Tobago Police Service;
  - 2.5. Basdeo Singh has since abandoned their marriage and is residing in Guyana.

## The Other Proceedings

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3. The claimant filed separate proceedings against the said Basdeo Singh and Survived Marketing in CV 2020 – 02574 and judgment in default of appearance was entered on 7 January 2021 in the sum of \$605,861.95. Those proceedings were assigned to the Honourable Mr. Justice Ramcharan, who made an order for service by newspaper advertisement, but were dealt with as an “over the counter” judgment in default by the Assistant Registrar.

## The Application – Discussion and Resolution

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4. The defendant seeks, by notice of application, an order that the court strike out the amended claim form and statement of case on the ground that it is an abuse of process and/or that the issues which fall for determination in these proceedings are res judicata.
5. The resolution of this application depends on whether the claimant can be found to have made an election to pursue its claim against the defendant in CV 2020 – 02574 ***MZSM Company Limited vs. Basdeo Singh & Survived Marketing***<sup>1</sup> in which judgment in default of appearance was entered against both defendants. The pleadings on behalf of the claimant in that matter mirrored exactly the ones in these proceedings including for relief in the sum of \$592,373.
6. At the core of the claim is the sum of \$755,373 which is the subject of two promissory notes – one signed by the defendant in these proceedings and the other signed by the first defendant in CV 2020 – 02574. It must be said that the intention cannot be that these promissory notes are cumulative as the facts that have been presented revealed that there was a total claim of \$755,373 at the material time. Therefore, this is not a claim for \$755,373 x 2 or, as has now

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<sup>1</sup> Referred to as "**Survived Marketing**" in the default judgment

been claimed in both matters, the balance of \$592,373 x 2. Of course, that is the effect of the two separate claims.

7. Counsel for the claimant has not sufficiently explained away that action which in reality gives the claimant the possibility of getting two separate and possibly enforceable judgments for \$592,373 each. As couched, there is nothing stopping the claimant from doing just that i.e. enforcing two judgments for those amounts if judgment was obtained in both matters. To my mind, this is a travesty and the fact that the matters were assigned to two different judges rather than consolidated into one at the very earliest stage shakes the bona fides of the claimant in a very real way. It would have been so easy to have added all of the defendants into one action and relied on the very same documents that were presented in both as a confirmation of the promise to pay the claimant the entire sum of \$592,373. Alternatively, if the matters were filed simultaneously, a note could have been sent to the Registrar of the Supreme Court to have had both matters assigned to one judge as is a regular practice before this court. Even at the time of taking up default judgment, such a request could have been made in light of the circumstances. But that was not done and the allegation that there are two separate causes of action, which seems appealing on the surface having regard to the two separate promissory notes, is not helpful to the court under the overriding objective. Technically, there are two separate causes of action but the source of that action is one debt and not two and they obviously cannot be enforced at the same time to give the claimant an unfair benefit. Of course, the court makes no inference with respect to any impropriety whatsoever on behalf of counsel involved and accepts that it may have just been an oversight in the circumstances.
8. A very real issue for determination, though, is the validity of the promissory note signed by the defendant.
9. Returning now to the application, the court has looked at the very helpful Privy Council decision in ***Balgobin v South West Regional Health Authority***<sup>2</sup> [2012]

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<sup>2</sup> [2012] 5 LRC 524; [2012] UKPC 11

5 LRC 524 which was raised tangentially in the defendant's submissions and not addressed at all in the claimant's submissions.

10. Even though that case is based in tort, the Privy Council adopted the principles of election as of general application. In that case, the claimant brought an action in negligence against the South West Regional Health Authority (SWRHA) who she claimed to be her employer. The SWRHA disputed being her employer and a third-party – Tri-Star Latin America Limited (Tri-Star) – was added in relation to that issue. Default judgment was taken up against Tri-Star and the question arose as to whether, by doing so, the claimant had elected to pursue her remedy against Tri-Star thereby releasing SWRHA's liability.
11. The Board quoted with approval the statement of Parke B in *King v Hoare* as to whether there was a merger and then stated:

*"[16] In this context, the 'adoption' of liability by a claimant means the decision to choose one possible defendant over another as the one against whom the case is to be made. This presupposes that an election is genuinely feasible, in other words, that a case against either defendant could properly be made and that a decision as to which is to be selected has been consciously taken. As a matter of principle, where a claim against two possible defendants can be made and the espousal of a case against one defendant is necessarily inconsistent with the maintenance of a claim against a second defendant, a deliberate choice of one should preclude the continuance of a claim against the other."*

*[21] It appears, therefore, that where a claim against more than one defendant cannot be pursued either because the factual basis of the suit against one is incompatible with the factual foundation necessary to establish liability against the other or the legal bases of both claims cannot be consistently advanced, an election to pursue one basis of claim will preclude reliance on the other. By contrast, where there is no joint contract or relationship of principal and agent and the obligations*

*are several, a judgment in an action against one is no bar to an action against another: see Isaacs & Sons v Salbstein [1916] 2 KB 139 at 152 per Swinfen Eady LJ. **Furthermore, as Lush J, sitting in the Divisional Court in that case, said ([1916] 2 KB 139 at 143) there is no foundation for the contention that because A obtains a judgment against B (who in fact was never a party to the contract at all) he cannot afterwards obtain judgment on that contract against C, who was the real contracting party.***

*[Emphasis added]*

12. The Board went on to opine, in relation to the issue of election, that:

*“[29] A number of essential features can be derived from this passage, each of them pertinent to the question whether an unequivocal election has been made. First the person making the election must have determined that he would follow one remedy out of a range of two or more. Although it is not expressly stated, this formulation implies that the decision has been made that the selected remedy will be pursued at the expense of the others that were available. Second the choice must be communicated to the other side. Third it must be communicated in a way that will lead the opposite party to believe that a choice of the nature required has been made--in other words, a deliberate preference of the chosen alternative over any other.”*

13. The facts of this case for determination before this court do not support that a deliberate preference or election was made, and intimated to the defendant in these proceedings, to pursue its remedy against the defendants in CV 2020 – 02574 to the exclusion of the defendant in these proceedings. Obviously, from the pleaded facts, the claimant relies upon the fact of the payments made by the defendant as an acknowledgment of the debt and payment towards the same. Copies of cheques in that regard were produced. A question for determination at trial would be whether those cheques were made pursuant to the said promissory notes or as a result of the course of further dealings

which the defendant had with the claimant independent of the promissory note. In any event, very serious allegations have been made with respect to the alleged forgery of the defendant's signature on documents. Those allegations of forgery would have to be properly particularized beyond what has been already pleaded in the defence.

14. The Board's opinion continued:

*"[32] While it would not be correct to suggest that obtaining a default judgment can never amount to an unequivocal election, the circumstance that such a judgment will almost certainly be obtained without any consideration of the merits is inescapably relevant to that question. In Kok Hoong v Leung Cheong Kweng Mines Ltd [1964] 1 All ER 300 it was held that a default judgment, although capable of giving rise to an estoppel, must always be scrutinised with great care in order to determine the 'bare essence' of what was the import of the judgment. Viscount Radcliffe said ([1964] 1 All ER 300 at 305):*

*'a default judgment is capable of giving rise to an estoppel per rem judicatam. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked on as only another form of a judgment by consent (see [Re South American and Mexican Co, ex p Bank of England [1895] 1 Ch 37, [1891-4] All ER Rep 680]) and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. **There is obvious and, indeed, grave danger in permitting such a***

*judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default.”*

*[Emphasis added]*

15. If, as the defendant alleges and then subsequently proves, there was forgery, the court cannot allow such a serious charge to escape the court's consideration and remedies on the facts that have presented and which have been furthered on this application.

### **The Order**

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16. As a result, the notice of application is dismissed. The court goes further to order that CV 2020 – 02574 be transferred to this court and that it be consolidated with this matter to ensure that there is no double enforcement of the amounts claimed in both matters.
17. With respect to the issue of costs, this court is of the respectful view that this situation, and application, has arisen as a result of the claimant's actions and the defendant was quite entitled to raise the question for the court's consideration. Had the claimant brought a singular claim or had made it clear that the matters were related to that it could have engaged the attention and consideration of one singular judge of the High Court rather than two, this matter may have been dealt with in a different manner having regard to the court's case management conference jurisdiction and powers.
18. The claimant shall therefore pay the defendant's costs of the application to be quantified by the court in default of agreement.

/s/ D. Rampersad J.