

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. CV 2008 - 00683**

**BETWEEN**

**ASHA CHARAN**

**Claimant**

**AND**

**OMAR MOHAMMED**

**Defendant**

**Before the Honourable Madam Justice Rajnauth-Lee**

**Appearances:**

**Miss Tara Lutchman for the Claimant**

**Miss Kandace Bharath for the Defendant**

**Dated: the 12<sup>th</sup> November, 2009.**

\*\*\*\*\*

**REASONS**

**THE PROCEEDINGS**

1. The action was commenced by Claim Form filed on the 26<sup>th</sup> February, 2008 whereby the Claimant claimed inter alia damages for breach of contract

pursuant to an oral agreement entered into by the Claimant and the Defendant for the sale of motor vehicle PCB 3671 (“the said motor vehicle”) to the Claimant for the price of \$90,000.00. The Claimant claimed further or in the alternative damages for fraudulent and/or negligent misrepresentation made on the 5<sup>th</sup> December, 2007 by the Defendant to the Claimant thereby inducing the Claimant to purchase the said motor vehicle.

2. By her Statement of Case, the Claimant complained inter alia that during oral negotiations the Defendant represented to her that:

(a) Everything was working well with the said vehicle; and

(b) The Claimant was buying a very good vehicle.

According to the Statement of Case (paragraph 5), acting in reliance on the above representations the Claimant did not take a mechanic to inspect the said vehicle and agreed to purchase it from the Defendant for the price of \$90,000. in or about November, 2007.

3. According to the Statement of Case, since the Eastern Credit Union, to which the Claimant had applied for a loan, required a recent satisfactory valuation report and/or appraisal of the said vehicle, the Defendant supplied the Claimant with an inspection report/appraisal dated the 10<sup>th</sup> August, 2007 supplied by Motor Critic Limited which categorized the said vehicle as having undergone “normal wear” and graded it as “B+” (para.11). The Claimant further alleged that soon after she took possession of the said vehicle the said vehicle began malfunctioning and was in need of substantial repairs. She claimed not to have been able to drive the said vehicle since the 14<sup>th</sup> December, 2007.

4. By his Defence the Defendant denied the Claimant’s claim alleging that at the time that he informed the Claimant that the said vehicle was in good working

condition he told her that she should bring her mechanic to check it out, but that she did not do so. The Defendant alleged that he never expressly and/or impliedly informed the Claimant that the said vehicle was free from defects as the said vehicle was a second hand vehicle and there was always the possibility of defects occurring. The Claimant filed a Reply on the 13<sup>th</sup> June, 2008.

5. By Notice of Application filed on the 2<sup>nd</sup> December, 2008 the Claimant sought permission to amend her Statement of Case on the grounds inter alia that since the filing of the Statement of Case certain repairs were undertaken to the said vehicle and other defective parts were discovered and in need of replacement. Permission was granted by the Court. The Amended Statement of Case was filed on the 18<sup>th</sup> February, 2009. The Defendant filed a Re-Amended Defence on the 26<sup>th</sup> March, 2009.

#### **CASE MANAGEMENT CONFERENCE**

6. At a Case Management Conference on the 22<sup>nd</sup> May, 2009, the Court ordered as follows:

***IT IS ORDERED that***

- 1. The Claimant do file an Agreed Bundle of Documents on or before 24<sup>th</sup> day of July 2009;*
- 2. The Parties do file Witness Statements of all Witnesses on or before the 29<sup>th</sup> September, 2009;*
- 3. The Witness Statements do stand as Evidence in Chief;*
- 4. Witnesses to be present at the Trial for cross examination.*

A pre-trial review was fixed for the 23<sup>rd</sup> October, 2009.

## NOTICE OF APPLICATION

7. On the 2<sup>nd</sup> October, 2009 the Claimant filed a Notice of Application for the following relief:

1. *That the Claimant be granted relief from sanctions.*
2. *That the time for compliance with the directions given on the 22<sup>nd</sup> May, 2009 be extended.*
3. *That the time for the filing and serving of the Witness Statement of Neil Prescod be extended to 2<sup>nd</sup> October, 2009.*
4. *Such further and/or other reliefs.*

8. By notice filed on the 5<sup>th</sup> October, 2009, the Claimant withdrew the 2<sup>nd</sup> October application and on the said 5th October, 2009, the Claimant filed another Notice of Application seeking the same relief. The only difference between the two (2) applications was that the proposed witness statement of Neil Prescod was not exhibited to the first application.

9. At the pre-trial review, Attorney for the Defendant objected to the said application. The Court heard the application and dismissed it.

10. The grounds of the application filed on the 5<sup>th</sup> October, 2009 were as follows:

1. *Directions were given on the 22<sup>nd</sup> May, 2009 by the Honourable Madam Justice Rajnauth-Lee for the filing and serving of Witness Statements by the 29<sup>th</sup> September, 2009.*

2. *The Claimant had difficulty in making arrangements with Mr. Neil Prescod, a mechanic and Witness in this case.*
  3. *There was difficulty in contacting Mr. Prescod and having his Witness Statement executed in time in order to be filed by the 29<sup>th</sup> September, 2009.*
  5. *Due to the above the signed Witness Statement was only received by the Claimant's Attorney on the 2<sup>nd</sup> October, 2009.*
11. The application was supported by the affidavit of Miss Tara Lutchman, the Claimant's Attorney. I will set out paragraphs 5 - 10 of her affidavit:
5. *Early arrangements were being made by the Claimant and myself to notify Mr. Neil Prescod that due to his having conducted repairs to motor vehicle PBC 3671 and producing estimate dated 1<sup>st</sup> December, 2009 and Invoice dated 16<sup>th</sup> February, 2009 that we required him to be a Witness on behalf of the Claimant in this case.*
  6. *Mr. Neil Prescod was contacted on numerous occasions by both the Claimant and myself in order to obtain the necessary information for the Witness Statement to be prepared. On these occasions Mr. Prescod was unavailable to speak with us concerning the Witness Statement.*
  7. *It was only on the 23<sup>rd</sup> September, 2009 that I was able to properly speak to Mr. Prescod and I thereafter prepared a draft of the Witness Statement.*
  8. *I am informed by the Claimant and verily believe to be true that she personally hand-delivered the Witness Statement to*

*Mr. Prescod at his business place at No. 12 Roble Street, Morvant on the 23<sup>rd</sup> September, 2009. I personally spoke to Mr. Prescod and explained that corrections needed to be made to the Draft Witness Statement so that it could be finalized and returned to him for signing in order to be filed by the 29<sup>th</sup> September, 2009.*

9. *Mr. Prescod was in possession of the Draft Witness Statement since the 23<sup>rd</sup> September, 2009. After this I made repeated requests to Mr. Prescod that corrections be made so that the Draft Witness Statement could be prepared in final.*
10. *The corrections for the Witness Statement were only returned to my office on the evening of the 1<sup>st</sup> October, 2009. Corrections were made and the final Witness Statement was only signed by Mr. Prescod on Friday 2<sup>nd</sup> October, 2009. A draft copy of the Witness Statement of Neil Prescod is hereto attached and marked as **“TLI”**.*

### **CIVIL PROCEEDINGS RULES, 1998**

12. Part 29:13 of the Civil Proceedings Rules, 1998, (“C.P.R.”) provides as follows:

- (1) *If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court than the witness may not be called unless the court permits.*

- (2) *The court may not give permission at the trial unless the party asking for permission has a good reason for not seeking relief under rule 26.7 earlier.*

13. Part 26:7 of the C.P.R. provides as follows:

- (1) *An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.*
- (2) *An application for relief must be supported by evidence.*
- (3) *The court may grant relief only if it is satisfied that –*
  - (a) *the failure to comply was not intentional;*
  - (b) *there is a good explanation for the breach; and*
  - (c) *the party in default has generally complied with all other relevant rules, practice directions, orders and directions.*
- (4) *In considering whether to grant relief, the court must have regard to -*
  - (a) *the interests of the administration of justice;*
  - (b) *whether the failure to comply was due to the party or his attorney;*
  - (c) *whether the failure to comply has been or can be remedied within a reasonable time; and*
  - (d) *whether the trial date or any likely trial date can still be met if relief is granted.*
- (5) *The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.*

## **LAW AND CONCLUSIONS**

14. In the well-known case of **Trincan Oil Limited and others v. Chris Martin** Civil Appeal No. 65 of 2009, Mr. Justice Jamadar J.A. in delivering the judgment of the Court of Appeal said 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 sanctions must be made promptly and supported by evidence. Rules 26.7 (3) and (4) are distinct. Rule 26.7 (3) prescribes three conditions precedent that must all be satisfied before the exercise of any true discretion 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 discretion 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.*

15. In the Court's view, Miss Lutchman's affidavit had a familiar ring to it. A witness statement is only prepared less than one (1) week prior to the date fixed for filing. In this matter no proper explanation was given as to why Mr. Prescod was unavailable to speak to Miss Lutchman concerning his witness statement, and why it was only on the 23<sup>rd</sup> September, 2009, that she was properly able to speak to Mr. Prescod and thereafter to draft the witness statement.

16. In the Court's view, this was a clear case in which the Attorney ought to have filed an application to extend time for the filing of Mr. Prescod's witness statement or to file a witness summary in its place prior to the date specified by the Court for the filing of witness statements. It is clear to the Court that Miss Lutchman's experience with this witness was that he was either too busy or was not co-operating. In those circumstances, she must have expected that his witness statement would not have been ready for filing on time.

17. In addition, I have looked at the proposed witness statement. It cannot be acceptable that a witness statement is not signed in the presence of the Attorney, but in the presence of the Claimant even though this witness lives in the jurisdiction and gives his address as Morvant. If the witness could not sign in the presence of the Attorney, there ought to have been some better arrangement made and explanation for same. In fact, Miss Lutchman proposed to use a witness statement of a witness she has never seen.

18. In all the above circumstances, the Court was not satisfied that the Claimant had provided a good explanation for the breach. In the exercise of the Court's discretion I refused the Claimant's application for relief against sanctions and ordered that the Claimant pay to the Defendant costs of the application assessed in the sum of \$1,500.00 on or before the 30<sup>th</sup> November, 2009.

.....  
**Maureen Rajnauth-Lee**  
**Judge**