

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-02132

BETWEEN

MOOTILAL RAMHIT AND SONS CONTRACTING LIMITED

Claimant

AND

EDUCATION FACILITIES COMPANY LIMITED

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before the Honourable Mr Justice Seepersad

Appearances:

1. Mr Deonarine instructed by Ms Kawal and Ms Clerk for the Claimant.
2. Ms Piper for the 1st Defendant.
3. Mr Byam instructed by Ms Niles for the 2nd Defendant.

Date of Delivery: 14th December, 2017

Decision

1. Before the Court for its determination is the 2nd Defendant's application filed on the 12th October, 2017 by virtue of which the following relief has been sought:
 - a. An order pursuant to Part 13.3 of the Civil Proceedings Rules 1998 (as amended) that the Order of the Honourable Mr Justice Seepersad dated July 27th 2017 be set aside; and/or
 - b. Additionally and/or alternatively an Order pursuant to the inherent jurisdiction of the Court that the judgment entered in default of appearance and defence on July 27th 2017 be set aside;
 - c. This action be dismissed against the second named Defendant or that all further proceedings in this action be stayed on the ground that it is not and has never been a proper party to these proceedings;
 - d. The Claim Form and Statement of Case filed on 8th June, 2017 be amended by striking out the name of the Attorney General of Trinidad and Tobago as a Defendant;
 - e. In the alternative that the second named Defendant be at liberty to defend and/or strike out the second named Defendant as a party to this action herein.
 - f. That the costs occasioned herein be the costs in cause.
2. In support of the notice of application, two affidavits were filed, one on the 12th October 2017 and the other on the 15th November, 2017.
3. On the 27th July, 2017, this Court issued a judgment in default of entering an appearance with respect to three sums namely \$2,699,724.11, \$417,801.60 and \$359,792.99. No issue has been taken in relation to the regularity of same and the 2nd Defendant accepted that no appearance was filed having regard to administrative challenges.
4. In the affidavit of the 12th October, 2017, the 2nd Defendant pointed out that in several similar and/or interrelated matters before the Courts, the State entered appearances and

similar legal points have been taken. At paragraph 12 of the affidavit, it was stated that the Attorney General is not a proper party to the action and at paragraph 14 of same, the 2nd Defendant stated that it is in the public interest, administrative inadvertence notwithstanding, for the issue as to whether or not the Attorney General is a proper party to the action, to be determined by the Court.

The Law and Analysis

5. The Court addressed its mind to the relevant provisions of the Civil Proceedings Rules 1998 (as amended) (CPR) and in particular Part 13.3 which states:

“13.3 (1) The Court may set aside a judgment entered under Part 12 if—

(a) the defendant has a realistic prospect of success in the claim; and

(b) the defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.”

6. An application to set aside under Part 13.3 of the CPR has to be determined with regard to the two factors outlined therein and the Court is not at liberty to resort to the overriding objective outlined at Part 1 of the CPR. The two preconditions outlined at Part 13.3(1)(a) and 13.3(1)(b) must be met and if they are not, the Court has no discretion to set aside a default judgment which was regularly issued.
7. The Court must therefore consider whether the Defendant has a realistic prospect of success in the claim and whether the Defendant acted as soon as was reasonably practicable when it realised that the judgment had been entered. In its consideration of the aforesaid criteria, the Court’s inherent jurisdiction cannot be invoked as the express provisions of Part 13.3 of the CPR cannot be circumvented.

Realistic Prospect of Success

8. A realistic prospect of success according to the learned authors of Blackstone’s Civil Practice 2016 at paragraph 20.16 means more than an arguable defence. In the case of

International Finance Corporation v Ute Africa Sprl [2001] All ER (D) 101

Moore-Bick J stated as follows:

“A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favour of setting the judgment aside. In my view, therefore, Mr. Howe was right in saying that the expression “realistic prospect of success” in this context means a case which carries a degree of conviction.”

The need for an affidavit of merit

9. The applicant has an obligation to place before the Court the facts which support the application so that the Court can determine whether the position has a realistic prospect of success. This obligation is usually discharged by the filing of an affidavit of merit which pellucidly outlines the factual matrix and the prevailing circumstances in support of the articulated argument so as to demonstrate that the said position has a realistic prospect of success.
10. The Court of Appeal in **Anthony Ramkissoo v Mohanlal Bhagwansingh Civil Appeal No. S-163 of 2013** stated as follows:

“8. Rule 13.3 (1) requires that the defendant demonstrate that he “has a realistic prospect of success” in defending the claim. Part 12 CPR, 1998, deals with the general rules concerning applications for Court orders. It provides that generally every application must be in writing; it must include certification that any facts stated are true; and where evidence in support of an application is required it must be contained in an affidavit.

9. In this application the defendant did certify in the application that the facts stated in the defence are true, but did not depose to those facts in his affidavit. In my opinion, on an application pursuant to Rule 13.3 to set aside default judgments – the affidavit in support of the application must condescend to deposing to the facts which substantiate the requirements of both limbs of the rule. An affidavit of merits is required. It is not enough to rely on the certificate to the application and to simply attach the defence.”

11. In **Curt Semper v Candy Sampson and Others CV2010-04557** Rajkumar J (as he then was) stated:

*“21. In the case of **Ramkissoon v. Olds Discount Co. (T.C.C.) Ltd (1961) 4 WIR 73** Mc Shine Ag. CJ at page 74 F cited the case of *Farden v. Ritcher* as “sufficient authority for holding that before a judgment which has been regularly obtained and properly signed could be set aside, an affidavit of merit was required as almost an inflexible rule, and when such an application to set aside is not thus supported, it ought not to be granted except for some very sufficient reason.”.*

12. In its Notice of Application the 2nd Defendant stated as follows:

“The 2nd Defendant has a good defence to this action. That the Claim Form and Statement of Case both dated and filed on 8th June 2017 discloses no reasonable cause of action against the second named Defendant and that the second named Defendant has been improperly joined as a party to these proceedings.”

13. This statement was not repeated in the affidavit of 12th October 2017 but was restated at paragraph 6 of the supplemental affidavit, which was filed on 15th November, 2017. The focal point of the 2nd Defendant’s argument is that the Statement of Case discloses no grounds to justify the institution of the action against it and that the claim amounts to an abuse of the Court’s process.

14. **The 2nd Defendant’s arguments raise complex issues of law, as the assertion is that the Attorney General is wrongly named as a party to the action and the 2nd Defendant has mounted a frontal attack on the Claimant’s pleadings. In such circumstances an affidavit of merit is not strictly necessary as the issue to be determined revolves around issues of law.**

15. **The relationship between the Government of the Republic of Trinidad and Tobago and the Education Facilities Company Limited is one which should be clarified and in doing so the law as it relates inter alia to agency, apparent/ ostensible authority and the circumstances under which the veil of incorporation can be pierced in relation to Limited Liability Companies, has to be considered.**

16. **The Court is also of the view that the issue as to whether the contract in this case, ought to have been issued in accordance with the provisions of the Central Tenders Board Act, is one of paramount importance to the citizens of this Republic. There is a perception that special interest companies have been used to circumvent the strictures imposed by the Central Tenders Board Act and ultimately contracting parties should always have clarity with respect to the contractual provisions, including certainty as to the party upon whom ultimate responsibility rests with regard to the payment of sums due under the contract.**
17. **A consideration of the issues advanced leads the Court to conclude that there is a need to determine whether there exists an enforceable contract as between the Claimant and the 2nd Defendant and the Court should consider the effect of any agency arrangement which may have existed as between the 1st and 2nd Defendants.**
18. **It is not in dispute that there are other matters in which the aforesaid areas of law are currently engaging the Court's attention and the determination as to whether the Attorney General is a proper party must be engaged, as the claims presented can significantly impact upon the public purse.**
19. **Given the prevailing economic climate, the Court has an obligation to jealously guard and protect the public interest and no claim which lacks legal justification should be entertained. If this application is dismissed and the default judgment is allowed to stand but in the related matters, other Courts proceed to rule that those cases against the 2nd Defendant should be struck out on the basis that the Attorney General is not a proper party to the proceedings, then an unacceptable situation would arise and ultimately severe prejudice would be occasioned by the 2nd Defendant and by extension, the citizens of this Republic.**
20. **Having considered the submissions of the parties, the Court cannot conclude that the position advanced by the 2nd Defendant is on its face, devoid of merit. The Court has to consider the legal arguments as against the evidence which it could reasonably expect to be adduced at trial and evaluate whether the position advocated by the 2nd Defendant is one which is more than arguable and carries**

with it a degree of conviction. The threshold requirement is a threshold that is higher than a reasonable prospect of success and a unilateral burden is placed on the shoulders of the Defendant to establish, on the face of its argument, that the defence which it wishes to mount is one of substance which can stand up to scrutiny, should the matter proceed to trial. This Court is of the view that the legal arguments advanced by the 2nd Defendant do in fact have a realistic prospect of success and the articulated position does carry a degree of conviction.

Promptitude

21. The Court next considered whether the 2nd Defendant acted as soon as was reasonably practicable after it acquired knowledge of the default judgment. In the affidavit filed 12th October 2017, the Attorney at Law for the 2nd Defendant indicated she became aware of the default judgment on the 20th September 2017 and the instant application was filed on the 12th October 2017. Given the timeline which operated, the Court is of the view that the issue of promptitude does not arise as the instant application was filed shortly after the 2nd Defendant acquired knowledge of the judgment. Given the evident constraints under which the 2nd Defendant's legal officers seem to be operating the Court is of the view that the 22 day period between the 20th September 2017 and the 12th October 2017 is not unreasonable.
22. **In the circumstances, the two pre-conditions outlined under Part 13.3 have been satisfied and the Court hereby sets aside the judgment dated 27th July 2017. The 2nd Defendant is hereby directed to file and serve an appearance on or before 4 pm on the 15th December 2017 and to file and serve its defence on or before 4pm on the 12th January 2018. The 2nd Defendant shall pay to the Claimant costs associated with the obtaining of the default judgment together with the costs associated with the instant application which said cost shall be assessed by the Court, in default of agreement.**

.....
FRANK SEEPERSAD

JUDGE