

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**SAN FERNANDO**

**Claim No. CV 2017-02824**

**Between**

**ROY FELIX**

**Claimant**

**And**

**DAVID BROOKS**

**Also called "MAVADO"**

**Defendant**

***Before the Honourable Mme. Justice J. Wilson***

***Appearances:***

Mr. Michael Rooplal and Ms. Viveka Pargass for the Claimant

**DECISION**

This is the Claimant's application brought under the Absconding Debtors Act, Chapter 8:08 ("the Act") for an order that the Court authorize the Marshal to arrest and bring before the Court David Brooks, also called Mavado, who is alleged to indebted to the Claimant and is about to quit Trinidad and Tobago on 1 August 2017.

The grounds of the application are as follows:

1. The Defendant is indebted to the Claimant in the sum of USD 50,000.00, this debt having arisen on or around 28 July 2017 by the Defendant's breach of contract;
2. The Claimant has instituted legal proceedings against the Defendant claiming damages for breach of contract in the sum of USD 50,000.00;
3. The Defendant intends to leave Trinidad and Tobago for Antigua on Tuesday 1 August 2017;

4. If the Defendant is allowed to leave the jurisdiction, the Claimant faces the real risk of not being able to recover the amount owed from the Defendant, who ordinarily resides at Kingston, Jamaica.

The application is supported by the affidavit of the Claimant sworn on 28 July 2017, the material parts of which are stated below.

The Defendant is a citizen of Jamaica and is a well-known singer and performer who performs under the sobriquet "Mavado." The Defendant is ordinarily resident in Kingston, Jamaica. In 2006, the Defendant was banned from performing in Trinidad and Tobago due to the alleged violent lyrical content. On 29 March 2011 the Defendant was permitted to perform at the Centre of Excellence, Macoya, Trinidad, which performance is said to have effectively lifted the previously imposed ban.

On 5 May 2011 the Claimant entered into a written agreement with the Defendant ("the first agreement") for the Defendant to perform at a concert on 30 July 2011 at the National Stadium, Port of Spain, in consideration for which the Claimant paid the Defendant the sum of USD 67,000.00. However, prior to the scheduled performance the Defendant was denied entry into the jurisdiction by the immigration authorities, as a result of which the concert was cancelled.

Thereafter, on or around 1 August 2011 the Defendant and the Claimant entered into an oral agreement ("the second agreement") under which the Defendant was to perform at a concert under the same terms as the first agreement. The parties were unable to agree on a date for the said performance as a result of which the arrangements were ultimately aborted sometime between March and the middle of June 2017.

During a telephone conversation around the middle of June 2017, the Defendant agreed to repay the Claimant the sum of USD 67,000.00, being the consideration paid to the Defendant under the first agreement ("the third agreement"). It was agreed that the sum of USD 20,000.00 would be paid to the Claimant by wire transfer prior to the Defendant's arrival in Trinidad and Tobago for a concert on 1 July 2017 in which he was scheduled to perform. It was further agreed that the balance of USD 47,000.00 would be paid by the Defendant prior to his arrival in Trinidad and Tobago for another concert on 29 July 2017 in which the Defendant was also scheduled to perform.

The sum of USD 10,000.00 was paid by the Defendant by wire transfer on or around 28 June 2017 prior to his arrival in Trinidad and Tobago while the sum of USD 7,000 was paid in cash upon his arrival in Trinidad the following day in advance of the said concert on 1 July 2017. However, the Defendant has

failed to pay the outstanding sum of USD 50,000.00 within the agreed timeframe, namely before his arrival in Trinidad for the concert on 29 July 2017.

The Defendant is scheduled to leave the jurisdiction for Antigua on 1 August 2017.

The Claimant has instituted proceedings against the Defendant seeking damages for breach of contract in the sum of USD 50,000. The Claimant deposes that he believes the Defendant has no defence to the action and if the Defendant is allowed to leave the jurisdiction, the Claimant faces the real risk that he would not recover the amount owed from the Defendant.

### **The Absconding Debtors Act**

Broadly, the objective of the Act is to allow a person ("the Claimant") who alleges that he has a good cause of action, in debt or otherwise, to prevent another person ("the Defendant") from leaving the jurisdiction without first paying the debt or meeting the claim or giving security therefore. This is done by the Claimant obtaining a fugae warrant for the arrest of the Defendant if it appears that the Defendant is about "to quit" the jurisdiction. Once the Defendant has been arrested a hearing is convened before a Judge of the High Court, unless the Defendant in the meantime has paid the debt or otherwise satisfied the Claimant.

The Act provides a statutory remedy to overcome the obstacles that necessarily lie in the way of a person who wishes to commence or pursue an action against a person who has left the jurisdiction, and, if successful, to recover sums of money ordered to be paid. Although there are means of serving legal process on persons outside the jurisdiction, practical difficulties may serve to reduce their value. Inevitably, the procedures enabling a claimant to proceed against, and enforce judgment in relation to, a defendant in another jurisdiction involve delay and expense more so than in relation to a defendant who is resident in the jurisdiction.

In allowing for the arrest of an absconding debtor prior to judgment in actions for breach of civil obligations, the Act provides a valuable remedy. However, having regard to the nature and scope of the remedy, the discretionary power to invoke it should be exercised sparingly and only in appropriate cases. The relevant provisions of the Act are discussed in further detail below.

Section 2 of the Act confers a discretion on a judge of the High Court to issue a warrant for the arrest of a Defendant who is alleged to be indebted to a Claimant and who seeks to quit the jurisdiction without satisfying his obligation to pay the Claimant.

Section 3 imposes the following prohibitions against the issue of a warrant under section 2:

*“Such a warrant shall not issue against an infant, nor in respect of any debt less than two hundred and fifty dollars, nor in respect of any debt that has been due and owing for more than two years previously to the application for such warrant, nor until an action shall have been commenced by the alleged creditor against the debtor for the recovery of such debt by writ specially endorsed as provided by the Rules of the Supreme Court.”*

Sections 4 and 5 set out the general requirements that must be satisfied by a Claimant in bringing an application for the issue of a warrant. Section 4 provides that the application must be in respect of a debt or liquidated demand for a sum of two hundred and fifty dollars or more and shall be supported by an affidavit by a person who can swear positively thereto, verifying the cause of action and the amount and the date when the amount accrued due. The affidavit must also state the Claimant’s belief that there is no defence to the action.

Section 5 imposes further evidential requirements. The affidavit in support of the application must contain a positive statement of the Defendant’s intention to quit Trinidad and Tobago, showing satisfactory grounds for the deponent’s belief, and the date on which and place for which the Defendant proposes to leave, as far as this may be known to the deponent.

A review of the Act suggests that a warrant should be issued under section 2 only where there are reasonable grounds to establish that:

1. The Defendant owes a debt to the Claimant;
2. Proceedings have been instituted for the recovery of the debt and there is no defence to the action;
3. The Defendant is about to leave the jurisdiction;
4. The failure to arrest the Defendant would materially prejudice the Claimant’s prospects of recovering the debt or of enforcing judgment against the Defendant; and
5. The prohibitions of section 3 do not apply.

### **Assessment of the Evidence**

The Claimant’s evidence is that the debt arises pursuant to the third agreement under which the Defendant, in or around the middle of June 2017, agreed to pay to the Claimant the sum of USD

67,000.00, representing the consideration paid by the Claimant to the Defendant in May 2011 under the first agreement.

Counsel for the Claimant submitted that the payment of the sums of USD 10,000.00 and USD 7,000.00 by the Defendant could only be considered as part-payment of the sum of USD 67,000.00 owed to the Claimant, in respect of which USD 50,000.00 remains outstanding.

Counsel for the Claimant submitted that no monies are due and payable to the Claimant for breach of contract under the first agreement, the Defendant having been discharged from any liability in that regard pursuant to clause 2, paragraph 2, of the said agreement on the ground of force majeure.

Counsel for the Claimant further submitted that no breach arises under the second agreement as the details regarding the date of the Defendant's re-scheduled performance were not mutually agreed.

In order for the Claimant's application to succeed it must first be established that the third agreement gave rise to a binding obligation on the Defendant to pay the sum of USD 67,000.00 to the Claimant on or before 28 July 2017, that there is no reasonable defence to the proceedings that have been instituted by the Claimant for recovery of same and that the Defendant's scheduled departure from the jurisdiction on 1 August 2017 would materially prejudice the Claimant's ability to recover the outstanding sum of USD50,000.00.

While it is reasonable to infer that the payment by the Defendant of the sums of USD 10,000.00 and USD 7,000.00 on 28 and 29 June 2017 respectively were made pursuant to an agreement between the parties, I am unable to conclude that the terms and conditions of the agreement in so far as they relate to the amount due and the date for payment are as alleged by the Claimant. That is to say, I am unable to hold that there is no defence to the proceedings. I am inclined to this position having regard to all of the circumstances of this case, including the length of time that has elapsed since the sum of USD 67,000 was paid by the Claimant to the Defendant under the first agreement, the repayment of which forms the basis of the third agreement, the Defendant's stated exoneration from liability under the first agreement for repayment of the said sum of USD 67,000.00 on the basis of force majeure, the Claimant's forbearance in making binding arrangements for a subsequent performance by the Defendant under the second agreement and the informal nature of the arrangements in general under the third agreement.

In addition, while it is clear from the Claimant's evidence that the Defendant is scheduled to depart from the jurisdiction on 1 August 2017 after a performance on 29 July 2017, the Claimant has not established

that the failure to arrest the Defendant would materially prejudice his prospects of recovering the debt that allegedly exists. On the contrary, the Claimant's evidence is that the sum of USD 10,000.00 was paid by wire transfer on 28 June 2017, when the Defendant was outside the jurisdiction, and a further sum of USD 7,000 was paid in cash the following day, when the Defendant was within the jurisdiction.

Further, the Claimant's evidence is that the Defendant has visited the jurisdiction on three occasions between November 2016 and July 2017 for scheduled performances. The relative frequency of such visits over the last few months together with the recent payment of sums by the Defendant both from within and outside the jurisdiction contradict the assertion that the Defendant's absence from the jurisdiction would materially prejudice the Claimant's ability to recover any debt that may be outstanding.

In the circumstances, the Claimant has not satisfied the requirements for the issue of a warrant under section 2 of the Act and the application is dismissed.

Dated this 31<sup>st</sup> day of July 2017.

Jacqueline Wilson

Judge