REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL. APP. NO. 163 of 2013

BETWEEN

ANTHONY RAMKISSOON

APPELLANT

AND

MOHANLAL BHAGWANSINGH

RESPONDENT

PANEL: **A. Mendonça, J.A.**
P. Jamadar, J.
N. Bereaux, J.A.

APPEARANCES: **Mr. L. Chariah and Mr. T. Dassyne instructed by Ms. S. Nanan appeared on behalf of the Appellant**
Mr. K. Ratiram appeared on behalf of the Respondent

DATE DELIVERED: July 19th, 2013

JUDGMENT

1. This is an appeal from the judge's dismissal of the Appellant's application to set aside the default judgment regularly obtained by the Respondent in default of defence.

2. The claim of the Respondent as set out in the statement of case was for monies lent. He claimed that in October 2008, the Appellant told him he wished to construct a house, and requested that the Respondent lend him monies to construct a foundation for the house. At that time, the Appellant gave the Respondent a handwritten estimate for materials and labour. The Respondent further averred that after discussions between him and the Appellant, it was orally agreed between them that the Respondent would lend the Appellant monies for materials and labour to construct the foundation of the house. It was agreed that the Appellant would construct the house within six months from October 2008, and would repay the Respondent the monies lent within one year of the expiration of the six-month period.

3. The Respondent claimed that in pursuance of the said oral agreement between the period October 2008 to December 2008, he lent the Appellant the sum of $91,414.10 for materials and the sum of $22,000.00 for labour, making a total of $113,414.10. A demand was made for payment of the sum, but it was not paid. The Respondent therefore claimed that sum together with interest and costs. Annexed to the statement of case is a handwritten estimate which is intended to be the handwritten estimate referred to in the statement of case. Also, attached to the statement of case were various cheques made payable to third parties as well as invoices.

4. The Appellant entered an appearance to the claim on December 10th, 2012. An extension of three months was subsequently granted by the Respondent for the filing of the Appellant's defence which was the maximum period that the

Respondent could agree to extend the time for the filing of the defence (see Rule 10.3 (6) of the Civil Proceedings Rules 1998 (CPR). The defence was then due on March 3rd, 2013.

5. On February 20th, 2013, the Appellant filed an application seeking an extension of time to file his defence. The application came on for hearing on March 4th, 2013. On that date, it appears that neither party nor their attorneys were present at the hearing of the application, and it was dismissed. On March 21st, 2013, the Appellant then made a further application for an extension of time to file his defence. The application came on for hearing on March 26th, 2013. The judge, however, after hearing arguments on both sides refused the application for an extension. There has been no appeal from that decision. It seems, however, that prior to the hearing of that application, the Respondent applied to enter judgment in default of defence. The judgment was signed on March 27th, 2013. According to the Appellant's affidavit, a clerk in his attorney's office learnt of the default judgment on April 26th, 2013. The Appellant's attorney was then out of the country and on her return on May 1st, 2013, the Appellant was notified of the judgment.

6. On May 9th, 2013 the Appellant made the application to set aside the judgment which is the subject of the appeal. Rule 13.3 (1) of the CPR is relevant to an application to set aside a default judgment regularly obtained. That Rule provides as follows

> "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."

Therefore, before the Court can set aside a default judgment, the Court must be satisfied of two things, that is to say, (1) the defendant has a realistic prospect of success and (2) that the defendant acted as soon as reasonably practicable when he

found out that judgment had been entered against him. Both limbs must be satisfied as indicated in **Shah v Barrow CA Civ 209 of 2008**.

7. The judge in this case was of the opinion that the Appellant did not satisfy either limb. He was also of the view that the application to set aside the judgment in any event, was a patent abuse. He stated at paragraph 3:

> "I must confess, I do not understand why this application is being made after I had already dismissed an application made by the defendant to extend the time to file his defence from which there has been no appeal. That application is dated March 21, 2013. My order dismissing the application for an extension of time to file the defence, effectively, in my view, shuts the door on the defendant. Firstly, where the defendant has not appealed that decision, he impliedly accepts that he cannot have permission to file a defence, and, secondly, that decision paves the way for judgment to be entered against the defendant by the claimant."

8. In my judgment, the Appellant has not satisfied Rule 13.3 (1) (a) that he has a realistic prospect of success. In those circumstances, it is not necessary that I consider whether the application to set aside was an abuse of process, and I do not propose to do so. The following are my reasons for the conclusion I have reached on Rule 13.3 (1).

9. Rule 13.3 (1) (a) requires a defendant to show that he has a realistic prospect of success. The rule directs the Court to determine whether there is a realistic as opposed to a fanciful prospect of success (see **Swain v Hillman and Anor. [2001] 1 ALL ER 91).** A 'realistic prospect of success' is therefore to be distinguished from prospects that are fanciful.

10. Rule 13.4 (5) provides that an application (other than an application by the claimant) must be supported by evidence. Under the Rules of the Supreme Court, 1975 (RSC,

1975), it was an almost inflexible rule that an affidavit of merit was required. This, in my view, is no less true under the CPR as it was under the RSC 1975. The defendant must, by evidence, establish he has a defence that has a realistic prospect of success. He or others should, therefore, depose in an affidavit or affidavits to such facts and circumstances that demonstrate the defendant has a realistic prospect of success.

11. In **Ramkissoon v Olds Discount Co (TCC) Ltd (1961) 4 WIR 73,** the question arose whether an affidavit of the solicitor of the defendant to which was annexed a draft defence, but which did not purport to testify to the facts set out in the draft defence, was an affidavit of merit. It was held that it was not. In that case, Mc Shine C.J. (Ag), who gave the judgment of the Court stated at page 75 that

> "In his affidavit the solicitor does not purport to testify to the facts set out in the defence, nor does he swear of his personal knowledge as to the matters going to constitute the excuse for the failure, and so this does not amount to an affidavit stating facts showing a substantial ground of defence.
>
> Since the facts related in the statement of defence have not been sworn to by anyone, consequently there was not, in our view, any affidavit of merit before the judge nor before us."

That is relevant under the CPR as well. If the facts which the defendant says give rise to a realistic prospect of success are not deposed to, then the defendant has not demonstrated that he has a realistic prospect of success. The Appellant has, unfortunately, erred in much the same way as did the Appellant in the **Olds Discount** case. He has annexed a draft defence to his affidavit, but has said nothing about it, other than to say it is annexed. He has not attempted to testify or verify any of the facts set out in the defence. Quite simply, in my judgment, as a consequence, the Appellant has not shown that he has a realistic prospect of success. But even if the defence were to be considered as setting out the defence of the Appellant, it does not, in my opinion meet the test of a realistic prospect of success.

12. The defence should be looked at against the background of what a defendant is required to set out in his defence. Part 10 of the CPR deals with the defence. Rule 10.5 (1) requires the defendant to include in his defence a statement of all the facts on which he relies to dispute the claim against him (which statement must be as short as practicable, see Rule 10.5 (2)). Rule 10.5(3) requires that the defendant in the defence must state (a) which if any allegation in the claim form or statement of case he admits, (b) which if any he denies and (c) which if any he neither admits nor denies because he does not know whether they are true, but which he wishes the claimant to prove.

13. Rule 10.5 (4) and Rule 10. 5 (5) are also relevant and these are as follows:

"(4) Where the defendant denies any of the allegations in the claim form or statement of case-

(a) he must state his reasons for doing so; and

(b) if he intends to prove a different version of events from that given by the claimant, he must state his own version.

(5) If, in relation to any allegation in the claim form or statement of case the defendant does not-

(a) admit or deny it; or

(b) put forwards a different version of events,

he must state each of his reasons for resisting the allegation."

14. The draft defence in this case at paragraph 1 states that

"The defendant will contend that the claim form and the statement of case disclose no reasonable cause of action."

There was no attempt before this Court to say that the claim form and statement of case do not disclose a cause of action. In any event such an argument is doomed to fail as the claim form and statement of case clearly disclose a cause of action.

15. The material parts of the defence begin, essentially, at paragraph 3. The defence at paragraphs 3 and 4 denies paragraphs 3 and 4 of the statement of case. These are the paragraphs in the statement of case which set out the Respondent's allegations of discussions between the parties leading to the agreement to lend the money, but the Appellant in his defence does not give any reason for these denials as is required in 10.5 (4). In **MI-5 Investigations v Centurion Protective Agencies Limited CA Civ 244 of 2008,** it was stated that the defendant need not set out reasons for denial, if he sets out a different version of events from which the reasons for his denial are evident. But the Appellant here, does not do that either.

16. In paragraph 3 of the defence, the Appellant states that in or December 6th, 2004 he was employed with the Respondent. He then states the positions in which he was employed, his salary, and refers to an agreement that the Respondent promised to purchase a property for him at a price of $500,000.00, which he says never materialized. It is difficult to see any connection between that information and the claim made by the Respondent arising out of a 2008 agreement. The statement in paragraph 4 calling upon the Respondent to provide proof of the money lent also does not help the Appellant. The effect, therefore, is that paragraphs 3 and 4 of the defence do not set out the reasons for the denial or any different version of events from which the reasons for denial are evident.

17. Paragraph 5 of defence is in answer to paragraph 5 of the statement of case. Paragraph 5 of the statement of case pleads the alleged agreement which is the core and is central to the Respondent's case or cause of action. That is met by the following in the defence:

    "The defendant denies paragraph 5 of the statement of case, the defendant avers that he never received any pre-action letter."

    That amounts to no more than a bare denial without reasons for the denial.

18. Paragraph 6 of the statement of case provides that,

> "In pursuance of the said oral agreement the claimant lent to the defendant the sum of $91,414.10 for materials, and the sum of $22,000 for labour during the period October to December, 2008, making a total of 113,414.10."

In answer to that, the Appellant states in the draft defence, that

> "The defendant denies paragraph 6 of the statement of case. The defendant avers that he never had such discussions with the claimant."

The averment that he never had such discussions is unintelligible in the context of the claim at paragraph 6 of the statement of case, and provides no or no cogent reason for the denial. The other two paragraphs in the defence do not assist the Appellant and amount to no more than bare denials as well.

19. In the **MI-5** case, it was held that where the defendant does not comply with Rule 10.5 (4) and set out reasons for denying an allegation, or a different version of events from which the reasons for denying the allegation are evident, the Court is entitled to treat the allegations in the statement of case as undisputed or containing no reasonable defence to that allegation. The draft defence, therefore, in this case, does not dispute or raise any reasonable defence to the material allegations. It consequently does not establish that the Appellant has a realistic prospect of success. In the circumstances, the Appellant has, therefore, failed to satisfy 13.31(a).

20. With respect to 13.31(b), whether the Appellant acted as soon as reasonably practicable when he found out that judgment had been entered against him, the judge held that the Appellant failed to do so. The judge was of the view that the evidence as to whether the Appellant found out that judgment was taken up against him was ambivalent, replete with impermissible hearsay, inconsistent and vague. The judge was not convinced that the Appellant only discovered that judgment was entered against him on May 1st, 2013. In any event, even if he did, the judge

concluded that the Appellant had not shown that he had acted as soon as reasonably practicable. On the evidence, the Appellant said that the application to set aside the judgment was ready since April 2013, but was not filed until May 9th 2013. The judge wondered why it was not filed before then.

21. The Appellant in his affidavit stated that he was only aware that judgment was obtained against him on May 1st, 2013. He attempted to explain the circumstances in which that came to be so. In doing so, the Appellant relies on statements of information. In many cases, however, he does not comply with Rule 31.3 (2) which requires that where an affidavit contains statements of information and belief, it is necessary to state in the affidavit the sources of such information and the grounds of such belief. It would be appropriate to place no reliance on such statements.

22. Despite that, however, I do not think that there is any ambivalence in the Appellant's evidence, that he only became aware of the judgment against him on May 1st, and that statement has not been challenged. After he found out, he would obviously have been required to attend on his attorney to swear an affidavit. The attorney was out of the jurisdiction until May 1st and would have had to prepare the affidavit on her return. Although there is a statement in the affidavit that the application to set aside was prepared in April and was not filed, it seems, pending the signing of the ddefault judgment by the Registrar, it is clear that the affidavit refers to events occurring after that date and would have been prepared or finalized after May 1st. The affidavit was sworn and filed with the application to set aside on May 9th. In all the circumstances, I do not agree that the Appellant has failed to act as soon as reasonably practicable after he found out that judgment was entered. In my opinion, the judge failed to properly consider the evidence before him and take into account what was reasonably required to be done after the judgment was discovered by the Appellant. However, as the Appellant needs to satisfy both limbs

of 13.3 (1), the result, in those circumstances, is that the appeal must fail and should accordingly be dismissed.

23. The Appellant shall pay the Respondent's costs of the appeal in the sum of $1,000.00 being two-thirds of the $1,500.00 costs awarded below.

A. Mendonça
Justice of Appeal

24. I agree that the appeal should be dismissed. I shall confine my decision to the fact that I consider the defence to be a bare denial and that the Appellant has not demonstrated that he has a realistic prospect of success per Rule 13. 3 (1) (a).

N. Bereaux
Justice of Appeal