REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2011-00674

BETWEEN

SHADAE CRUICKSHANK

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before The Honourable Madam Justice C. Pemberton

Appearances:

For the Claimant: Ms D. Jean-Bastiste-Samuel

For the Defendant: Ms N. Jones instructed by Ms M. Rodrigues

DECISION

[1] This decision forms part of a series of events which have marked the progress of this case through the system.

[2] **FACTS**

The short facts are that on 21st February 2011, Ms Shadae Cruickshank, an Assistant Steward with the Trinidad and Tobago Defence Force filed a

claim in which she sought inter alia exemplary and/or aggravated damages for assault and battery, false imprisonment and breach of statutory duty. The claim was duly served on the Defendant, the Attorney General of Trinidad and Tobago.

[3] No defence was filed up until 6th April 2011. Ms Cruickshank sought to convince the court that she should be permitted to take up a default judgment. That request was denied, with the court's decision dated 13th July 2011 being circulated by the Registrar to the parties. The Attorney General has stated that the Decision was received by the Advocate Attorney on 22nd July 2011.

[4] On 30th September 2011 the Attorney General filed an application to extend the time for service of the Defence. This application was supported by affidavit evidence, to which was appended a draft defence. The application was met with resistance by Ms Cruickshank.

[5] **GROUNDS OF APPLICATION**

The grounds may be listed as inter alia:

- That Legal Representation within the Department was filed by 11th May 2011 mere days prior to the hearing of the Application by Ms Cruickshank to enter a default judgment;
- That the receipt of the Court's decision in refusing permission crystallised on 22nd July 2011 – Instructing Attorney received word on Tuesday 18th July and Advocate Attorney received word on Friday 22nd July;
- That the delay in filing the Defence "can be justified" as assignment of the file was effective on 6th May 2011 after application for permission to enter a default judgment was made;
- There was difficulty in receiving instructions;

- That instructions have since been received and a Draft Defence is attached.

[6] **CPR**

Part 10.2 (1) provides that a defendant, wishing to defend a claim must file a Defence.

[7] Part 10.3(3) states that in proceedings against the State, the period for filing a Defence is 42 days after the date of service of a Claim Form and Statement of Case. I would commend to all the dicta of Lord Dyson in **THE ATTORNEY GENERAL v KERON MATTHEWS**[1] at paragraph 14 which states as follows:

> *First, a defence can be filed **without** permission of the court after the time for filing has expired. **If the Claimant does nothing** or waives late service, **the defence stands and no question of sanction arises.***
>
> [Emphasis mine].

[8] Part 10.3(b) allows parties to extend the time between themselves up to a period of three months after the date of service of the Claim Form but only one such agreement can be made (See Part 10.3(7)). Thereafter if a Defendant requires an extension he must apply to the court (See Part 10.3(9).

[9] Part 10.3(5) permits a Defendant to apply to the court for an order extending the time for filing a Defence. Lord Dyson explains that

> *There is no rule which states that, if the defendant fails to file a defence within the time specified by the CPR, no defence may be filed unless the court permits. The Rules do: However, make provision for what the parties may do if the defendant*

[1] [2011] UKPC 38

fails to file a defence with the prescribed period: Rule 10.3(5) provides that the defendant may apply for an extension of time;

[10] Part 26.1(1) (d) empowers the court to extend the time for compliance with any Rule. When the court is acting pursuant to its power, the order may be subject to conditions (See Part 26.1 (2)).

[11] **WHAT THIS APPLICATION IS NOT**

Before I embark on the discussion may I state quite catorgically that this is **NOT** an application to vary the timetable set by the court by extending time limits, Also, it is **NOT** a relief from sanction application under Part 26.7 or is it an application to set aside a default judgment. This application is simply for an extension of time to file a defence.

[12] **NATURE OF THIS APPLICATION**

The consequences of non compliance with Part 10.3(3) are not only to afford the Defendant an opportunity under Part 10.3(5) but also to expose a Defendant to a Claimant's application for judgment in default of defence. In this case, the latter consequence was attempted unsuccessfully. We are therefore faced with the reality that the Attorney General is within its rights to apply to the court for permission to serve its defence during an extended period pursuant to Part 10.3(5), there being no further application by Ms Cruickshank for a judgment in default of Defence[2].

[13] I take this to mean that if Lord Dyson's dicta is to be applied in this case, it may be argued that the application for an extension of time is otiose since Ms Cruickshank did nothing to pursue her right to make a fresh application

[2] See Lord Dyson in **MATTHEWS** case where he states the following: *and Rule 12.4 provides that, if the period for filing a defence has expired and a defence has not been served, the court must enter judgment if requested to do so by the Claimant. If the Defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the Claimant that judgment in default should be entered in his favour*.

to enter a default judgement subsequent to the decision that her application for a default judgment was pre-mature which she was eminently entitled to do. In any event, an application was made and I shall continue to address it

[14] **APPLICATIONS UNDER PART 10.3(5)**

Lord Dyson further opined that *"No distinction is drawn in Rule 10.3(5) between applications for an extension of time before and after the period for filing a defence".*[3]

[15] This is an application pursuant to Part 10.3(5) as stated at paragraph 9 above. In that regard, when considering applications under Part 10.3(5) the judge's discretion is unfettered, since there are no thresholds requirement provided for in the CPR. The factors to be taken into account under the other provisions of the CPR or in other instances when applications are made which may be listed in various authorities are persuasive and provide guidance but are **NOT** binding. Each case is to be dealt with *sui generis* against the background of furthering the Overriding Objective of the CPR, which is to enable courts to deal with cases justly.

[16] **FACTORS TO BE CONSIDERED INTHIS CASE**.

What are the considerations when faced with an application to extend time? As I said above, the Rules do not mandate what I must consider, so I have a general discretion when considering this application. I will therefore examine this application under the following heads:

(1) failure to comply was not intentional;

(2) there was a good explanation for the failure to comply;

(3) whether any prejudice would be caused to the Claimant;

(4) if a refusal would deprive the Defendant of the opportunity to defend the case;

[3] See paragraph 16 **MATTHEWS** case.

(5) Public importance of this matter;

(6) To further ends of the administration of justice.

[17] **EVIDENCE AND ANALYSIS**

Ms Maria Rodrigues Attorney at Law attached to the Office of the Chief State Solicitor, deposed *inter alia* as follows:

> *(3) The opening and assigning of files in the Attorney General's Office requires a number of administrative steps to be taken …*

These steps have not been shared with the court. However Ms Rodrigues wants us to accept that these steps *"ensures proper record keeping of court matters".*

[18] Ms Jean-Baptiste-Samuel did not take issue with this, so I take it that a number of administrative steps with respect to the opening and assignment of files are taken within the Attorney General's Department to ensure proper record keeping. I reiterate that these steps have not been disclosed so I have no way of evaluating them.

[19] At paragraph 4, Ms Rodrigues confirms that the Claim Form was served on the Attorney General on 22nd February 2011 and that a file was opened on the same day and forwarded to the Solicitor General's Assignment Desk. The records show that the file was *"only"* received on the desk on 24th February 2011.

[20] Ms Jean-Baptiste-Samuel deposed that she issued a Pre-Action Protocol letter dated 18th November 2010. She received a response requesting 35 days to respond to her letter. The time passed and so Ms Jean-Baptiste-Samuel issued her claim on 22nd February 2011. According to Ms Jean-Baptiste-Samuel *"all the objectives of the Pre Action Protocol were*

disregarded". To my mind it certainly appears that way. This to my mind, however, is **NOT** fatal to a claim and can only impact on costs[4].

[21] Ms Rodrigues then spoke to the Attorney General's receipt of Ms Cruickshank's application for permission to enter a judgment in default of defence on 11th April 2011. This application was placed on *"the file",* which was still housed on the assignment desk. This was not troubled by Ms Jean-Baptiste-Samuel.

[22] However, Ms Jean-Baptiste-Samuel stated that there is no explanation as to the lapse between the response to her Pre-Action Protocol letter and the filing of the Claim Form. I too note that exclusion and I also note that there is no explanation of what happened to the file between the time of the assignment desk's receipt of the Claim Form on 24th February 2011 and April 11th 2011, when the application for permission to enter default judgment was filed on behalf of Ms Cruickshank.

[23] Ms Rodrigues continued that on the following day, 12th April 2011 she received the "re-assigned" Pre Action Protocol file. Shortly thereafter she took steps to commence her enquires and interviews with the relevant personnel. Ms Rodrigues deposed that she was "unaware of the existence of the Claim Form".

[24] Ms Rodrigues continued to detail the steps that she took, once the Pre-Action Protocol file had been re-assigned to her on 12th April 2011. These steps included:

(1) requesting the relevant Station Diary Extract;

(2) receiving same;

(3) requesting meetings with the relevant personnel;

[4] **SEE DENNIS GRAHAM V. POLICE SERVICE COMMISSION AND MINISTRY OF NATIONAL SECURITY CV 2007-00828.**

(4) receiving and perusing relevant documentation;

(5) meeting with the relevant personnel and taking instructions.

These activities took place from 12th April 2011 until 17th June 2011.

[25] Before that date Ms Rodrigues deposed that on 3rd May 2011 the High Court Action file had been re-assigned to Advocate Attorney-at-Law since the original Advocate had proceeded on bereavement leave. There was no mention made of the personnel involved by name. On 6th May 2011 Ms Rodrigues and Mr Brent James were assigned to take charge of this matter.

[26] On 13th May 2011, Ms Rodrigues and Ms Jones attended the hearing of the application for a judgment in default of Defence but she continued work on the file. Ms Rodrigues deposed that she managed to secure instructions from a necessary officer who had been away on study leave. A Draft Defence was annexed to this application which Ms Rodrigues deposed demonstrates that *"the Defendant has a realistic prospect of success".*

[27] Ms Rodrigues further deposed that the *"administration of justice requires the full ventilation of these proceedings".* Further no trial date has been and no prejudice could be visited on the Claimant should the Attorney General be allowed to defend this matter.

[28] Ms Jean-Baptiste-Samuel's ire was incurred by this account of the facts. Mrs Jean-Baptiste-Samuel essentially contends in her affidavit in response that she opposes any extension since the Attorney General actions culminating in its filing the application rendered settlement entered into talks 'a hoax'. Ms Jean-Baptiste-Samuel asserts that the application had been filed very late and was not accompanied by an application for a relief from sanctions. Mrs Jean-Baptiste-Samuel complained that the

Attorney General's conduct throughout these proceedings was not in keeping *"with the spirit of the Rules, protocols, Practice Directions, Rules of Court or with basic court etiquette".*

[29] **ANALYSIS AND CONCLUSION**

Whilst I understand and fully appreciate Mrs Jean-Baptiste-Samuel's pique, is it sufficient to shut out the Attorney General's Defence in the face of Ms Rodrigues's explanation and the **trump** – that a Draft Defence has been exhibited to the application? Further could the Draft Defence which is annexed not support Ms Rodrigues's position that the failure to comply with Part 10.3 (3) was not intentional? On the evidence was there not a good explanation for the failure to observe the strictures contained in Part 10.3(3) thereby giving further credence to Ms Rodrigues's application of 30th September 2011? I would be hard pressed not to answer them in any way other than to support the application.

[30] I have seen demonstrated in Ms Rodrigues's affidavit, a faulty system, which State Solicitor has tried to work, using her best efforts, to effect compliance with the Rules. Instead of condemning her, I commend her efforts whilst appealing to those upon whom the responsibility lies to make a difference!

[31] Since these are very early days in this matter, and the subject of these proceedings are of great public importance and interest, I must not deprive but **ALLOW** the Attorney General the opportunity to defend his position with respect to allegations of abuse made by a member of the Trinidad and Tobago Defence Force against members of the Trinidad and Tobago Police Service (himself against himself). Further I can see no prejudice being caused to Ms Cruickshank by this decision as no Case Management Conference has been commenced and moreover no trial date has been set by the court.

[32] In considering whether to grant the Attorney General an extended time to file his defence, I shall look at whether to do so would *further or hinder the control or regulation of the system designed to ensure fair, play, equality, impartiality, lack of bias even handedness*[5]. When all of the evidence is considered, I am fortified in my conclusion to permit the Attorney General an extended time to file his defence and thereby defend this matter.

[33] In the circumstances, I would allow the Attorney General the time to file its defence after the time limited by Part 10.3(3). I shall order that the Defence be filed within 14 days of the date of this Order failing which Ms Cruickshank shall be at liberty to apply for permission to enter judgment in default of defence.

[34] **COSTS**

In applications such as these, costs will be paid by the Party making the application for extension of time to perform mandated actions. There is no reason to depart from this. The Attorney General shall pay Ms Cruickshank costs of this application to be assessed if not agreed **in any event.**

ORDER

1. That the Defendant be permitted to file and serve its Defence in this action within 14 days of the date of this Order.
2. That should the Defendant fail to file and serve its defence within the time limited at paragraph 1 of this Order then the Claimant shall be at liberty to apply for permission to enter judgment in default of defence forthwith.
3. That the Defendant do pay the Claimant's costs **in any event** to be assessed if not agreed.

[5] **MAINWAY INDUSTRIAL INSTALLATION LIMITED v BRAVELION INDUSTRIES LIMITED** CV 2009-02485 the court's definition of "administration of justice".

4. That the Claimant do prepare her Statement of Costs on or before 29th February 2012.
5. That the assessment do take place on 22nd March 2012 at 10:00 a.m. SF02 which shall be the date of the first Case Management Conference.
6. That the hearing date of 9th February 2012 is vacated.

Having come to the decision in the terms set out above, I consider the application filed by the Defendant on 13th December 2011 otiose. The court still reiterates its view that the parties should meet to attempt to settle this matter.

Dated this 17th day of January 2012.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE