

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

NO. CV 2009-00642

BETWEEN

OTIS JOBE

Claimant

AND

(POLICE CONSTABLE) EDGAR BAIRD
THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO
Defendants

**BEFORE THE HONOURABLE MR. JUSTICE PETER A.
RAJKUMAR**

APPEARANCES:

Mr. Yaseen Ahmed for the Claimant

Mr. Sarfraz Alsaran for the Defendant

Oral judgement

Friday 13th March 2009

11.26 am

The Application

What is before me is an application filed on the 20th of February 2009 seeking an extension of time to proceed with a proposed claim by the

claimant outside of the limitation period prescribed for matters involving assault and battery.

The Amendment

1. An amended Claim form was filed without objection on the 10th of March 2009 together with an amended Statement of Case so the claims that the first claimant seeks to make are in relation to damages for:

(a) assault and battery, taking place on the 11th of February 2005

(b) negligence,

(c) breach of statutory duty and

(c) other consequential claims for

i. damages,

ii interest and

iii costs.

There is no objection to the affidavit of the 20th of February 2009 by the claimant being used in support of the claim to extend time in relation to the amended or further claims of the 10th of March 2009.

2. The reasons given by the claimant are set out in that affidavit and can be summarized as follows:

(1) inability to raise funds in time

(2) being under the impression (garnered from previous attorney at law), that he had to await the outcome of the criminal matter before starting any civil matter in this case.

4. **The Facts**

- (i) The incident that the claimant complains of took place on the 11th of February 2005 and stems from an altercation on the bus route, where the claimant was charged with damage to property. He alleges that the response of the defendant PC Baird and other unnamed police officers was disproportionate and resulted in serious assault and battery upon him.
- (ii) He supports that claim by reference to two medical certificates, and prima facie, for the purposes of this application the injuries set out in the claimant's affidavit, and in the attachments thereto, are accepted, subject to rebuttal if the matter were to go forward.

The trial of the charges brought against the claimant started in 2008, those charges being still part heard in the Port of Spain Magistrates Court. The next date of hearing is the 27th of March 2009, and I am informed from the bar table, and I accept, that those charges are expected to be concluded shortly.

The Affidavit

5. What is relevant in these proceedings are the following matters which I set out from the affidavit.

Paragraph 8 of the affidavit.

“The first named defendant and the two other officers have denied in their evidence in the Magistrate's Court given between August 2008

to December 2008 that they assaulted or beat the claimant, and in fact they are alleging it was I who assaulted PC Baird”

Paragraph 9 of the affidavit

“(The claimant) was always under the impression prior to dealing with (my) last attorney at law that I had to await the outcome of the criminal matter before starting any civil matter in this case.”

Paragraph 10 of the affidavit

“I did visit my present attorney at law in about November 2008 to get the high court matters started. I however, was advised that I needed to pay some legal fees in order to commence the matter.”

Paragraph 11 of the affidavit

“At that time I was not permanently employed having been sent home by my previous employer, Customs Interior, where I was employed as a spray painter for the last 7 years.”

He deposes that he submitted applications to various companies trying to seek employment, but was unable to secure any permanent employment and further in the affidavit, he sets out the venture that he entered into with which he tried to secure an income and his costs (expenses). This court accepts that that income is not steady, or productive of any sufficient excess that will allow him to make as a priority the payment of fees to an attorney at law.

6. Up to that period of time, November 2008 the affidavit is devoid of references to specific dates. Paragraph 9 simply sets out that the claimant was always under the impression prior to dealing with his last attorney at law that he would have to await the outcome of the criminal matter before starting any civil matter in this case. The date at which his present attorney

came into the matter is not set out, so the date at which that impression was conveyed is not known. We do know from the affidavit that the present attorney at law was in the picture in November 2008 and that was the point in time when the claimant sought to get the high court matter started, and was advised that he needed to pay some legal fees in order to commence the matter. November 2008 I find was within the limitation period.

7. The submission was made by attorney at law for the proposed defendants that the claimant would have qualified, being unemployed at the time, under Section 23 of the Legal Aid and Advisory Act as someone entitled to legal aid.

8. I note also from the affidavit that there is no question of any letter before action having been written, even in November 2008, which was another option, apart from legal aid, that the claimant might have utilized to put the proposed defendants upon notice that there was in the offing a high court claim.

9. I note also, that there was no “cross charge” in the magistrates court. I note the submission of attorney for the proposed claimant, that *despite paragraph 8 of the claimant’s affidavit* the issue in the magistrates court is not relevant to the issue sought to be brought to the high court, in that, while the question of assault by the proposed claimant upon PC Baird might be an issue, as was the issue of his resisting arrest and obstructing or resisting arrest, the converse of that issue was not before the magistrates court, namely, the assault upon the proposed claimant by the proposed defendant. I will revert to this matter.

The Law

10. Turning to the law, Section 9 of the Limitation of Certain Actions Act has been cited, which provides for the court's power to extend limitation periods. Section 9 (1) provides as follows:

“Where it appears to the court that it would be inequitable to allow an action to proceed, having regard to the degree to which:

(a) the provisions of section 5 or 6 prejudice the plaintiff or any person whom he represents; and

(b) in the decision of the court under this sub-section would prejudice the defendant or any person who he represents

the court may direct that those provisions shall not apply to the action or to any specified cause of action to which the action relates.

11. In relation to Sub-section 9 (1) (b), the submission is made by Mr. Ahmed that the defendant would not be prejudiced, as he was aware that there was a live matter involving him before the Magistrates Court. That submission is noted, but it ignores the fact that while he may be aware there was a live matter in the Magistrates Court involving him there would be no notification to him before now that it was proposed to add him as a defendant to a civil action with claims for damages.

12. Section 9, sub-section 2, I simply note, but Section 9 sub-section 3 provides for the circumstances. in which the court's discretion can be exercised. It is important to set these out as in acting under this section the

court shall have regard to all the circumstances of the case, and in particular to:

- (a) *the length of, and the reasons for the delay on the part of the proposed claimant*
- (b) *the extent to which having regard to the delay, the evidence adduced or likely to be adduced by the proposed claimant or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 8 or ... section 9*
- (c) *the conduct of the defendant after the cause of action arose, including the extent to which he responded to requests reasonably made by the plaintiff for information or inspection, for the purpose of ascertaining facts which were or might be relevant to the plaintiff cause of action against the defendant,*
- (d) *duration of any disability....*
- (e) *The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the defendants act or omission to which the injury was attributable, might be capable at that time of giving rise to an action for damages*
- (f) *The steps if any, taken by the plaintiff to obtain medical, legal, or other expert advice, and the nature of any such advice he may have received.*

ASSUMPTION THAT SECTION 9 IS APPLICABLE

13. I note the cases that have been cited by attorney at law for the claimant, and in particular the case of HCA: CV 617 of 2004 for **Derryck Mitchell and Kumar Bickraj v The Attorney General of Trinidad and Tobago**. Counsel for the claimant submitted that section 9 was applicable because it related to section 5 of the Limitation of Certain Actions Act, Chapter 7:09 Act 36 of 1997 which section applied to any action for damages for negligence, nuisance or breach of duty, whether the duty exists by virtue of a contract, or any enactment, or independently of any contract, or any such enactment, where the damages claimed by the proposed claimant for the negligence, nuisance or breach of duty consist of, or include damages, in respect of personal injuries to the proposed claimant or any other person.

14. Counsel for the claimant submits that this action is one for negligence, as well as for breach of duty. He contends that the breach of duty arises from Section 35 and 36 of the Police Service Act, and therefore the court had the power under Section 9 to extend the time limit for the torts provided by Section 5 of the Limitation of Certain Actions Act. Counsel for the proposed defendants did not draw any distinction between the powers of the police under Section 35 and 36 of the Police Service Act and their duties. For the purpose of this ruling therefore, I will assume this case involves a breach of duty and that the court is simply asked to decide whether to exercise its discretion. However I recognise that the issue whether or not there is in fact a breach of duty, may be one for further consideration.

RELEVANT CONSIDERATIONS AS TO EXERCISE OF COURT'S DISCRETION

15. I turn therefore to the considerations that the court is asked to take into account in exercising its discretion, in particular:

- 9 (3) (a) length of and reasons for the delay,
- 9 (3) (b) extent to which the evidence adduced or likely to be adduced, is or is likely to be less cogent, than if the action had been brought within the time allowed
- 9 (3) (c) the conduct of the defendant including the extent to which he responded to requests reasonably made by the plaintiff for information
- 9 3 (e) the extent to which the plaintiff acted promptly and reasonably
- 9 3 (f) the steps taken by the plaintiff to obtain medical legal or other expert advice.

16. The proposed claimant acted promptly to obtain medical advice. His medical report relates back to the injury that he says he sustained on the 11th February 2005. I note that there is no evidence of any communications with the defendant or any requests made of the defendant. I note it would have been reasonable to assume that in November 2008 within the limitation period a pre action protocol letter might have been issued to the proposed defendants, one of the matters in which could have been the seeking of the identity of the other officers who are alleged to have assaulted the claimant. That was not done.

17. The primary issues therefore are the length of and the reasons for the delay by the proposed claimant and the extent to which the proposed claimant acted promptly and reasonably once he knew whether or not he knew the defendant's act or omission might be capable of giving rise to an action in damages.

18. I find that in November 2008 in accordance with his own testimony in his affidavit that the defendant's acts to which the proposed claimant's injuries prima facie would have been attributable, would have been known to

DELAY

19. The question therefore is to what extent would he have acted reasonably from November 2008 to the time of making this application. The length of time from November 11th 2008 to February 20th 2009 as pointed out by the claimant's attorney is only 9 days outside the normal limitation period. The reason for the delay from November to February on the face of it, would be impecuniosity. While one might accept that is a reason for not initiating the high court action, it does not appear to be the reason for not either:

- (a) seeking legal aid and or
- (b) issuing a pre action protocol letter.

I am troubled by:

- (i) the inaction from November 2008 and the reasons therefor
- (ii) the failure to issue a pre action protocol letter in November 2008.
- (iii) the fact that proceedings in the Magistrates Court exist involving the question of assault by the proposed claimant against the proposed defendant, but (I am told) no cross charges, or counter charges, involving claims for assault by the police officer against the proposed claimant exist.

20. I note the application of these considerations in particular in the case of **Derryck Mitchell and Kumar Bickraj** at page 6 and the statement of principle there as follows:

“the legislature has determined that four years is the time limit within which actions such as the proposed one shall be commenced. That is the declared intention of Parliament. Courts ought not to extend statutory limitation periods without good cause and section 9(3) describes at least six considerations which a court must have regard to. These considerations are not weighted. That is a matter Parliament has left to the Courts. The overriding consideration is “all the circumstances of the case”, which gives the courts a fair measure of latitude.

However, as with all judicial discretions, this one must be exercised in a fair and reasonable manner, bearing in mind the relevant facts in applying the appropriate legal considerations. “Judicial discretion is not some amorphous power to be exercised whimsically. Such an exercise of power would be arbitrary.”

21. In those circumstances, the court has to consider whether a claimant who alleges that he has suffered on the face of it severe personal injury and on the face of it suffered as a result of high handed and unreasonable action on the part of the proposed defendants is to be left without a remedy because he files his claim more than four years after the limitation period, prescribed for the torts, of negligence and breach of duty, and further when he falls just outside that four year limitation period simply by a matter of nine days.

CONCLUSION AND DISPOSITION

22. On balance the court finds that in the circumstances of this particular case, it should not extend that time. The reasons why it should not extend that time relate back to the matters put forward in the affidavit to justify the

exercise of the court's discretion. The court accepts that the period for which the extension of time is sought is nine days, but notes also that in November 2008 the claimant ,(having an attorney), would have known that he needed to initiate court action, and would have known that the four year limitation period would have been running against him. He would have known that he therefore required the court to extend the limitation period and would have needed to provide good explanation \reasons for it to do so.

23. If it were that the claimant were not in a position to pay legal fees he is effectively asking the court to have waited until whatever time he was telling the court that he would have been in a position to pay legal fees, and that would produce an open ended extension of the four year limitation period. In this case it was nine days, but the reason given by him could have been productive of inordinate extension of time and I find it is not sufficient reason in the light of:

- (a) his option to approach legal aid and/or
- (b) his option to have had a letter before action issued.

24. If the circumstances were that letter before action had been issued, and that the application were to simply extend time thereafter for the claim in the light of the nine day period now sought, the court would have not hesitated to extend the time, but that is not the case. I am fortified in this conclusion by the fact that these claims for damages for breach of statutory duty, for assault and battery, and negligence are matters that would take the defendants almost by surprise as I have no evidence that they were raised at the Magistrate's Court level as the subject of a charge initiated by the proposed claimant and in fact Counsel submitted they were not so raised in the proposed claimant's defence to the charges against him.

25. In these circumstances I adopt the approach of the Honourable Justice Jamadar and I decline to exercise the court's discretion in this case to extend the period of limitation.

I will be prepared to supplement the reasons for decision I have just adduced, if necessary.

26. The application is dismissed.

Further Ruling on costs

27. Having considered the question of costs I declined to make any order as to costs. The reasons I declined are that:

- (i) one of the grounds is impecuniosity
- (ii) the period of the time sought to be extended is simply by nine days.
- (iii) I am not convinced that default in proceeding with the matter is entirely that of the applicant. I decline to penalize the applicant in costs in the circumstances of this matter.

28. Leave granted to the applicant to appeal

Supplemental Reasons

29. Having reviewed the written transcript of the oral decision delivered above I see no need to add thereto, save by the insertion of the words therein in italics and as follows – The delay in this case is associated with raising in the instant application for the first time the alleged complaints arising from the incident more than four years ago. The incident was and is the subject of ongoing proceedings in the Magistrate's Court. I considered this to be suspicious as raising the claims at this stage carried the hallmarks of being an after thought. There would have been, in my view. sufficient opportunity

and options even apart from high court action available to the proposed claimant within the original limitation period provided by statute to raise the allegations.

30. Accordingly I considered the affidavit evidence did not attain the threshold level of credibility and persuasiveness with regard to the relevant factors as to justify the exercise of the court's discretion to extend time. I made no order as to costs.

Peter A. Rajkumar
Judge.