THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-0007

BETWEEN

WENDELL JEREMY

First named Claimant

EMMANUEL PETERS

Second named Claimant

ASA MC LEAN

Third named Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Appearances:

Claimants: Gerald Ramdeen instructed by Dayadai Harripaul

Defendant: Kelisha Bello instructed by Nisa Simmons

Before The Honorable Mr. Justice Devindra Rampersad

Dated: 3 August, 2020.

RULING

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1. On or about 13 November 2011, the claimants were involved in an altercation which led to their arrest and detention and their later charge with the offence of robbery with violence. The claimants say that they were maliciously prosecuted, were deprived of their liberty and have suffered loss and damage. They also seek damages for false imprisonment, special damages for loss of earnings, aggravated and exemplary damages, interest and costs.

2. A claim for these reliefs were commenced on 2 January 2019 and the defendant was served on the same day – a fact which is not in contention. No appearance was filed. On 1 February 2019, the claimants brought a Notice of Application for permission to enter judgment against the defendant in default of appearance along with the costs of the application to be assessed in default of agreement.

3. The claimants' said Notice of Application was dealt with in chambers on 22 February 2019 without a hearing. The following order was then made:

> *"1.* ***Permission be and is hereby granted to the Claimants to enter judgment against the Defendant*** *for the reliefs sought in the Claim Form filed on 2nd January, 2019, more particularly stated as,*
>
> *i. Damages for malicious prosecution and all consequential loss suffered by the Claimants as a result of the actions of Police Constable Ragoobar in commencing and prosecuting charge Nos. 6945 and of 2011 at the Sangre Grande Magistrate Court against the Claimants which charges were heard and determined on the 24th March, 2015;*
>
> *ii. Damages for false imprisonment of the First Named Claimant from the 13th November, 2011 until the 30th December, 2011;*
>
> *iii. Damages for false imprisonment of the Second Named Claimant from the 13th November, 2011 until the 30th September, 2012;*
>
> *iv. Damages for false imprisonment of the Third Named Claimant from the 13th November, 2011 until the 17th November, 2011;*
>
> *v. Special Damages for loss of earnings at the following rates for the period of the Claimants incarceration:-*

(i) First Named Claimant at the rate of $250.00 per day

(ii) Second Named Defendant at the rate of $250.00 per day

(iii) Third Named Defendant at the rate of $300.00 per day

vi. Aggravated and exemplary damages;

vii. Interest at a rate to be determined by the Court for the period from the service of the proceedings herein until the date of judgment and thereafter at the statutory rate from the date of judgment to the date of payment;

viii. Costs assessed on the prescribed basis

ix. Such further or other relief that this Court deems fit in the circumstances of this case.

2. The Defendant do pay the costs of this Claim to be assessed in default of agreement;

3. ***Judgment be and is hereby entered for the Claimants against the Defendant with damages to be assessed;***

4. The Defendant herein do pay the costs of this application to be assessed in default of agreement."

[Emphasis added]

4. On 22 March 2019, the defendant made an application which is the subject of this ruling. It sought the following relief pursuant to Parts 11.17 and/or 13.3 of the CPR together with relief under Part 10.3 (5):

4.1. That the judgment be set aside;

4.2. That the time be extended for the defendant to file a defence;

4.3. That there be no order as to costs.

5. An affidavit in support was filed and deposed to by Nisa Simmons on even date in which she said that there was an administrative mix-up or error that led to a file not being created in the Chief State Solicitor's department before she proceeded on end of contract leave on 1 March 2019. As a result, she was not aware of the existence of the matter. The file was only created on 7 March

2019 and on 15 March 2019, while still on leave, she received a call from her office informing her that the matter had been served on 2 January and the file created on 7 March.

6. She said she called the claimant's advocate attorney that day and she was informed that default judgment had already been entered against the defendant 2 weeks prior. The notice of application filed on 1 February 2019 referred to above was not served on the Chief State Solicitor's Department. This is not in issue.

7. Ms. Simmons said that the defendant could not have attended any hearing as the defendant was not served with the application nor notified of the hearing date. She said that the defendant was not afforded the opportunity to make representations at any hearing in respect of the said application and that it acted as soon as reasonably practicable in making the application.

Abuse of Process?

8. The claimant's attorney contends that the defendant's application made to this court is an abuse of process. His contention is made adopting the reasoning of, amongst other authorities, the Court of Appeal decision in ***The Attorney General v Shawn Singh***[1].

9. Part 11.17 provides:

> ***Application to set aside order made in the absence of a party***
>
> *11.17 (1) A party who was not present when an order was made may apply to set*
>
> *aside that order.*
>
> *(2) The application must be made within 7 days after the date on which the order was served on the applicant.*

[1] CA Civ No.265 of 2010

(3) The application to set aside the order must be supported by evidence showing—

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made.

10. The defendant, therefore premises this limb of the application on the fact that they were not present on 22 February 2019 when the order was made for permission to enter judgment and the entry of judgment. The order, it must be said, was made in Chambers without a hearing but there is no doubt that the defendant was not served with the application and so did not make representation at that time.

11. The other limb of the attack on the default judgment is under Part 13. 3 which provides:

Cases where the court may set aside or vary judgment entered under Part 12

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.

(2) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

12. For completeness, the relevant portion of Part 12 has to be considered:

12.1 (1) This Part contains provisions under which a claimant may obtain judgment

without a trial where a defendant—

(a) has failed to enter an appearance giving notice of intention to defend in accordance with Part 9; or

(b) has failed to file a defence in accordance with Part 10.

(2) Such a judgment is called a "default judgment".

Claims in which default judgment may not be obtained

12.2 (1) A claimant may not obtain default judgment where the claim—

(a) is a fixed date claim;

(b) is an admiralty claim in rem; or

(c) a claim in probate proceedings.

(Rule 74.22 makes special provision for default judgment in admiralty cases for

personal injury arising out of a collision between two ships)

(2) A claimant needs permission from the court if he wishes to obtain default judgment on any claim which is—

(a) a claim against a State;

(b) a claim against a minor or patient as defined in rule 2.3; or

(c) an action in tort brought by one party to a marriage against another.

Conditions to be satisfied—judgment for failure to enter appearance

12.3 At the request of the claimant the court office must enter judgment for failure

to enter appearance if—

(a) the court office is satisfied that the claim form and statement of case have been served;

(b) the period for entering an appearance has expired;

(c) the defendant—

(i) has not entered an appearance;

(ii) has not filed a defence to the claim or any part of it;

(iii) where the only claim is for a specified sum of money, apart from costs and interest, has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it; or

(iv) has not satisfied the claim on which the claimant seeks judgment; and

(d) (where necessary) the claimant has permission to enter judgment.

(Rules 5.5, 5.9, 5.10 and 5.13 deal with how to prove service of the claim form and statement of case).

13. Mr. Ramdeen for the claimant has submitted that the defendant cannot straddle the two limbs of the application to set aside the judgment and to do so amounts to an abuse of process. He has also submitted that abuse of process also raises its head in relation to the Part 11.17 limb as mentioned below. Ms. Bello for the defendant disagrees, chose not to elect between the two and said that she is perfectly entitled to seek relief in the alternative.

The Application for Default Judgment

14. Despite the fact that the application is not before the court on the defendant's notice of application for relief, it is well established historically[2] that the court is entitled to look at the record before it. That application was filed on 1 February 2019, after the time for the filing and service of an appearance had expired. However, by that time, the time for the filing and service of a defence had not yet expired[3].

15. The application itself is one under Part 12.2 (2)(a) of the CPR, which is set out above and it provides as follows:

> *"TAKE NOTICE the Claimants herein apply to the Court under the provisions of Part 12.2 (2) (a) of the Civil Proceedings Rules 1998 as amended for an order that:*
>
> *1. Permission be granted to the Claimants to enter judgment as against the Defendants herein.*
>
> *2. That the Defendants herein to pay the costs of this application to be assessed in default of agreement.*
>
> *3. Such further or other relief as this Court deems fit in the circumstances of this case."*

[2] ***Craven v Smith*** (1869) LR 4 Exch 146

[3] See Part 10.3 (3) of the CPR which gives the defendant 42 days after the date of service of the claim form and statement of case i.e. after 2 January 2019, to file a defence

16. Obviously, there was no relief sought for judgment to be entered at that time. The draft order that was provided in support of the application, though, went further to include an order for the entry of judgment.

17. The application was addressed to the Registrar of the Supreme Court and to the defendant so it is obvious that there was the intention to have it served on the defendant. That was not done.

18. Part 12.2 does not provide any specific mention that the application for permission must be made *ex parte*[4]. As a result, the normal provisions of Part 11 would apply as would the general rule requiring service under Part 11.5 (1)[5].

19. The court dealt with the application without it having been served and without a hearing, obviously under its discretion pursuant to Part 11.13 (d) of the CPR.

The Part 11.17 Limb:

20. As a result, Ms. Simmons, who deposed to an affidavit in support of the defendant's application, said[6] that:

> *"… the Defendant was not afforded the opportunity to make representations at any hearing in respect of the application."*

21. She also went on to say[7]:

> *"The Defendant could not have attended any hearing we were not served with the Claimant's application nor notified of any hearing date."*

22. Ms. Bello for the defendant focused primarily on authorities which addressed the Part 11.17 issue.

23. Mr. Ramdeen has suggested that this argument involves an abuse of process for the following reasons: –

[4] See Part 11.5 (2) of the CPR
[5] *"The general rule is that the applicant must give notice of the application respondent"*
[6] At paragraph 10
[7] At paragraph 11

23.1. The learned judge exercised her discretion under Part 11.13 (d) to deal with the application without a hearing;

23.2. Since there was no hearing, Part 11.17 cannot apply. Instead, the learned judge's exercise of discretion to deal with the application without a hearing ought to have been appealed;

23.3. The decision to not have appealed that exercise of discretion but to follow the lower threshold prescribed under Part 11.17 is where an abuse of process arises[8]. An appeal would have required a finding that the court had exercised its discretion wrongly, as opposed to the less onerous Part 11.17 threshold of just having to explain the reason for non-attendance and that it is likely that had they attended, there may have been a different outcome.

24. Mr. Ramdeen also questions the attempt to approbate and reprobate. He suggests that the defendant cannot employ the double-barreled approach by first of all questioning the manner in which the order was derived under Part 11.17 and also, at the same time, applying to set aside the default judgment under Part 13. His suggestion is that this approach is also an abuse of the process.

25. On the other hand, the defendant has produced authorities in relation to the Part 11.17 point without addressing the issue of the need for an appeal instead. Ms. Bello did not make any attempt to directly address the fact there was no hearing other than as mentioned in the affidavit.

The Part 13.3 Limb

26. Once the validity of the order made on the 22 February 2019 is established, the court can only then consider the application to set it aside under this limb. Foremost in the argument in this regard is the allegation that the claim became

[8] See the reasoning of the Court of Appeal in ***The Attorney General v Shawn Singh*** (supra) and a discussion of the court's exercise of its discretion under Part 11.13 (d) in ***Dayanan Gangoo v The AG*** Civ App No. P256 of 2014

statute barred prior to the commencement of the action and therefore, on the ground, the defendant has a good defence. However, notwithstanding that preliminary view, the defendant says that there is sufficient merit in the defence otherwise even in the event that limitation period point is rejected.

The Decision to pursue both

27. Having regard to the foregoing, the court sees the ideological conflict facing the defendant. The court also appreciates the quasi-blunderbuss approach to attack all possible fronts at the same time under the protection of the overriding principle. That principle involves the resolution of issues between parties justly.

28. To my mind, it is a dangerous road to travel to forget that principle when getting bogged down in procedural inefficiencies and irregularities. Rules are there to achieve fairness and certainty while attempting to reach a just resolution of a conflict, not to get in the way of it.

29. The question, therefore, at this stage, is whether the attempt to straddle both limbs in the manner in which it was done is an abuse of process? Can the defendant argue both without electing a position in relation to the order? Ms. Bello for the defendant says that she can, in the alternative.

30. To my mind, having regard to the issue-based approach, there is no reason why the court cannot address both limbs in the alternative, crossing each bridge at a time as required on the journey to determine whether the judgment should be set aside. Obviously, they cannot be pursued simultaneously but the court can adequately separate the two approaches and deal with them consequentially without there being the need to declare that there is an abuse of process. The defendant essentially wishes to put in a defence and defend the claim. The court therefore holds that Attorney-at-law for the defendant can raise the issues which can possibly lead her to that result in the alternative.

31. The court will therefore treat with the application as has been suggested by the defendant's counsel i.e. in the alternative.

The Law:

32. The court has considered the submissions and has looked at its decision in ***Hypolite General Contractors Co. Ltd v The Attorney General Of Trinidad And Tobago***[9] and the affirming decision of the Court of Appeal in ***Hypolite General Contractors Company Limited v The Attorney General of Trinidad and Tobago***[10] and has considered the factors under ***Roland James v The Attorney General of Trinidad and Tobago***[11] to come to the following conclusions.

33. The defendant was not present when the order was made on 22 February 2019.

34. The application made on 1 February 2019 *was not one for the entry of judgment but one for permission to enter judgment*. In going further than was asked, the court was possibly exercising its powers under Part 26 to give judgment of its own discretion but, however, the case had not yet reached the stage of a case management conference. All that was before the court was the application for permission. Nothing more was asked for. In that regard, the discussion by the Court of Appeal in ***Dayanan Gangoo*** is apposite;

35. That order for permission and judgment was made in chambers under the court's exercise of its discretion under Part 11.13 (1) (d) mentioned above;

36. At the time when the court exercised its discretion under Part 11.13 (1) (d) aforesaid, the claimant's notice of application had not been served on the defendant. In that regard, counsel for the claimant indicated that he had no input into the decision of the court to exercise its discretion as aforesaid. Therefore he could not have given notice to the defendant of the application

[9] CV2014-02803, 02804, 02805, 02807, 02809, 02810, 02811
[10] C.A.CIV.P.107/2017
[11] C.A.CIV 44 of 2014

since the order made on the 22 February 2019 was itself made without notice even to the claimant by the court in chambers. The court does not accept, however, that the application without a fixed date of hearing could not have been served on the defendant. In other words, notwithstanding that the date had not been fixed, the application could have been served on defendant who definitely would have been alerted as to the default;

37. The words used in Part 11.17 (1) are sufficiently wide to capture the circumstances as exist in this matter where the order was made in the absence of the defendant. To my mind, it is obvious that the making of an order by a court can be done in the presence of the parties or in chambers. The words of Part 11.17 (1) does not differentiate between the two possibilities. This is a material difference between the application of Part 11.17 and Part 40.3 since the latter applies in the context of an order made at a trial. In the case of notices of application under Part 11, the resolution of the application and the making of an order are discussed in the context of different scenarios without any restriction to its application to only those orders made at a hearing. Part 11.16, which immediately precedes Part 11.17, speaks about the power of the court to proceed in the absence of a party who fails to attend the hearing of the application. It is arguable that Part 11.17, following right after, may relate to that particular provision. However, this court prefers not to give it that narrow interpretation since, if it was meant to only apply in that manner, they would possibly have been part of the same rule. By placing it separately and using broad terms, this court is of the respectful view that, notwithstanding the fact that Part 11.17 (3) speaks about there being a good reason for failing to attend "*the hearing*" and that had the applicant "*attended*" some other order might have been made, Part 11.17 encompasses all of Part 11. In this case, the claimants failed to follow the Part 11 general rule by failing to serve the notice of application and ought not to be allowed to benefit from that material omission. No doubt, the addressing of the application to the defendant and the failure to invoke a response would have influenced the

court's decision to exercise its discretion to deal with the matter without a hearing.

38. There is no evidence of the order ever having been served on the applicant. Therefore, the application was made within the timeline contemplated by the rule.

39. The fact that there was no hearing is, to my mind, as a direct result of the claimant's failure to serve the notice of application thereby depriving the defendant of notice in order to make representation. Obviously, since there was no hearing, and there was no service of the application, the first limb of Part 11.17 (3) is satisfied.

40. There is also the distinct possibility that had the court been aware that the application had not been served and the defendant had a position on the validity of the claim to wit the limitation period point and the desire to defend in any event but for the administrative omission to follow-up the order, the court may have approached its discretion to deal with the matter without a hearing differently. As this court said in ***Hypolite***,

> *"21. When the court considers an application to enter judgment against the State in the circumstances of this case where no draft defence was provided and no explanation was given for the failure to do so, different considerations in law in respect of the exercise of the court's discretion arise to an application made for the extension of time for the filing of the defence.*
>
> *22. In the former situation, the court is not called upon to come to a decision to permit the entry of judgment based on an acceptance or rejection of the bona fides of any defence. Instead, once the court is satisfied that the claim has merit and is not on its face frivolous or vexatious or an abuse of the court's process and that the time has expired for the filing of a defence, the court may be inclined to exercise its discretion to permit the entry of judgment unless it has before it some other cogent evidence which it could consider in favour of refusing the application. It is more than just the regular administrative function of the taking up of judgment over-the-counter in cases such as this which involves the State.* ***The rule provides for the retention of a discretion in the court to manage judgments against the State especially since any such judgment has to be made out of the***

> ***contributions of the taxpayers and therefore there is a greater public interest involved than a matter involving private parties engaging in their regular commercial enterprises. However, this discretion has to, of course, be exercised judicially based upon facts presented to the court which could allow it to consider whether or not to exercise its discretion to grant permission.***
>
> *[Emphasis added]*

41. Clearly, therefore, this court is of the respectful view that the process of giving permission to enter judgment against the State is more than just a rubber-stamping of an application. Otherwise, the power may not have been reserved to a judge exercising his/her powers under the CPR, including the overriding objective. It may have instead been given over to an administrative function involved in the process of taking up of judgment over-the-counter. To my mind, however, the rule intended the preservation of judicial discretion for the reason given. When faced with the defendant's representations which may have been generated as a result of the service of the application, it is likely that the court may not have dealt with the matter in chambers, may not have entered judgment, since it was not asked for in the application and may have considered an application for the extension of time for the filing of the defence.

42. As a result, the court is of the respectful view that it can exercise its discretion under Part 11.17 to set aside the order made on 22 February 2019 especially having regard to the failure to serve the application on the defendant. If, on the other hand, service of the same had been proven, the court may have viewed the decision to exercise the court's discretion under Part 11.13 (1) (d) differently if the defendant had, notwithstanding such service, failed to make representation. But that is not the case.

43. Consequently, it is not necessary to consider the application of Part 13.3. If even the court is wrong on the application of Part 11.17, the court is convinced, on the authorities, and having regard to the draft defence that was filed, that

the test for the setting aside of the default judgment would have been met under ***James*** supra.

44. Further, having regard to the authority of ***James*** (supra), the court considers the defendant's application appropriate for the exercise of its discretion for the extension of time for the filing and service of the defence. The factors which guide the court in that regard are, as discussed in ***James***, the guiding factors under Part 26.7 of the CPR.

45. Looking at all of those factors in the round, the court is of the respectful view that the court's discretion ought to be exercised to allow the extension of time. The incident which is involved occurred on 13 November 2011 and the claimants were charged on 16 November 2011. However, the magistrate's court proceedings were only dismissed on 24 March 2015 so that notwithstanding the 2011 dates, the court would have to consider the impact of the 24 March 2015 dismissal in relation to the allegation about the limitation period. There are sufficient other indicators of an arguable case for the court to consider having the matter sent to trial for determination. Notwithstanding the fact that the explanation for the failure to file the defence on time was not a good one, that factor is only one in a host of others which lean towards the permission to file the defence.

46. Statements were allegedly made by the virtual complainant on the day in question upon which the officers say that they relied. It may not have been up to them to ascertain the veracity of those statements at that time. That is a matter for trial before a competent tribunal. So that, arguably, there was a defence on the merits for the court's consideration.

The Order

47. As a result, the court orders that the order made on 22 February 2019 be set aside.

48. The court orders further that permission is granted to the defendant to file and serve a defence by 11 August 2020.

49. The court will hear the parties on the issue of costs at the Case Management Conference which would be fixed after the service of the defence.

/s/ D. Rampersad J.