BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No. 9 of 2012

BETWEEN:

NIGEL WORME **Applicant**

AND

NOLAN WHITNEY **Respondent**

Before the Honourable Sir Marston C. D. Gibson, K.A., Chief Justice

2013: February 18
2014: March 3

Appearances:

Ms. Zahidha I. James for the Applicant
Ms. Lana Edwards for the Respondent

DECISION

Introduction

[1] On 26 November 2012, Magistrate Michelle Weekes at District 'A' St. Matthias, entered an order enforcing a judgment previously entered on default against the Applicant and ordered that he pay the Respondent $26,000.00 plus damages arising from a wrongful dismissal claim. The

Applicant seeks leave to appeal against the learned Magistrate's enforcement order. For the reasons which follow, the application is denied with costs.

Background

[2] On 14 April 2000, the Respondent commenced Magisterial Suit No. 1122/2000 against the Applicant claiming damages in the sum of $26,726.00 for wrongful dismissal. On 22 January 2004, Magistrate Valton Bend entered a default judgment against the Respondent. It is not contested that this order was made after a failure to appear by the Respondent's then counsel, Ms. Dyon Scarlett who, by her own admission, was late in arriving to court on that day.

[3] On 5 November 2004 the Respondent's former Attorneys, Messrs Nelson & Wilson, wrote to the then Attorney for the Applicant, Mr. Adrian King, and informed him that judgment had not yet been satisfied, despite having been entered almost one year ago. He further stated that "unless we hear from you and the said judgment is satisfied on or before the 30th day of November 2004, we will be obliged to institute levy proceedings against your clients for the recovery of the judgment debt."

[4] On 22 November 2004, Ms. Scarlett, who acted in association with Mr. Adrian King, responded to Messrs Nelson & Wilson and informed them that the Applicant would be making an application to set aside the default

judgment before 30 November 2004. That application was filed, along with a supporting affidavit, on 29 November 2004.

[5] It is at this point that the procedural background to this matter becomes more than a little obscure. Counsel for the Applicant claimed there was no record, official or otherwise, of that application ever being heard. This Court however, was able to ascertain that the records of the District 'A' Magistrate's Court indicate that this application was heard and dismissed by Magistrate Bend on 11 March 2005.

[6] It appears that Ms. Scarlett filed a second application to set aside the default judgment on 8 July 2005 but, in doing so, utilised the same affidavit and grounds as used in the first application. I say that "it appears" because the Applicant's current counsel, Ms. James, has not provided any documentary evidence of this second application, neither is there any evidence of such at the District 'A' Magistrate's Court.

[7] On 4 May 2010, the Respondent filed a judgment summons seeking enforcement but, for reasons unknown, that summons was never served. And there the matter lay, dormant, until the Respondent filed a second judgment summons in pursuit of enforcement almost two years later on 16 February 2012. The second judgment summons was heard on 26 November 2012 before Magistrate Weekes who dismissed that second application.

[8] During the hearing of the instant application, it became clear that there was some disagreement as to the Magistrate's reasons for the dismissal. It is not disputed that the learned Magistrate dismissed the application on the ground that it should have been made on appeal in the Court of Appeal. What is in dispute, however, is whether she also did so for reasons that there was considerable delay in making the second application. I shall address this point later.

[9] On 14 December 2012, the Applicant filed the instant application for leave to appeal the 26 November 2012 order of Magistrate Weekes. The grounds of the application are:

> 2. The learned Magistrate erred in law in failing to take into account the following matters:
>
> 2.1 the original Judgment entered in Default on the 22nd day of January 2004 had been unreasonably entered in that the then Attorney-at-Law acting for the Applicant/Defendant Ms. Dyon Scarlett, having called ahead to that [sic] District 'A' Magistrate's Court informing the same that she would be arriving late for the then scheduled hearing, was duly informed upon her arrival at 10:25 a.m. that Judgment had been entered in default of her appearance.
>
> 2.2 that Ms. Scarlett had filed two applications with an affidavit annexed to set aside the said judgment on the 29th day of November 2004 and again on 08th day of July 2005. The first was dismissed without a record of grounds and the second having been filed in identical language was never heard.
>
> 2.3. that Ms. Scarlett's said affidavits outlined clearly a good arguable defence with every prospect of success against the Respondent/Plaintiff's claim for Wrongful Dismissal.

The Supporting Affidavit

[10] On 14 December 2012 Ms. Zahidha James, Counsel for the Applicant, filed an affidavit in support of this application. She deposed, *inter alia*, that on 26 November 2012 she represented the Applicant before Magistrate Weekes and argued that the Applicant had a good prospect of success in defending the claim and that the learned Magistrate dismissed the application on the ground that it should have been made before this Court.

[11] Attached as Exhibit "ZH1" was the affidavit of Ms. Scarlett dated 26 November 2004. So far as pertinent, the Scarlett affidavit swore that:

> 3. The abovementioned matter was scheduled for hearing on the 22nd day of January 2004 in the District 'A' Magistrate's Court, Civil Division.
>
> 4. On the said date I realized that I would not be able to arrive at the Court at the appointed start time of 9:00 o'clock a.m. and I asked my arrive at the court as the said time and that I would be arriving there at about 10:30 o'clock a.m. [sic].
>
> 5. That while I was driving on my way to court at about 10:25 a.m., I saw the Plaintiff/Respondent's Attorney-at-Law Mr. Hilary Nelson driving in the opposite direction in a line of traffic. I indicated to Mr. Nelson that I was on my way to court in relation to this matter.
>
> 6. Mr. Nelson responded that he had already attended court and that judgment had been granted for the Plaintiff/Respondent in this matter.

The affidavit then outlined purported facts regarding the former employment of the Applicant and the alleged events surrounding his termination.

The Submissions

The Applicant's Submissions

[12] Ms. James submitted that an application to set aside a default judgment may be heard by a Magistrate and may be heard more than once. She acknowledged that the Magistrate's Court is a creature of statue and contended that, while there is no express power or jurisdiction in the **Magistrate's Court Act, Cap. 116A**, to set aside a judgment in default, such power could be located elsewhere, in either another statutory provision or subsidiary legislation. She cited the case ***National Insurance Board v Wesley Grannum*, Magisterial Appeal No. 6 of 2010 (date of decision 22 June 2012)**, where this Court was asked to determine the power to award costs in relation to the **Supreme Court (Civil Procedure) Rules 2008 ("the CPR")**. At [18], ***Peter Williams JA*** said:

> [18] The ***Magistrate's Courts (Civil Procedure) Rules, 1958*** were made under the ***Magistrates Jurisdiction and Procedure Act, Cap. 116***, which was repealed by **Cap. 116A**. Nevertheless, the ***1958 Rules*** would still be in effect by reason of ***section 30(3)(a)*** of the ***Interpretation Act, Cap. 1***, which preserves statutory instruments under repealed legislation so that they have "the like effect" under the substituted legislation.
> (Emphasis supplied)

[13] Counsel, in applying those principles to this application, referred the Court to **section 3(1) of the Magistrates Courts (Civil Procedure) Rules 1958, Cap. 116** which states:

> Wherever touching any matter of practice or procedure these rules are silent, the ***County Court Rules, 1936***, made in England under the ***County Courts Act, 1934***, shall apply *mutatis mutandis*: and, in cases, where no forms are contained in the Appendix to these rules, the parties may use as guides in framing such forms the Forms contained in Appendix A to those rules. . . "
> (Emphasis supplied)

[14] Therefore, Counsel said, regard must be given to **Order 37, Rule 4 of the County Court Rules 1981 (UK)**, from which the magisterial power to set aside default judgments was derived. That provision reads:

> **Setting aside default judgment**
>
> 4(1) Without prejudice to rule 3, the court may, on application or of its own motion, set aside or vary any judgment entered in a default action pursuant to Order 9, rule 6.
>
> (2) An application under paragraph (1) shall be made on notice.

[15] Counsel further submitted, that to the extent that Magistrate Weekes' decision to dismiss the application was based on the proposition that the application to set aside could only be heard once in a Magistrate's Court, that too was an error of law. She relied on ***David Sealy v Caribbean Consolidators*, Civil Appeal No. 224 of 2000 (date of decision 30 June 2004) ("*David Sealy*")** where this Court held that: (1) *res judicata* does not arise in applications to set aside a default judgment since there has been no final determination of the issues; and (2) a second application may be made

to set aside default judgment, even before a judge of concurrent jurisdiction, subject to the inherent power of the court to prevent an abuse of process.

[16] Ms. James' final argument was that the determination of a "reasonable time" for filing the application must be viewed in light of all the circumstances of the case. She urged the Court to consider that the Respondent waited some 10 years before entering an order for enforcement of the judgment. Set against that background, she said, the Applicant should not be penalised for failing to apply to set aside the default judgment a mere 10 months after it was ordered.

The Respondent's Submissions

[17] Ms. Edwards, for the Respondent, submitted that the default judgment was entered in the Magistrate's Court in the absence of both the Applicant and his counsel and was regularly obtained pursuant to **section 173 of the Magistrates' Courts Act** which reads:

> Where on the day so named in the summons, or at any continuation or adjournment of the court or action in which the summons was issued, the defendant does not appear or sufficiently excuse his absence or neglects to answer when called in court, the magistrate may, upon due proof of service of summons, proceed to the hearing or trial of the action on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended.

[18] In response to Ms. James' submissions on the application of the UK **County Court Rules,** Ms. Edwards contended that, if the Court was minded to accept the application of those provisions, the Court must also have regard to

section 5(2) of the County Court Rules which states that "No application to set aside any proceedings for irregularity shall be granted unless made within a reasonable time, nor if the party applying has taken any step in the proceedings after knowledge of the irregularity."

[19] Ms. Edwards referred to the 26 November 2004 affidavit of Ms. Scarlett and the admission made there that she was informed of the default judgment order on the very day it was entered, but waited 10 months before applying to set the order aside and even then only after receipt of the letter of 5 November 2004 seeking to enforce the judgment. She also argued that the second application to set aside was made some three months after the dismissal of the first application. These actions, she said, cannot be deemed to have been made within the "reasonable time" as required by **Rule 5(2) of the County Court Rules**.

[20] Counsel added that, in dismissing the second application, Magistrate Weekes referred to both the length of time taken to file the application to set aside as well as the irregularity of filing that application with the Magistrate's Court. Ms. Edwards further argued that the Applicant failed to provide a justifiable reason for the delay in applying to set aside the judgment. She referred to ***Jeffrey Brathwaite v M & W Jordan Enterprises*, Civil Suit No. 1761 of 2005 (date of decision 29 April 2008) ("*Brathwaite v Jordan Enterprises*")**

where ***Alleyne J (Ag)***, as he then was, noted that, in determining an application to set aside a default judgment, the court must consider, *inter alia*, the overall period of delay and any delay between the date of judgment and the application to set it aside.

[21] Counsel argued that this application was an abuse of process and again referred to the aforementioned periods of delay and to Ms. James' admission, during oral arguments, that the matter lay dormant from 8 July 2005 until May 2010 and then until February 2012 when the Respondent sought to enforce judgment. Ms. Edwards also submitted that Ms. Scarlett erred in utlising her affidavit of 26 November 2004 to support both the first and second applications to set aside, since no fresh evidence would have been placed before the court. In any event, counsel submitted, the proper forum for appealing the order of 22 January 2004, was the Court of Appeal pursuant to **section 238(1)(c) of the Magistrate's Courts Act**.

[22] Counsel's further submission was that Magistrate Weekes did not err in enforcing the default judgment as she was empowered to do so pursuant to **section 174 of the Magistrate's Courts Act**.

The Issues

[23] The issues which arise for determination are:

1. Does a magistrate have concurrent jurisdiction to set aside a regularly obtained default judgment made by another magistrate; and

2. What is the effect, if any, of failing to make a timely application to set aside a default judgment?

Discussion

[24] Taking those issues in turn, in relation to the proper forum for appealing the order of Magistrate Bend, this Court has, in the decision of ***David Sealy*** in the context of the High Court, provided clear legal criteria for the setting aside of a regularly obtained default judgment. That case concerned ***Greenidge J's*** initial refusal of a summons to set aside a default judgment. A subsequent summons to set aside was made, heard and granted, on conditions, by ***Payne J***. That order was appealed on the basis that ***Payne J*** had no jurisdiction to hear the second summons as it was *res judicata* and that the second summons was an abuse of process.

[25] ***Sir David Simmons CJ*** referred to ***Gordon v Vickers*** **(1990) 27 JLR 60, 65** a case in which ***Rowe P***, of the Jamaican Court of Appeal, adopted the reasoning of ***Carey JA*** in ***Vehicle Supplied Ltd v The Minister of Foreign Affairs, Trade and Industry*** **(1989) 26 JLR 390**. ***Rowe P*** said:

> I think that the reasoning of Carey JA can be usefully applied in an endeavour to determine on what general lines a Court ought to exercise its

> discretion when called upon to decide a second or subsequent application to set aside a default judgment.
>
> ...
>
> It is open to a defendant against whom a default judgment has been entered to make more than one application to have it set aside. This does not mean that the Court is powerless to curb an abuse of its process, ***nor does it mean that a defendant against whom a default judgment has been regularly entered can make repeated applications to have it set aside without adducing new relevant facts.***
> (Emphasis added)

[26] Applying these principles, ***Simmons CJ*** held that a second application may be made to set aside a default judgment, even before a judge of concurrent jurisdiction, subject to the inherent power of the court to prevent an abuse of process. Of more importance to the matter at bar was his Lordship's comment, quoting the observations of ***Rowe P***, that such second application must, however, be predicated upon new evidence.

[27] Similarly, in ***CRL Limited v Charles Anthony Stoute*, Civ. App. No. 1 of 2007 (date of decision 12 March 2009)**, ***Simmons CJ*** cited with approval the following dictum of ***Scott J*** in ***Columbia Pictures Inc. and Others v Robinson and Others* [1987] 1 Ch. 38, 86**:

> It has always been my understanding that an interlocutory application to set aside or vary an interlocutory order can be made on due notice at any time. As a matter of judicial discretion, a first instance judge will not set aside or vary an *inter partes* interlocutory order made by a brother first instance judge *unless the application to set aside or vary is made on the basis of fresh material not before the court when the original interlocutory order was made.* If no new material is relied on, or if the only new material is material that the applicant could and ought to have placed before the court on the original application – the applicant to set aside or vary being the respondent to the original application – then the original order can only be disturbed on appeal.
> (Emphasis added)

[28] It is clear in the case at bar that no new evidence has been adduced in support of the application. As noted above, Ms. James' affidavit outlined the circumstances which precipitated the filing of this current application and then referred to and repeated the evidence outlined in Ms. Scarlett's affidavit. And, in any event, Magistrate Weekes was right in holding that, on an application of **section 238(1)(c) of the Magistrate's Courts Act**, the proper procedure, where there was no new evidence adduced for disturbing the default judgment entered by Magistrate Bend, was an appeal to this Court. That section provides:

> [Subject to this Part] where a magistrate gives judgment or makes an order in exercise of his civil jurisdiction, either party to the action in which such judgment was given or order made may appeal to the Court of Appeal.

[29] This alone suffices to dispose of the instant application, but for completeness I will address the other arguments submitted in relation to the issue of delay.

The Delay

[30] It is well established that, in exercising its discretion to set aside a regularly obtained default judgment, a court must have regard to whether the defendant's claim has a reasonable prospect of success (see ***W.H. Bryan and Co Ltd v Mildred Caroline Herbert*, Civil Suit No. 2745 of 2000 (date of decision 3 July 2002), *Colmenares v Fields*, Civil Suit No. 208 of 1998 (date of decision 10 October 2005) ("*Colmenares v Fields*")**, ***Theresa***

***Hawkins v Kenneth Arthur et al*, Civil Suit No. 302 of 2003 (date of decision 30 October 2003)** and, more recently, ***Darian O'Brian Clarke v Southpark Limited*, Civil Suit No. 1098 of 2011 (date of decision 31 December 2013)**.

[31] However, there is also a line of authority that, notwithstanding the presence of a meritorious defence, a court may also exercise its discretion to refuse an application to set aside where the application was made after a period of inexcusable and inordinate delay. For example, in ***Clarke v Hinds et al*, Civ. App. No. 20 of 2003 (date of decision 4 June 2004) ("*Clarke v Hinds*")**, this Court said at [18] to [20]:

> [18] Although in most cases the primary consideration in exercising the discretion is whether the defendant has a case with a real prospect of success, ***we are of the view that there will be cases in which, irrespective of the merits, it will be a correct exercise of the discretion not to set aside a default judgment because of delay and the lapse of time between the judgment and the order setting it aside...Delay could be decisive, if it seriously prejudices the Plaintiff or third party rights have arisen in the intervening period. Harley v. Samson (1914) 30 T. L. R. 450*** was a case in which the Defendant had a good defence but the default judgment was nevertheless not set aside because of the delay of one year during which the judgment debt had been assigned. Delay may also be such that it is proper to infer that there can be no longer a fair trial, especially where the resolution of the dispute depends on memories of witnesses who are going to give oral evidence of an event that happened in a moment of time, such as is the case in most accident litigation: ***Griffiths L.J*** in ***Eagil Trust Co Ltd. v. Piggott-Brown [1985] 3 All E.R. 199 at 123 CA***.
>
> [19] ...

> [20] The judge's finding that there was no evidence to suggest that the delay of 5 years in the final adjudication of the summonses to set aside the default judgment was largely the fault of the respondents, was inaccurate. ***It was for the respondents to ensure that the summonses filed by them were expeditiously heard, especially in the circumstances of this case***. In ***Société Française d'Applications Commericiales et Industrielles Sarl v. Electronic Concepts Ltd. [1976] 1 W.L.R 51, Oliver J*** at 56B-D stated, "(Counsel) submits – and I think this must be right – that there is no real distinction to be drawn between a case where a plaintiff delays in instituting the relevant proceedings and the case of a plaintiff who institutes the relevant proceedings and then delays in prosecuting them". It follows that the judge's discretion in this case was exercised on an erroneous assessment of the responsibility for the inordinate delay.
> (Emphasis added)

[32] In ***Colmenares v Fields***, *supra*, ***Reifer J*** at [5] observed that

> [m]erely to show an arguable case is not enough. The Defendant must show a case that has a reasonable prospect of success and carry some degree of conviction. If in the opinion of the Court there has been inexcusable and inordinate delay, even though there may be a substantial defence, the Court may, in its discretion, dismiss the application.

[33] Taking the events in chronological order, I note that, in her affidavit in support of the application of 29 November 2004, Ms. Scarlett deposed that she was informed of the entry of the default judgment the very same morning it was entered, that is 22 January 2004. I, therefore, cannot find reasonable the 10-month period from that date until the filing of the application. As noted above, a second application to set aside the default judgment was then filed on 8 July 2005, almost four months after the initial application was dismissed by Magistrate Bend.

[34] I pause here to note that neither counsel has submitted to the Court a full text of the decision of Magistrate Weekes dismissing the application. This notwithstanding, and whether the Magistrate so ruled or not, the delay between 8 July 2005 and 26 November 2012 is a factor which must also be considered by this Court. Ms. James herself deposed that:

> 11. Ms. Scarlett's applications to have the Judgment set aside do not appear to have been heard ***and the matter remained dormant from the 08th day of July 2005 until a Judgment Summons was filed on the 16th day of February 2012***.
>
> 12. On the 26th day of November I represented the Applicant/Defendant and submitted that the second application to set aside the judgment was still alive and/or that the grounds of the Defense [sic] being good, with every prospect of success, deserved to be heard on the merits.

(Emphasis added)

[36] Based on the dates therein and by my calculations the Applicant and/or his counsel dallied for a period of over seven years before the second application came on for hearing before Magistrate Weekes. There can be no doubt that, on an application of the principles in ***Clarke v Hinds*** and the language of ***Reifer J*** in ***Colmenares v Fields*** where the period of delay was also seven years, the delay was "inexcusable and inordinate". This warrants the dismissal of this application since the Applicant has clearly failed in his continuing obligation to ensure that his application be expeditiously heard.

[37] Finally, I address Ms. James' argument, advanced during oral argument, regarding the mutual responsibility of both parties for the delay. She

contended that the Respondent was just as culpable as the Applicant since he waited some eight years to enforce judgment. Taking the picture as a whole, she said, "if it is reasonable to go six to ten years before you seriously try to enforce a Judgment, then it is reasonable to wait six to ten months to try to set it aside."

[38] I cannot accept this argument for two reasons. First, whilst it would be prudent for a judgment creditor to enforce any judgment awarded against him in a timely manner, he is under no duty to do so. A judgment debtor, *a contra*, is under an affirmative obligation, as provided by the **UK County Court Rule 5 (2),** to seek to have the judgment set aside as expeditiously as possible ("within a reasonable time"). Secondly, given the entirety of the delay in these proceedings, it is unacceptable that the Respondent should be disadvantaged through the tactical maneouvre of "letting sleeping dogs lie", a metaphor explained in the dictum of Lord Salmon in ***Birkett v James*** **[1978] A.C. 297, 329:**

> Defendants' solicitors might no doubt have taken out applications to dismiss for want of prosecution or for peremptory orders to compel the plaintiffs to get on with their actions. Not unnaturally they rarely did so, relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to believe that a dog which had remained unconscious for such long periods of time might well die a natural death at no expense to their clients; whereas, if they were to take the necessary steps to force the action to trial, they would merely be waking up a dog for the purpose of killing it at great expense to their clients which they would have no chance of recovering. Accordingly it was unusual for summonses to dismiss actions for want of prosecution or for peremptory orders to be taken out.

Whilst that case concerned an application to strike out for want of prosecution, those principles are equally apposite at bar. Accordingly, I hold that, apart from failing to adduce any new evidence in support of this application, Ms. James has failed to provide a plausible justification for the abovementioned periods of delay.

The Fairness of Granting the Application

[39] Given the foregoing factual matrix, I am also of the view that it cannot be right or just to permit the Applicant to continue with his substantive claim some 13 (almost 14) years after it was commenced and some 10 years after the entry of the default judgment. In ***Clarke v Hinds*** at [25], this Court stated:

> We have asked ourselves whether by confirming the default judgment and refusing leave to defend, we have been unfair or unjust to the respondents. Our answer is, unreservedly, No! A defendant has no right to have a regularly obtained default judgment automatically set aside. ***There must reach a point when, because of delay, even a defendant with a meritorious defence is precluded from defending: "it is in the interest of the state that there should be an end to litigation".*** That maxim derived from Latin is the basis of statutes of limitation and of the power of the court to dismiss an action for want of prosecution if there has been excessive delay.
> (Emphasis added)

Disposal

[40] In light of the foregoing, I make the following orders:

1. The application for leave to appeal is dismissed;

2. The Respondent shall have the costs of this application, to be agreed or assessed by the Court in the absence of agreement.

Marston D Gibson

Chief Justice