BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 1019 of 2010

BETWEEN

WISMAR J. GIBSON	**APPLICANT/RESPONDENT**
AND	
THE BOARD OF MANAGEMENT OF THE LODGE SCHOOL	**FIRST RESPONDENT/APPLICANT**
THE PRINCIPAL OF THE LODGE SCHOOL	**SECOND RESPONDENT/APPLICANT**

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: July 27
2019: April 26

Appearances:

Ms. Veronica MacFarlane in association with Mr. Pearson Leacock, Attorneys-at-law for the Applicant/Respondent

Mrs. Deidre Gay Makenna, Attorney-at-law for the First and Second Respondents/Applicants

DECISION

INTRODUCTION

[1] On 17 December 2010, the Applicant/Respondent obtained a judgment in default of defence against the First and Second Respondents/Applicants. On 17 September 2014 the

Respondents/Applicants applied to have the judgment entered against them set aside. The application was accompanied by an affidavit. They are also asking the court to abridge the time for giving notice for this application pursuant to the provisions of Part 26 of the CPR or alternatively under the inherent jurisdiction of the court.

ISSUE

[2] The sole issue for the court's determination is whether the default judgment entered on 17 December 2010 should be set aside by way of the present application, some four years after it was granted.

FACTUAL BACKGROUND

[3] The Applicant/Respondent, a teacher in English and Communication Studies, who at the time was assigned to the Alma Parris School in a temporary position, accepted an offer of employment made to him by letter dated 31 July 2008 from the Board of Management of the Lodge School for a one year temporary teaching assignment from 1 September 2008 until 31 August 2009.

[4] During that period, namely November to December 2008, a vacancy for a teacher in English Language and Literature to CSEC and Communication Studies to CAPE at the Lodge School was advertised in the Daily Nation. The Applicant/Respondent applied and received an email on 23 December 2008 inviting him to attend an interview on 29 December 2008 in respect of the advertised vacancy.

[5] On or about the 30 or 31 December 2008, the Second Respondent/Applicant called the Applicant/Respondent informing him that he was successful at the afore-mentioned interview.

[6] On 13 December 2009, the Applicant/Respondent received a letter from a Ms. Judith Murrell, Secretary/Treasurer of the Board of Management of the Lodge School dated 8 January 2009 offering him a temporary contract from 1January to 31 August, 2009.

[7] The Applicant/Respondent was confused about the terms of the contract he received because he thought the position for which he had previously interviewed was permanent. He discussed it with the Second Respondent/Applicant who informed him of the appointment process. The Second Respondent/Applicant advised that the provisional contract was part of the process and told the Applicant/Respondent to write a letter accepting the contract in order to expedite the process.

[8] Part of the appointment process also included a performance report on the teacher in question, which he or she is required to sign. A performance report was done on the Applicant/Respondent but he did not sign because among other things, it was incomplete and he was not satisfied with some of its contents.

[9] The Applicant/Respondent then sought an audience with the Principal about the report but was unsuccessful. He then informed the BSTU of the said report. The President contacted the First Respondent/Applicant by way of faxing a letter to the Chairman, requesting an urgent meeting to discuss the said report on the Applicant/Respondent – no meeting was convened since the Chairman was out of the jurisdiction.

[10] However before a meeting could be scheduled to discuss the said report, the Applicant/Respondent was issued with another report,

which according to him "contained information that warranted investigation."

[11] The Applicant/Respondent's contract ended on 31 August 2009 and was never renewed. He nevertheless reported to work at the Lodge School on 1 September, 2009 only to realize he was not timetabled.

[12] Approximately a week later, he received the termination of services certificate and was able to claim unemployment benefits.

CHRONOLOGY OF EVENTS

[13] The relevant chronology of events is set out in some detail here because with matters of this nature dates and timing are critical.

[14] The Applicant/Respondent commenced this action by way of fixed date claim form which was filed on 29 July 2010 and served on the Respondents/Applicants' attorney-at-law on the same date as evidence by the affidavit of service filed on 8 September 2010. The acknowledgment of service was filed on 11 August 2010 evidencing an intention to defend the matter. On the 14 December 2010 the Applicant/Respondent served notice dated 13 December 2010 on the Respondents/Applicants indicating the date of hearing. The matter came on for hearing on 17 December 2010, however by then the Respondents/Applicants had not filed a Defence or affidavit in answer pursuant to Rule 10.2 (2)(b) and judgment was entered for the Applicant/Respondent.

[15] The order was entered on 31 October 2011 and on 30 April 2012, the Applicant/Respondent applied for the matter to be set down for assessment of damages. An affidavit of service filed on 8 May 2012

shows that the Respondents/Applicants were served with the notice of application for assessment of damages on 2 May 2012.

[16] The matter came on for hearing but was adjourned and on 13 December 2012, the matter was set down for trial on the issue of damages during the period 15 April 2013 to 14 May 2013.

[17] On 2 June 2014, the Applicant/Respondent applied for an order for the Respondents/Applicants to show cause why they should not be cited for contempt of the order made on 17 December, 2010 – the application was accompanied by an affidavit.

[18] On 17 September 2014, the Respondents/Applicants applied essentially to have the judgment entered against them on 17 December 2010 set aside – this application was also accompanied by an affidavit.

[19] On 11 November 2014 when the matter came on for hearing the court ordered the Respondents/Applicants to file and serve written submissions on or before 5 December 2014 and the Applicant/Respondent to file and serve a response on or before 19 December 2014.

[20] The Respondents/Applicants filed their submissions in addition with a supplemental affidavit in support of the application to have the said judgment set aside on 17 March 2015. The Applicant/Respondent filed submissions in response on 30 April 2015.

THE RESPONDENTS/APPLICANTS' SUBMISSIONS

[21] Counsel for the Respondents/Applicants submitted that although the First Respondent/Applicant applied for an order setting aside the default judgment, it was her contention that the Applicant/Respondent

cannot obtain default judgment where the claim is by fixed date claim form. It is her submission that although the application to set aside the judgment relates primarily to the procedure of setting aside a default judgment, all of the circumstances of the case should be taken into account by the court, including the provisions of Part 26.2(2) and Part 1 of the CPR.

[22] According to her, one of these circumstances is that the attorney-at-law Mr. Steve Straughn who had conduct of the matter neither appeared in person when the matter was set down for hearing nor filed a defence on behalf of the Respondents/Applicants as required. Further she noted that whilst it is unfortunate that Mr. Straughn failed to act in his capacity as attorney-at-law, it is evident that the Respondents/Applicants intended to defend the action.

[23] Counsel submitted that the negligence of Mr. Straughn is truly at fault for the position in which the Respondents/Applicants find themselves, but urges the court not to punish the Respondents/Applicants as a result thereof, when it is clear that they were not dilatory but had in fact applied their minds to the case and provided information to Mr. Straughn in a timely manner.

[24] Counsel also submitted that liability of the First Respondent/Applicant reverts to the Minister of Education pursuant to the provisions of the Education Act, Cap. 41. She noted that the First Respondent/Applicant is responsible for implementing the Minister of Education's policy; may give directions of a general nature to the Principal; may, subject to the provisions of the Education Act, employ persons of such categories, on such terms and conditions as may be prescribed and dismiss and otherwise exercise disciplinary control

over those persons. Further the First Respondent/Applicant may make recommendations to the Minister with regard to any matter directly or indirectly affecting any school or the development of secondary education generally.

[25] She submitted that the CPR must be adhered to in order to satisfy the overriding objectives.

[26] Further it is her contention that the explanation which gave rise to the default, is based upon an unusual circumstance and the failure of the public servant to complete his responsibility. Therefore it surpasses simply inadvertence and should be seen as an anomaly which required the most lenience that can be given.

THE APPLICANT/RESPONDENT'S SUBMISSIONS

[27] Counsel for the Applicant/Respondent submitted that the Applicant/Respondent made no assumptions that he was offered a permanent position at the Lodge School. She argued that in order for a person to be appointed to the post of teacher, the Principal or Board of Management of the school makes the recommendation but the ultimate determination is that of the Public Service Commission.

[28] She further submitted that even though the Applicant/Respondent subjected himself to an interview process where he was successful and working in a vacant position, neither the Principal nor the Board of Management made a recommendation on his behalf.

[29] She also noted that contrary to what the Respondents/Applicants submitted, appointments were not on hold at the time the matter was filed.

[30] On the submission by the Respondents/Applicants that a default judgment cannot be granted where a matter has commence by Fixed Date Claim Form, she indicated that this is without merit, instead referring to Rule 12(2) which she noted gives the court discretion. She based this on the wording of the Rule noting that had the word "shall" been used, there would be no discretion open to the court. She also pointed out that the court's decision was largely informed by the non-appearance of the Crown even after service of notice on them at the direction of the learned Judge and the Crown's failure to file anything in response.

[31] She argues that even though the Respondents/Applicants hold Mr. Straughn responsible for the failure to apply to set aside the default judgment, that even when they became aware of the situation, they did not make any application to set aside the judgment with alacrity but only made the application almost three years after finding out about the judgment.

[32] With respect to Part 13.3(1) Counsel submitted that the Respondent has no real prospect of successfully defending the Applicant/Respondent's substantive claim in that the draft defence discloses no defence to the Applicant/Respondent's claim that the Principal of the Lodge School promised him the job in question; that he was the successful candidate and most qualified candidate for the vacant post; that his recommendation for same was never forwarded by the Respondents/Applicants to the Ministry of Education; that there was a breach or omission to perform their duty by the Respondents and that he was not provided with a hearing before being terminated.

[33] Additionally, Counsel submitted that the court must consider the prejudice that may be caused to the Applicant/Respondent if the judgment is set aside. She relied on the authorities of *Bico v. McDonald Farms Ltd No. 33 of 1993* and *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. [1986] 2 Lloyds Report 221*. She further stated that there is no affidavit evidence by the Respondents/ Applicants on which the court can rely which set out the reasons for the Respondents/Applicants failure to file their Defence.

LAW AND DISCUSSION

[34] CPR Part 12 makes provisions for obtaining a default judgment. In relation to the setting aside of a default judgment Rule 13 is applicable. Rule 13.3 states

> "(1) The court may set aside or vary a judgment under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the Defendant has:
>
> (a) applied to the court as soon as reasonably practicable after finding out that judgment had been entered; and
>
> (b) given a good explanation for the failure to file an acknowledgment of service or a defence as the case may be.
>
> (3) Where this Rule gives the court power to set aside a judgment, the court may instead vary it."

[35] It is clear from Rule 13.3 that each of the tests above must be met before a default judgment may be set aside.

[36] Additionally, CPR 13.3 (2) states:

> "In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances."

[37] So that a failure to satisfy any one of the three conditions is fatal unless the Defendant is able to demonstrate exceptional circumstances warranting the exercise of the discretion in his favour.

[38] I will first address the submissions by the Respondents/Applicants that the judgment obtained on December 17, 2010 was irregularly entered in circumstances where the matter began by fixed date claim form and a default judgment was never requested or alternatively applied for by the Applicant/Respondent in accordance with Part 12 of the CPR.

[39] Rule 12.2 speaks to instances where a default judgment may not be obtained. Specifically, it states:

> "A claimant may not obtain default judgment where the claim is
>
> (a) a claim in probate proceedings;
>
> (b) a fixed date claim form; or
>
> (c) an admiralty claim in rem."

[40] However Rule 27.2 provides that:

> "(1) When a fixed date claim is issued the court must fix a date for the first hearing of the claim.
>
> (2) On the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.

> (3) The court may, however, treat the first hearing as the trial of the claim if
>
> (a) it is not defended; or
>
> (b) it considers that the claim can be dealt with summarily.
>
> (4) Subject to sub-rule (5) or any other enactment, the court must give at least 14 days notice of any first hearing...".

[41] Therefore, if the court, in applying Rule 27.2 determines that the judgment was not regularly obtained then that is the end of the matter and the default judgment should be set aside.

[42] An examination of Rule 27.2 however suggests that if a claim is commenced by a fixed date claim form, then the court is empowered under this Rule to treat the first hearing as the trial of the claim since as in the case at bar, no defence was entered on the Respondents/Applicants' behalf. In these circumstances the court therefore holds that the judgment was regularly obtained.

Has the Respondents/Applicants applied to the court as soon as reasonably practicable after the judgment was entered?

[43] As previously stated Counsel for the Respondents/Applicants applied on 14 September 2014, almost four years after judgment was entered against them on 17 December 2010, to have the default judgment set aside. In the supplemental affidavit in support of the application she averred that the Respondents/Applicants were not served with the default judgment. They claimed that they became aware of the said judgment in a newspaper article published in the Daily Nation on or

around November, 2011. It should be noted that Counsel for the Applicant/Respondent did not offer any evidence to controvert this assertion but instead noted that the Respondents/Applicants were served with documents filed on 30 April 2012 for the assessment of damages and yet did not apply to have the judgment set aside at that time.

[44] She further noted that after the Respondents/Applicants became aware of the judgment, certain actions were taken and still they did not apply to have the judgment set aside – for example, the matter came on for case management and case management orders were given. Also a quantified claim was filed as well as a contempt application which was set down for hearing for 18 September 2014 and it was at this stage that the Respondents/Applicants on 17 September 2014, some three years nine months after the judgment was entered and two years eleven months after the Respondents/Applicants alleged knowledge of the judgment, applied to have it set aside.

[45] Whichever time frame is accepted, it is the opinion of the court that the Respondents/Applicants did not apply to have the default judgment set aside within a reasonable time and even though delay is not the decisive factor, it is an important faction in considering whether to set aside a default judgment.

[46] In *S. P. Musson Son and Co. Ltd. v. Burke et al BB 2008 HC 18*, the court considered the point of delay and its impact on its decision.

[47] **Crane-Scott J.** opined that the court may in some cases have to consider the issue of delay. She stated:

> "[32] In appropriate cases, the court may also have to consider whether, notwithstanding the merits of the defence, it will be a correct exercise of the court's discretion not to set aside the default judgment due to the delay and the lapse of time which has taken place between the judgment and the application to set it aside. [See *Evans v. Bartlam [1937] A.C. 473; Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc., (The Saudi Eagle) [1986] 2 Lloyd's Rep. 221, CA*]."

[48] **Crane-Scott J.** referred to the learning in *Clarke v. Hinds et al, Civ. Appeal No. 20 of 2003* where the Court of Appeal noted the following at paragraph [18] of the judgment:

> "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."

[49] Another case which speaks to delay is *Colemenares v. Fields BB 2005 HC 23*. In that case **Reifer J.** citing the authors of Commonwealth Caribbean Civil Procedure observed the following at paragraph [4] of the judgment:

> "...Merely 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."

Has the Respondents/Applicants provided a good explanation for the failure to file a Defence?

[50] I will deal next with whether the Respondents/Applicants have provides a good explanation for failing to file their Defence. Counsel for the Respondents/Applicants submits that their failure to file a Defence in time was due to administrative inefficiencies in the Solicitor General's Office. She explained that the attorney with conduct of the matter failed to take the necessary steps to ensure that the Defence was entered. She went on to explain that when a file is assigned to Counsel it is his or her responsibility to ensure that what is required to be done, is done. She further submitted that if Counsel does not invite consultation from the Solicitor General or Deputy Solicitor General, there is no review of the file. Essentially, she contends that the failure to enter the Defence was due to Mr. Straughn's negligent conduct of the matter, this negligence she stated extended to other matters assigned to him – he constantly missed deadlines, failed to complete pleadings and to comply with orders.

[51] In *International Finance Corporation v. Utexafrica S.P.R.L. [2001] EWHC 508*, **Moor-Bick J.** underscored the importance to be attached to all judgments. The learned Judge stated:

> "A person who holds a regular judgment even a default judgment, has something of value and in order to avoid

> injustice he should not be deprived of it without good reason."

[52] What constitutes a "good explanation" was discussed in *Inteco Beteiligungs AG v. Sylmord Trade Inc. [BVIHCM 2012/0120* where **Bannister J.** had this to say:

> "...the expression 'good explanation' is not an easy one... In my judgment, the expression "good explanation" where it occurs in CPR 13.3(1) means an account of what had happened since the proceedings were served which satisfies the court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the Applicant/Respondent obtains judgment... Muddle, forgetfulness, an administrative mix up are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."

[53] So that what may constitute a good explanation in one case may not be a good explanation in another, the reason being each case must be decided on its own facts.

[54] In *Marina Village Ltd. v. St. Kitts Urban Development Corporation SKBHCVAP 2016/0012* the learned judge found that the reason why the appellant only became aware of the claim form on October 17, 2014 was in effect due to its own administrative inefficiency. On appeal, the appellants sought to have the default judgment entered against them set aside. The court held that the appellant by its own deliberate action determined not to ensure that there were adequate administrative arrangements in place to access correspondence sent to

it in a timely manner. The appellant could not rely on the consequences of its own deliberate action as a good explanation..."

[55] Similarly, in *Public Works Corporation v. Matthew Nelson DOMHCVAP 2016/0007* the court found that the Appellant's reason for failure to file the Defence was not a good explanation. It noted that giving a full and detailed explanation does not make the explanation one that is good or rather excusable. The court referred to the learning in *Michael Laudat et al v. Danny Ambo DOMHCVAP 2010/0016* where it was noted:

> "Counsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice direction where the explanation given for the delay is misapprehension of the law, mistake of the law..., lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence."

[56] The explanation given for failing to file the Defence is essentially that of administrative inadequacies in the Solicitor General's Office. They have laid the blame squarely at the feet of a junior officer, indicating that it was his negligence which resulted in the default judgment being entered. I have considered the explanation and do not find that it is a good one. The reason why the Defence was not filed was due to the administrative inefficiencies in that department more specifically in their failure to put in place measures to monitor and/or supervise the performance of the officer assigned this matter and considering what

was at stake, this should not have occurred. This matter concerns the Claimant's livelihood which was and continues to be uncertain.

Whether the Respondents/Applicants have a real prospect of successfully defending the claim?

[57] In the Respondents/Applicants' proposed Defence, they contend that there is a manner and way in which teachers are appointed and that it was incorrect for the Applicant/Respondent to assume that a permanent appointment would have been granted to him so soon following the interview. They submit that the Public Service Commission in collaboration with the Chief Education Officer are charged with the responsibility of appointments after a perusal of performance reports on a teacher. They also noted that the matter is one of general public importance as it relates to the proper application to recommendations for and permanent appointments to the teaching profession pursuant to the Education Act, Cap. 41.

[58] According to the Respondents/Applicants, the Applicant/ Respondent's performance report was still outstanding and further at all material times dating back to 2007, appointments were placed on hold pending the interpretation of the Public Service Act. They also stated that there is a probationary period during which time services rendered must be evaluated in order to determine suitability for appointment. The Applicant/Respondent also accepted a temporary assignment and that kind of arrangement is subject to determination by one month's notice on either side.

[59] Based on the Defence, I am satisfied that the Respondents/Applicants have a good defence in that the procedure for an appointment to be effected was not completed, however in appropriate cases it also becomes necessary to consider whether, notwithstanding the merits of the defence, it would be a correct exercise of the court's discretion to set aside or not set aside the default judgment due to the delay and the lapse of time which has taken place between the judgment and the application to set it aside.

[60] It is a balancing exercise and one in which the court must also consider the overriding objective in the exercise of its discretion, which enables the court to deal with matters justly. See *Russell Holdings Limited v. L&W Enterprises Inc. and Ads Global Limited [2011] JMCA Civ. 39*, paragraph 83.

[61] The court also has to be mindful of the fact that "litigation ought to be pursued in the context of the rules and its allotted time frame but where practicable, matters must be ventilated and disposed of on their own merits" – *Hines-Brissett v. Brissett [2015] JMSC Civ. 41*.

[62] In applying the overriding objectives to the case at bar, the court has to determine what is fair and just in a situation where the Respondents/Applicants took so long to apply to have the judgment set aside. With the lapse of so much time, the court also has to consider the use of the court's resources, amongst other things.

[63] The Respondents/Applicants' position has focused mainly on the appointment process and the incompetence of the officer assigned to

the matter, equal consideration also has to be given to the fact that the state of affairs has negatively impacted on the Applicant/Respondent's livelihood.

[64] In the instant case the court finds that the Respondents/Applicants have not applied promptly and has not provided a good explanation for failure to defend in time. Even if their versions of the event is accepted, they had ample time and several occasions after finding out about the judgment, where they could have sought to have it set aside and they never did, until the contempt proceedings were filed – this is totally unreasonable and unacceptable.

[65] I do not find that the Respondents/Applicants have provided "exceptional circumstances" or compelling reasons why they should be permitted to defend the proceedings in which the default judgment was obtained.

CONCLUSION

[66] In the circumstances I refuse to set aside the judgment in default of defence. The First and Second Respondents/Applicants' Application filed on 17 September, 2015 is dismissed.

[67] The First and Second Respondents/Applicants to pay the Applicant/Respondent's costs jointly and severally of this Application to be assessed in default of agreement.

[68] Finally I would like to thank Counsel for graciously reconstructing this file after the original could not be located for some time.

PAMELA A. BECKLES
Judge of the High Court