



[2018] JMSC Civ 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 01524

BETWEEN	DALE AUSTIN	CLAIMANT
AND	THE PUBLIC SERVICE COMMISSION	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

Judith M. Clarke, Jamila Thomas and Dale Austin for Claimant

Garth McBean, Q.C. and Lorenzo Eccleston, instructed by Garth Mcbean and Company for the Defendant

Heard: November 12 and 15, 2018

UNLESS ORDER – STRIKING OUT OF DEFENDANT’S STATEMENT OF CASE – WHETHER DEFENDANTS WHOSE CASE HAS BEEN STRUCK OUT CAN PARTICIPATE IN ASSESSMENT OF DAMAGES HEARING – TO WHAT EXTENT CAN THE DEFENDANTS WHOSE CASE HAS BEEN STRUCK OUT, PARTICIPATE IN AN ASSESSMENT OF DAMAGES HEARING – FUNDAMENTAL RIGHTS OF DEFENDANT – PROPORTIONALITY OF RESTRICTION ON DEFENDANTS’ RIGHTS TO OBJECTIVE OF STRIKING OUT THE DEFENDANTS’ STATEMENT OF CASE

ANDERSON, K. J

[1] In respect of this matter, the defendants’ statement of case has been struck out, arising from the defendants’ failure to comply with unless orders. The defendants had applied for relief from sanctions, but that application was unsuccessful. As a consequence, an assessment of damages hearing was scheduled for Monday of

this week and I presided over that hearing. At that hearing, there was a preliminary submission made by the claimant's counsel, that the defendants have no right to participate at all, in this hearing. In other words, they should not be allowed either to cross-examine witnesses, or to make submissions to the court. In the alternative, the claimant submits, that, at most, even if the court disagrees with that strongly held and pursued position of theirs, the defendants can only be permitted, if the court wishes that assistance from them, to make submissions to the court, after all of the claimant's uncontested evidence has been presented to the court, as to the award of damages which should be made. That though, would not be permitted by the court, to the defendants, arising from any right which the defendants have, but rather, only as a matter of the court requiring assistance.

- [2] There is no doubt that, as was stated by our Court of Appeal in a prior judgment which was relied on by the claimant's counsel, the consequences of an unless order, are in fact and are intended to be, draconian. That consequence is, of course, that, in respect of a party who fails to comply with an unless order, the automatic consequence which necessarily follows, is that said party's statement of case, stands as struck out.
- [3] To my mind though, at this juncture, the claimant's reliance on **rules 10.5 to 10.7 of the CPR** is misplaced. At this stage, the defendants are not seeking to dispute the claim. Rather they are seeking to dispute the sum which should be awarded as damages in respect of that claim, since the claimant has now obtained judgment against the defendants arising from his claim for damages, arising from the defendants' liability to him, for having defamed him.
- [4] The defendants are contending, in response to the claimant's preliminary submission, that it would be unconstitutional for this court to conclude that the defendants have no right to participate at all, or at most, in the extremely limited way, as has been suggested by the claimant's counsel. It would be, the defendants contend, if the court were to agree with the claimant on that submission, a breach of the defendants' right to a hearing and their right to a fair hearing, under and in accordance with the Charter of Rights in the Jamaican constitution.

- [5] Jamaica's Supreme Court has made a decision as to the constitutional rights of a person, in the context of an assessment of damages hearing. That decision was made by the Full Court. That decision was made in the case: **Natasha Richards and anor. and Errol Brown and The Attorney General** – [2016] JMFC Full 05. That case sets out the law at present, in that respect, as that decision was not appealed. That case specifically addressed the issue of the constitutionality of **rule 12.13 of the CPR** – which is a rule that sets out what the defendant, following upon a default judgment, can be heard as regards. Suffice to state, for present purposes, that **rule 12.13** did not allow, prior to that judgment having been rendered, a defendant to be heard by this court, at all, during an assessment of damages hearing, as to quantum of damages.
- [6] By virtue of the Full Court's Judgment in the **Natasha Richards** case, the defendant now, in an assessment of damages hearing, can be heard, both in terms of cross-examination of the claimant and any witnesses relied on by the claimant at any assessment of damages hearing and also, in terms of making submissions as to the quantum of damages. That is because, the Full Court had ordered, in the **Natasha Richards** case, that **rule 12.13 of the CPR** is struck out, as those provisions offend against a defendant's constitutional right to a fair hearing, as per section 16 of the Jamaican Constitution.
- [7] I am aware that there is a case which has been argued before the Court of Appeal, and in respect of which, judgment is now being awaited, where the constitutionality of **rule 12.13 of the CPR** is also being addressed.
- [8] The Court of Appeal though, has never addressed, in a judgment, the issue of the constitutionality of **rule 12.13 of the CPR**. As such, the reliance by the claimant on the Court of Appeal's judgment in **Winston Johnson v Norbert Lawrence** – [2012] JMCA Civ 3, is not such that same can be helpful to this court, at this time. In that judgment of the Court of Appeal which over-ruled a judgment of mine, no reference was made to the constitutional rights of a defendant, following upon a judgment having been entered against that defendant. I had though, addressed same, in my written reasons at first instance, in respect of that claim. Unfortunately

though, as referred to, by the Court of Appeal, at paragraph 4 of its judgment in that case, it was subsequent to the hearing of the appeal, that my written reasons became available to the Court of Appeal. In my mind, undoubtedly, that is why the Court of Appeal rightly considered it prudent not to refer to same, since of course, the parties had not been able, during the hearing of that appeal, to refer to same.

- [9] At first instance in that case though, I had stated that I was then of the view that **rule 12.13 of the CPR** was unconstitutional and that was why I had permitted the defendant to be heard during the assessment of damages hearing which I had presided over, at first instance.
- [10] The Court of Appeal has disagreed with the view that the defendant has a right to be heard, following on a default judgment having been entered against him. The **Winston Johnson and Norbert Lawrence** judgment of the Court of Appeal makes that clear, but that case has not done so, in a context whereby the constitutionality of **rule 12.13 of the CPR** was being considered. Instead, it was **rule 12.13** as it was in the CPR at that time, which was then being considered.
- [11] In the **Natasha Richards** case though, the Full Court struck out **rule 12.13 of the CPR** altogether. That is the law at present. The Eastern Caribbean Court of Appeal, in the case: **George Blaize v Bernard La Mothe and the Attorney General** – HCV AP 2012/0004 – Judgment delivered on October 9, 2012, concluded in precisely the same way, in respect of provisions in their rules of court, which were then worded just as was our **rule 12.13**. Same is referred to, at paragraph 27 of our Full Court's judgment, in the **Natasha Richards** case.
- [12] The issue of proportionality was front and center of the court's considerations in the **Blaize** case, as well as in the **Natasha Richards** case. See paragraph 27 of the Full Court's Judgment, in the **Natasha Richards** case, at which paragraph in that judgment, Batts, J – who delivered the lead judgment in that case, made that clear. I had also raised that issue, with both parties during their respective oral submissions on the relevant preliminary issue and accordingly, both parties had addressed this court on same, at that time.

- [13] To put it simply now, I do not agree that to restrict the defendant's right to cross-examine and make submissions upon an assessment of damages hearing, would be constitutionally proportional and/or permissible. That restriction on the defendant's right to be heard, is disproportional to the objective to be achieved, when a party's statement of case is struck out.
- [14] The reference by the claimant's counsel, to the situation which exists as regards a defendant in a criminal case, is to my mind, misplaced. Even a defendant found guilty in a criminal case, may be heard as to the sentence to be imposed on him by the trial court. Furthermore, even where a criminal trial is held in a defendant's absence from the entire process, this cannot automatically result in a guilty verdict being imposed on that defendant, or a sentence being imposed on that defendant, as a consequence of his absence from the court – as punishment for same. Overall the process pertaining to that defendant, must be fair. Any country which truly abides by the rules of law, also abides by the rule of fair treatment to all, in accordance with the law. In Jamaica, the constitution is our nation's supreme law.
- [15] In respect of a judgment on admission, a defendant has a right, upon an assessment of damages hearing, to cross-examine and make submissions as to quantum of damages. See the **Rexford Blagrove** case – SCCA 111/2005, in that regard. The Court of Appeal so concluded, in that case. I referred to that judgment, in my first instance written reasons for judgment, in the **Winston Johnson and Norbert Lawrence** case.
- [16] As things now stand in Jamaica, also, a defendant against whom a default judgment has been entered, also, just as following a judgment on admission, has the right to cross-examine witnesses and an unrestricted right to make submissions as to quantum. Why then should a defendant whose statement of case has been struck out, be treated any differently than that?
- [17] The purpose of the striking out of a party's statement of case, is to result in a judgment as to liability being entered against the party whose case has been struck out. That happens without there being a trial. That is undoubtedly a draconian

consequence. That though, should not prevent the defendant whose statement of case had been struck out, from participating in any assessment of damages hearing which will follow. Our constitution also now specifies that there exists a constitutional right which did not previously exist, before the Charter of Rights, became part and parcel of Jamaica's constitutional rights provisions. That is the right to equal protection of the law. Since neither counsel referred to same, in submissions before me, I will make no further reference to same.

[18] The reliance by the claimant on the statement as recorded at paragraph 25 of the judgment of Koparam, J in the **Deonanan** case, is unhelpful also, since that case did not address any issue of constitutional rights and was not one which was being addressed by the judge, in the context of an assessment of damages hearing.

[19] I therefore disagree with the claimant's preliminary submission and will make the following orders:

- i. The defendants are entitled to be heard, both in cross-examination of the claimant or any witnesses that may be called to testify, by the claimant, during the assessment of damages hearing in this claim, as well as in making submissions as to quantum of damages, following upon the close of the evidence.
- ii. The claimant is granted leave to appeal.
- iii. The costs of this court's hearing of this matter on November 12 and 15, 2018, shall be costs in the claim and shall be taxed, if not sooner agreed.
- iv. The defendants shall file and serve this order.
- v. The assessment of damages shall await the out come of any appellate court proceedings pertaining to same and if no appellate court proceedings are pursued, it shall be open to the registrar to schedule in this court, two (2) hearing days for same.

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Hon. K. Anderson, J.