



[2012] JMSC Civ. 66

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO. 2010 HCV 01691**

<b>BETWEEN</b>	<b>DAVID ROWE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CONSTABLE JERMAINE THOMPSON</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

**HEARD ON APRIL 12 & May 4, 2012**

**Marc Williams, instructed by Williams, McKoy & Palmer for the Claimant.**

**Nigel Gayle instructed by the Director of State Proceedings for the Second Defendant.**

**CORAM: ANDERSON, K., J.**

[1] In this matter, the Claimant has filed Claim against the Defendants seeking damages for assault, battery and false imprisonment arising from his having allegedly been unlawfully detained at the Half Way Tree Police Station, by police personnel, for a period of sixteen (16) days, which commenced on 26<sup>th</sup> June, 2007.

[2] The Claim form along with the required accompanying documentation, including, but not limited to the Particulars of Claim, were, according to evidence provided to this Court by means of Affidavit filed on 8<sup>th</sup> July, 2011, served on the Second Defendant, on

20<sup>th</sup> April, 2011. The Second Defendant does not dispute this assertion of the Claimant.

[3] The Second Defendant has to date, failed to file a Defence to the Claimant's Claim and as a result, by means of Application for Court Orders which the Claimant filed on 8<sup>th</sup> July, 2011, the Claimant seeks to have this Court enter as against the Second Defendant, a Default Judgment. Rule 12.3 (1) of the Civil Procedure Rules permits this Court to grant a Default Judgment against the State, in circumstances just such as this.

[4] It is also not in dispute that the Second Defendant filed an Acknowledgment of Service on 26<sup>th</sup> April, 2010, but again, I reiterate, that no Defence has as yet been filed by the Second Defendant. It is important to note that when the Claimant filed his Claim, his Attorney on record, was Ms. Nancy Anderson. On 30<sup>th</sup> November, 2011, however, a Notice of Change of Attorney was filed, such that he is now being represented by Attorneys-at-law, Messrs. Williams, McKoy and Palmer.

[5] Recently, there have been filed by the Second Defendant, certain documentation seeking primarily two Orders, these being: "(1) An Order for the Claimant to respond to the Second Defendant's request for Information filed and served 20<sup>th</sup> February, 2012; and (2) An Order that the Defence is to be filed within twenty-eight (28) days of the date of service of a satisfactory response."

This Court has carefully considered both of these respective applications, and my Judgment arising therefrom is set out at paragraph 20 below, whereas my reasons for judgment follow in paragraphs 6 to 19.

[6] The Second Defendant, in its 'Request for further information' as filed, has sought to find out the names/identities of the various constables who allegedly either assaulted, or battered or falsely imprisoned the Claimant, or did all of the same, in relation to him. The Second Defendant contends and this Court accepts that this is an understandable position for the Crown to take, that it cannot properly respond to the Claimant's Particulars of Claim without knowing who were the particular police officers involved in the alleged interactions with the Claimant at the material times. The Crown has contended, that, without such information, the Crown would be forced, in any Defence which it files, to make bare denials of the various allegations as contained in the Claimant's Particulars of Claim. This may very well be true, but perhaps an even more unsavoury consequence of any failure on the part of the Crown to obtain the information sought, would it seem to this Court, altogether prevent the Second Defendant from responding in any manner whatsoever, to the Claimant's Particulars of Claim, this because, the Crown would not be able to receive instructions from anyone who was allegedly involved in the incidents in question, as regards such allegations. In any event, the making of a bare denial in one's defence, is impermissible under the Civil Procedure Rules. See Rule 10.5(4) in this regard.

[7] Thus, understandably also, the Claimant, no doubt being cognizant of this, filed an Affidavit which has been deposed to by the Claimant, in response to the Second Defendant's request for information and in that Affidavit, has provided, based on the information which the Claimant contends is available and/or known to him, the information which has been sought by the Second Defendant. That Affidavit of the Claimant as filed in response to the Second Defendant's response for further information, was filed on 12<sup>th</sup> April, 2012.

[8] The respective applications came up for hearing before me on 12<sup>th</sup> April, 2012. In order to properly render Judgment in respect of those applications, it is absolutely necessary for this Court to carefully consider the provisions of Rule 59.2 of the Civil Procedure Rules, which, as they fall under Part 59 of the Civil Procedure Rules, concern, **“Proceedings by and against the Crown.” Rule 59.2 (1) – (4) are as follows:- “(1) Where a claim is made in proceedings against the Crown, the Claim Form or Particulars of Claim must contain reasonable information as to the circumstances in which it is alleged that the liability of the Crown has arisen and as to the government department and officers of state involved. (2) At any time during the period for filing an acknowledgment of service under rule 9.3 the Defendant may request information under Part 34. (3) The Defendant's time for filing an acknowledgment of service is then extended until four (4) days after – (a) the Defendant gives notice in writing to the Claimant**

**that it is satisfied with the information supplied or (b) the Court on the application of the Claimant decides that no further information is reasonably required. (4) The Defendant's time for filing and serving a defence under rule 10.3 is extended to 28 days after the time for filing an acknowledgment of service under paragraph (3)."** (Emphasis mine)

[9] Rule 59.2 (1) of the Civil Procedure Rules is, for the reasons sated above, clearly applicable to the matter at hand. Thus, 'further information' was sought by Second Defendant and the Claimant has, at least to some extent, provided the same, by means of Affidavit evidence in response.

[10] The Second Defendant's counsel who appeared before me, instructed by the Director of State Proceedings, namely, Mr. Marcel Gayle, strenuously contended that arising from the provisions of Rule 59.2 of the Civil Procedure Rules and following on the 'Request for further information' as filed by the Second Defendant, the time for filing a Defence is stayed and as such, until that information has been duly provided, a Default Judgment should not be entered against the Crown and instead, there should now be an Order that the Defence of the Second Defendant is to be filed within twenty-eight (28) days of date of service of a 'satisfactory response.'

[11] As has been stated above, the Claimant has already responded to the Second Defendant's 'Request for further information.' The Claimant however, has not responded in a manner which accords

with the Rules, this insofar as Rule 34.4 of the Civil Procedure Rules require that, 'any information provided under this part must be verified by a Certificate of Truth in accordance with rule 3.12.' The Claimant has responded to the Second Defendant's 'Request for further information', by filing a sworn Affidavit which of course, does not have therein, a Certificate of Truth. If the Crown is of the view that the information as provided to the Second Defendant by the Claimant is incomplete and/or inadequate, or that the same has not been provided in a lawfully recognizable manner, then the Crown has recourse which may be made available upon application to this Court, pursuant to the provisions of Rule 34.2 of the Civil Procedure Rules, to compel the Claimant to provide the 'further information sought.' To date however, as far as this Court is presently aware, no such application has as yet been made by the Second Defendant.

[12] The Second Defendant's contention that the Crown can successfully invoke the provisions of Rule 59.2, 59.3 & 59.4 of the Civil Procedure Rules insofar as the matter at hand at the present time is concerned, has not only been placed before me by Crown Counsel Mr. Gayle in oral arguments, but also, has been deposed to directly by Ms. Stacyan McLean, who is an Attorney-at-law employed to the Attorney General's Chambers and who deposed to the only Affidavit filed by the Second Defendant in support of its Application to this Court, in particular, in paragraphs 12-14 thereof. In these paragraphs, Ms. McLean has deposed as follows:-

- (12) 'To date, the Claimant has not provided an answer to the Request for Information, in accordance with Part 34, Rules 3.12 and 59.2 of the Supreme Court of Jamaica Civil Procedure Rules, 2002, the Second Defendant has no duty to file a Defence, or even an Acknowledgment of Service, until the Request for Information has been satisfactorily answered by the Claimant and that the time starts running as at that date. Where there is doubt as to whether the answer is satisfactory, time starts running within 28 days after the Court Orders that no further information is reasonably required.
- (13) The Director of State Proceedings on behalf of the Second Defendant, is now seized with preliminary instructions, as outlined earlier, and has a good meritorious defence, a denial of the allegations in general and to put the Claimant to prove same.
- (14) At the time preliminary instructions were received, the ordinary time limited in which to file Defence has expired. However, because of the automatic stay which is in effect by virtue of the unanswered filed and served Request for Information, the Second Defendant is still not out of time in which to file a Defence.'

[13] As can clearly be recognized from the wording as used by Ms. McLean in that which she has deposed to above, in paragraphs 12-

14 of her Affidavit, she has, for the most part, set out contentions of law, rather than of fact. This was not appropriate and is all the more worthy of mention as being inappropriate, because, the contentions of law as made by Ms. McLean in those paragraphs of her Affidavit evidence are, in this Court's view, fundamentally flawed.

They are flawed, firstly, because, Rules 59.2 – 59.4 only come into play in a situation wherein a Request for Information is filed in response to a Claim, instituted against the Crown, before the time period for the filing of an Acknowledgment of Service has expired. Once that Request for Information is filed within that time then the Defendant's time for filing an Acknowledgment of Service is essentially stayed until one or the other of the conditions as set out in Rule 59.2 (3) of the Civil Procedure Rules is met. Once one or the other of those conditions has been met, the time for filing an Acknowledgment of Service is extended until four (4) days after that condition has been met. Thereafter, in accordance with Rule 59.2 (4), 'the Defendant's time for filing and serving a defence under rule 10.3 is extended to twenty-eight (28) days after the time for filing an acknowledgment of service under paragraph (3).'

[14] The Rules referred to in paragraph 13 of this judgment clearly do not permit a Defendant, being the Crown, to for whatever reason, wait until after the time period for filing a Defence has long expired and then file and serve a Request for Information in order to stay the time period for the filing and service of such defence. That position is not only flawed but illogical in law, since the question which must be answered is, if the time period for filing and serving a defence has



expired, what would there then be that could properly be stayed? Clearly, this question permits no proper or legally logical answer. Also though, that proposition of law as placed before this Court by Crown Counsel, is one which is anathema to the overall basis for the currently existing Rules of Court, which simply put, is to move away from counsel-driven litigation (as existed prior to the introduction into Jamaica of the Civil Procedure Rules, 2002 and instead, move towards Court driven litigation (as now exists by virtue of the Civil Procedure Rules, 2002). This Court thus rejects the Crown's proposition on this legal point, in its entirety.

[15] That however, is by no means the end of the matter, as this Court still must exercise its discretion as to whether or not a Default Judgment ought properly to be Ordered against the Crown (the Second Defendant) in respect of this Claim. In that regard, this Court must bear in mind that as a general rule, this Court should always be slow to enter a Default Judgment against any party to a Claim, as the entering by this Court of Judgments, after having heard from the respective parties on the legal and factual issues which arise in relation to a particular Claim, must of necessity, always be the preferable course, since not only does the doing of such, best enure to the Court rendering a just verdict, but also, assists in engendering and/or buttressing the confidence of the public in any system of justice which members of the public are to be expected to abide by.

[16] This Court though, also bears in mind that Crown Counsel, Ms. Stacyan McLean, has deposed to the Second Defendant having

informed the Claimant by letter dated February 20, 2012 that they were, 'seized with instructions from the Commissioner of Police.' In that letter, the Second Defendant informed the Claimant's Attorneys, that the police's investigations revealed no record of the Claimant having been taken into police custody at the Half Way Tree Police Station lock-up either during the material time as alleged, or at all. Accordingly, that letter also requested further details as to the names of the Crown servants allegedly involved in the commission of the torts against the Claimant. Again, as this Court has already mentioned herein, this position is an understandable one, bearing in mind that simply because no record can be found of the Claimant's alleged detention at the Half Way Tree Police Station lockup for sixteen (16) days, beginning as of June 26, 2007, does not mean that his detention never occurred. In any event, that lack of record of the Claimant's alleged detention at the lock-up, even if having arisen because the Claimant was never detained there on the dates as alleged by him in his Particulars of Claim, neither would nor could provide any answer whatsoever to the Claimant's Claim for damages arising from that which he has alleged, was the commission in relation to him, on various dates between June 26 and July 12, 2007, of assault and battery. In the circumstances, that which has been deposed to by Ms. McLean at paragraph 13 of her Affidavit (which has been quoted in paragraph 12 of this Judgment and thus, will not be recounted at this juncture), is both troubling, as well as puzzling. It is puzzling because this Court is left to wonder why the Request for Information is still being pursued at this time, if based on the preliminary instructions as received by the Second Defendant from

the Commissioner of Police, the Second Defendant is satisfied that he can properly deny the allegations in general and that he has a good and meritorious defence to same. This contention is also troubling, because it suggests that the Second Defendant considers himself as being entitled to rely on a defence which he has no instructions that can properly support, this being a Defence which would merely deny all of the allegations made by the Claimant against the Crown's servants, being the police constables.

[17] Once again, this Court reiterates that Rule 59.2 (1) of the Civil Procedure Rules clearly has not been complied with by the Claimant insofar as his Particulars of Claim are concerned. This Rule is expressed in mandatory terms and thus, this Court has no discretion to waive compliance therewith, since to do so would as the saying goes, 'drive a horse and carriage' through the Rules of Court, such as to render Rule 59.2 (1) valueless. The Jamaican Court of Appeal has made it clear in the case of: Dr. Richard Keane and Karene Keane, Supreme Court Civil Appeal No.109 of 2009, that such an approach in the circumstance of mandatorily expressed Rules of Court, is not appropriate. See in that regard, the Judgment of Harris J.A. therein, especially at paragraph 12.

[18] What then should this Court do in a situation such as this? There can be no doubt that the delay by the Second Defendant in filing a Defence has been considerable. That however, must be considered in the context wherein the Claimant's Particulars of Claim does not contain all of the required particulars. Should the Second

Defendant be penalized for failing to file within time, a Defence to a Claim which has not been particularized in accordance with the applicable Rules of Court? This Court does not hold that view.

In this Court's considered view, the Second Defendant should be afforded sometime within which to hereafter file a Defence. The information as provided by the Claimant in his Affidavit evidence filed in response to the Second Defendant's Request for Further Information, has, in this Court's view, provided as much information as the Claimant can properly be expected to be able to provide, at least at this stage, with a view to, at the very least, enabling the Second Defendant to go about the process of seeking to identify the constables allegedly involved in the in the unlawful acts allegedly committed upon and in relation to the Claimant and to obtain the necessary instructions from those persons. In that regard however, this Court will require that the Claimant file and serve on the Defendants, amended Particulars of Claim, specifying therein, all of the information as to the identities of the persons involved in any way whatsoever, in relation to the allegedly unlawful acts committed on and in relation to the Claimant, as has been deposed to by the Claimant in his Affidavit which was filed on April 12, 2012. The time period for the filing of a Defence by the Second Defendant, will be extended until June 8, 2012. The Claimant shall be expected to file and serve such amended Particulars of Claim by or before 15<sup>th</sup> May, 2012.

[19] Thus, the Claimant's Application for Court Orders is denied, whereas, the Second Defendant's Application for Court Orders is

granted in part, but also, denied in part. There only remains therefore, the matter of costs. There can be no doubt that for whatever reason, the Crown in respect of the Claim as filed against it, 'sat' (to use a polite term), on its legal responsibilities. If the Crown had acted with the necessary expedition as required by Rule 59.2 (2), then the likely result would have been that neither the Claimant or the Second Defendant would have had to have made either of their respective Applications to this Court. Thus, in respect of the Claimant's Application for Court Orders, this Court will make no Order as to costs. Insofar as the Second Defendant's Application for Court Orders is concerned, costs will be awarded in favour of the Claimant and the same will be summarily assessed at: \$10,000.00.

[20] My Orders therefore, are as follows:-

- (i) The Claimant's Application for Court Orders as filed on 8<sup>th</sup> July, 2011, is dismissed;**
- (ii) The Second Defendant's application for Court Orders as filed on 5<sup>th</sup> April, 2012, is granted only to the extent as specified in Order No. (iv) below;**
- (iii) The Claimant shall file Amended Particulars of Claim, setting out in that amended Court document, the particulars as required by virtue of that which has been set out by this Court in paragraph 18 hereof.**

**The same shall be filed and served by or before 15<sup>th</sup> May, 2012.**

- (iv) The Second Defendant shall be at liberty to file a Defence in respect of this Claim, by or before 8<sup>th</sup> June, 2012.**
- (v) No Order as to costs is made in relation to the Claimant's Application for Court Orders as filed on 8<sup>th</sup> July, 2011.**
- (vi) Costs in respect of the Second Defendant's Application for Court Orders as filed on 5<sup>th</sup> April, 2012, is awarded to the Claimant in the sum of \$10,000;**
- (vii) The Second Defendant shall file and serve this Order.**

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**Hon. Kirk Anderson, J.**