

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L 1999/B163

| | | |
|---------|----------------------|------------------|
| BETWEEN | GEORGE BURKE | PLAINTIFF |
| AND | THE ATTORNEY GENERAL | FIRST DEFENDANT |
| AND | CONSTABLE SINCLAIR | SECOND DEFENDANT |

Dr. R. Manderson-Jones (Now deceased) for the Plaintiff on May 3, 2000.
Mr. N. Hamaty instructed by the Director of State Proceedings for the 1st Defendant

IN CHAMBERS

Summons to set aside judgment in default of Appearance

Heard: May 3, June 29, 2000

HARRISON J

Background to the Application

1. The endorsement on the Writ of Summons alleges that the plaintiff brings this action against the defendants and is claiming damages for detinue and conversion of the plaintiff's motor vehicle and malicious prosecution of the plaintiff on or about the 11th December 1998 in Linstead, in the Parish of Saint Catherine.

2. The statement of claim alleges inter alia :

"1 The plaintiff sues the Attorney General under and by virtue of the Crown Proceedings Act for the acts of the second defendant who at all material times was a police constable.. in the employment of the Jamaica Constabulary Force...

....

6. PARTICULARS OF EXEMPLARY DAMAGES

1. The defendants were at all material times agents of the State and acting as such..."

2. On the 23rd November, 1999 an interlocutory judgment in default of the second defendant entering an appearance was filed and judgment entered on the 13th January, 2000.

3. On the 21st February, 2000 a Summons to Proceed to have damages assessed against the second defendant was filed. It was set for hearing on the 16th March 2000, but was adjourned sine die.

The Application

Counsel appearing for and on behalf of the first named defendant now seeks an order that:

“The interlocutory judgment entered against the second defendant on the 13th January 2000 be set aside on the ground that no reasonable cause of action exists against the second defendant by virtue of s. 3(1) (D)(sic) and s. 13(2) of the Crown Proceedings Act.”

I reserved judgment on the 3rd May, 2000, but due to my sojourn in the Manchester Circuit Court, I was not able to deliver the judgment before now. Unfortunately, Dr. Manderson-Jones who appeared for the plaintiff is now deceased and I have instructed the Registrar of the Supreme Court to advise the plaintiff of the date when the judgment is to be delivered.

Preliminary Objection

Mr. Manderson-Jones objected in limine to the application made by the Attorney General and submitted that the application to set aside ought to have been made on behalf of the second defendant, the person against whom the judgment was entered. In response, Mr. Hamaty argued that the interlocutory judgment in default against the second defendant was served on the Director of State Proceedings on the 13th January, 2000 and this would effectively have clothed the first defendant with the necessary locus standi to make the application. Mr. Manderson-Jones submitted on the other hand, that the service on the Director of State Proceedings was only for the purpose of serving a courtesy copy and this could not give any locus standi to the person served. The Court ruled however, that the first defendant did have the locus standi to make the application and as such it would proceed with the application.

The Evidence and Submissions

Let me begin by examining the provisions upon which Counsel for the first defendant seeks to rely upon. Sections 3(1)(a) and 13(1) of the Crown Proceedings Act read:

“3 (1) Subject to the provisions of this Act , the Crown shall be subject to all liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-

(a) in respect of torts committed by its servants or agents...”

13(2) Civil proceedings against the Crown shall be instituted against the Attorney-General.”

The evidence upon which the first defendant relies upon is contained in the affidavit of Mr. Hamaty who has deposed inter alia that:

“3. An appearance was entered on behalf of the first defendant on the 16th July 1999;

4. On the 7th March 2000, the Director of State Proceedings was served with a copy of a summons to proceed to assessment of damages against the second defendant.

5. The second defendant is a servant and agent of the Crown and the claim framed by Counsel for the Plaintiff concerns a matter which occurred while the second defendant was in the lawful exercise of his duties as a member of the Constabulary Force.

6. The Director of State Proceedings contacted the Police seeking instructions in this matter

7. We received a file from the Commissioner of Police on the 14th October 1999 containing statements including one from the second defendant outlining our instructions in this matter.

8. No reasonable cause or action exists against the second defendant by virtue of the provisions of section 3(1) (a) and s. 3(2) of the Crown Proceedings Act. Alternatively, the interlocutory judgment entered against the second defendant was irregularly obtained.

9. I hereby exhibit a draft Defence which the first defendant intends to file in this matter....”

Mr. Hamaty submitted that the application to set aside was grounded in sections 3(1) and 13(2) respectively of the Crown Proceedings Act (referred hereinafter as “The Act”). He argued that section 13(2) designates the Attorney General as the proper party to be sued when an action is brought against the Crown and that the Crown servant is not required to be joined in the suit. He further submitted that the Judicature (Civil Procedure Code) Law provides that the Crown Servant is required to be named in the body of the pleadings for identification purposes only. With respect to Section 3(1) of The Act, he submitted that the section does not refer to or indicate that the Crown servant is to be named in the suit. Furthermore, in the instant case the plaintiff had not alleged that the second defendant was acting in his private capacity at the material time but had pleaded in the statement of claim that the second defendant was at all material times an agent of the State and acting as such.

Finally, Mr. Hamaty submitted that the Attorney General had exhibited a proposed Defence which, if the application succeeds, the first defendant will eventually file. He argued that if the Defence filed succeeds and the second defendant is made to pay for acts which are not contested, then this would create an injustice. Put another way, he submitted that it is only if the second defendant was acting on a frolic of his own that the matter could proceed against him.

Mr. Manderson Jones submitted on the other hand firstly, that the summons was defective as the application is on behalf of the first defendant for a judgment against the second defendant to be set aside. He submitted that the application should have been made by or on behalf of the second defendant. Secondly, he submitted that the ground upon which the summons is made was defective. He argued that as a matter of law a

judgment may be set aside if it is irregular or if there is a defence on the merits. He submitted that the Affidavit in support was defective as set out hereunder:

1. The Affidavit was not made by or on behalf of the second defendant.
2. Where it is being argued that there is no cause of action, an affidavit should not be filed at all.
3. The affidavit of Neil F. Hamaty states (at paragraph 2) that an appearance was entered on behalf of the second defendant. The judgment was against the second defendant in default of appearance pursuant to section 72 of the Judicature (Civil Procedure Code) Law.
4. There is no foundation showing source of knowledge, information or belief for the assertion in paragraph 5 that the second defendant was in the lawful exercise of his duties as a member of the Police Constabulary Force. (Ramkissoon v Olds Discount)
5. Even if he was acting in the course of his duty (which is matter that can be established only at the trial) the second defendant may be sued in his personal capacity, as in any other case of vicarious liability.
6. Paragraph asserts that no reasonable cause of action exists relying on section 3(1) (a) and 3(3)(2) of the Crown Proceedings Act which are different from the sections referred to in the summons viz s. 3(1)(D) and 13(2)
7. Paragraph 9 exhibits a defence despite the contention that there is no reasonable cause of action.

Finally, he submitted that the draft defence was defective as it was that of the first defendant and not of the second defendant.

Findings and Conclusion

Subsequently to the date when this judgment being reserved, I had the benefit of reading the judgment of the Court of Appeal (Jamaica) in *The Attorney General v Gladstone Miller* SCCA 95/97 delivered on the 24th day of May, 2000. It deals with claims made against the Crown for the torts of its agents and/or servants and who ought to be the proper party to be sued. Bingham J.A in examining the provisions of sections 3(1)(a) and 13(1) of the Crown Proceedings Act said this:

“The Crown Proceedings Act was passed into law in England in 1947. It was brought into operation in Jamaica on February 1, 1959. It made the Crown liable for the tortuous acts of its servants or agents done in the course of their employment. In so doing, it extended the principle of vicarious liability as between private persons falling in the category of master and servant or employer and employee. Prior to this, for one to proceed against the Crown in a civil suit had to be by way of a petition of right. Although claims in tort could still be brought against the Crown servant or employee alone, once it was established that

he was acting within the course or scope of his employment, the proper defendant to be sued was the Attorney General, he being the official representative of the Crown by virtue of his office. A suit against the servant or employee alone therefore would be meaningless, as the Attorney General could enter appearance and take over defence of the suit. It is this vein that section 13(2) of the Crown Proceedings Act mandates that "Civil Proceedings against the Crown shall be instituted against the Attorney General."

Turning now to the instant case, paragraph 1 of the statement of claim alleges that the first defendant is being sued by virtue of the Crown Proceedings Act for the acts of the second defendant who at all material times was a police constable and who was in the employment of the Jamaica Constabulary Force. The statement of claim also alleges in the particulars of exemplary damages that the "defendants were at all material times agents of the State and acting as such." At first reading I was concerned why the plaintiff's allegation made reference to the "defendants" but upon perusing the draft defence it is observed that a Constable Roberts had accompanied the second defendant on mobile patrol duty at the material time. The point is however, that there is an allegation that the second defendant was acting as an agent of the State at the material times.

The question then, is whether the default judgment entered against the second defendant would be a bar to the first defendant making an application to set aside that judgment.

In light of the provisions set out in sections 3(1) and 13(2) of the Act and the decision of the Court of Appeal in The Attorney General v Gladstone Miller SCCA 95/97 delivered on the 24th day of May, 2000, I hold that the proper party to be sued would be the Attorney General as the allegations against the second defendant are that he was acting in the course of his employment at the material time. I further hold that the first defendant would be within his rights and would be entitled to apply to set aside the judgment in default and he ought to be allowed to have the action heard on its merits.

IT IS HEREBY ORDERED:

1. That the judgment in default of appearance against the second defendant is hereby set aside.
2. The first defendant be at liberty to file and serve the Defence within 14 days of the date hereof.
3. No order as to Costs .