[2020] JMSC Civ 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV01853

BETWEEN	**KEITH GARDNER**	**CLAIMANT**
AND	**CHRISTOPHER OGUNSALU**	**DEFENDANT**

IN CHAMBERS

Faith Gordon instructed by Hugh Wildman & Co the for Claimant

Ronald Paris and Melissa Cunningham instructed by Paris & Co for the Defendant/Applicant

Heard: November 26th, 2019 and January 24th, 2020.

Application to set aside Default Judgment - Whether incorrect procedure adopted in applying for default judgment-defamation - actionable remarks - defences of merit.

T. HUTCHINSON, J (AG.)

INTRODUCTION

[1] This is an Application filed on behalf of the Defendant Mr. Christopher Ogunsalu on the 22nd of January 2019, in which he seeks the following orders from the Court

1. That the Order (for Default Judgment) granted on October 26th, 2018 be set aside.

2. That the Defendant be granted an extension of time to file his defence within 7 days of the order sought herein.

3. That the costs of the Application be costs in the claim.

4. Such further and other relief as this Honourable Court may see fit.

[2] His application relates to a claim which filed was on May 14th, 2018 by Mr Keith Gardner in which he seeks to recover damages from the Defendant for defamation among other orders which are outlined as follows;

a. General Damages – inclusive of damages for loss of reputation

b. An injunction to restrain the defendant whether by himself, his servants and/or agents or otherwise howsoever from publishing or causing to be published the said words or any of them or any similar words defamatory of the Claimant or any words to the effect

c. Interest (on the award)

d. Costs and Attorneys Costs

e. Any other relief the Court deems fit

BACKGROUND

[3] The Claimant is the Director of Security for the University of the West Indies, Mona Campus as well as the Western Campus. He served in the JCF for over 40 years when he retired at the rank of Assistant Commissioner and he is also a qualified Attorney-at-Law. The Defendant Christopher Ogunsalu is a Lecturer at the University of the West Indies.

[4] On the 8th of May 2018 the Defendant sent an article to the Claimant by email which copied in a number of personnel attached to the teaching and administrative staff of the University of the West Indies (UWI). The Claimant particularises that the following extracts in that email were defamatory in character;

I. Dear Mr Gardner, it is such a shame that you have the audacity to reply to my email in the manner that you did.

II. Yes Justice is blind, that is why a blatant, cold blooded murder (sic) can be set free by the Jury to now be mingling and toying with an academic community of which I am part of its builders.

III. Yes Justice is blind and that is why the University of the West Indies will be blind to not dismiss you from office even after you yourself confirmed that because you cannot see you are unable to do your work, thus further confirming that you are **a major security risk to us. If I became successful in my application for the post of Principal, one of my intentions was to neat up campus security which means you will be sent off.**

IV. This is my freedom of speech and my freedom to express myself and what is going on in my head.

V. Do not fool this university about some upcoming surgery which you claim will be successful (why do you want to see again when you refuse to see mentally)

VI. Who are you to say that your upcoming surgery will correct your long lost vision? Are you now God or are the hands of the surgeon. It is likely that the spirit of those that may have died by way of your actions will misdirect the hands of the surgeon into a no-restoring direction. That is how surgery works.

VII. You have now exposed yourself to this academic community that you are a little child with cheese ziz in the left hand and biscuit in the right hand and still crying for breast milk from mummy.

VIII. Now where is the missing report that I have asked you to furnish to this university authority, so that I can have them protected. My boy is smart. He

says that he will discredit me as a father if I do not expose you on this missing report.

IX. I wish you all the best in you upcoming surgery, despite everything. I also wish to let you know that one of the best eye surgeon in the world is in Cameroon and she is the wife of a dentist I trained and mentored and currently work with. We can help you at no cost but promise not to try to kill my son again.

[5] It was outlined in the Particulars of Claim that the words used in relation to the Claimant meant and were understood to mean;

a. The Claimant was a cold blooded murderer who was freed by a jury.

b. The Claimant had committed several acts of murder and is likely to commit murder again

c. The Claimant is not a fit and proper person to hold the position of Director of Security at the UWI by virtue of his past record as a murderer.

d. The Claimant by virtue of his past is a security risk to the UWI.

[6] On the 31st of May 2018, the Defendant, through Counsel, filed an acknowledgment of service outlining an intention to defend the Claim but took no further action.

[7] On the 15th of August 2018, the Claimant filed a notice of application for Court Orders seeking Judgment in default of a defence pursuant to Rule 12.10(4).

[8] On the 26th of October 2018 Judgment in Default of Defence was entered against the Defendant and on the 22nd of January 2019, the Defendant, having learned about the Default Judgment on the 30th of October 2018, filed this application for court orders to have same set aside and seeking an extension of time to file his defence.

[9] The application which was supported by an Affidavit sworn to by the Defendant with draft defence attached is made on the following grounds;

a. The Applicant has applied to the Court as soon as is reasonably practical after finding out about the order made on the 26th of October 2018.

b. The Applicant has a good reason for his failure to file his defence within the stipulated time.

c. The Applicant has a real prospect of successfully defending the claim.

DEFENDANT'S SUBMISSIONS

[10] In respect of this application, the Defence has sought to persuade the Court on two separate limbs that the Defendant should be afforded the opportunity to present a defence in this matter. The first limb of this application states that in the order made on the 26th of October 2018 the Court had merely granted permission to enter default judgment but did not pronounce the form of judgment in keeping with rule 12.10(4). It was submitted that there being no judgment entered against the Defendant he was not required to apply to set aside judgment.

[11] It was also submitted that the Defendant at this stage only needed to ask the Court for an extension of time within which to file his Defence, the applicable rule being rule 10.3(g). Reliance was also placed on case law as Counsel noted that it has been established that in determining whether to extend time to file a Defence the Court should have regard to the period of delay, the merits of the defence and any prejudice to either party – ***Mary Chandler v Patrick Marzouca [2016] JMSC CIV 3.***

[12] In putting forward this submission, Mrs Cunningham-Cuff noted that a Court tasked with dealing with this type of application should also consider that where there has been a procedural default even if unjustifiable, particularly when no prejudice has been deponed to by the Claimant, the litigant ought not to be denied access to

justice – ***Phillip Hamilton (executor in Estate of Arthur Roy Hutchinson v Federick Flemmings etal [2010] JMCA Civ 19.***

[13] In respect of the delay in filing a defence it was submitted that the period of delay was not inordinate. It was also stated that the explanation given for the failure shows that it was not due to wilful delay or default on the defendant's part. It was also submitted that the affidavit and draft defence reveal that Mr Ogunsalu has a defence of merit. In concluding the submissions on this limb, Counsel asserted that the grant of an extension to file the defence would not be prejudicial to the Claimant but it would be wholly prejudicial to the Defendant if he were prevented from defending the claim.

[14] In respect of the submissions in the alternative, that is, that the judgment entered should be set aside on the basis that the defendant has a reasonable prospect of successfully defending the claim, Counsel relied on Rule 13.3(1) and (2) of the CPR. Reference has also been made to the Affidavit in support and the Draft defence which are said to raise issues suitable for determination at a trial.

[15] In identifying the issues to be determined by this Court, Counsel outlined them to be as follows;

a. Are the words complained of in paragraph 10 of the Particulars of Claim capable of bearing the meaning ascribed to them by the Claimant in paragraph 11 of the Particulars.

b. Whether the words complained of were understood to bear the meanings ascribed to them.

c. Whether the words complained of are defamatory or capable of bearing a defamatory meaning.

d. Whether the defendant can rely on the defence of vulgar abuse in respect of 10(ii) and (vi).

e. Whether on items 10(iii) words were fair comment on a matter of public interest.

f. In respect of 10 (viii) whether the words are true in substance and in fact.

[16] At paragraph 4 of the affidavit filed in support of this application, the Defendant outlined that although he had been advised by his attorneys to formalize their retainer and give instructions for a defence he misunderstood these instructions as he did not appreciate that he had to attend their office to do so before a defence could be prepared and filed, as he believed he had done enough to enable the preparation of a defence.

[17] On the issue of delay, at paragraph 5 of the same affidavit the defendant deponed that on the 30th of October 2018 he learned from the newspaper that the Claimant had obtained judgment on the 26th of October 2018. He immediately contacted his attorney and on learning that no defence had been filed he gave instructions for this application to be filed. It was stated that the failure to file the required documents was not deliberate and he has sought to have this application filed as soon as reasonably practicable.

Reasonable prospect of success

[18] It was submitted that the emails were sent to the Claimant in his capacity as Director of Security at the UWI and copied to persons who had an interest in security. The circumstances giving rise to the emails were said to involve security irregularities involving the son of the defendant who was a student at UWI and all the parties copied in would have had knowledge of this incident.

[19] In light of the foregoing, Counsel submitted that the emails were no more than a heated exchange between the Claimant and the Defendant and consisted of statements which were described as amounting to no more than vulgar abuse and would have been understood by the audience to be as such.

[20] It was asserted that at no point in these statements made was it said or imputed that:

I. The Claimant had committed several acts of murder and likely to commit murder again.

II. The Claimant was not a fit and proper person to hold the post of Director of Security by virtue of his past as a murderer.

III. The Claimant was not a fit and proper person to be associated with the UWI.

IV. The Claimant by virtue of his past is a security risk to the UWI.

[21] In respect of the statements made on the Claimants suitability for the post of Director of Security, it was submitted that these were all related to his ability to perform that task due to his visual impairment. It is the Defendants position that these statements were fair comment on a matter of public interest and not motivated by malice or ill will. It was also contended that when the emails are read as a part of a series of emails it becomes clear that the meaning of the words used were not to be taken literally but were references to security issues on campus and the recipients being aware of these issues the words would not have been understood by them to be defamatory as alleged.

[22] In respect of paragraph 10 (i) and (iv) of the Particulars of Claim, Counsel submitted that the words used did not have a defamatory meaning. Paragraph 10 (ii), (v), (vii) and (ix) were described as amounting to no more than vulgar abuse as the audience was well aware of the security issues in play and would have understood these words to be a reference to that. In relation to paragraph 10 (ii) it was also submitted that it was public knowledge that the Claimant had been charged and acquitted in relation to the murder of his wife and as such the audience would not have interpreted these words to mean more than they already knew.

[23] In concluding her submissions on this point, Counsel remarked that when the context of the email exchange was considered along with the audience to whom publication took place, who possessed prior knowledge of the security issues in play between the parties, it would raise questions as to whether these words would have been taken seriously by the audience to have the effect of defaming the Claimant's character and in light of the foregoing, the Defendant had a real prospect of succeeding were this matter to proceed to trial.

Was the Application promptly made

[24] In respect of the period which elapsed between the Defendant becoming aware of the Default Judgment and this application being filed, it was submitted that a delay of 3 months is not inordinate in light of the fact that 3 months included the legal vacation. It was also noted that no evidence by been provided by the Claimant of any prejudice which would be occasioned to him by the order being granted. Counsel referred to and relied on the authority of ***Standard Bank PLC etal v Agrinvest Intl Inc etal [2010] EWCA Civ 1400*** where it was observed by the Court therein that this rule does not have to be satisfied before a Court can grant relief. Counsel submitted that in light of this principle even if the Court finds 3 months to be a lengthy period the strength of the defence is a basis on which it can still grant relief.

Good Explanation

[25] Under this heading, Counsel referred to and relied on paragraph 4 of the Affidavit which she submitted makes it clear that it was a mere misunderstanding on the part of the defendant of instructions given by his attorney. She submitted that this explanation is a fair one but even if the Court finds that it isn't it can still grant the order sought and in this regard reliance was placed on Brian Wiggan v AJAS Ltd [2016] JMCA Civ 32 at paragraph 13 where it was stated as follows by Brooks JA;

> *[13] In arriving at a decision on the setting aside of a judgment regularly obtained, the guidelines outlined in Marcia Jarrett v SERHA are useful. They require an assessment of the nature of the quality of the defence, the*

> *period of delay between the judgment and the application to set it aside, the reasons for the [respondent's] failure to comply with the provisions of the rules as to the filing of a defence and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside.*

[26] Counsel also relied on ***Sasha Gaye Saunders v Michael Green etal 2005HCV2868 (unreported)*** where it was stated by the Learned Judge that although the absence of a good explanation diminishes the merit of the application it does not mean that it takes it away. She submitted that the decision of ***Joseph Nanco v Anthony Lugg etal [2012] JMSC Civ 81*** on which the Claimant relies can be distinguished on its facts as in that case the Applicant provided no reason for his failure to file, a situation which she maintained differs from the instant case.

CLAIMANT'S SUBMISSIONS

[27] In advancing her submissions on behalf of the Claimant, Ms. Gordon submitted that the main issue is whether or not the Defendant has a real prospect of success in light of the law on defamation, which is the lowering of the reputation of an individual in the eyes of right thinking persons. It was submitted that because the statements were published in an email to members of the university community they had the capacity to lower the Claimant's reputation in the eyes of these individuals.

[28] In respect of Paragraph 10 (ix) of the Particulars of Claim, Counsel submitted that the statement 'promise not to kill my son again' could convey to the audience that the Claimant had tried to kill the Defendants son. In responding to the submission on behalf of the Defendant in respect of Paragraph 10 (ii) which was said to be information already been in the public domain, it was Counsel's submission that it was the context within which this information was proffered in the email which made it defamatory as the statement implied that the Claimant is a cold blooded murderer and the justice system was flawed in finding him not guilty.

[29] In respect of the Defence submissions made about the meaning of Paragraph 10(v) Counsel submitted that the words made light of the Claimants situation and

contained an inference that the Claimant had no intention to do surgery but was trying to mislead the university. In contrast to what has been argued by Counsel for the Applicant, it was the position of Ms. Gordon that when the emails are read in their entirety it can be seen that the Defendant set out to defame the Claimant albeit his being upset/irate.

[30] It was submitted that the comments made are not true, fair or protected by privileged defences to defamation and the defendant has not provided any evidence to the contrary.

Reasonable Prospect of Success

[31] In respect of the defendant's assertion that he had a reasonable prospect of success, it was submitted that he does not as the statements made are defamatory and have had the effect of lowering the reputation of the Claimant in the eyes of right thinking persons of the university community and other parties privy to these emails.

Was the application promptly made

[32] On the issue of the promptness with which the application was made, it was submitted that while 3 months is not a long time, the Claimant's personal circumstances have resulted in him being prejudiced by this delay as he had to defer any procedure required for treatment and to utilise funds earmarked for these personal expenses to pay Counsel to defend this application on his behalf. Counsel also relied on the observation of the Court in ***Standard Bank Plc V Agrinvest International Inc*** *supra* where the Court made it clear that promptness will always be a factor of considerable importance and if there is a failure to make an application promptly the Court may be well justified in refusing relief notwithstanding the possibility that the defendant might succeed at trial.

Good Explanation

[33] Counsel submitted that the explanation which has been put forward for the Defendants failure to file a defence is not a good one and she has asked the Court to find that this is nothing more than a strategy to have judgment rightly obtained set aside. It was also highlighted that there was no affidavit from Counsel for the Defendant on the issue of communication between himself and the Defendant to support this contention of advice given and a misunderstanding and as such this situation should be viewed as no different from what obtained in ***Joseph Nanco v Anthony Lugg*** *supra.* Counsel also referred to and relied on the authority of ***Sasha Saunders v Michael Green*** *supra,* specifically the observation of the Learned Judge that in the absence of a good explanation to file an acknowledgment of service or defence the prospect of setting aside a default judgment diminishes.

[34] Counsel also referred to a number of other authorities in the list of authorities filed in support of her written submissions. These decisions have been reviewed and the guidance provided therein has been taken into account for the purposes of this judgment.

ANALYSIS AND DISCUSSION

[35] In respect of the first limb of the Application made on behalf of the Defendant, the rules provide at 12.10(4) and (5) that in instances where there is an application for default judgment where the claim is for some other remedy the Claimant is required to file an application supported by evidence on an affidavit and there is no need for notice to be provided to the other party.

[36] The judgment of ***Mary Chandler v Patrick Marzouca*** *supra* involved a brief consideration of this provision. In that claim in addition to a demand for a sum of money owed, the Claimant also sought other remedies. On the failure of the Defendant to file an acknowledgement of service, the Claimant requested that Judgment be entered on its claims in sums quoted. The Court was then faced with

two applications, that of the Claimant as well as the Defendants application not to enter judgment or in the alternative to have judgment entered set aside on the basis that not only had the Defendant not been served but an incorrect approach had been adopted by the Claimant in seeking to have judgment in default entered.

[37] In delivering her decision, the learned judge stated as follows;

> *"Having considered the submissions made by Mr. Foster and the relevant provisions of the CPR, I quite agree that the claim that was initiated by the claimant is not one for a specified sum of money as contemplated by the Rule 2.4 of the CPR.*
>
> *Additionally, the application as filed failed to comply with Rule 12.10 of the CPR.*
>
> *Consequently, the application made by the claimant requesting entry of judgment/default judgment was procedurally incorrect and cannot succeed. The outcome of this decision is that this application is therefore denied" (emphasis supplied)*

[38] In the fourteenth edition of the text ***A Practical Approach to Civil Procedure***, the learned author Stuart Sime at page 175 stated as follows;

> *'Default judgments in non-money and non-recovery of goods claims (principally these will be cases where some form of equitable relief is sought, such as injunctions) have to be applied for. In other words, where equitable relief is sought and the defendant does not attend the claim, a judgment can be obtained only at a hearing before a master, district judge or judge who will decide whether to exercise the court's discretion to grant the relief sought.*
>
> *The application will be made by issuing an application notice and must be supported by written notice'.(emphasis supplied)*

[39] A review of the request for default judgment filed by the Claimant in the instant case reveals that this was not an application for a specified sum of money and the application itself was supported by an affidavit of evidence in keeping with the rules and decided cases, as such, the Claimant was in full compliance with the required approach in seeking judgment.

[40] On the issue of whether the judgment had in fact been entered or the Claimant had merely obtained permission to enter same, it is clear from the extract cited

from the text, that once the application supported by affidavit is presented to the Judge for consideration the Court has the jurisdiction to enter default judgment during the hearing once it is satisfied that there is sufficient basis on which this can be done. In the instant case, there was a hearing before B Morrison J on the 26th of October 2018 during which he heard from Counsel for the Claimant. It was in the course of this hearing that he made the following orders;

1. Default Judgment is entered against the Respondent in terms of paragraph 1 of the Notice of Application for Court Orders.

2. Damages to be assessed.

[41] The wording of the orders is pellucid and are not capable of any other meaning except that judgment had been entered in default of a defence and the matter was now to proceed to assessment of damages. Accordingly, the submission of Counsel on this limb must fail.

Rule 13.3(1) and (2) CPR – Application to set aside Default Judgment

[42] ***In Brian Wiggan v Ajas Limited [2016] JMCA Civ 32*** an appeal against an order of the Court below setting aside a default judgment, Brooks JA reviewed the relevant rules as follows;

> *Rule 13.3 of the CPR requires a party who is applying to set aside a default judgment, to show that it has a real prospect of successfully defending the claim. Rule 13.3 states:*
>
> *"(1) The court may set aside or vary a judgement entered 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 is reasonably practicable after finding out that judgment has been entered.*
>
> *(b) given a good explanation for the failure to file an acknowledgement 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."*

[43] After highlighting the applicable rules, the Learned Judge continued;

> *[12] The application must be supported by evidence on affidavit and the affidavit must exhibit a draft of the proposed defence (rule 13.4(2) and (3)). The substantive test for setting aside a default judgment is, therefore, whether the defendant has a real prospect of successfully defending the claim. See Swain v Hillman and another [2001] 1 All ER 91.*
>
> *[13] In arriving at a decision on the setting aside of a judgment regularly obtained, the guidelines outlined in Marcia Jarrett v SERHA are useful. They require an assessment of the nature of the quality of the defence, the period of delay between the judgment and the application to set it aside, the reasons for the [respondent's] failure to comply with the provisions of the rules as to the filing of a defence and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside. (emphasis supplied)*

The quality of the defence/reasonable prospect of success

[44] It has been submitted on behalf of the Defendant that he has a reasonable prospect of successfully defending this claim if it were permitted to proceed to trial. The basis of this defence is that the comments made by the defendant could be grouped under the categories of fair comment or vulgar abuse which have long been accepted as defences to defamation.

[45] An examination of the decided cases on defamation reveal that one of the categories for which an action can be brought is the imputation of a crime punishable by imprisonment or corporal punishment. In order for the words uttered to be actionable per se there must be a direct assertion of the guilt of the Claimant as a mere allegation of suspicion is not sufficient ***Wight v Bollers [1936] LRBG 330, 332.***

[46] In expanding on this principle in the second edition of the text ***Commonwealth Caribbean Tort Law***, the learned author Gilbert Kodilinye on page 282, states the following;

> *'the words used by the defendant must be looked at in the context in which they were spoken in order to determine what was actually imputed…for example, the words P is a thief would not be actionable per se if followed by the words 'the cloth he sold me is not worth half of what he charged me for it' as taken together the words do not impute any criminal offence. Nor will spoken words be actionable if they constitute mere vulgar abuse. Words will amount to mere vulgar abuse and not slander if (a) they were words of heat and anger and (b) they were so understood by persons who were present when they were uttered. Thus, disparaging or insulting words spoken at the height of a violent quarrel may be vulgar abuse and not actionable but the same words spoken in 'cold blood' may amount to slander'.*

[47] An example of this distinction is found in the local Court of Appeal matter of ***Blake v Spencer (1992) 29 JLR 376*** in which it was the decision of the Court that the words '*you is a f—- prostitute'* uttered in the course of a heated exchange between the parties did not amount to mere vulgar abuse as they plainly imputed unchastity on the part of the Plaintiff.

[48] This situation was markedly different from that which existed in ***Griffiths v Dawson [1968] Gleaner LR 17,*** Court of Appeal, Jamaica in which the Defendant spoke to the Plaintiff, an estate overseer in the presence of other witnesses as follows;

> '*You Griffiths are a …criminal, you are sabotaging my life, stop me from getting work and blackball me all around; you are a …. Criminal'*

[49] In delivering the judgment of the Court Luckhoo JA stated;

> *'no reasonable person hearing the words uttered in those particular circumstances could come to the conclusion that the Defendant was accusing the Plaintiff of having committed a criminal offence for which the Plaintiff might be liable for imprisonment. The words amounted only to vulgar abuse and were not actionable'*.

[50] In ***Deandra Chung v Future Services International Limited etal [2014] JMCA Civ 21***, in examining the question whether the words used in that matter were capable of bearing a defamatory meaning it was stated by Morrison JA as follows;

> *I take as a starting point Bonnick v Morris et al [2002] UKPC 31, in which Lord Nicholls explained (at para. 9) the correct approach to determining whether a statement can bear or is capable of bearing the defamatory meaning alleged:*
>
> *"As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in Skuse v Granada Television Ltd [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the [newspaper], reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant. An appellate court should not disturb the trial judge's conclusion unless satisfied he was wrong." (emphasis supplied)*

[51] Having stated thus, the Learned Judge continued;

> *(1) On an application for a determination on meaning under rule 69.4 of the CPR, the court's immediate concern is whether the words complained of are capable of bearing the meaning attributed to them by the claimant; however, for this purpose, the test to be applied by the court is no different from that applied in deciding whether words are capable of having any libellous meaning.*
>
> *(2) In considering a publication that is alleged to be libellous, the court should give the words complained of the natural and ordinary meaning which they would have conveyed to the ordinary, reasonable and fair-minded reader; that is, a person who is not naïve, unduly suspicious or avid for scandal.*
>
> *(3) Applying this criterion, the judge must determine the single meaning which the publication might be apt to convey to the notional reasonable reader and to base his consideration on the assumption that this was the one sense in which all readers would have understood it.*
>
> *(4) Either in addition, or as an alternative, to the natural and ordinary meaning of the words complained of, the claimant may rely on extrinsic facts, which must be pleaded, to show that the words convey a meaning defamatory of her which, without such evidence, they would not bear in their natural and ordinary meaning.*

[52] In light of these authorities, it is clear that for the defendant to have a reasonable prospect of successfully defending this claim it must be shown that in their natural and ordinary meaning the words used would not be understood by the ordinary

reasonable reader to suggest that the claimant has committed a criminal offence for which he might be liable for imprisonment.

[53] Having adopted this approach, I found that while it is true that the words complained of at paragraphs 10 (i) and (iii) to (viii) and to a lesser extent paragraph 10(ix) of the Particulars of Claim could conceivably be said to be covered under the defences of vulgar abuse and fair comment, the words used at paragraph 10(ii) could not be said to amount to mere vulgar abuse. In describing the Claimant as a cold blooded murder(er) who had been acquitted by the jury, the Defendant was clearly implying that the Accused had killed his wife in cold blood, ie without any justification and a jury had wrongly acquitted him, in that sense the meanings attributed by the Claimant at paragraphs 11 (a) and 11(d) in particular are meanings which would likely be arrived at by the ordinary reasonable reader on a cursory reading of this comment.

[54] A careful examination of this comment reveals, that unlike a number of the other extracts complained of, it contains no reference to the ongoing security concerns which were said to be in issue between the Claimant and the Defendant. As such, Counsel's submissions that the audience reading the messages would have been familiar with these issues and would have understood these remarks in that context is not supported by the evidence and as such is wholly without merit.

[55] In respect of the alternate submission that this was information which was already in the public domain and nothing new was being offered by the remark, again this submission must fail given that '*the words used by the defendant must be looked at in the context in which they were spoken'*. As Counsel submitted the Claimant had been charged for murder and acquitted of same but this was not the comment made by the Defendant. The context within which the remark was made was clearly intended to convey the very meaning complained of by the Claimant and the Defendant has failed to present any evidence that would dispel the likelihood of same.

[56] It is in light of the foregoing that I am unable to find that on the affidavit and draft defence presented the Defendant has met the threshold of satisfying the Court on the primary consideration that his defence has a reasonable prospect of success.

Had applied to the Court as soon as reasonably practicable – Rule 13.3(2)(a)

[57] It is not in issue between the parties that a period of three months elapsed between the Defendant becoming aware of the default judgment and making this application. In respect of this period, the Defendant has submitted that this is not an inordinately long time. The Claimant on the other hand while agreeing that the period between judgment and application was not a long one has asked the Court to consider the fact that the delay would have been prejudicial to the Claimant who had in hand a judgment on which he had hoped to act. In ***Victor Gayle v Jamaica Citrus Growers and Anthony McFarlene 2008HCV05707*** (unreported), in finding that a delay of more than a year was not viewed as a bar to the setting aside of the order where there was a defence of merit, the learned judge made it clear: -

> *'that in an application to set aside a default judgment entered under part 12 of the CPR, in* ***applying rule 13.3, the primary consideration is whether the defence has any real prospect of*** *success…However in exercising the discretion whether or not to set aside the judgment regularly obtained, the court must also consider the matters set out in rule 13.3(2). (emphasis supplied).*

[58] In **Michelle Daley etal v Tonyo Melvin etal C.L.2002/D-034** in dealing with an application to set aside judgment in default 3 ½ months after the date when the judgment had been entered it was stated by Justice Daye that a delay of 3 1/2 months was not an unduly long time.

[59] Having reviewed paragraph 5 of the Defendant's application and the authorities referred to above, I am satisfied that the application was made as soon as was reasonably practicable especially when the Court takes into account the fact that the legal vacation fell within the three-month period. In respect of the prejudice suffered by the Claimant, while I have no reason to doubt that these assertions

arose from instructions given to Counsel by the Claimant, in the absence of an affidavit providing this evidence I was unable to take same into account.

The Defendant has offered a good explanation for failing to file a defence within time – 13.3(2)(b)

[60] In respect of this limb of the considerations, I note that paragraph 4 of the Defendant's affidavit outlined his explanation for this failure and the contents have been referred to above. It was the submission of his Counsel that the explanation is a fair one and should be accepted as such by the Court. It is my view however, that this situation was in fact worse than that which existed in ***Joseph Nanco v Anthony Lugg and B&J Equipment Rental Ltd [2012] JMSC Civ 81*** as in that situation the Defendant had instructed his attorney of his intention to defend the matter and the latter had failed to file the relevant documents.

[61] In the instant case, the Defendant accepted that he was given instructions by his attorney to pay the retainer and to attend to give instructions in order to have his defence filed and he didn't. His explanation that he misunderstood that a physical visit to the Chambers was necessary is far from reasonable as there is nothing to suggest that he had sought to comply with these instructions whether by telephone or otherwise, what is evident is having received the instructions he did nothing further.

[62] In those circumstances, I am unable to find that the Defendant had provided a good explanation for his failure to file his defence and accordingly his application fails on this limb as well.

DISPOSITION

[63] The defendant having failed to satisfy the Court that he has a reasonable prospect of success in defending this claim and that he has a good explanation for his failure to file his defence within the requisite time, his application filed on the 22nd of January 2019 is denied.

The orders of this Court are as follows:

1. Defendant’s application for Court Orders filed on the 22nd of January 2019 is refused.

2. The matter is to proceed to assessment of damages.

3. Costs of this Application to the Claimant/Respondent.