



[2023] JMSC Civ 218

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV03666

BETWEEN	PANSY MCDONALD	CLAIMANT
AND	GARRETH WILLIAMS	1st
AND	JAMAICA DEFENCE FORCE	DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2nd
		DEFENDANT
		3rd
		DEFENDANT

IN CHAMBERS

Ms. Kimberly Wong Instructed by Jacobs Law for the Claimant

Ms. Jevaughnia S. Clarke instructed by the Director of State Proceedings for the Defendants

Heard: October 26, 2023 and November 17, 2023

CIVIL PROCEDURE - APPLICATION FOR PERMISSION TO FILE DEFENCE OUT OF TIME- DEFENCE NOT FILED SAME TIME WITH APPLICATION-NO AFFIDAVIT OF MERIT FILED - AMENDMENT TO APPLICATION MADE 2 YEARS AFTER APPLICATION FILED - FACTORS TO BE CONSIDERED BY COURT IN DECIDING WHETHER TO GRANT AN EXTENSION OF TIME FOR FILING DEFENCE - Rule 10.3(9), 26. (1)(2)(c), 1.1(1) (2) and 1.2 of the Civil Procedure Rules

MASTER L. JACKSON (AG)

INTRODUCTION

[1] The Claimant Ms. Pansy McDonald filed a claim against the Defendants on the 18th of August 2021 as it relates to an accident that occurred on or around the

23rd of December 2019 along the Twickenham Park Main Road in the vicinity of the Fishing Village, Spanish Town in the parish of St. Catherine.

- [2] The Claim Form and Particulars of Claim and the accompanying documents were served on the 3rd Defendant (in its representative capacity) on the 19th of August 2021 as confirmed by the acknowledgment of service filed by the 3rd Defendant on the 26th of August 2021. By virtue of this, the Defence was due the 28th of October 2021. Having not filed its defence within the requisite time frame, the 3rd Defendant on the 21st of October 2021, filed an application for extension of time to file defence supported by an affidavit sworn to by Mr. Matthew Gabbadon.
- [3] The Claimant on the 4th of November and the 17th of November 2021 respectively consented to two 14 day extensions for the defence to be filed. Even with being given two extensions by the Claimant, which is consistent with rule 10.3(5) of the CPR, the Defendants did not file their defence. What transpired after these two consents were given, is critical to the disposition of the application, and thus bear with me as I go through the chronology of events carefully.
- [4] When the matter came before Master R Harris on the 20th of April 2022, it was adjourned to the 8th of June 2022. On the 8th of June 2022 the matter was adjourned to the 29th September 2022 for the applicant to file a supplemental affidavit and to serve the notice of application and affidavit in support. On the 29th of September 2022, it was further adjourned to the 16th of January 2023. On that date, Justice O Smith (ag), ordered that the Defendants were to file and serve their application on or before the 31st of January 2023, and if it was not filed, then judgment in default of failing to file Defence out of time shall be entered for the Claimant and a date for assessment of damages is to be fixed.
- [5] On the 8th of May 2023, the orders made by Justice O Smith (ag) were not complied with, and Justice Thompson-James on that date, made the following orders:
- a. Notice of Application for Extension of Time to File Defence is adjourned to September 25, 2023 at 12 noon for 1 hour for hearing*

b. Order 1 made by Justice O Smith on January 16, 2023 is hereby extended to May 19 2023.

c. Respondent's Attorney-at-law is permitted to file and serve affidavit in response on or before May 26 2023.

d. Applicant's Attorney-at-law is permitted to file and serve affidavit in reply on or before June 2, 2023 if necessary.

e. No further affidavits are to be filed and served after June 16, 2023

f. Parties are to file and serve submissions and list of authorities to be relied on at the hearing on or before July 31, 2023.

g. Defendant/Applicant's Attorney-at-law is to prepare and file a Judge's Bundle and serve a copy of the Index on the Respondent on or before September 18, 2023.

[6] On the 25th of September 2023, only the Claimant filed its submissions and the 3rd Defendant craved the leave of the court to give them one more opportunity to file the submissions and Judge's bundle and index. This was ordered to be done on or before the 29th of September 2023 and 13th of October 2023 respectively. The matter was adjourned for hearing for the 26th of October 2023.

[7] On the 26th of October 2023, Counsel Ms. Clarke announced to the court that she filed and served another application on the same date and a defence. The court was not in receipt of the application or the defence and had to rely on what the parties said was filed. The Claimant objected to how Counsel for the Defendants sought to ambush them given that the only application that was to be heard on the 26th of October 2023, was an application for extension of time based on the previous orders of the court as outlined above in the chronology of events. Counsel indicated that the application filed and served was one for relief from sanction with a defence but no affidavit in support accompanied this application.

[8] The Claimant objected to any further adjournment that the Defendants may wish to seek to rectify any errors or misstep, to include to file an affidavit with respect to this new application. The Court, agreed that since the matter was set for hearing and the Defendants had been given many opportunities to get their house in order for their application to be heard, no more adjournments would

be granted. The court noted that what was before it for hearing was an application for extension of time to file defence and that is the application that would be heard.

- [9] Ms. Clarke then decided to withdraw her application filed on the 26th of October 2023 for relief from sanctions, she then applied orally that her application filed on the 21st of October 2021 for extension of time to file defence, be amended to read “defence filed October 26, 2023 is permitted to stand as filed and that time is abridged for the service of the defence”. The amendment was made.
- [10] Counsel for the Defendants then proceeded with its submissions concerning its application for extension of time to file defence and the court allowed the Claimant an adjournment to expand orally on its written submissions in light of the fact that the amendment to the application was made just before the hearing got underway and that a defence was filed at such a late stage in the proceedings. I will now proceed to briefly outline the submissions made by each party.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

- [11] The Defendants’ written submissions essentially are that the delay in making the application was not excessive or unreasonable. It was argued that the Defendants, having recognised that the instructions needed to respond to the claim would not be received in time, filed their application at the soonest. That is, the deadline for the Defence was the 28th of October 2021 and the application was filed the 21st of October 2021.
- [12] Counsel for the Defendants relied on the decision of **Attorney General of Jamaica and the Western Regional Health Authority v Rashaka Brooks JNR (a Minor) by Rashaka Brooks Snr (His father and next friend) [2013] JMCA Civ 16** and drew similarities between that case and the case before the court. It was stated that similar to Rashaka Brooks, the Attorney General is being sued pursuant to the Crown Proceedings Act and does not have personal knowledge of the alleged incident. Not having personal knowledge of the alleged incident, would mean that they would need to rely on the Jamaica Defence Force for the relevant instructions.

- [13] The affidavit in support of the Defendants' application sworn to by Mr. Matthew Gabbadon on the 21st of October 2021 explains that prior to the claim being instituted, the 3rd Defendant sought instructions from the Jamaica Defence Force relative to the allegations and none were forthcoming. Ms. Clarke argued that the affidavit of Mr. Gabbadon provides a reasonable and valid explanation for the delay. Counsel also submitted that once the defence became available, it was filed and hence the amendment sought by them for the defence filed on the 26th of October 2023 to be permitted to stand as filed. It was also noted that the interest of justice and the circumstances of the case warrants the orders being sought.
- [14] Concerning the issue of prejudice, it was also submitted that the Claimant has not stated that she would be prejudiced if the Defendants are granted an extension of time to file their defence. The Defendants further submitted that any prejudice suffered by the Claimant can be remedied with an award of costs, if the court deems it fit.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

- [15] Counsel for the Claimant, in her written submissions stated that based on the circumstances and the relevant tests to be applied for an application for extension of time to file defence, the Defendants should not be granted the orders as prayed.
- [16] The first reason given was the length of the delay to file the defence by the Defendants. The Claimant opined that the time that has elapsed from the service of the claim form to the filing of the defence was almost two years and such a delay is inordinate as described by the Court in **Grant, Washington v NSWMA and AGC [2013] JMSC Civ 112**. The second reason is that, in addition to the delay, no good explanation has been proffered for the delay. Merely stating that no instructions were forthcoming is not good enough. The Claimant also noted that the affidavit of Mr. Gabbadon did not give a timeframe within which the defence would be forthcoming.
- [17] In expanding on her written submissions, Counsel for the Claimant submitted orally that the Defendants' have been given several chances to file their

defence and did not do so until the day the matter was scheduled to be heard. The defence however was not attached to any affidavit and is therefore not properly before the court and the Defendants cannot rely on same. The application by the Defendants is therefore flawed and the court should not grant the orders as prayed and therefore should enter default judgment against the Defendants.

ISSUE

Whether an extension of time should be granted for the Defendants to file and serve their Defence.

THE LAW

- [18] Rule 10.3(9) of the CPR allows the Court to extend the time to file a Defence. CPR 26.1(2)(c) enables the Court to extend the time to comply with an order, direction or rule of the Court after the prescribed time for compliance has expired. None of the two rules provides the Court with any guidance in the exercise of its discretion to extend time. However, a number of authorities have provided the necessary guidance on what the Court should consider when determining whether to grant or refuse the application to extend the time to file a Defence.
- [19] The principle governing the Court's approach in granting or refusing an application for an extension of time was summarized by Lightman, J in **Commissioner of Customs & Excise v Eastwood Care Homes (Ilkeston) Limited and Others** [All England Official Transcripts (1997-2008) delivered 19 January 2000] where he stated that, "*It was no longer sufficient to apply a rigid formula in deciding whether an extension has to be granted. Each application has to be viewed by reference to the criterion of justice.*" The Courts in this jurisdiction have endorsed and adopted these principles, in a number of cases to include the oft cited **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 and **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (a minor) by Rashaka Brooks Senior (his father and next friend)** [2013] JMCA Civ 16.

[20] Most recently, in **Green and Green v Williams Et al** [2023] JMCA Civ 5 Dunbar-Green JA at paragraph 81, in examining the established principles from a number of authorities including **Fiesta Jamaica Limited** and **Rashaka Brooks**, in dealing with an application of this nature had this to say:-

“There is no rigid formula and the overriding objective should be paramount in the judge’s exercise of discretion whether to grant the application for extension of time to file a Defence”

She also stated at paragraph 101 that:-

“it is well-established that in considering whether to grant an extension of time in which to file a Defence, the Court should be guided by the overriding objective to deal with cases justly, in the context of settled factors among which are the length of the delay, the explanation for the delay, the merits of the Defence, the prejudice occasioned by the delay to the other party, the effect of the delay on public administration and the importance of compliance with time limits. Dealing with cases justly involves having regard to the appropriate allocation of the Court’s resources, saving expenses and ensuring that cases are dealt with expeditiously and fairly (rule 1 of the CPR). The general rule is that a Defendant who has been dilatory in the filing of a Defence must provide an acceptable explanation for that conduct as well as evidence of a viable challenge to the claim”.

[21] It is therefore important, that in dealing with the application by the Defendants, I must examine the delay in applying to extend the time to file a defence, the explanation for the delay, the merits of the application/defence, the importance of complying with time limits, the prejudice to the other party and the delay on public administration.

THE ANALYSIS

[22] I am of the considered view, that there are two reasons why the Court should dispose of the application in favour of the Claimant and that the court should not grant the Defendants an extension of time to file defence. The first is on the basis that the Defendants’ having obtained two consents on the 7th and 14th of November 2021 from the Claimant to file their defence, after their first application was filed, another application for the court to consider whether to grant an extension of time to file defence should have been filed by them. This is because the two subsequent consents by the Claimant after the Defendants’

application was filed, determined that application. That is, the application filed 21st October 2021.

[23] This position held by the court is confirmed when one examines the orders made by Justice O Smith (ag), on the 16th of January 2023. Justice O Smith ordered that the Defendants were to file an application for extension of time to file defence out of time on or before the 31st of January 2023. She also ordered that if it was not filed, then judgment in default of filing defence would be entered and the matter proceed to assessment of damages. Having not done so, Justice Thompson-James gave them an extension to file the said application by the 19th of May 2023 along with other orders that the Claimant was permitted to file affidavits in response and the Defendants could reply if necessary. This was not done.

[24] Having not filed the relevant application as ordered by Justice O Smith (ag) on the 16th of January 2023 and extended to the 19th of May 2023 by Justice Thompson-James, then the position would therefore be that if no relief from sanction was sought, then the unless order of the court would now take effect. That is, “judgement in default of failing to file defence out of time shall be entered and that the matter would proceed to assessment of damages”. The Court of Appeal in the matter of **National Workers Union v Shirley Cooper [2020] JMCA Civ 62**, in examining unless orders pursuant to rule 26.7 of the CPR stated that *“the plain meaning of rule 26.7 is that where the time limited for compliance has expired and a sanction is prescribed, there is no need for any further order from the court for the sanction to take effect. In the circumstances, what was required of the appellant was to seek relief from sanctions under rule 26.8.”* Thus, the Defendants in this matter, having not filed any such relief the unless order took effect from the 19th of May 2023.

[25] Even if I am wrong in relation to the above, and the view is that the application filed the 21st of October 2021 for extension of time to file defence and amended the 26th of October 2023 cannot be viewed as determined by the two subsequent consents filed by the Claimant, as will be demonstrated below, the second reason for refusing the Defendants’ application, is on the basis that upon an examination of the principles governing applications for the extension

of time to file defence, the Defendants have not established that their application filed 21st of October 2021 as amended for an extension of time to file defence should be granted.

THE DELAY

[26] The first issue the court must address is having regard to the facts in the matter, whether the delay in filing the application was inordinately long. The Claimant served the Defendants the Claim and Particulars of Claim on the 19th of August 2021. The acknowledgment of service was filed the 26th of August 2021. Having filed an acknowledgment of service, the defence was due 42 days after the claim was served on the Defendants. That would mean that the defence was due on the 28th of October 2021. The 3rd Defendant on the 21st of October 2021 filed its application for extension of time to file defence accompanied by the affidavit of Mr. Matthew Gabbadon.

[27] In **Hoip Gregory v Vincent Armstrong [2013] JMCA civ 36**, the court stated that “... *the court should include in its consideration the principle that time limits established by the CPR should be observed*”. I find that the Defendants whilst abiding by the time frame to file an acknowledgement of service, only failed in filing their defence on time. The defence should have been filed the 28th of October 2021. Realising that they would not be able to file their defence within the time frame, filed their application on the 21st of October 2021. It is clear that there is no delay in the application made by the 3rd Defendant for extension of time. This court has seen instances where similar applications have been filed as short as a month after the defence was due to as long as a year after and have been accepted by the courts.

[28] The issue of delay is not only limited to an examination of the time frame within which the application itself was filed, but also the filing of the draft defence, especially if it is not filed at the same time as the application. The Defence in this matter was filed on the 26th of October 2023 which Counsel for the Defendants requested to be permitted to stand by way of an amendment to the 2021 application. Having received two consents by the Claimant in November

2021, the Defendants still did not file a defence in this matter until the 26th of October 2023 almost two years after its application for extension of time to file defence.

[29] The court cannot ignore that there is significant delay in the filing of the defence in this matter and I am constrained to find that the delay of two years from the filing of the application to the filing of the defence is inordinately and egregiously long. My position that the delay should be described as such, is confirmed when one examines the decision of Dunbar-Green JA in the matter of **Green and Green v Williams Et al**. In examining the facts in that case she had this to say:-

“...That apart, the delay of 25 days in filing the proposed Defence, though unacceptable, would not, in my opinion, amount to an inordinate delay in the circumstances. But, the position is quite different as regards the length of the delay in filing the application to enlarge time (approximately 11 months). That was both inordinately lengthy and egregious.”

[30] Master S Orr (as she then was) in **Aston Wright v AG [2022] JMSC Civ 25** was confronted with a period between the filing of the application on September 16, 2016 and the filing of the affidavit of merit on December 5, 2021 which the Defendant sought to rely on at the hearing on December 8, 2021. She found that the Defendant delayed some five years and nearly four months in properly making an application to file its defence out of time before the court. She found that delay to be most egregious.

[31] In any event, even if one were to argue that the time frame from the filing from the application to the defence is long, the length of the delay is only one factor the court should consider in determining whether to grant the application. Rattray J stated in **Devon Davis v Karen Marajah [2019] JMSC Civ. 7** that-

“The length of the delay is a consideration that strongly goes against granting the Application for an extension of time, without some valid and/or reasonable explanation being advanced for the delay. However, the mere fact of a delay ought not to be the determining factor, as the Court must also consider all the other factors as a whole.”

THE EXPLANATION FOR THE DELAY

- [32] In **Peter Hadadd v Donald Silvera** unreported SCCA No 31/2003 delivered on July 31, 2007 the Court said that *“in order to justify a Court in extending time during which to carry out a procedural step, there must be some material on which the Court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules.”*
- [33] Rule 11.9(2) of the CPR requires all notices of application for Court orders to be supported by Affidavit evidence unless a rule, order or practice direction provides otherwise. Master Orr (as she then was), in the matter of **Wright v AG [2022] JMSC Civ 25** in examining this rule in relation to an Application to Extend time to file Defence stated that, *“Applications to extend the time to file a Defence have a further requirement that the supporting Affidavit must include evidence outlining the Defence to satisfy the requirement of a Defence of merit and exhibit the draft Defence. The Affidavit must also explain any delay. While the required evidence need not be in one Affidavit, all of the evidence must be before the Court for the application to be properly before the Court for the application to be heard.”*
- [34] From the cases on the point, it is clear that there must be “sufficient material which could provide a good reason for the delay in failing to comply with rule 10.3(1) of the CPR” (see **Philip Hamilton v Frederick Flemmings and Gertude Flemmings** [2010] JMCA Civ 19). See also **Thamboo Ratnam v Thamboo Cumarasamy** [1965] 1 WLR 8, at page 12, and the exceptional case, **Rashaka Brooks**. It is imperative that the party that wishes the Court to exercise its discretion, must explain the reason for the delay. The explanation must be acceptable and reasonable in the circumstances. In **Rashaka Brooks**, often cited as an exception to the rule, the explanation for the delay in filing a Defence to the Claim was that it was awaiting a scientific report that was germane to the issues in the case. The deponent for the Attorney General’s Department had also explained to the Court’s satisfaction, *“the efforts made to secure the evidence concerning the elements of merit and the reason for its absence”*.

- [35] In **Attorney General of Jamaica v Roshane Dixon & Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ23, Harris JA stated that *“the Court in Fiesta, and Haddad v Silvera, pronounced that some reason for the tardiness must be given, even if it is insufficient. The proposition that the inadequacy of a reason does not in itself prevent the Court from assisting a tardy applicant does not mean that the Court will look with favour upon such an applicant in all cases. Failure to act within the requisite period is a highly material criterion, as Smith JA stated in Haddad v Silvera. The weaker the excuse, the less likely the Court will be inclined to countenance a tardy applicant who seeks the Court’s aid to extend time”*.
- [36] There is only one affidavit filed in this matter. That is the affidavit of Mr. Matthew Gabbadon which was filed on the 21st of October 2021 with the application to extend time. Mr. Gabbadon stated that the Attorney General’s Chambers sought instructions from the Jamaica Defence Force on the 8th of September 2021 and several follow up requests have been sent. But up to the date the application was filed, instructions were not forth coming, hence the need to make the application. Mr. Gabbadon stated that because the 3rd Defendant was being sued in its representational capacity it had no personal knowledge of the incident and until instructions were received it would not be able to file a defence. Counsel Ms. Clarke in her submissions reiterated that the 3rd Defendant was being sued in a representational capacity and this was a classic Rashaka Brooks situation.
- [37] Whilst it can be argued that because the 3rd Defendant is being sued in its representative capacity it may be difficult for them to obtain instructions, I do not agree that this matter can be compared to Rashaka Brooks. In fact, when one compares the allegations and the nature of the application, it is more similar to **Attorney General of Jamaica v Roshane Dixon & Attorney General of Jamaica v Sheldon Dockery** [2013] JMCA Civ23. In that case the Respondent, Sheldon Dockery, commenced proceedings against the appellant claiming damages for false imprisonment and malicious prosecution. The respondent, Roshane Dixon, instituted proceedings against the appellant claiming damages for assault and battery. In the affidavit filed in support of the

application for extension to file defence, the reasons advanced for the delay in filing the defence were stated to be the lack of complete instructions to assess the claim. Harris JA had this to say *“the bare statement that the delay was due to the inability of the appellant to obtain adequate instructions to assist in complying with the requisite rule is highly unsatisfactory. This cannot be regarded as a proper explanation for the delay. Having received inadequate instructions, it was incumbent upon the appellant to have pursued the request for any additional information needed with due dispatch.”*

- [38] It is my view then, in light of **Roshane Dixon and Sheldon Dockery**, that the Defendants would still need to go further in any affidavit filed in support of its application and explain what steps have been taken to secure instructions, what difficulties it experienced and why. This is especially in light of the details contained in the Particulars of Claim filed where the date of the accident was outlined, the location of the accident and the license plate of the vehicles involved specifically stated. Additionally, the claim is a simple motor vehicle accident and does not involve multiple government agencies or parties. Detailed explanation and particulars concerning the delay would be critical in these circumstances whether in Mr. Gabbadon’s affidavit or through the filing of subsequent affidavits before the hearing of the matter.
- [39] Furthermore, at the time of the hearing of this application, the Defendants obtained two consents on the 7th and 14th of November 2021 by the Claimant yet they filed a defence the 26th of October 2023. The Defendants were no longer then in the position of what I may call a Rashaka Brooks situation at the hearing of the application. Therefore, the Defendants would also need to explain even with being granted two consents why it took them two years to file a defence. No explanation in this regard was provided.
- [40] From the foregoing, I find that the Defendants have not proffered a good or reasonable explanation for the delay and have not moved me to be sympathetic towards their application.

THE DEFENCE

- [41] The authorities have shown that, on an application to enlarge time to file a Defence, the salient issue is whether, on the evidence relied on by the party at fault, the Court can, at the very least, form a preliminary view on the likely outcome of the case.
- [42] Such an application to extend the time to file a defence must be supported by affidavit evidence which outlines the facts being relied upon to defend the claim. This affidavit is often called the affidavit of merit. Morrison JA, as he then was, in **B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2** noted that the affidavit of merit must demonstrate a 'prima facie defence.' This position was followed in **Kimaley Prince v Gibson Trading & Automotive Limited (GTA) [2016] JMSC Civ 147**. There, McDonald J placed reliance on **B & J Equipment Rental Limited v Joseph Nanco, supra**, then stated the following at paragraph 22: *'Having regard to the foregoing, it is apparent that the affidavit of merit ought to disclose facts which constitute the defence and in my view this obligation is not met by exhibiting a draft of the proposed defence...'*
- [43] Justice Kirk Anderson in examining the affidavits filed in the matter of **Smith v Jamaica Defence Force Co-operative Credit Union [2018] JMSC Civ 29** and whether they constituted affidavits of merit stated "*...the Defendant, by its two affiants, has opted to simply exhibit a copy of a draft of the proposed Defence, deny the allegations outlined in the Claimant's Claim, and state that the proposed Defence has a good prospect of success. That was insufficient as the evidence adduced on behalf of the Defendant ought to have disclosed facts which constitute a prima facie Defence in support of the Defendant's application for the Defence which was filed out of time, 'to stand,' and that obligation has not been met by the Defendant merely exhibiting a draft of the proposed Defence to those affidavits and having stated in the affidavit evidence that that proposed Defence has a good prospect of success*".
- [44] It is to be noted that the 3rd Defendant did not file any other affidavits apart from Mr. Gabbadon's. That affidavit made no reference to the draft defence nor did

it contain or state the merits to the Defendants' defence. The Defence filed the 26th of October 2023 was not accompanied by any affidavit. In the matter of **Green and Green v Williams et al** one of the grounds of appeal was the fact that the Master examined the draft defence in the application for extension of time to file defence when there was no affidavit of merit. The court stated that the master should not have examined the defence without some evidence of its contents. It also held that;

“The requirement for some evidence of merit must mean that there should be some facts or material to make even an iota of difference by challenging the appellants' claim. There is no rigid formula and the overriding objective should be paramount in the judge's exercise of discretion whether to grant the application for extension of time to file a defence, but, as Phillips JA observed in Philip Hamilton v Frederick Flemmings and Gertrude Flemmings, the considerations are on the premise that a defaulting party does not have an unqualified right to an extension of time. The learned master departed from this approach by granting the application without any evidence that there was a meritorious defence. She therefore erred.”

[45] Thus, from the foregoing, I am reminded that any Draft Defence filed or exhibited is not evidence and so what is contained in that document cannot be considered evidence before the Court. It is what is intended to be put before the Court. There being no affidavit of merit in this case and just a draft defence filed on the 26th of October 2023, the Defendants have failed to comply with the requirements of such applications for extension of time to file defence. The court having no affidavit evidence (that is an affidavit of merit) upon which it can make an assessment as to the merit of the defence of the Defendants case, the application filed for extension of time to file defence, also fails on this limb.

PREJUDICE TO THE OTHER PARTY

[46] As it concerns the issue of prejudice, the Defendants submitted the Claimant has not indicated that, if the Court were to grant the orders sought in this application it will suffer any real prejudice. Counsel for the Defendants in her

submissions noted that cost could cure any inconvenience faced by the Claimant.

[47] The Claimant's Attorney on the other hand, in her oral submissions noted that there would be prejudice to the Claimant if the orders being sought were granted. She noted that the Claimant has been waiting almost 2 years for the Defendants to file a defence to an accident that occurred in 2019.

[48] As pronounced in **Haddad v Silvera**, the payment of costs does not ameliorate any hardship which would be encountered by a party in circumstances of delay. Merely stating that the Claimant will not suffer prejudice is not sufficient. In keeping with its duty to regulate the pace of litigation, the Court has adopted a strict approach in giving consideration to the application for an extension of time, especially in circumstances where a poor excuse or no excuse has been advanced for a delay with complying with the rules. **In Port Services Ltd v Mobay Undersea Tours Ltd and Fireman's Fund Insurance Co SCCA No 18/2001 delivered on 11 March 2002**, Panton JA (as he then was) speaking to the Court's reluctance to assist tardy litigants, said:

"In this country, the behaviour of litigants, and, in many cases, their attorneys-at-law, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions. The widespread nature of this behaviour is not seen or experienced these days, I daresay, in those jurisdictions from which precedents are cited with the expectation that they should be followed without question or demur here. ... For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigant's own deliberate action or inaction."

[49] I am also further reminded that *"in our jurisdiction, where there is an embedded and crippling culture of delay, significant weight must be accorded to the issue of delay, whenever it arises as a material consideration on any application"*. **Flexnon v Constantine [2015] JMCA 55.**

CONCLUSION

[50] Whilst there was no delay in the filing of the application by the 3rd Defendant, there is inordinate delay in the filing of the defence two years after the application was filed. Although there was an explanation in the affidavit of Mr. Gabbadon concerning the late filing of the defence at the time the application was made for extension of time, this court does not view the explanation as being satisfactory in the circumstances. Moreover, the Defendants have failed to proffer a good explanation for the delay in filing its defence two years after the application was filed and where two consents have been given by the Claimant for the Defendants to file their defence.

[51] In addition, the Defendants have not established that there is a meritorious defence as no affidavit of merit was filed. The 3rd Defendant merely filed a defence on the day of the hearing of the application and requested an amendment to the application for the said defence to be permitted to stand. Even with this amendment, this defence is not properly before the court and cannot be examined to see if it is one of merit for it to be permitted to stand. Finally, there being the likelihood of prejudice to the Claimant if the application is granted, and the interests of justice not being served, the application to extend time to file Defence is denied.

ORDERS

1. The Defendants' application to file its defence out of time filed on the 21st October 2021 as amended the 26th of October 2023 is refused.
2. Judgment is entered against the 3rd Defendant in default of defence with damages to be assessed.
3. Cost to be cost in the claim
4. Standard Disclosure is to take place by January 31 2024
5. Inspection is to take place by February 12 2024
6. Witness Statements are to be filed and exchanged by March 15 2024

7. Written submissions and a List of Authorities in relation to the damages claimed is to be filed and served by April 15, 2024
8. An Agreed Bundle of Documents is to be filed and served by the Claimant's Attorneys-at-Law by April 15, 2024
9. An Assessment Bundle which includes the written submissions filed on behalf of both parties is to be filed by the Claimant's Attorneys-at-Law and the index served on counsel for the Defendant by April 22, 2024
10. A Pre -Trial Review is scheduled for May 8, 2024 at 10:00am for thirty minutes at which time, provided the parties have complied with the case management orders the claim will be transferred to the Assessment Court for a hearing date to be scheduled.
11. The Claimant's Attorney-at-Law is to prepare, file and serve this Order