JUDGEMENT **[2013] JMSC Civ. 26**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV01524

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

Mr. Ian Wilkinson, Mrs. Shawn Wilkinson & Mrs Terry-Ann Valentine instructed by Wilkinson & Co for the Claimant.

Mrs. Jacqueline Samuels-Brown Q.C. instructed by Firmlaw for the Defendants.

IN CHAMBERS

HEARD: 13th November, 4th December 2012 & 21st February 2013

ADMINISTRATIVE LAW - JUDICIAL REVIEW-PART 56 OF THE CPR – RULE 56.3, 56.4 & 56.11 (4) (c)
APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW GRANTED - WHETHER PART 11 OF THE CPR, PARTICULARLY RULE 11.16(3) APPLIES - RULE 11.16(3), WHETHER DIRECTORY OR MANDATORY

Mangatal J:

[1] In an amended Notice of Application for Court Orders, the 1st Applicant/1st Defendant, the Public Service Commission " the P.S.C" sought the following orders:-

1. The claim herein be struck out

1A. That the *ex parte* order made herein granting permission for judicial review be set aside.

2. The P.S.C.be granted an extension of time for applying to set aside the permission granted for leave to apply for Judicial Review and for vacating paragraph 2 of the Ex parte Order of March 16, 2012 set out below in paragraph numbered 3 herein.

3. The Order made herein on March 16, 2012 to wit "An Order granting permission to apply for judicial review shall operate as a stay of the decision of the First Respondent to terminate the services of the Applicant " (hereinafter "**the order for a stay")** be vacated.

4. The Attorney General of Jamaica be removed as a party to this claim.

The grounds on which the P.S.C. is seeking the orders are as follows:

a) The Claimant is not entitled to judicial review as he was employed on a contract and his termination is in accordance with the terms of his contract. Further, the Public Service Regulations do not apply. Additionally, the Claimant has failed to serve the P.S.C. with a copy of the Ex parte Order made on his ex parte application as required by the law.

b) The Ex parte Order made on the Claimant's application and served on the P.S.C. is irregular and/or null and void.

c) The Ex parte Order was made without the P.S.C. having had an opportunity to make submissions.

d) The Ex parte Order of March 16, 2012 was made in the absence of evidence from the P.S.C.

e) On the evidence now adduced the Order for a stay ought not to continue in force.

f) The effect of the Order for a stay is to undo that which had already taken effect and accordingly was not a conservatory Order preserving the status quo.

g) The Order for a stay is not necessary in all the circumstances.

h) The balance of convenience is in favour of the Order being vacated.

i) As a matter of law the Attorney General is not a proper party in Judicial Review proceedings.

j) Such other grounds as are revealed in the Affidavits of Lois Parkes herein.

[2] The Privy Council in the decision of **Sharma v Brown-Antoine [2007] W.L.R. 780** has made it clear that where leave had been granted to move for Judicial Review, the Court should exercise its discretion to set the leave aside very sparingly. In this application, a number of the points taken require adjudication in a preliminary way since, if they were to succeed, this would mean that the Court need not examine other arguments raised.

[3] The main point taken at this juncture was that the ex parte Order made on the Claimant's application and served on the P.S.C is irregular and or null and void. It was argued that the Order failed to comply with Rule 11.16(3) of the Civil Procedure Rules (the "C.P.R."). In her written submissions filed on the 30th November 2012, learned Queen's Counsel, Mrs. Samuels-Brown developed and expanded upon these arguments as follows:-

(See paragraph 14 of Written Submissions)

14. Based on the foregoing arguments it is submitted that:-

i. The order as filed by the Claimant is not an order as contemplated by the rules and leave granted to the Claimant has accordingly lapsed and his claim ought to be struck out.

ii. Alternatively, an irregular and or incomplete or erroneous order has been filed and or there has been a failure to comply with a rule which requires rectification by the Court pursuant to Rule 26.9 of the Civil Procedure Rules.

iii. In accordance with (ii) above, the Court may direct that a proper order be filed and served and also extend the time for service of an order compliant with the rules.

[4] Mrs. Samuels-Brown also went on to argue that in the event that the Public Service Commission required an extension of time for making the application to set aside leave, then the Court has been provided with good, cogent and substantial reasons on the basis of which it could exercise its discretion extending the time.

[5] Rule 11.16 reads as follows:-

> **Application to set aside or vary order made on application made without notice**
>
> ***11.16*** ***(1) A respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again.***
>
> ***(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.***
>
> ***(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule.***

Relationship between Rule 11.16 and Part 56 of the Civil Procedure Rules

[6] Counsel for the Claimant, Mr. Ian Wilkinson, and Mrs. Shawn Wilkinson, who each made oral submissions on different hearing dates, in their written submissions dated 30th November 2012 contend that Rule 11.16 is not applicable to Part 56 of the

CPR. Relying on the dicta of Panton JA in the Court of Appeal decision of ***Golding v Simpson Miller*** SCCA No. 3 of 2008 (delivered 11 April 2008) it was argued that unless the general provisions of the CPR are specifically imported into Part 56, they are not applicable. It was further argued by the Respondent that unlike rule 56.13(1) which specifically states that Parts 25 to 27 of the CPR are applicable at the First Hearing, no such reference is found where Part 11.16 is concerned. It was also submitted that importing Rule 11.16 into Part 56 would lead to procedural incoherence.

[7] One of the fundamental aims of the CPR is to improve efficiency in civil proceedings. The CPR contains some specific Parts which deal with particular types of civil proceedings. For example, Part 76 governs Matrimonial Proceedings, Part 67 deals with Administration Claims, Part 68 deals with Probate and Part 56 deals with Administrative law. The aim of this is to ensure that such matters proceed in a manner that is expeditious, just and in a way suited to the specific nature of the proceedings in issue. In each of these Parts, the rule makers have set out how proceedings are to be commenced, how service is to be effected, and other important matters relative to the conduct and adjudication of those claims. Where other general rules of the C.P.R. are to have any effect on those special rules, the rule makers have made express reference to such rules or they have been incorporated by reference or by necessary implication. Outside of such express intent, broadly speaking, the format and layout of the C.P.R. demonstrates an intention on the part of the rule makers to have those special proceedings regulated by the rules which are specifically applicable to them.

[8] In the decision of ***Golding v Simpson-Miller***, Counsel for the Respondent in that case had submitted that the Court should embrace the provisions of Part 11 of the Rules (which deals with Applications for Court Orders) so that the Court could vary the condition imposed by rule 56.4 (12) of the CPR. Panton JA rejected this argument and at paragraph 10 of the Court's written judgment stated:

> ***"Part 11 of the Civil Procedure Rules provides "general rules" in relation to applications for Court Orders, whereas Part 56 deals specifically with Administrative Law. Where it is intended that these specific rules are to be affected by other rules, it is so stated. For***

example, in Rule 56.13(1), it is provided that parts 25 to 27 of the Rules apply. This Provision reads thus:

"At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and parts 25 to 27 of these rules apply."

It cannot be that without there being a statement to that effect, the special rules are to be watered down by any and every other provision in the body of rules. That would be a mockery of the entire rules and provide countless loopholes for dilatory litigants and their attorneys-at-law. The whole point of providing for the orderly conduct of litigation would be defeated."

[9] In my judgment, there being no specific reference to Part 11 in Rules 56.3, 56.4 and 56.11 (4) (c) Part 11 can have no bearing on the procedures set out therein. There are valid reasons why the makers of the rules would not have contemplated Part 11, and specifically Rule 11.16, having any effect on applications for leave to apply for Judicial Review. One such reason as asserted by the Claimant is that it would essentially result in substantive and procedural incoherence and procedural absurdity. At paragraph 20 of the written submissions dated 30th November, 2012, it is pointed out that:

"***By way of calculation, having regard to the facts of this case, the Claimant was granted leave from the 16th day of March 2012 on condition that a claim for judicial review was filed within 14 days of receipt of the order granting leave. This*****[order]*** ***was served on the Respondents on the same date-the 16th of March 2012. If, on the First Respondent's argument, Rule 11.16(3) should apply to the instant proceedings, then the Respondents should have been notified that they had until March 30, 2012 to apply to set aside the order even though the Order permitted the Claimant until this date to file his***

judicial review claim failing which the Claimant could not do so. This would have led to a clear procedural absurdity and illogicality."

[10] I agree with the Respondent that the consequence if that position was taken would be that a litigant could challenge an order for leave, at a stage when the order is conditional and at a time when the successful claimant is mandated to file his claim for Judicial Review. This would clearly lead to some procedural difficulty and overlap in proceedings which would be contrary to the overriding objective. The grant of leave is made *conditional* on the Applicant filing a claim within 14 days as mandated by Rule 56.4(12). If the Applicant does not file the fixed date claim form making a claim for Judicial Review, then the conditional leave will lapse or expire (See ***Golding v Simpson-Miller).*** If a Respondent were to be allowed to challenge the conditional leave within the same time period set out in Part 11.16 (2) and the Applicant to whom leave is granted defaults, then the result would have been a multiplicity of proceedings, that would not necessarily further the overriding objective.

[11] However more fundamentally, the nature of the application for leave to apply for Judicial Review indicates that Rule 11.16 and Part 11 generally would not be applicable to the rules dealing with such applications. In Judicial Review proceedings, an applicant has to obtain the Court's leave before a claim can be brought against a public body for judicial review. In this area of the law, since the Applicant may simply be seeking the Court's permission to bring such a claim, (as opposed to also seeking interim relief) the Rules expressly contemplate such an application being made ex parte. Indeed Rule 56.3(2) states that an application for leave may be made without notice. Rules 56.4(1) and 56.4(2) respectively state that the application must be considered forthwith and that the judge may grant leave without hearing even the applicant, much less the Respondent. Rule 56.4(4) states that a judge may direct that notice of the hearing be given to the Respondent or the Attorney-General. This is in complete contrast and totally distinguishable from the applications contemplated by Part 11. Rule 11.8 (1) tells us implicitly that the applications contemplated under that Part are not those for leave to apply for judicial review. This Rule states the general rule as being that the applicant must give notice of the application to each respondent. Also, if one looks at Part 56.3 (3)

and looks at the content of what an application for leave ought to contain, the requirements differ fundamentally from a general application for court orders. This to my mind, is yet another indication that the rule makers clearly did not intend that the general provisions of Part 11 were to have any effect on the rules in Part 56 that deal with leave.

[12] By not making any reference to Part 11, particularly as it relates to the setting aside of leave, the makers of the rules were contemplating a wholly different regime for challenges to ex parte orders for leave to apply for Judicial Review. It seems to me that the rule makers contemplated such applications being made at the First Hearing and not during the time when the order for leave would remain conditional, or in the period specified in Rule 11.16. Rule 56.13(1) clearly states that Parts 25 to 27 of the Rules apply to the First Hearing. The First Hearing in Judicial Review proceedings is akin to a case management conference and the rules envisioned that at that time, parties would make applications that would contribute to the management of the case. An application to set aside an ex parte order would be such an application.

[13] **Rule 26.1(2)(v), and Rule 26.1(7), which are listed under the heading "The court's general powers of management" state:**

> ***26.1 (2) Except where these Rules provide otherwise, the court may-***
>
> ***.....***
>
> ***(v) take any steps, given any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.***
>
> ***26.1. (7) A power of the Court under these Rules to make an order includes a power to vary or revoke that order.***

[14] The above clearly demonstrates that the Court would have the power at the First Hearing to hear an application to set aside an order for permission/ leave**.**

[15] In reaching the conclusion that Part 11 has no effect on the Rules in Part 56 of the Civil Procedure Rules referred to in paragraphs 9 & 11 above, it is therefore my decision that the order for leave would not be void or invalid as there would not have been a requirement for it to contain the Notice as contemplated by Rule 11.16(3). Nor would there be any need to consider an application for extension of time for making the Application to set aside.

[16] However, in the event that I am wrong in deciding that Rule 11.16 has no applicability to those Rules, I have gone on to consider the effect of Rule 11.16 (2) and 11.16(3) of the CPR.

Meaning of "Must" in Rule 11.16(2) and 11.16(3) CPR

[17] Both the Applicants and the Respondent have argued that "must" can have either of two effects, depending on the context in which it is used. It can either indicate a mandatory requirement or a permissible/directory one. Both sides have cited authorities that looked at the different contexts in which the Court has been called upon to interpret the meaning of the word "must".

[18] In the decision of **Dorothy Vendryes v Dr. Richard Keane and Karene Keane SCCA no.1 of 2009 (del. 15th April 2011)** Sykes J had set aside a default judgment on the basis that it was irregularly entered due to the respondent's failure to comply with rule 8.16(1) of the CPR. Sykes J. had interpreted the word "must" in that rule as being mandatory. The Court of Appeal upheld that aspect of the decision of my learned brother, Sykes J who had reasoned that :–

> ***"[the] objective of access to justice and telling the defendant of his rights are vital components of the new civil litigation process that ought to be reinforced and strengthened. Were I to decide that these documents need not be served, I would be undermining an important concept that permeates the CPR. More important, I would be deciding that "must" in the rules does not mean what it says. I do not see any good reason for treating the word as meaning less than mandatory."***

[19] In adopting this reasoning, the P.S.C had argued that the requirement that the notice to the party who was excluded from an ex parte hearing be contained in the order obtained is to ensure objective access to justice and equality of arms in the civil courts. It was its argument that the purpose for which the inscription is to be included makes it mandatory.

[20] The Respondents agree that where a rule directs that certain information be provided and this information is of a substantial and important nature in the sense that its absence would imperil the claim or the defence of the matter or be likely to cause an injustice, the Court is more likely to view the rule as being mandatory rather than directory. This is so even where there are no sanctions for non-compliance. However, learned counsel submitted, that this is not the situation in the case at bar.

[21] In the decision of **Hoip Gregory v Vincent Armstrong** (SCCA No. 80 of 2006 Application No. 81/2006; **Hoip Gregory v O'Brien Kennedy** SCCA No. 81of 2006; Application No. 165/2006) Delivered 23rd August 2012, Brooks JA considered the meaning of "must" as used in rule 2.4 (1) of the Court of Appeal Rules. After examining the various authorities, Brooks JA held that "must" as used in that rule was of a directory nature, rather than mandatory. He reasoned that there being no provision that stipulates that the notice of appeal is invalid if the written submissions do not accompany them, or other sanction for breaching its provisions, this lends itself to the conclusion that in that context "must" is directory rather than mandatory. At paragraph 24 of the Written submission of the Respondent, they too argue that like Rule 2.4 (1), the fact that there is no provision which stipulates that an ex parte order filed without compliance with rule 11.16(3) is invalid and the fact that no sanction is stipulated, are indicative of a lack of intention on the part of the legislature that such an order (otherwise valid) would be rendered invalid as contended by the P.S.C.

[22] In my judgment, even though the rationale for wanting to include the notice in the order is to make the litigant aware of his or her rights when faced with an ex parte order, the absence of the notice does not invalidate an otherwise valid order.

[23] When a judge adjudicates on an application, the orders made usually reflect what the Applicant has sought in his application, or in some instances the order may be one which the judge is mandated by a specific rule in the CPR to make. For example, by virtue of Rule 56.4(9) where the application is for an order of prohibition or certiorari, the Judge is mandated to direct whether or not the grant of leave operates as stay of the proceedings. In the case of rule 11.16(3), the language is quite different. It does not speak of the judge directing or being mandated to direct anything at all. Rather it states that the order "must contain a statement telling the respondent of the right..." to challenge the order made ex parte. (my emphasis). This language does not correspond to that used in respect of orders required to be made by the judge. The notice or statement, whilst important, is therefore a procedural formality. It does not go to the substance of the order itself. Consequently where it is absent, it is not a defect which will render the order void. Rule 11.16(3) is in my judgment directed at the formal order and not the adjudicating decision of a judicial nature embodied in the substantive order.

[24] At paragraph 12 of the decision of **Hoip Gregory**, Brooks JA stated,

> "....there are circumstances which sometimes arise that require a defaulting applicant to succeed, despite his default. In some of those circumstances, **practicality** demands that successful result."

[25] In that case, Brooks JA had cited from the decision of **Saunder v Green and others 2005 HCV 2868** in which Sykes J in considering whether to set aside a default judgment had commented that the "risk of injustice to the claimant must be considered because justice cannot be for the defendant alone or for one party."

[26] In the instant case, if the Court were to find that the absence of the notice invalidates the order made ex parte, it would mean that the Court's resources would have been wasted in hearing and making this order. This conclusion would clearly lead to injustice. The fact that the Applicants are before the Courts challenging the order means that the lack of the notice did not deprive them of a right. It merely arguably means that they were not notified of their right to set aside within a particular time frame and therefore ought not to be unduly prejudiced by a late application.

[27] In my judgment, the situation regarding Rule 11.16 (3) is analogous to one where an injunction was ordered requiring a party to do a particular act within a specified time, but the formal order did not contain the penal notice. The fact that the penal notice was not contained in the order does not mean that the substance of the order would be invalid. Similarly, the lack of notice in the formal order on an ex parte application cannot impact the Judge's exercise of his or her judicial mind. In either case, it is not the Judge's order that is rendered invalid. It is that certain consequences may flow from the procedural defect. In the case of such an injunction, the lack of a penal notice may prevent a recipient of such an order from succeeding in committal proceedings against a defaulting Respondent-see Rule 53.2 and 53.3 of the CPR. The Notice not being contained in the Order could result in the recipient of the order being required to serve a properly worded order since the Rules are there for a reason and must be obeyed. However, if the Respondent to the ex parte order comes before the court, the lack of notice would, without more, and subject to any other relevant circumstances, prevent, or indeed, even estop the recipient of the order from successfully complaining if the Respondent applied to set it aside outside of the 14 day time period. It may also correspondingly provide the Court with a basis for extending the time for the setting aside of the order and be a factor for the Court to consider in exercising its discretion. Rule 26.1(2) (c) allows the Court to extend the time for complying with any rule.

[28] Based on the reasoning set out above, I am minded to find that the word "must" in part 11.16(3) is directory rather than mandatory.

[29] However, as previously stated, I am in any event of the view that whether directory or not, this consideration is not relevant to the order made in this case, which is governed by the relevant rules of Part 56 of the CPR and not by Part 11.

[30] I will now invite the parties to agree dates for the continuation of other aspects of the application by the P.S.C.