[2015] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No 41/2013

BEFORE: THE HON MR JUSTICE MORRISON, JA
THE HON MRS JUSTICE MCINTOSH, JA
THE HON MS JUSTICE LAWRENCE–BESWICK, JA (Ag)

BETWEEN	**PETER KAVANAUGH**	**APPELLANT**
AND	**THE ATTORNEY GENERAL**	**1ST RESPONDENT**
AND	**DET INSPECTOR CAREY LAWES**	**2ND RESPONDENT**

Owen Crosbie instructed by Owen S Crosbie & Co for the appellant

Miss Alethia Whyte and Miss Cheryl-Lee Bolton instructed by the Director of State Proceedings for the 1st respondent

18, 19 November, 20 December 2013 and 6 February 2015

MORRISON JA

[1] I have read in draft the reasons for judgment of McIntosh JA and agree with her reasoning and conclusion. I have nothing to add.

MCINTOSH JA

[2] We (the judges whose names appear above), heard arguments in this appeal on 18 and 19 November 2013 and took time to consider them before handing down our

decision, which we promised would be done on 20 December 2013. In fulfillment of that promise, after we had duly considered the arguments and determined the outcome of the appeal, the order set out below was handed down on 20 December 2013:

> "Appeal dismissed with costs to the 1st respondent to be agreed or taxed."

Inasmuch as the order ended with the words "written reasons to follow", I strive now to give my reasons for agreeing that the appeal be dismissed.

Background

[3] A good starting point, it seems to me, is to give a brief overview of the facts and circumstances which led to the decision of Frank Williams J ("the learned judge", hereafter), about which the appellant complains. The appellant, (then claimant), was an employee of the Jamaica Information Services (the "JIS"). He was charged, on an information returnable in the Resident Magistrate's Court for the parish of Manchester, with the offence of obtaining a certain sum of money for services he had performed on behalf of his employer, by falsely pretending that he was personally entitled to it. When the matter went before the court the learned Resident Magistrate ruled that there was insufficient evidence to sustain the charge and made no order for its trial. Hence, the matter was resolved in the appellant's favour.

[4] In the inevitable claim filed in the Supreme Court on 17 August 2011, the appellant sued for injury to his reputation and for loss and damage arising from "the considerable trouble, inconvenience, anxiety and expense" to which he was put, as a

result of the charge he faced. The claim form was duly served on the 1st respondent but instead of being accompanied by the particulars of claim (see rule 8.1(1)(b) of the Supreme Court Civil Procedure Rules 2002 (the "CPR")), its companion was an affidavit from the appellant. That point was noted by the 1st respondent's attorney-at-law, Miss Alethia Whyte and she initially took the view that the time for the filing of the defence, in accordance with rule 10.3(1) of the CPR, was 42 days from service of the claim form along with the particulars of claim. However, Miss Whyte subsequently formed the view that the non-filing of the particulars of claim ought not to deter the filing of the defence but, by that time, it became necessary to seek the consent of the appellant's attorney-at-law, Mr Owen Crosbie, to file the defence out of time.

[5] A written request to that effect was made by Miss Whyte and, in response, a letter dated 17 November 2011, was received from Mr Crosbie, agreeing to the filing of the defence by 25 November 2011 and referring to five signed copies of the document evidencing that consent, as being dispatched to her by priority mail. However, Miss Whyte's affidavit evidence was that the consent documents were not received and this was communicated to Mr Crosbie but no response was received from him in time to meet the consent time frame. Faced with this dilemma, Miss Whyte filed the defence only, on 24 November 2011 and, after efforts to obtain signed copies of the consent agreement had failed, filed, on 8 December 2011, a notice headed "Consent To File Defence Out Of Time", signed by her and accompanied by Mr Crosbie's letter, indicating his consent. This became a point of argument before the learned judge inasmuch

as it was the appellant's contention that the relevant rule requires the actual signed consent agreement to accompany the defence (see rule 10.3(8) which only requires the defendant to "file details of such an agreement", with no indication as to when that should be done).

[6] The appellant filed a notice of application for court orders on 13 December 2011, seeking orders (1) that the defence filed in this matter be struck out or ignored "as not a Defence filed in law not being in accordance with Rules of Court" and (2) that "judgment in default of Defence be entered." This application eventually came up for hearing before the learned judge on 4 October 2012.

[7] On 15 November 2012, the learned judge refused the application and made the following consequential orders:

> "i. ...
> ii. The claimant is to file and serve particulars of claim on the 1st defendant within fourteen (14) days of the date hereof.
> iii. The defendant is permitted to file and serve an amended defence within fourteen (14) days of service of the said particulars of claim, the said defence to contain a certificate of truth that complies with the requirements of rule 3.12(8)(a) of the CPR.
> iv. The name of the 2nd defendant is struck out and the matter is to proceed only against the Attorney General.
> v. Half costs to the 1st defendant to be agreed or taxed."

The appellant contended that in making these orders the learned judge fell into error and this contention was at the core of his quest, on appeal, for a reversal of the orders.

The appeal

[8] It was determined that the appellant had need of the leave of this court to pursue an appeal, having not obtained leave in the court below and, in his application filed on 22 November 2012, to correct that position, he added an application for a stay of execution of the orders of the learned judge, pending the hearing of the appeal. The record shows that his applications were granted, "by consent", on 6 May 2013 and the hearing of the appeal was set to commence in the week of 18 November 2013. So it was that on 9 May 2013 the appellant filed a notice of appeal containing the following grounds:

> "(a) The weight of the evidence is in favour of the grant of the application. In the alternative,
>
> (b) Mistrial
>
> (c) Full costs should be to the Appellant and none to the Respondent."

[9] It is my fervent hope that the following summary captures the essence of the appellant's complaints and the arguments advanced, by both sides, in this matter. I have sought to address them under three heads: (a) the order for particulars of claim to be filed (the particulars of claim issue); (b) filing of the defence without the consent agreement (the consent issue); and (c) the severance of the 2nd defendant from the claim (the severance issue).

The particulars of claim issue

[10] Mr Crosbie, in his written submissions, contended that the learned judge's order for the appellant to file and serve particulars of claim (consequential order (ii) in para [7] above), was arbitrary and ill-conceived. He pointed out that the 1st respondent had conceded that that was not necessary and referred the court to paragraphs 8 and 9 of the affidavit of Miss Whyte, where she indicated that her initial opinion that a particulars of claim was required was based on rule 8.1(1) of the CPR, but, on a consideration of rule 8.2(1)(a), she had determined that that opinion was incorrect and had sought his consent to file the defence out of time. Therefore, Mr Crosbie contended, the filing or non-filing of a particulars of claim was not in issue, thus making the learned judge's order *ultra vires*.

[11] On the other hand, Miss Whyte, pointed out that the learned judge was obliged to deal with the matter inasmuch as she had argued that issues raised by the appellant in the court below were not addressed or not adequately addressed in the appellant's affidavit so that the claim needed to be properly particularized in an appropriate particulars of claim. This therefore became an issue, Miss Whyte submitted and the learned judge saw fit to resolve it by utilizing his general powers under rule 29.6 of the CPR, leading to consequential order (ii) (para [7] above), about which Mr Crosbie complained. The orders made were well within his competence, counsel argued and she urged the court to find that it was a proper exercise of the learned judge's case management powers.

Was this an issue and did the learned judge properly resolve it?

[12] In submissions before the learned judge Miss Whyte had addressed the appellant's complaints that there was no denial in the defence of certain paragraphs in his affidavit. This caused counsel to point out that the defence was a response to the facts outlined in the claim as no particulars of claim had been filed and the affidavit had really not sufficiently particularized the claim. Once this point was taken, the absence of the particulars of claim became an issue which had to be resolved by the learned judge. Mr Crosbie's contention that the learned judge's order was *ultra vires,* as there was no issue, based on Miss Whyte's concession, was not sustainable.

[13] Further, the learned judge's decision that a particulars of claim was required in this matter was not arrived at on the views of the 1st respondent's attorney-at-law but on a careful review of the rules relating to the filing of particulars of claim and the requirements for the use of affidavits in civil proceedings under the new CPR regime. It is certainly to be noted that Mr Crosbie offered no challenge to the learned judge's review of the rules in this regard.

[14] In that review, the learned judge referred to part 8 of the CPR, the subject of which is "How to Start Proceedings". Rule 8.1(1) mandates that proceedings are to commence with the filing of:

> "(a) the claim form; and
> (b) unless either rule 8.2(1)(b) or 8.2(2) applies-
>> (i) the particulars of claim; or

(ii) where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this Part."

[15] Rule 8.2, under the heading "Particulars of claim to be issued and served with claim form", sets out in rule 8.2(1) and (2) the instances where "A claim form may be issued and served without the particulars of claim (or affidavit or other document required by rule 8.1(1)(b)(ii)". The learned judge went through each instance and quite correctly, in my view, determined that they were inapplicable to the instant case. He found at the end of the day that in a case, such as the instant case, the rule requires that the claim be commenced by the filing of the claim form and particulars of claim (see para [33] of the judgment).

[16] It seems to me that the learned judge is correct that the practice in a claim for malicious prosecution is trial in open court with viva voce evidence and that affidavit evidence is normally for hearings in chambers, associated with fixed date claim forms. The appellant in paragraph 4 of the claim form referred to "other matters shown in the Claimant's Affidavit hereunto annexed" and to the learned judge, that showed that this affidavit was being used to supplement the information in the claim form (see paragraph [32] of his judgment). This led the learned judge to conclude that, in the circumstances, a particulars of claim and not an affidavit should be filed in this matter and that its non-filing is an irregularity.

[17] I am of the opinion that there is no substance in the appellant's complaint on this issue. There was nothing advanced by the appellant which showed any error in the learned judge's reasoning and conclusion that would warrant interference by this court. I accordingly endorsed his decision that the non filing of a particulars of claim was an irregularity and confirmed consequential order (ii) as stated in paragraph [7] above.

The consent issue

[18] Mr Crosbie referred to the learned judge's comment at paragraph [45] of his judgment, which indicates that the predominant practice in the courts is for the defence and the consent agreement to be filed together and, notwithstanding the reasons given by the learned judge for so doing, it was counsel's contention that he erred in seeking to depart from that practice. It was his submission that the non-filing of the two documents together infringed the rules and the learned judge erred in concluding otherwise.

[19] Counsel submitted that the appellant did make an offer to the 1st respondent's attorney-at-law which required acceptance by 25 November 2011, but she did not file and serve the defence by that date so there was no defence as required by the CPR. It was counsel's submission that consequential order (iii) made by the learned judge (see para [7] above) therefore cannot stand because it was not within the competence of the learned judge to make such an order in the face of the non-compliance with the terms of the consent agreement.

[20] Additionally, the learned judge erred in finding that the defence was in accordance with the consent agreement because it was filed on 24 November 2011, completely ignoring that service was also required to be effected by 25 November 2011, Mr Crosbie contended and this was not done. The finding that "the particular facts and circumstances of the instant case support the 1st respondent's contention that the defence was validly filed and should be regarded as having been validly served" (see paras [52] and [59] of the judgment) was entirely without evidentiary support, he submitted, since the evidence is that it was not filed and served in accordance with the offer exhibited to the 1st respondent's affidavit.

[21] Contrary to the learned judge's findings it was the 1st respondent who was in breach of the rules, counsel submitted, with manifest misinterpretation of the relevant portions of the CPR, resulting in the 1st respondent not filing his defence within 42 days, filing the defence without the consent agreement and filing it in a manner inconsistent with the terms of the consent offer. Counsel submitted that, as the defence was not filed in accordance with the offer and there was no application for an extension of time before the learned judge (as required by rule 10.3(9)), the defence was not properly filed. Filing cannot be done in an arbitrary manner, he said. Therefore, argued Mr Crosbie, since there is no defence, rule 10.2(5) applies and judgment for failure to defend may be entered against that defendant if Part 12 of the CPR allows it. He pointed out that the appellant's application was made under rule 12.3(b).

[22] Counsel also pointed out that ordering the 1st respondent to file "a certificate of truth that complies with the requirements of rule 3.12(8)(a) of the CPR" was an admission that there was non-compliance with the rules so the learned judge could have struck out the defence "although the certificate would be entirely irrelevant since there was no defence filed in law to be certified".

[23] In her response to Mr Crosbie's submissions Miss Whyte argued that the rule for filing the defence and consent is not mandatory but discretionary. She referred the court to the case of **Auburn Court Limited and Delbert Perrier v National Commercial Bank and RBTT Jamaica Ltd** SCCA No 27/2004 Application No 7/2009 (delivered 18 March 2009) and the judgment of Harris JA, submitting that the provision in the rules of methods for extending the 42 day period is an indication that the rule is not mandatory.

[24] In any event, counsel submitted, the defence was properly filed and the fact that it was not served on 25 November 2011 does not render the defence invalid. Service was attempted on 25 November 2011, Miss Whyte submitted and it was through no fault of the 1st respondent that it was not effected on that day. She argued that as the letter from Mr Crosbie referred to in paragraph 10 of her affidavit showed that the appellant had consented, a few days delay in filing the consent could not have prejudiced the appellant. Miss Whyte submitted that the learned judge's reasoning on the point is sound and she asked the court to accept it.

[25] It was counsel's contention that the 1st respondent saw no need to seek an amendment to the certificate of truth, being of the view that it adequately addressed the requirements of rule 3.12 but, the judge, on his own motion and in accordance with his case management powers, may make orders to ensure full compliance with the rules, if he finds it necessary to do so. Counsel submitted that the learned judge acted within his jurisdiction in permitting the defence to be amended and to add a certificate of truth which accords with the requirements of rule 3.12 (8)(a) the CPR.

[26] She referred us to the case of **Shakira Dixon v Donald Jackson** SCCA No 120/ 2005 (delivered 19 January 2006) where Harrison P held that although striking out the defence may be permissible under rule 3.13(1), in some circumstances that may be too extreme (as in that case which involved a failure to file a certificate of truth). This is such a case, counsel contended, where striking out for what the learned judge viewed as a technicality, would be too extreme. Further, counsel urged the court to accept that if the defence is filed out of time it does not follow that it has no merit and, to bolster this submission, she referred the court to **The Attorney General v Keron Matthews** [2011] UKPC 38.

Do the rules require the consent agreement to be filed with the defence and does failure to do so mean that the defence was not properly filed and served? Additionally, was the defence rendered invalid for failure to comply strictly with rule 3.12(8)(a) of the CPR?

[27] Resolving the consent issue included a determination of whether the defence had been properly filed and served. To that end the learned judge reviewed part 10 of the CPR relating to the defence, in the context of the evidence before him.

[28] In particular, he reviewed rule 10.3 which provides a period of 42 days for the filing of a defence after the service of the particulars of claim (hence the initial view taken by the 1st respondent that the trigger for the filing of the defence had not been activated in the instant case). Rule 10.3 also provides for the parties to agree to an extension of the 42 day period (rule 10.3(5)) and rule 10.3(7) limits the total period of any extension to 56 days. Rule 10.3 also provides that "[t]he defendant must file the details of such an agreement" (see rule 10.3(8)).

[29] The learned judge quite correctly noted that the only evidence relating to the filing of the defence came from the affidavit of Miss Whyte, particularly in paragraphs 16 to 18. Her evidence was that she filed the defence on 24 November 2011 and, in paragraph 18, she stated that "By letter dated November 30, 2011, Mr Crosbie confirmed that he had received the Defences and enquired whether anything else was filed on November 24, 2011 apart from the defences." (Maybe this was a veiled enquiry as to whether the consent was filed with the defence.)

[30] It was also her evidence that efforts were made to serve the defence on 25 November 2011 which was the final date, according to the consent agreement. The learned judge was entitled to accept Miss Whyte's unchallenged evidence that her efforts were thwarted by a malfunctioning facsimile machine in Mr Crosbie's office and

as the 25th was a Friday, service was effected by priority mail on the next working day, which was Monday, 28 November 2011. The learned judge pointed out that in their dealings in this matter there were many instances of facsimile transmissions and this was permissible under rule 6.2 of the CPR.

[31] Was the defence improperly filed because the consent agreement not filed simultaneously with it? Rule 10.3(8) in providing for details of the consent agreement to be filed, does not state that it must be filed with the defence. The learned judge, although of the view that the predominant practice is and has been for the two documents to be filed together, accepted that "it is true that the present rule does not specifically state that the evidence or details of the consent must be filed at the same time" and found that failure to follow the practice was not fatal. He based this finding on the surrounding circumstances of this case such as the fact that there was consent as evidenced by Mr Crosbie's letter dated 17 November 2011 in which he wrote "please treat this as our consent..."

[32] The learned judge accepted that the non-receipt of the consent documents was the reason for what he termed "the unusual form of the consent". This, he said, was consistent with Miss Whyte's position that she had not received the consent documents. Had she received them, he said, she would have filed them instead of the letter. The learned judge added that, although belatedly, the consent was filed before the notice of application to strike out the defence and he considered this in the context of the overriding objective of enabling the court to deal with cases justly (rule 1.1(1) and (2) of the CPR).

[33] He reasoned that to find otherwise than that the defence was validly filed and served would be to give pre-eminence to form over substance and would not be in keeping with the overriding objective. With this I entirely agree. In my opinion, the appellant's complaints about the filing and serving of the defence and the challenge to the validity of the defence based on the failure to file the consent documents simultaneously with the defence, is without merit.

[34] Additionally, although the appellant made no issue of the form of the certificate of truth utilized by the 1st respondent in the defence, the learned judge, on his own volition, questioned whether the certificate of truth complied with rule 3.12(8)(a) of the CPR. That rule requires the attorney-at-law certifying the facts contained in the document to certify that the party supplying the facts believe them to be true and that the certificate is given on that party's instructions. It should also state that the party is unable to give the certificate personally and should give the reason for the inability to do so.

[35] However, in the defence, Miss Whyte, on behalf of the 1st respondent stated thus "I therefore certify on his behalf that all the facts set out in this Defence are true to the best of my knowledge, information and belief" which, to the learned judge, did not comply with rule 3.12(8)(a) of the CPR. It was his view that the belief referred to in the rule must be that of the person from whom the instructions are received. But, said the learned judge, that deviation, did not warrant striking out the defence and support for this view is to be found in **Shakira Dixon**, a judgment of this court relied on by Miss Whyte in her submissions.

[36] As I see it, the learned judge was exercising the discretion provided in rule 3.13(1) which states that "[t]he court may strike out any statement of case which has not been verified by a certificate of truth". At paragraph [82] of his judgment the learned judge said that there had been substantial compliance with the provisions of rule 3.12 and "no ascertainable prejudice to the claimant and to strike out this statement of case on the basis of what amounts in the court's view to a technicality, would not be in keeping with the overriding objective". In my opinion, there was no misunderstanding of the law or of the evidence before him and no basis for interfering with the exercise of the learned judge's discretion (see **Hadmor Productions Ltd v Hamilton** [1983] 1 AC 191; [1982] 1 All ER 1042 HL)

The severance issue

[37] There was no issue taken concerning the joinder of the Attorney General and the 2nd respondent, Mr Crosbie contended as, from the outset, in paragraph 1 of the 1st respondent's defence, it was admitted that the parties were properly joined when it stated that the 2nd respondent was the servant or agent of the 1st respondent and was acting in the course of his employment. In striking the 2nd respondent from the claim the learned judge was therefore clearly in error and, counsel submitted, the joinder of the 1st respondent was proper by virtue of the Crown Proceedings Act. He therefore asked the court to restore the 2nd respondent as a party to the action.

[38] It was Mr Crosbie's further submission that the result of the removal of the 2nd respondent from the action is a defence based on hearsay, speaking of what the 2nd respondent had to say. Counsel pointed out that rule 10.5 requires that the defence set out all the facts on which the defendant relies to dispute the claim and therefore does not admit of hearsay.

[39] In her counter arguments Miss Whyte submitted that joinder became an issue when the appellant complained that the 1st respondent had refused to accept service for the 2nd respondent thereby making it a matter for the determination of the learned judge. She referred the court to **Colis Clarke and Others v Attorney General and Others** Claim No 2008 HCV 04088 (delivered 21 January 2010) in support of her submission on this issue.

[40] The 1st respondent's refusal to accept service on behalf of the 2nd respondent was based on section 13(2) of the Crown Proceedings Act which mandates that all civil proceedings against the Crown must be instituted against the Attorney General, Miss Whyte submitted. It was her submission that where the Crown agent is not on a frolic of his own the Attorney General is the proper party to be sued and she referred the court to the case of **The Attorney General v Gladstone Miller** SCCA No 95/1997 (delivered on 24 May 2000), which was a case cited before the learned trial judge. He took guidance also from **Lewis v Minister of Labour and National Insurance et al** (1966) 9 WIR 459, a case which, counsel submitted, shows that a Crown's agent cannot be sued for acts done in his official capacity.

[41] Furthermore, Mr Crosbie's contention that the defence was based on hearsay was incorrect, Miss Whyte submitted, as although rule 10.5 of the CPR requires that the defence must set out all the facts on which the defendant relies to dispute the claim, in the peculiar circumstances of the 1st respondent who must act in a representative capacity by virtue of section 13(2) of the Crown Proceedings Act, the facts would have to come from the instructions of the Crown's servant/agent who, in this claim, would be the 2nd respondent and the defence filed must, of necessity, contain the facts based on the instructions of the 2nd respondent.

[42] At the end of the day, Miss Whyte submitted, the appellant had not advanced any reasonable error in the learned judge's decision. The issues before him, she said, were not sufficient for him to use such a draconian measure as striking out which is really a last resort and she urged the court to dismiss the appeal.

[43] In his reply Mr Crosbie submitted that the law on vicarious liability is clear and is not consistent with the approach advanced by the 1st respondent. He further submitted that at common law a man is liable for the consequences of his own actions whether he be agent of the Crown or otherwise. The only exceptions, he said, are judges.

Did the learned judge err in removing the 2nd respondent from the claim?

[44] In my view, the law and the authorities would require the learned judge, without any prompting, to address the joinder of the two parties named as defendants in the claim before him. It was not disputed that the named 2nd respondent was a crown servant and that he was acting in the course of his employment. Therefore, it would have been clear to the learned judge that the provisions of section 13(2) of the Crown Proceedings Act must apply to this claim. At paragraph [71] he said

> "All the acts alleged to have been done against the claimant were done by the 2nd defendant pursuant to his powers and duties as a member of the Jamaica Constabulary Force. and vicarious liability is not in issue."

[45] Indeed, in **The Attorney General v Gladstone Miller**, Bingham JA with whom the other members of the court agreed, had this to say at page 9 of the judgment (after tracing the development of the law relating to civil suits against the Crown):

> "Although claims in tort could still be brought against the Crown- servant or employee alone, once it was established that he was acting within the course or the scope of his employment the proper defendant to be sued was the Attorney General, he being the official representative of the Crown by virtue of his office. A suit against the servant or employee alone therefore would be meaningless, as the Attorney General could enter an appearance and take over the defence of the suit. It is in this vein that section 13(2) of the Crown Proceedings Act mandates that 'Civil Proceedings against the Crown shall be instituted against the Crown [sic]' ."

[46] It is clear therefore that Miss Whyte's submission that, in these circumstances, there is no breach of rule 10.5(1), is sound and the appellant's contention that the defence of the 1st respondent amounted to hearsay, is entirely without merit. As

Miss Whyte correctly submitted, any defendant who is sued in a representative capacity must base his or her defence on instructions from the person whom he or she represents and in the instant case the 1st respondent's defence answers the allegations against the 2nd respondent, in keeping with the 1st respondent's position as his representative. The learned judge expressed it in this way:

> "In these circumstances the defence must be a reflection of the instructions the 1st defendant receives from the 2nd defendant.... The hearsay rule is an evidential one and so relates to evidence; and not so much to pleadings or statements of case."

The learned trial judge therefore found that the defence properly contained the facts or instructions given by the 2nd respondent which clearly showed his acceptance that the defence was not in breach of rule 10.5(1).

[47] It seems to me that, in all the circumstances, the findings of the learned judge on this issue are unassailable.

The final analysis

[48] After what, in my opinion, was a careful analysis of the facts and circumstances of the case before him, the learned judge concluded that, although there were irregularities on both sides, they were mostly on the part of the appellant and that he was entitled to put matters right by using his case management powers under rule 26.9(3) of the CPR. However, Mr Crosbie strongly disagreed with this assessment

and maintained that the irregularities were only on the 1st respondent's part. Counsel submitted that the learned judge had failed to show that there was any irregularity on the part of the appellant, but this seems to me to be devoid of merit.

[49] Paragraph [32] of his judgment provides some examples of the irregularities to which the learned judge referred. This is what he had to say:

> "Additionally, the claimant has not (as required by rule 8.7(1)(d)) stated his occupation in the claim form. (Neither has he exhibited to the claim form the information with the learned resident magistrate's endorsement terminating the proceedings in his favour - to which he refers in paragraph 3 of the claim form, and on which he, presumably, will be relying)."

The learned judge went on to indicate the basis for his conclusion that a particulars of claim should have been filed by the appellant and found that its non-filing was an irregularity. It therefore is not correct to say, as Mr Crosbie stated in paragraph 10 of his written submissions that "... there is nothing shown as irregularity/s [sic] on the part of the applicant...."

[50] In my opinion, on the evidence before him, the learned judge was entitled to conclude that it did not warrant the draconian step of striking out the 1st respondent's defence. The appellant has failed to show that there was anything palpably wrong with the learned judge's assessment of the evidence requiring this court to interfere with the exercise of his discretion to refuse the application. Ground 1 and its alternative therefore failed.

[51] Accordingly, I agreed that the learned judge's decision should be upheld and the appeal dismissed with costs to the 1st respondent to be taxed if not sooner agreed.

LAWRENCE-BESWICK JA (AG)

[52] I too have read the draft reasons for judgment of McIntosh JA. I agree with her reasoning and conclusion and have nothing to add.