

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 96/2011**

**BEFORE:           THE HON MRS JUSTICE HARRIS JA  
                          THE HON MR JUSTICE DUKHARAN JA  
                          THE HON MISS JUSTICE PHILLIPS JA**

**BETWEEN           CHESTER HAMILTON                           APPELLANT  
AND                 COMMISSIONER OF POLICE                 RESPONDENT**

**Mrs Denise Senior-Smith instructed by Oswest Senior-Smith and Company  
for the appellant**

**Miss Lisa White and Miss Alicia McIntosh instructed by the Director of State  
Proceedings for the respondent**

**17 October 2012 and 31 July 2013**

**HARRIS JA**

[1] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and conclusion. I have nothing to add.

**DUKHARAN JA**

[2] I too have read the draft judgment of my sister Phillips JA and agree.

**PHILLIPS JA**

[3] This is an appeal from the decision of Brooks J (as he then was) given on 2 August 2011 where he ordered that:

1. The Fixed Date Claim Form not having been accompanied by an affidavit at the time that it was filed was a nullity.
2. The claim was dismissed.
3. Leave to appeal was granted.
4. Costs were to be agreed or taxed and paid to the respondent.

[4] The appeal relates to judicial review proceedings, where the appellant, having obtained leave from Daye J to make a claim for judicial review, filed a fixed date claim form within the time required by the rules, and served the same within the time required by the rules but together with the affidavit which had been filed in support of the application to obtain leave. The affidavit had not been refiled subsequent to obtaining the order of Daye J.

### **The proceedings in the court below**

[5] The ex parte notice of application for leave to apply for judicial review was filed on 4 November 2009 and sought leave to apply for judicial review of the decision of the Jamaica Constabulary Force (the Force) set out in Force Orders dated 14 May 2009 and bearing serial no 3232, which informed the appellant that he was to cease performing duties with the Criminal Investigation Branch and that he was reassigned to general duties with effect from 18 May 2009.

[6] The application was based on several grounds, inter alia, that the decision constituted an arbitrary and oppressive exercise on the part of the respondent, who had

acted in breach of natural justice and the Force's regulations. The order, it stated, was required for the fair and just disposal of the matter, pursuant to the overriding objective, and on the basis that the application had been filed in time. Additionally, if leave was refused, the appellant claimed, he would suffer substantial prejudice and it would be detrimental to the relevance of the Force's grievance procedure and policy and its statutory regulations.

[7] The affidavit in support of the application was sworn to by the appellant, and he deposed that he had been a member of the Force for over 14 years, having been first assigned to the Kingston East Division, where he started out in the guard room doing general police duties as a constable. In 1998 he joined the Criminal Investigation Branch as an aide and was appointed full detective in 1998. In 2005 he was promoted to the rank of detective corporal. He stated that he had received, by weekly Force Orders bearing serial number 3249 and dated 10 September 2009, commendation for efficient and dedicated service in respect of his "zeal, energy and initiative displayed considerably beyond the average in the performance of duty for ... 2008". He averred that since his engagement with the Force he had performed his duties impeccably and taken his job seriously. In fact, by letter of 16 February 2009, which he exhibited to the affidavit, he had been approved to act in the position of sergeant. He referred to the Police Service Regulations 1961 to confirm that appointments are made by the Police Service Commission pursuant to the criteria set out in the regulations, for example, giving preference to those members who have manifested, "superior intelligence and efficiency in the performance of their functions".

[8] He stated that it therefore came as a surprise to him when he received the letter of 14 May 2009, indicating that he had been reassigned from performing duties with the Criminal Investigation Branch to general duties. He instructed his attorneys to act on his behalf, and was initially informed by the respondent, in response to a letter from the attorneys, that the matter was receiving attention, and that he would receive further communication from the office. That communication came in the form of a letter dated 8 September 2009, which is the crux of this matter, and which I will therefore set out in its entirety.

September 8, 2009

"No. 7024 D/Corporal Chester Hamilton  
c/o Kingston Western Division

**Re-assignment to ordinary duties**

You are hereby notified that you are no longer deemed suitable to continue to perform C.I.B duties and is [sic] therefore re-assigned to ordinary duties with immediate effect.

This results from your handling of the investigation of the matter involving the carnal abuse and subsequent abduction of Jhaneel Gouldbourne, in which Constable Rushan Hamilton is implicated, which is deemed to be unprofessional. This is in addition to your poor work attitude as assessed by previous supervisor, D.S.P i/c of Crime, Kingston Eastern Division.

Your poor handling of this matter necessitated the re-assignment of the case to another investigator.

In light of the foregoing, you have lost the confidence of the organization in performing in the capacity of a member of the C.I.B and steps are being taken to assess your suitability for continued service with the organization.

You may respond to this notice within seven (7) days of receipt of same.

[Sgd.]

Assistant Commissioner of Police

Administration.”

[9] The appellant further averred that it was clear that this letter suggested unprofessional conduct on his behalf, which he denied. He set out what he recalled of the matter which had been referred to specifically. He indicated that he had received a report in October 2008 about a girl missing in the Harbour View area. He said that he had conducted his investigations and thereafter produced a report. The matter was then taken over by Inspector Davis, being of superior rank to him in the Force. Searches, he said, were conducted but the girl had not been found. He was asked to proffer charges against one Rachel Roberts, but he was of the view that there was not sufficient evidence to do so, and he confirmed this at the Office of the Director of Public Prosecutions by consultation with Mr Dirk Harrison, a deputy director of public prosecutions. He subsequently advised the inspector of this, who took the file from him, indicated that if he was not comfortable with what was in the file, he should “let his conscience be his guide”, which he therefore thought was the end of the matter. Charges were, however, subsequently laid against the said Rachel Roberts, he said, but the matter was dismissed for lack of evidence.

[10] He further deposed that the decision to re-assign his duties had caused him embarrassment, financial loss, and had affected his prospects for further promotion in the Force. He had not been given an opportunity to answer the charges laid against him

before the Force Orders were published. His colleagues, he said, viewed him as if he had been involved in unlawful conduct.

[11] On 22 February 2010, Daye J made the following orders, which have not been challenged:

- “ i. Leave granted to apply for judicial review.
- ii. Fixed Date Claim Form to be served on the Respondent within fourteen (14) days of the date hereof.
- iii. First hearing to be held on 15<sup>th</sup> June, 2010 at 3:30 p.m., for half (1/2) hour.”

[12] The fixed date claim form was filed on 8 March 2010, the 14<sup>th</sup> day after the order of Daye J. The orders sought were as follows:

- “1. An Order of Certiorari to quash the decision of the Respondents to demote the Applicant from the rank of Detective Corporal to the rank of Corporal and transfer the Applicant from the Kingston Eastern Division to the Kingston Western Division as per letter dated September 9 [sic], 2009.
- 2. An Order of Mandamus directed to the Respondents [sic] to compel the Respondents [sic] to reinstate the Applicant in the position of Detective Corporal so that he can perform his duties and receive his full salary.
- 3. Costs and Attorneys-at-law [sic] costs of this Application.
- 4. Such further and other relief as this Honourable Court may deem just.”

[13] The grounds of the claim focused on the breach of the principles of natural justice, in that the appellant claimed that he had not been made aware of any complaint against him, nor had he received any warning about his alleged conduct nor

had he been given an opportunity of a hearing in relation to any allegations which had been made against him.

[14] As indicated in paragraph [4] herein, the fixed date claim form was served at the Office of the Commissioner of Police, with the affidavit of the appellant which had been filed in support of the application for leave to apply for judicial review, referred to at paragraphs [6] to [9] herein, within 14 days of the order of Daye J, namely 8 March 2010. Evidence of the service of the documents was given by way of the affidavits of Miss Nesseine Mardner and Mrs Denise Senior-Smith, sworn to on 29 July 2011.

[15] At the first hearing of the fixed date claim form before Brooks J (as he then was), note was taken of the service mentioned above, and the fact that no affidavit had been filed with the fixed date claim form. Although submissions were made to distinguish this case from others, the learned judge indicated that he was bound by the dictum of Harris JA in **Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller** SCCA No 3/2008, delivered 11 April 2008, and he made the orders set out in paragraph [3] herein.

### **The appeal**

[16] On 9 August 2011 the appellant filed the notice of appeal and an amended notice on 20 June 2012. There were two main grounds of appeal, which read as follows:

“1. A. The learned Judge in Chambers erred in dismissing the Claim and ought to have granted relief under Rule 26.9 of the Civil Procedure Rules since:

- i. The appellant did serve his Affidavit being relied on along with the Fixed Date Claim Form within the fourteen (14) days stipulated by the Rules.
- ii. The Appellant satisfied Rule 56.11(1) which states that the Claim Form and Affidavit in Support must be served on all persons directly affected not less than fourteen (14) days before the date fixed for the hearing.
- iii. The Appellant served the Fixed date Claim Form and his Affidavit in Support within fourteen (14) days of the receipt of the Order granting leave and would have in substance satisfied the condition to present his claim within fourteen (14) days of the grant of leave.
- iv. The Affidavit of Chester Hamilton filed on the 16<sup>th</sup> February 2012 [sic] that was served on the Respondent satisfied Rule 56.9(3) and hence could be relied on by the Appellant in Support of his Claim and further that the Appellant having already filed an Affidavit containing the requirements of Rule 56.9(3) and served same on the Respondent within the time stipulated for leave should not render his Claim a nullity.

2. The Learned Judge erred that the filing of the Affidavit is conditional upon leave being granted."

### **The issues on appeal**

[17] In my view, the issues on appeal can be distilled thus:

- (i) As the leave is conditional on the applicant making a claim for judicial review, if the fixed date claim form is filed within 14 days of receipt of the order granting leave, is the condition satisfied, or does the leave lapse, if the applicant does not file an affidavit with the fixed date claim form, but serves the fixed date claim form

within the time specified in the rules, with the affidavit filed in support of the application for leave? and

- (ii) Can the provisions of rule 26.9 of the Civil Procedure Rules (CPR) cure the failure to file the affidavit with the fixed date claim form pursuant to rules 56.9(2) and (3)?

### **The submissions**

[18] Counsel for the appellant firstly relied on rule 1.1(1) of the CPR, the overriding objective, that is, to deal with cases justly, and rule 1.1(2) requiring the court to give effect to the overriding objective when it exercises any power under the CPR, especially the general powers of management set out in rule 26.1 and particularly rule 26.1 (2) (v), where the court can take any step, give any direction or make any order for the purpose of managing the case and furthering the overriding objective.

[19] Counsel relied further on rule 8.1(2) to support her submission that “proceedings are started by claim form either as set out in form 1 or 2, and a claim exists in the filing of these documents”. She referred to rule 27.2 dealing with the first hearing of the fixed date claim form, and submitted that the rule addressed the claim form specifically without mentioning the affidavit in support of it, which, she said, indicated that the fixed date claim form stood on its own, but the court could not determine any questions without the affidavit being filed. She drew the court’s attention to the fact that whereas rule 56.9(2) requires that an affidavit must be filed with the fixed dated claim form, rule 56.4(12) makes no reference to it.

[20] Thus, it was argued that there were two schools of thought: one which required that the fixed date claim form be filed within 14 days of obtaining leave of the court to apply for judicial review, and the other that the fixed date claim form must be filed with the affidavit in support for the leave condition to be satisfied. She relied on the former, stating that once the fixed date claim form had been filed within the 14 days as specified, the condition stated in rule 56.4(12) had been complied with, and any failure to file "a document in support within the time stipulated would not render the Claim a nullity but would appropriately be described as a procedural error which could fall under Rule 26.9". Counsel submitted that the only error of procedure which had occurred, was the failure to file with the fixed date claim form evidence on affidavit as set out in rule 56.9(2). Additionally, counsel contended, that the affidavit which had been served, with the fixed date claim form, had complied with rule 56.9(3) and so the respondent would have had notice of the facts being relied on and, having been made aware of the claim in the time stipulated and the evidence in support, the appellant would have "in substance satisfied the Order of the Court". Counsel stated that if the appellant did not succeed on the application before the court, a grave injustice would have been committed, in circumstances where, in the failure to file the affidavit with the fixed date claim form, no prejudice had been suffered by the respondent.

[21] Counsel relied on the overriding objective to reiterate the argument that as the respondent had been served with the affidavit previously filed, the respondent was aware that the appellant was relying on it, and so the affidavit not having been filed in

the stipulated time, should not be a basis for dismissal, and the court ought not to dismiss the claim. Counsel referred to and relied on a case out of the Federal Court of Australia, **Joseph Richard Bryant v Commonwealth Bank of Australia** [1995] FCA 1687 (24 November 1995), in support of this submission. Counsel argued further that the learned judge did not exercise his discretion to grant an extension of time, in respect of the filing or consideration of the affidavit previously filed and served with the fixed date claim form, as he said that he was constrained by the dictum of Harris JA in **Golding v Simpson Miller**.

[22] Counsel for the respondent argued that judicial review proceedings are to be pursued with alacrity and must be construed strictly as set out in part 56 of the CPR.

Counsel posed five questions which she asked the court to consider:

- (i) Is there a difference between the application for leave for judicial review and the application for judicial review? Counsel indicated that the answer must be "yes".
- (ii) Can the affidavit filed in support of the application for leave to apply for judicial review automatically form part of the claim to be filed after leave has been given? The answer, she submitted, must be "no".
- (iii) Does a fresh affidavit need to be filed after leave for judicial review has been granted? The answer submitted was "yes".
- (iv) Would a puisne judge of the Supreme Court have the authority or jurisdiction to make an order that only the fixed dated claim form should be filed after leave is granted given the scheme of the Civil Procedure Rules and the binding authority of **Golding v Simpson Miller**? The answer submitted was "no".

- (v) Can an applicant for leave for judicial review who fails to comply with the condition under rule 56.4(12) pray in aid rule 26.9 of the CPR? the answer submitted was "no".

[23] In answer to the court in respect of the last question as to whether the court could correct the situation where the affidavit filed previously had been served after the leave had been granted, counsel responded emphatically in the negative. Counsel submitted that parts 25-27 referred to in rule 56.13 are only applicable when a claim is extant and cannot refer to, nor correct any errors in proceedings, which do not exist. It was counsel's contention that pursuant to rule 2.4 of the CPR a "claim" must be construed in accordance with part 8, particularly rule 8.1 which stipulates that for a claim generally to exist, whether the originating document is in form 1 or form 2, it must be accompanied by another originating document which sets out the basis for the claim which is being filed.

[24] Counsel submitted that rule 56.4(12) indicates that the leave is conditional on the filing of a claim and part 8 refers to the filing of a claim, with the supporting document. The fixed date claim form is irregular if filed before the leave is granted, and so it must also, to be valid, require the affidavit to be filed after the leave is granted. Rule 56.4(12) does not speak to the leave lapsing, she submitted, but the leave is not absolute, and if the applicant wishes to obtain the remedy available under part 56 he has the obligation, without any choice but to "make a claim". To do this he cannot, counsel submitted, approach the court with a fixed date claim form only, or he would not have complied with the condition set out in rule 56.4(12), and having failed to do so

the leave would have lapsed. Counsel maintained that rule 56.9 could not be divorced from rule 56.4(12). A fresh affidavit must, she stated, be filed. Even if the applicant is intending to rely on the same affidavit, it must be refiled.

[25] Counsel argued strenuously that once the applicant had failed to make a claim within the 14 days prescribed by the CPR, rule 26.9 could not avail him. The application cannot be renewed under the rules and so no extension could be granted as no claim existed.

[26] Counsel relied on the judgments in **Malica Reid v The Commissioner of the Independent Commission of Investigations et al**, Claim No HCV 00981/2011 delivered 29 July 2011 and **Golding v Simpson Miller** for the correct statement of the law and stated that the facts in **Joseph Bryant v Commonwealth Bank of Australia** were dissimilar to those of the instant case, and could not assist the court, particularly as that case was dealing with private and not public law.

[27] With regard to whether any prejudice had been occasioned by the respondent, counsel reiterated that the judicial review process ought to be utilised speedily, and in the instant case, the appellant was challenging a decision made more than three years ago. Counsel implored the court to have regard for what she termed “the good administration of the Jamaica Constabulary Force” and dismiss the appeal as the appellant should have followed the rules strictly and not tried to get “another bite of the cherry”.

## **Discussion and Analysis**

[28] There are several rules of the CPR which are relevant to the determination of this appeal, which I will deal with where appropriate.

[29] It is a cardinal rule of construction that words must be given their natural and ordinary meanings. The provisions of the CPR make it clear that a "claim" and "claim form" must be construed according to part 8 (rule 2.4). Part 8 deals with how to start proceedings. It states, *inter alia*, that a claimant who wishes to start proceedings must file a claim form in form 1 or 2, and unless it is a case of emergency and one can so certify, and an application has been filed to obtain the permission of the court or the permission of the court has been obtained not to do so, the particulars of claim, or an affidavit giving the details of the claim as required, must also be filed. The rules state, however, that the proceedings are started when the claim form is filed (rule 8.1(2)), which is when it is received in the registry (rule 3.7). There is no rule indicating a sanction if the claim form is filed and the particulars of claim or the affidavit giving the details of the claim is not also filed.

[30] The rules also state that the claim form may be issued (when sealed by the court (rule 3.9)) and served without the particulars of claim or affidavit as the case may be, if the matters set out in rule 8.6, 8.7, 8.8, 8.9 and 8.10 are included in the claim form, (for example, a request for declaratory judgment, information on the nature of the claim, the remedy sought, damages, interest, the legal basis for the claim, the particulars of all material facts and the certificate of value), and the court has given

permission, or the case is one of emergency and the claimant has so certified or applied to the court for permission. The certification and application to the court for the permission to serve the claim form without the particulars of claim and/or affidavit in support and/or the order granting permission, must be served with the claim form. The rules set out the basis on which the court may grant that permission, and it is clear that the claimant can take no further steps, except to serve the claim form, until the said permission is given. No other sanction is stated. Rule 8.16 states that when the claim form is served it must be accompanied by certain documents. Again, no sanction is stated, if the rule is not complied with. It is without doubt though, that that rule is mandatory in nature, and that the claimant would not be able to take a fresh step, for instance, to request entry of a default judgment in circumstances where there has not been compliance with it. Any judgment obtained in default, based on such defective service of the claim form, namely without the required accompanying documents could be set aside *ex debito justitiae* as being irregular. But, in my view, the proceedings would not be a nullity and would still be accepted as having been commenced or made (see **Dorothy Vendryes v Dr Richard Keane and Karene Keane** [2011] JMCA Civ 15 and **B & J Equipment Rental Limited v Joseph Nanco** [2013] JMCA Civ 2).

[31] Part 56 of the CPR deals with administrative law which includes applications for judicial review. The provisions make it clear that a person wishing to apply for judicial review must first obtain leave to do so (rule 56.3) and the application for leave must be considered forthwith by a judge of the Supreme Court (rule 56.4(1)). Rule 56.4(11) and (12) have serious significance in relation to this appeal. On the grant of leave, the

judge must direct when the first hearing or, in the case of an emergency, the full hearing of the claim for judicial review should take place (rule 56.4(11)), and of even more importance the leave when obtained is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave (rule 56.4(12)). It is important to note that rule 56.4(12) does not specifically state that leave is conditional on the filing of an affidavit with the fixed date claim form or otherwise. The condition refers to "making a claim". There is also no mention of the claim being a nullity for failure to comply with the specific provision. The leave as stated is not absolute, it is conditional, and is inchoate unless the claim is made within 14 days of the grant of leave.

[32] Rule 56.9 (1), (2) and (3) is also of serious significance to the outcome of this appeal. It is obvious that an application for an administrative order must be made by a fixed date claim form, in form 2 identifying whether the application is for judicial review, relief under the Constitution, a declaration, or for some other administrative order, and naming it, as the case may be. It must also identify the nature of the relief sought (56.9(1)). A claimant must file with the claim form evidence on affidavit (rule 56.9(2)), and the affidavit must state the address of the claimant and the defendant and details identifying the nature of the relief sought (rule 56.9(3)). The rules do not state that a claim for judicial review is not made if the affidavit is not filed with the fixed date claim form. There is no sanction stated if the affidavit is not filed with the fixed date claim form. But what is clear, is that the rule does state that the application for an

administrative order is **made** by a fixed date claim form in form 2. Additionally, as already stated, proceedings are started when the claim form is filed (rule 8.1(2)).

[33] Contrary to what the respondent has submitted, rule 56.4(12) does not say that the leave is conditional on the filing of the fixed date claim form with the accompanying affidavit. What the rule says is that the leave is conditional on the "making of a claim" within 14 days of receipt of the order granting leave, and as stated the application for judicial review is made by fixed date claim form in form 2 (rule 56.9(1)). Also of interest is the fact that on 22 February 2010 Daye J when granting leave to apply for judicial review, also made the orders that, "ii Fixed Date Claim Form to be served on the Respondent within fourteen days of the date hereof. iii First hearing to be held on 15<sup>th</sup> June 2010 at 3:30 p.m. for half (1/2) hour". There was no mention by the court that the affidavit required in the rules should be filed and/or served with the fixed date claim form or otherwise, nor within the required time frame. In my view, it could not have been the intent of the court to direct the claimant to act outside of the requirement of the rules, and may have been an omission on the part of the learned judge. The court also could have assumed that the applicant would have complied with the rules, namely rule 56.9(2). This should not be taken as an indication that the rules should be ignored, however. That having been said, in my opinion, in the instant case the filing and service of the fixed date claim form on 8 March 2010, within 14 days of the order granting leave, would have been in compliance with the order of the court and with rule 56.4(12), and the condition stated therein would have been satisfied.

[34] It is also my view, however, that the previously filed affidavit could not satisfy rule 56.9(2) and so there would not have been compliance with that rule. As indicated, rule 56.9(2) states that the affidavit must be filed with the fixed date claim form. In order to comply with that rule therefore, the affidavit would have to be filed subsequent to the order granting leave just as the fixed date claim has to be so filed to have efficacy, which was stated in **Lafette Edgehill, Dwight Reid, Donnette Spence v Greg Christie** [2012] JMCA Civ 16, which I will deal with later in this judgment. I agree with the submission of counsel for the respondent that there is no similar provision in the CPR to clause 425 of the Judicature (Civil Procedure Code) Law (CPC), which permitted the use of affidavits previously made and read in court, to be used before a judge in chambers. Prima facie therefore, service of the affidavit previously filed (in support of the application for leave to apply for judicial review) with the fixed date claim form (filed 14 days after the grant of the leave), would have been irregular.

[35] Rule 56.13 provides that the judge must give any directions to ensure the expeditious and just trial of the claim. In that regard, it is stated that parts 25-27 apply, which deal specifically with the court furthering the overriding objective by actively managing cases, the court's general powers of management and the procedures by which the courts will manage cases. Counsel for the respondent had argued that provisions relating to the management of cases had no relevance to the instant case, and were inapplicable, as parts 25-27 could only be invoked in circumstances where a claim was in existence, which would no longer be the case when rule 56.9(2) had not

been complied with. The fixed date claim form, she argued, was a nullity. The claim no longer existed. Bearing in mind what I have already said with regard to the making of the claim by the filing of the fixed date claim form, it is clear that I do not agree. The fixed date claim form was in existence and could have been managed by the court utilizing its general powers of management.

[36] Rule 27.2 addresses the first hearing of fixed date claim forms generally, but refers to the registry fixing a date, time and place for the first hearing of the claim when the fixed date claim form has been issued, meaning, as already stated, having been impressed with the seal of the court. Of course, in the case of administrative orders, rule 56.4(11) makes it clear that on the grant of leave the judge, and not the registry, must direct when the first hearing shall take place. However, rule 27.2 does speak to service of the fixed date claim form being required not less than 14 days before the first hearing. Again, there is no mention of the required affidavit under rule 56.9(2). I would not agree with counsel for the appellant, however, that the wording therefore suggests that the fixed date claim form has an independent life of its own. Service, in my view, without the affidavit would be in breach of rule 8.2 and would be irregular. The question is can the failure to comply with rule 56.9(2) and consequently rule 8.2 be cured?

[37] This brings me to the "catch-all" rule 26.9, which deals with the general power of the court to rectify matters where there has been a procedural error. But there are restrictions. The rule only applies where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule practice

direction or court order. Counsel for the respondent argued forcefully that rule 56.4(12) sets out clearly the consequence of not filing the affidavit, and that is that the leave being conditional would lapse, and the claim would therefore not exist. I do not agree. As pointed out, that rule does not refer to the affidavit at all, but to making a claim. Had the claim not been filed, in my view, the situation would have been different as rule 56.4(12) sets out the consequence of the failure to make the claim. The claim having been made, however, the leave becomes absolute, and the failure to file the affidavit would not, in my view, have invalidated any step taken in the proceedings, unless the court so ordered (rule 26.9(2)), although none was taken in the instant case, as the court ordered that the claim was a nullity. There is therefore no stated consequence in the facts of this case in respect of the failure to comply with a rule. In these circumstances, pursuant to rule 26.9(3) where there has been a failure to comply with a rule, the court can make an order to put matters right. In this case, the court could have ordered the affidavit to be refiled and the fixed date claim form to be re-served with it.

#### Some relevant authorities

[38] There have been a few fairly recent cases decided in this court dealing with certain aspects of the procedure to be followed with regard to administrative orders, particularly the applications for judicial review, some of which have already been referred to by counsel in their submissions. I think it may be prudent to give a comparative analysis of these cases in an effort to dispel certain confusion which

appears to exist with regard to the filing of the application for judicial review, and which may result in injustice, if counsel had failed to strictly adhere to the required procedure.

[39] In the **Edgehill et al v Greg Christie** case, the facts were that the applicants had filed their applications for leave for judicial review, their affidavits in support and the fixed date claim forms all at one and the same time. Leave to proceed to judicial review was granted and the applicants, through their counsel, then attended on the registry, had the date filled in on the fixed date claim forms for the first hearing of the same, and served the same subsequently, arguing that the fixed date claim forms were only issued when the date for the first hearing was filled in, and as that had been done after the leave was granted the fixed date claim forms had complied with rule 56.4(12) and were valid. Rattray J upheld a preliminary objection that he had no jurisdiction to hear the applications for judicial review. He said that the consequence of failure to make a claim for judicial review within the prescribed time was that the leave would lapse. It would, he said, become invalid. Where no claim had been filed within the time prescribed by the rules the court had no jurisdiction to proceed further with the matters. The appeal from that order was dismissed. In my judgment on the appeal, I said that I had some sympathy for the applicants as their fixed date claim forms had been filed, however, as their fixed date claim forms had been filed without leave, because they had not been filed subsequent to leave having been obtained, they were invalid, and could not be cured.

[40] In **Christopher Olubode Ogunsalu v Dental Council of Jamaica** SCCA No 53/2008, delivered 3 April 2009, the fixed date claim form was filed within 14 days of obtaining leave but the incorrect number was inserted thereon which this court found was a mechanical exercise that fell within the power of the registry and could not be considered the fault of the litigant. The fixed date claim form was held to be valid. In **Andrew Willis v Commissioner Taxpayer Audit and Assessment Department**, App No 190/2009, delivered 19 January 2010, a single judge of appeal refused leave to appeal the order of F Williams J, stating that leave having been granted to the applicant to apply for judicial review, the condition under the rules for the applicant to make a claim within 14 days not having been satisfied, the leave had expired, and the claim filed was invalid and could not be renewed. In that case the fixed date claim form was filed seven days late.

[41] It is necessary to deal with the case of **Golding v Simpson Miller**, in some detail, as the respondent relied on the dictum of Harris JA in that case as dispositive of the appeal, and the appellant saw the necessity to attempt to distinguish it from the instant case. Counsel for the respondent also relied heavily on the case of **Malica Reid**, as the learned judge in that case stated, as he did in the instant case, that he felt bound to follow certain dictum of Harris JA. The facts in the two cases, however, are somewhat different.

[42] In **Malica Reid** the appellant filed the fixed date claim form and the application for leave with affidavit in support at the same time, similar to what occurred in the

**Edgehill et al v Greg Christie** case. He filed the fixed date claim form again on the last day allowed by the condition in the rules, but failed to file an affidavit in support of the claim with the fixed date claim form. Counsel for the appellant sought to argue, similarly as in the instant case, that the affidavit filed in support of the application for leave could be allowed to stand as having been properly filed in respect of the application for judicial review. The judge canvassed the rules as they exist under the CPR and as previously formulated under the CPC, with particular reference to the fact that both sets of rules were pellucid that leave must first be obtained. He then referred to the system operating under the CPR which he described as a potential cause for confusion, in that the fixed date claim, once leave is obtained, is filed on the same file with the same claim number as the application for leave to apply. Additionally, the affidavit filed in support of the application for leave, contains most, if not all, of the information required for the substantive application for judicial review. In spite of that, the affidavit would still have to be refiled in order to comply with the rules. Ultimately, he found that having failed to file the affidavit with the fixed date claim form, the leave to apply for judicial review had lapsed, and the fixed date claim form filed on the 14<sup>th</sup> day, since the grant of leave was void, and of no effect. It is interesting to note that the learned judge expressed certain concerns held by him in this way:-

“I must confess that I would have been inclined to hold that a Fixed Date Claim Form which is filed within the time is valid, despite the absence of the affidavit. The leave not having, therefore lapsed, the absence of the affidavit, bearing in mind the potential for confusion mentioned above, could therefore be considered a procedural error which could be cured by the court. Authority for granting

that cure is contained in rule 26.9 as was submitted by Mr Cameron.”

The learned judge, however, as earlier intimated, referred to certain dictum of Harris JA on page 33 of her judgment in **Golding v Simpson Miller**, which I will deal with in greater detail, felt constrained to follow it, and found the fixed date claim form to be a nullity.

[43] In the **Golding v Simpson Miller** case, the court allowed an appeal, as the judge at first instance had extended the time to allow the filing of the fixed date claim form outside the 14 day period permitted in the rules. The order for leave to apply for judicial review was made on 13 December 2007, the order extending time was made on 10 January 2008, permitting a further 14 days from that date to apply for judicial review. There were six grounds of appeal filed. Each ground was focused on the error of the judge with regard to the filing of the fixed date claim form. The appellant complained, *inter alia*, that the learned judge had erred in extending the time within which to file a fixed date claim form as the grant of leave was conditional on the making of a claim under rule 56.4(12) within 14 days of the grant of leave; the respondent having not filed a fixed date claim form, the leave granted under rule 56.4(12) lapsed; that the leave was only conditional on the filing of a fixed date claim form; if the learned judge had a discretion to extend time for the filing of a fixed date claim form he had exercised it wrongly as events had overtaken the relief being sought; if the learned judge had a discretion to extend the time for the filing of a fixed date claim form he had exercised it wrongly as there was no sufficient material before him

for him to do so; and the learned judge had failed to give adequate reasons for his decision.

[44] It is not surprising that within the framework of those grounds, learned Queen's Counsel Mr R Henriques, on behalf of the appellant, submitted that:

"the respondent was under an obligation to have filed a Fixed Date Claim Form by December 27, 2007 and having not done so, the leave granted to her, being a condition precedent, expired by reason of her failure to file the requisite pleading within the prescribed period and there was therefore no basis upon which the court could have extended time."

[45] Smith JA, having indicated that the issue on the appeal was whether D McIntosh J erred in enlarging the time within which an applicant to whom conditional leave had been granted may make a claim for judicial review, stated on page 13 of the judgment:

"Leave having been granted, the next procedural step required the respondent to file a fixed date claim form for judicial review within fourteen (14) days of receipt of the order granting leave. See rule 56.4(12). The respondent did not make a claim for judicial review within the prescribed time or at all."

And at page 15, having quoted rule 56.4(12), he said:

"Leave is not absolute. It is conditional. The condition is precedent, that is to say the vesting of the right is delayed until the claim form for judicial review is filed. Only when the claim for judicial review is made does the leave become absolute."

In setting out the procedural stages in an application for judicial review, he stated firstly that the application must be made promptly, although the court may extend the time for making the application for leave (rule 56.6(1) and (2)), and then he stated :

"2. If leave is granted the judge must fix a date for the first hearing (rule 56.4(11)). Such leave is conditional on the applicant filing a fixed date claim form in form 2, within fourteen (14) days of the order granting leave – see rule 56.4 (12) and 56.9. This is the commencement of the substantive application (If leave is refused rule 56.5 infra applies).

3. The claim form and affidavit in support must be served on all the parties directly affected not less than fourteen (14) days before the date fixed for the first hearing (rule 56.11(1))..."

In dealing with when the court may exercise its general powers of case management, (parts 25-27), it was his opinion, that the court could not do so before the substantive proceedings have commenced, and he stated that:

"... proceedings are properly started by the filing of the claim form within fourteen (14) days of the granting of leave."

In my opinion, Smith JA had made it crystal clear that the proceedings commenced, and that the claim was made on the filing of the fixed date claim form.

[46] It is true that on page 33 of the judgment, Harris JA stated:

".....There can be no doubt that the grant of leave to proceed to judicial review under rule 56.4(12) is provisional. It is not absolute. It imposes a condition on an applicant to present his or her claim within 14 days of the grant of the leave. To satisfy this condition a Fixed Date Claim Form with an affidavit in support thereof must be filed in obedience to rule 56.9(1)(a) and 56.9 (2). It follows therefore that it would be obligatory on the part of the applicant to present the requisite documents within the time specified."

And also on page 34, the learned judge of appeal said this:

“...On a true construction of rule 56.4(12) the grant of leave is dependent upon the respondent filing a Fixed Date Claim Form and supporting affidavit within 14 days of the grant of leave. The pleading having not been filed within the prescribed time, the condition remained unfulfilled and the leave thereby lapsed.”

[47] Harris JA seems in her analysis to have conflated rules 56.4(12) and 56.9(2). With the greatest respect, I view any statement with regard to the condition precedent stated in rule 56.4(12) as referring to the filing of an affidavit with the fixed date claim form as obiter, since the issue of whether the conditional leave would lapse if the affidavit referred to in rule 56.9 was not filed with the fixed date claim form was not before the court. The issue before the court was whether the learned judge was correct in extending the time to make a claim for judicial review, the leave having been granted and the claim not having been made within the required time frame. In that case, no claim had been filed at all, and the court held unanimously that the conditional leave had lapsed, that as the substantive proceedings had not commenced part 26 could not avail the appellant, and the application for leave, in the circumstances of that case, could not be renewed.

[48] The case referred to by counsel for the appellant from the Federal Court of Australia namely **Joseph Bryant v Commonwealth Bank of Australia** gives some guidance but is not a case dealing with an application for judicial review and of course was construing and reviewing different statutory provisions. It was an appeal from a judgment of Lockhart J who had made a sequestration order under the Bankruptcy Act 1966, (the Act) against the estate of the appellant on a petition presented by the

respondent. The appellant filed several grounds of appeal, but of relevance to the matters under review, there were four points under the ground claiming that the judge had erred in not dismissing the creditor's petition, and point numbered three read as follows:

"(3) there was no affidavit verifying paragraph 4 of the petition; .."

It was clear that section 47(1) of the Act required that a petition be verified, and that if not verified, it was liable to be struck out. Under rule 12(3)(b) of the bankruptcy rules, the affidavit verifying the petition must be filed at the time when the petition is filed. In this case an affidavit expressly verifying, in terms, paragraph 4 of the petition was not filed. The court ruled that:

"It may have been safer or more prudent if such an affidavit had been filed. The failure to file such an affidavit would not, however, render the filing of the petition a nullity. The petition has still been presented: r 12(1)."

The court found that there was other evidence which established the requisite facts, and so this point of the ground of appeal failed.

## **Conclusion**

[49] The issues identified on this appeal would therefore be answered in this way:

(i) (a) The leave granted by Daye J was conditional on the making of a claim for judicial review.

(b) The fixed date claim form filed on 8 March 2010 commenced the proceedings to apply for judicial review,

and satisfied the order of Daye J and the conditional leave stated in rule 56.4(12). The leave did not lapse. The claim was not a nullity.

- (c) The failure to file the affidavit required by rule 56.9(2) with the fixed date claim form does not invalidate the claim, but is an irregularity. The affidavit filed in support of the application to obtain leave for judicial review does not satisfy the requirements of rule 56.9(2) and (3).
- (ii) The court is empowered under rule 26.9 to put matters right by extending the time to file the required affidavit, and/or directing the refiling of the affidavit filed in support of the application for leave to apply for judicial review, to be used in support of the fixed date claim form for judicial review, and ordering service of the fixed date claim form with the supporting affidavit on all interested persons, within the time frame in keeping with the rules.

[50] I would therefore allow the appeal with costs to the appellant. I would also order that the appellant refile the affidavit in support of the application for judicial review and re-serve the fixed date claim form with the affidavit, the application for leave and the order granting leave.

**HARRIS JA**

**ORDER**

Appeal is allowed. The Order of the learned judge is set aside. Costs to the appellant to be agreed or taxed. Appellant should refile the affidavit in support of the application for judicial review and re-serve the fixed date claim form with the affidavit, as well as the application for leave and the order granting leave.