JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO 55/2018

APPLICATION NO COA2022APP00131

BETWEEN	**JACQUELINE MENDEZ**	**1st APPLICANT**
AND	**PUBLIC SERVICE COMMISSION**	**2nd APPLICANT**
AND	**DEBORAH PATRICK-GARDNER**	**RESPONDENT**

Miss Lisa White instructed by the Director of State Proceedings for the applicants

Mrs Deborah Patrick-Gardner and Deanroy Bernard for the respondent

26 January and 2 June 2023

Costs-Application to set aside default costs certificate-Whether there was good reason to set aside the Default Costs Certificate-Civil Procedure Rules, rules 65.21 and 65.22(3)

F WILLIAMS JA

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

STRAW JA

[2] I too have read the draft judgment of Simmons JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

SIMMONS JA

[3] This was an amended application by Mrs Jacqueline Mendez and The Public Service Commission ('the applicants') to set aside a default costs certificate issued by the registrar of this court on 30 May 2022 in favour of Mrs Deborah Patrick-Gardner ('the respondent'). The applicants also sought the following orders:

> "(1) That the time for the making of the application be abridged.
>
> (2) That the Registrar proceeds to tax the Purported Bill of Costs filed by the Respondent in the instant matter."

[4] The application was supported by the affidavits of Ricardo Maddan and Jevaughnia Clarke, sworn to on 15 June and 14 December 2022 respectively, as well as the second affidavit of Jevaughnia Clarke, sworn to on 23 January 2023, to which a draft amended points of dispute was exhibited.

[5] The application was opposed by the respondent who relied on her affidavit filed on 17 January 2023.

[6] On 26 January 2023 after considering the submissions in this matter, we made the following orders:

> "(1) The default costs certificate is set aside.
>
> (2) The Registrar is to proceed with the taxation of the respondent's Bill of Costs.
>
> (3) Costs of this application are awarded to the respondent to be agreed or taxed."

[7] At the hearing, counsel for the respondent objected to the utilisation of the second affidavit of Jevaughnia Clarke sworn to on 23 January 2023, to which a draft amended points of dispute was exhibited. Miss White, for the applicants, submitted that the applicants were not seeking to renew their application but had amended same in order

to place all the relevant material before the court. The court found that it was in the interest of justice to allow the use of the said affidavit.

[8] It was indicated to the parties on that date that the reasons for our decision would be provided in writing, and this judgment is a fulfilment of that promise.

Background

[9] On 21 January 2022, Mrs Patrick-Gardner succeeded in the appeal against a decision of the Full Court, made on 19 April 2018, that had granted an order of *certiorari* quashing the decision of the 2nd applicant, the Public Service Commission ('the Commission'), to retire her from the public service (**Jacqueline Mendez and Public Service Commission v Deborah Patrick-Gardner** [2022] JMCA Civ 3). In accordance with the general rule, costs were awarded to her to be agreed or taxed.

[10] On 21 April 2022, Mrs Patrick-Gardner filed a bill of costs in the matter which was served on the Director of State Proceedings on the same day. A default costs certificate was issued by the registrar of this court in accordance with rule 65.21 of the Civil Procedure Rules ('CPR'), as no points of dispute had been filed by the applicants.

[11] The default costs certificate was served on the Director of State Proceedings on 13 June 2022. On 14 June 2022, points of dispute were filed on the applicants' behalf and served on the same day. On 15 June 2022, the application to set aside the default costs certificate that is now before this court was filed. That application was considered by the registrar based on paras. [62] and [63] of by **Kandekore (Lijyasu) v COK Sodality Co-operative Credit Union Limited et al** [2018] JMCA App 2 ('**Kandekore**'). The registrar correctly found that she lacked the jurisdiction to set aside the default costs certificate as the respondent was entitled to it by virtue of rule 65.21 of the CPR. The application was then referred to the court.

[12] On 20 January 2023, the amended application that was considered by this court was filed on the applicants' behalf.

The application

[13] The grounds on which the application is based are:

1. Rule 26.1(2)(c) of the CPR gives the court the power to shorten the time for compliance with any rule, practice direction, order or direction of the court;

2. Pursuant to rule 26 of the CPR, the court may grant relief from sanctions.

3. The applicants in keeping with rule 65.22(3) of the CPR can renew the application to set aside the default costs certificate;

4. The granting of the orders is in keeping with the overriding objective;

5. The application was made promptly and is supported by affidavit evidence;

6. The failure to file points of dispute in a timely manner was not intentional and can be explained by good reasons;

7. The failure to comply was no fault of the applicants and has been remedied;

8. The applicants have filed points of dispute;

9. It is in the interests of justice for the application to be granted;

10. The respondent would not be prejudiced as a taxation hearing would allow for a proper assessment of costs;

11. The respondent is not entitled to the costs claimed as they are not reasonable;

12. The applicant has a reasonable prospect of success at taxation;

13. There are good reasons for which the court may set aside the default costs certificate. Those reasons include:

i. The bill of costs was filed by the respondent who was not counsel in the matter;

ii. Some of the sums claimed are excessive and in some instances, duplicated;

iii. Sums were claimed for Queen's Counsel when no Queen's Counsel appeared in the matter;

iv. Sums were claimed for two counsel for the court hearing when no certificate for counsel was granted; and

v. The costs are excessive in terms of the time needed for each task, the number of counsel needed for the matter and the multiple rates charged.

Costs

[14] Rule 1.18(1) of the Court of Appeal Rules 2002 ('CAR') states:

> "The provisions of CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal subject to any necessary modifications and in particular to the amendments set out in this rule."

[15] Where the party to whom costs have been awarded intends to pursue those costs, taxation proceedings are to be commenced by filing and serving a bill of costs on the paying party within three months of the date of the order. The paying party may dispute any item in the bill of costs by filing and serving points of dispute within 28 days after

the service of the bill of costs (see rule 65.20(3) of the CPR). That was clearly not done in the instant case.

[16] The respondent, pursuant to rule 65.20(5) of the CPR, sought and obtained a default costs certificate. The rule states:

> "The receiving party may file a request for a default costs certificate if-
>
> (a) the period set out in paragraph (3) for serving points of dispute has expired; and
>
> (b) no points of dispute have been served on the receiving party."

[17] Rule 65.22 of the CPR, which deals with the setting aside of the default costs certificate, states:

> "(1) The paying party may apply to set aside the default costs certificate.
>
> (2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it.
>
> (3) The court may set aside a default costs certificate for good reason.
>
> (4) An application to the court to set aside a default costs certificate must be supported by affidavit and must exhibit the proposed Points of Dispute."

[18] In the instant case, there is no dispute that there was no procedural irregularity in the grant of the default costs certificate. Based on the above rule, the respondent was entitled to the default costs certificate due to the applicants' failure to file their points of dispute within the time stipulated. The application to set it aside was, therefore, not within the remit of the registrar under rule 65.22(2) of the CPR and was correctly referred to the court. In accordance with rule 65.22(3), the court was required to make a determination as to whether there was "good reason" to set aside the default costs certificate.

[19] The factors that may amount to 'good reason' have not been stated in the CPR. There is, however, case law that can be utilized by the court to assist in its determination of this issue. In **Advantage General Insurance Company Limited (formerly United General Insurance Company Limited) v Marilyn Hamilton** [2019] JMCA App 29 ('**Advantage General**'), P Williams JA stated at para. [62] that the award of a default costs certificate is:

> "[62]…akin to the entering of a default judgment for failure to acknowledge service or to file a defence. It is an administrative function of the registrar without a hearing or any consideration of the merits of the matter."

[20] In keeping with that observation, she considered the following factors:

(1) The circumstances leading to the default;

(2) Whether the application to set aside was made promptly;

(3) Whether there is a clearly articulated dispute about the costs sought; and

(4) Whether there was a realistic prospect of successfully disputing the bill of costs.

[21] In this regard she was guided by **Kandekore** and **Rodney Ramazan and Ocean Faith N V v Owners of Motor Vessel (CFS PAMPLONA)** [2012] JMCA App 37.

[22] As pointed out by McDonald-Bishop JA in **Advantage General**, the category of what may amount to be "good reason" is not closed. The learned judge of appeal stated at para. [14], "[n]either the CPR nor the relevant authorities has provided an exhaustive list or closed category of factors that may constitute 'good reason'." McDonald-Bishop JA opined that "some of the matters that are required in the consideration of an application for relief from sanctions may be relevant considerations in determining whether good

reason exists for the setting aside of a default costs certificate. The requirement for the application to be made promptly may be one such consideration".

[23] In **Advantage General**, at para. [56], P Williams JA referred to the following passage in **Henlin Gibson Henlin (a firm) and Calvin Green v Lilieth Turnquest** [2015] JMCA App 54, where F Williams JA (Ag) (as he then was), stated at paras. [34] and [35]:

> "[34] The words 'good reason', (which are used in rule 65.22(3) of the CPR), have been judicially considered in several cases. One such case is **Kleinwort Benson Ltd v Barbrak Ltd and other appeals; The Myrto (No 3)** [1987] 2 All ER 289. This is how the words were discussed at page 300 c, of the report:
>
> > 'The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge…'
>
> [35] Many of the other cases that discuss the phrase 'good reason' cite the **Kleinwort Benson** case. What all these cases confirm is that whether good reason exists or not is a matter that is left to the individual judge's discretion and is dependent on the particular facts and circumstances of each case."

The circumstances leading to the default

[24] The applicants, as stated above, relied on the affidavit of Jevaughnia Clarke sworn to on 14 December 2022.

[25] Miss Clarke, in her affidavit, sought to explain the reason why the points of dispute were not filed within the time stipulated in the CPR. The affidavit states that the Attorney General's Chambers were damaged due to flooding and had to be closed as of 20 October 2021 for remedial works to be completed. As a result, the staff had to vacate the building

and the departments within the Chambers had to be housed at different locations. She deposed that this state of affairs "significantly hampered" the operations of the litigation division. Ms Clarke indicated that, on 29 March 2022, the Chambers removed to its current location and several files including that for the instant matter were stored offsite and were not readily accessible. Additionally, when the documents were served in April 2022, counsel who had conduct of the matter was no longer at the Chambers. It was further deposed that Miss Lisa White, requested that the file be located and this was done on 13 June 2022. On 14 June 2022, the points of dispute were filed and served on the respondent. The application was filed on 15 June 2022.

[26] It was also stated that the applicants were not responsible for the failure to file the points of dispute and the default was remedied within a reasonable time.

[27] The respondent in her affidavit asserted that at the time when the bill of costs was served, the Attorney General's Chambers had already been relocated to its current location and Miss White was acting as a Deputy Solicitor General and was in charge of the litigation division. In conclusion, Mrs Patrick-Gardner stated that no good reason has been proffered for the applicants' failure to file their points of dispute within the stipulated time.

[28] The applicants' points of dispute were filed by their attorney-at-law, the Director of State Proceedings, on 14 June 2022 despite having been served with the respondent's bill of costs on 21 April 2022. This was clearly outside of the 28 days permitted by rule 65.20(3) of the CPR. The applicants were also not able to take advantage of rule 65.20(6) which precludes the issue of a default costs certificate if the points of dispute are filed before it is issued.

[29] The following admonition by Panton P in **Orrett Bruce Golding and The Attorney General of Jamaica v Portia Simpson Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 3/2008, judgment delivered 11 April 2008, is relevant:

> "15. Before leaving this matter, I have to remind litigants and their attorneys-at-law that they ignore the Civil Procedure Rules at their peril. The days of paying scant regard to the Rules are over. Those days went out with the 1990s....There can be no return to such times as it is not in the interests of justice for the Courts to permit such laxity."

[30] The explanation given by Ms Clarke, in her affidavit, indicates that the applicants were not personally at fault in this matter. The fault lay squarely at the feet of their legal representative, the Director of State Proceedings. In such circumstances, the court has demonstrated a general unwillingness to punish a client for the mistakes of his attorney-at-law. In **Merlene Murray-Brown v Dunstan Harper & another** [2010] JMCA App 1, the principle was stated by Phillips JA in the following terms:

> "[30]…The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys [sic] errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended…"

[31] The applicants in this case are represented by the Director of State Proceedings and, as such, would not necessarily fall within the usual category of litigants who have paid for legal services. However, their legal representative would still be required to act in accordance with the provisions of the CPR. I, therefore, formed the view that the above principle is also applicable in this case.

[32] That principle was applied by Rattray J in **Canute Sadler and anor v Derrick Michael Thompson and anor** [2019] JMSC Civ 11, in his consideration of whether the defendants in that case had provided a good reason for failing to file their points of dispute. The learned judge stated:

> "[47] From the evidence it appeared that the failure to file the Points of Dispute was through no fault of the Defendants, as

> highlighted at paragraph 9 of the Affidavit of Counsel Mr. Campbell, but was due to their Attorneys-at-Law. In this regard, I am guided by the dictum of Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, who stated at page 866 that '**We never like a litigant to suffer by the mistake of his lawyers**'." (Emphasis supplied)

[33] I have noted that the court in **Salter Rex & Co v Ghosh** refused to grant the relief sought as there was no merit in the applicant's case.

[34] The circumstances in this matter, as outlined in Ms Clarke's affidavit, were best described as unfortunate. One would have expected that her office would have put measures in place to ensure that matters such as this did not 'fall between the cracks' so to speak. The matter between the parties was quite contentious and it would have been quite reasonable to expect the respondent to pursue the recovery of the costs awarded to her with alacrity. The respondent has quite astutely pointed out that at the time when the bill of costs was served, the Attorney General's Chambers had already relocated to its current location. That does not negate the assertion by Ms Clarke that some of its files, including those pertaining to this matter were stored off-site. However, greater diligence was required.

[35] In the circumstances, I formed the view that whilst the explanation proffered by the applicants' legal representative for the failure to file the points of dispute was less than satisfactory, the justice of the case required further exploration of the matter.

Whether the application to set aside was made promptly

[36] The application to set aside the default costs certificate was in my view made promptly. Mr Maddan, in his affidavit, stated that the default costs certificate was served on the Director of State Proceedings on 30 May 2022. That appears to be an error as the document bears a stamp which indicates that it was received on 13 June 2022 at 1:04 pm. Points in dispute was filed on 14 June 2022 and the notice of application to set aside the default costs certificate was filed on 15 June 2022.

Whether there is a clearly articulated dispute about the costs sought

[37] The applicants' points of dispute identified several areas in which they seek to challenge the costs claimed by the respondent. It seems that the underlying concern is that the costs claimed could not have been reasonably incurred given the nature of the matter. The applicants have taken issue with the fact that costs are being claimed for Queen's Counsel (now King's Counsel), when no Queen's Counsel appeared on the record. They also take issue with costs being claimed for more than one counsel where no special costs certificate was granted by the court. It is also asserted that some of the charges were, in some instances either excessive and/or duplicated.

[38] The respondent in her affidavit stated that it was unclear from the points of dispute filed which items were being challenged by the applicants. She also made the point that no alternative sums were proposed as required by the CPR. In other words, the points of dispute filed on 14 June 2022 fall short of what is required by rule 65.20(2) of the CPR. This the respondent argued, is a "fatal flaw". The respondent submitted that the points of dispute in the instant case bear some similarity to those considered by the court in **Kandekore** and as in that case, require "far more 'specificity'". In those circumstances, she argued that there is no clearly articulated dispute pertaining to the costs claimed.

[39] Rule 65.20(2) of the CPR states:

> "Points of dispute must-
>
> (a) identify each item in the bill of costs which is disputed;
>
> (b) state the reasons for the objection; and
>
> (c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item."

[40] The points of dispute filed on 14 June 2022 do not satisfy those requirements. The applicants have, however, signalled their intention to rely on amended points of dispute which are exhibited in draft to the affidavit of Javaughnia Clarke filed on 24 January 2023.

A document entitled "The appellants amended points of dispute", which is in the same terms as that draft, was also filed on 24 January 2023. The draft amended points of dispute satisfy the requirements of rule 65.20(2) and, as such, I had no difficulty in finding that there is a clearly articulated dispute about the costs sought.

Whether there is a realistic prospect of successfully disputing the bill of costs

[41] Mr Maddan, in his affidavit, averred that the bill of costs was not properly laid by Mrs Patrick-Gardner as, prior to 8 January 2021, she was represented by counsel Mr Hugh Wildman and would, therefore, not have been privy to details of the work done by him. Mr Maddan also asserted that the sums claimed in the bill of costs were excessive and in some instances, duplicated. In addition, it was stated that there are good reasons for setting aside the default costs certificate.

[42] The amended points of dispute assert that there was a duplication of some of the sums claimed, excessive time and hourly rates for the various tasks undertaken by counsel, sums were claimed for Queen's Counsel although there was no Queen's Counsel on the record and sums claimed for more than one counsel where no special costs certificate was granted by the court.

[43] The respondent relied on her affidavit sworn to on 16 January 2023. She stated that the information in the bill of costs was obtained from the files that she retrieved from her former attorneys-at-law, Hugh Wildman and Company. She denied that the charges were excessive and in some instances duplicated. She also stated that it was unclear from the original points of dispute which items were being challenged and no alternative sums were proposed as required by the CPR.

[44] As stated in para. [41] above, the amended points of dispute clearly indicate the items that are being challenged, the bases of that challenge and the amount being proposed by the applicants. Mrs Patrick-Gardner, as stated above, took issue with the amended points of dispute being considered due to it having been filed out of time. Having perused that document and the bill of costs, I formed the view that the points

raised by the applicants are more than arguable and that they have a realistic prospect of successfully disputing the bill of costs.

[45] It is for the above reasons that I concurred with the orders set out in para. [6] of this judgment.