

**IN THE FULL COURT OF THE SUPREME COURT OF
JUDICATURE OF GUYANA
2020-HC-DEM-CIV-FCA-33**

BETWEEN:

**PRITHIMA KISSOON
Appellant/ Claimant**

-and-

1. **BASIL WILLIAMS**

2. **GUYANA NATIONAL
NEWSPAPERS LTD, a Company
Incorporated under the provisions
of the Companies Act, Chapter 89:01
and continued under the Companies
Act 1990.**

3. **The Attorney General of Guyana,
added by Order of Court dated 9th
April, 2019
Respondents/ Defendants
Jointly and Severally**

BEFORE

**The Hon. Mr. Justice Navindra A. Singh
The Hon. Mr. Justice Gino Peter Persaud**

APPEARANCES

**Mr. C. A. Nigel Hughes for the Appellant
The First Named Respondent appears *pro se*.**

JUDGMENT DELIVERED: March 31st, 2021 via electronic mail

PERSAUD, J:

1. I have read the decision of my brother Justice Navindra Singh and I also agree that the appeal should be allowed for the reasons stated therein.
2. I wish to add some brief observations. The Application Notice which is the subject matter of this appeal was not filed by the first defendant, Basil Williams (BW) to have himself struck out as first defendant in his personal capacity. Instead, the Attorney General as added third defendant filed the NOA to strike out the first defendant. This was unusual and also amounted to a second bite at the proverbial cherry to seek to have the first defendant removed as a party to the action since there was a first Application Notice filed in October 2018. Although the trial judge held that that was an application by the first defendant to strike out the claim against him (as opposed to a striking out a party) the logical end result would have been that the first defendant would have been removed from the litigation were it successful. It was not successful. The current NOA under appeal was a second and successful attempt to remove the first defendant from the litigation. The 2018 NOA concluded with an order that the Attorney General be added as a third defendant and an amended Statement of Claim was filed which was followed by a single defence filed by both the first and third defendants. It was a short defence in which the first and third defendants relied on the legal defence of qualified privilege. No facts were traversed. It did not take the point that there is no cause of action against the first defendant in his personal capacity. So, initially the first defendant pleaded and relied on the defence of qualified privilege in his joint amended defence with the third defendant but subsequently sought to be struck out as a party.

3. The first defendant having failed on the first Application Notice in October, 2018 to be removed from the litigation tried a second time, this time with an Application Notice filed by the third defendant on behalf of the first defendant seeking to have the first defendant struck out. In both NOAs the argument was the same, that is, that the proper party was the Attorney General under the State Liability and Proceedings Act (the Act) and not Basil Williams in his personal capacity. The second NOA proved successful with the trial judge striking out the first defendant on the eve of the trial who then achieved what was originally intended in the first NOA. This appeal is from the order striking out the first defendant in the second NOA.

4. I pause here to observe that there was nothing preventing an order in the determination of the first Application Notice from striking out the first defendant while simultaneously preserving the claim and ordering the Attorney General to be added as the third defendant. However, this was not done, and the first defendant remained a party until the second NOA was filed.

5. The Claimant has also expressly pleaded the legal element of malice in defamation and contends that Basil Williams must prove that the words complained of were not actuated by malice and this is an evidential issue for trial. I uphold this contention. I am of the view that the order of the trial judge in striking out the first defendant before trial was premature, moreso in light of the fact that malice is pleaded by the Claimant. Such a finding would have been better left for the end of the trial which may have disclosed, after the evidence, whether the action was proven against the first defendant. If it was not so found at the end of the trial, then the appropriate order can

be made that no cause of action was proven against him in his personal capacity and a suitable order for costs made. The first defendant would therefore have suffered no prejudice from not being struck out at this stage before trial. On the other hand, the Claimant contends that she would be severely prejudiced if she cannot pursue a claim against Basil Williams in his personal capacity.

6. The Claimant expressly contends in respect of the element of malice pleaded in her claim that whether sued in his personal capacity or as AG he has to prove that the words uttered by him were not actuated by malice and this is an evidential matter for trial.
7. The situation is further complicated because with the change of government after elections the first and third defendants is no longer one and the same. The Claimant will obviously have challenges at trial if the first defendant remains struck out and removed from the litigation since he no longer holds the office of the third defendant.
8. How does a Claimant prove malice and a defendant's state of mind at the date of publication? While inferences can be drawn from the defendant's conduct this is surely an evidential matter for trial. Malice is a subjective matter. Malice also aggravates damages. It is a necessary element in a claim for exemplary damages.
9. The learned authors of Price on Defamation state at para 18-02:

The question of malice in defamation only arises in relation to the defendant's motive for publication. The burden of proving it always lies with the Claimant...where the statement is fair

comment or is published on an occasion of qualified privilege the claimant will lose the case if he cannot prove malice.

10. And at para 18-04:

The most common application of malice is to defeat a defence of qualified privilege, see Horrocks v Low (1975) AC 135.

11. What happens if the first defendant remains removed from the litigation and during the evidence at trial the claimant establishes malice on his part? No liability will attach on his part because he was struck out as a party. The prejudice that will accrue to the Claimant if the first defendant remains struck out is evident. He should therefore be restored as a party for the trial.

12. A perusal of the amended SOC *in toto* discloses that the Claimant has expressly pleaded malice and that the publications were falsely and maliciously done by the first defendant while in the office of the third defendant. It also discloses that the first defendant is expressly named (pleaded) and goes on to further clarify that at the time of the publications he was the current holder of the office of AG and on 19th January, 2017 whilst acting as the AG, falsely and maliciously wrote the offending material.

13. Given the manner in which the amended SOC is pleaded it is my view that this can in no way be construed to mean the cause of action is solely being pursued against the AG as third defendant to the exclusion of BW in his personal capacity as first defendant. The Claimant did not seek leave to withdraw and discontinue the first defendant after the third defendant was added so she clearly intended to pursue a claim against the first defendant. In fact, an

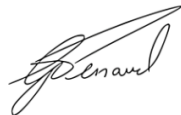
overall perusal of the amended SOC *ex facie* merely reinforces the fact that the first defendant remaining a party to the litigation is crucial for trial.

14. The fact that the offending statements were made by the first defendant while he happened to be holding the office of the third defendant does not mean he cannot be liable in his personal capacity for defamation.

15. The issue of ministers of government being personally liable as opposed to the State being liable in matters such as defamation etc. is remarkably clarified in New Zealand where the Executive has published online clear policy guidelines. That policy states that Ministers may be sued for acts done while a Minister but having a more “*personal*” aspect e.g. a Minister may be sued in defamation arising from the contents of a particular speech or other public statement. The extent to which a Minister will be personally liable will depend on the law relating to the particular matter. If proceedings are instituted against a Minister personally for defamation a Cabinet paper must be prepared for a Cabinet decision on whether the Crown will meet the Minister’s legal costs to retain private counsel or whether the Crown will undertake the defence of the proceedings. In the instant case, the State through the AG, presumably by Cabinet decision, undertook the defence and filed a single defence on behalf of both the first and third defendants. The trial should therefore proceed with the first defendant being restored as a party. The policy of the New Zealand government offers interesting guidance both in terms of clarity of personal/State liability and transparency and accountability.

16. I find that the second NOA which is the subject matter of this appeal was misconceived. The original intent to have BW removed as a party to the litigation as evidenced by the filing of the first NOA in 2018 was unsuccessful and there is no reason why it should be successful at this stage before trial. The finding that there was no dispute from the pleadings that the first defendant was acting in his capacity as AG at all material times and that it is the SOC which avers that the offending statements were allegedly made by the first defendant in his capacity as AG cannot be supported on an overall examination of the amended SOC. Pleading that the first defendant falsely and maliciously published defamatory material while in the office of the third defendant does not automatically mean that the Claimant is solely pursuing a claim against the State (the AG). Further, paragraphs 13, 16 and 18 of the Claimant's Affidavit in Answer to the NOA reinforce their contention that the first defendant is also sued in his personal capacity because the statements were made with malice which their Reply has consistently shown, and which is an issue to be proven at trial.

17. The ruling of the trial judge was therefore premature and for the reasons outlined above and also advanced by my brother Justice Singh, I am in agreement that the appeal be allowed with his costs proposed. The first defendant is to be restored as a party to the litigation for the impending trial.



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Hon. Mr. Justice Gino Peter Persaud
High Court Judge