

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF
GUYANA
REGULAR JURISDICTION

2018-HC-BER-CIV-SOC-68

BETWEEN:

ALEX HERBERT MOORE

Claimant

-and-

SHALIMAR ALI-HACK

Defendant

The Honourable Justice Navindra A. Singh, Puisne Judge

Messrs. Mayo Robertson and Arudranauth Gossai for the Claimant

Mr. Robin Stoby S.C. and Meses. Jamela Ali and Kim Kyte-Thomas for the
Defendant

Delivered December 2nd 2020 via electronic mail

DECISION

The Claimant instituted this claim on July 22nd 2020 claiming damages for the tort of defamation against the Defendant.

On August 18th 2020 the Defendant applied to the Court to strike out the claim on the ground that the pleadings disclose no reasonable basis for instituting the claim, or alternatively, that the claim is an abuse of the process of the Court, or that it is frivolous and/ or vexatious since the Director of Public Prosecutions of Guyana [hereinafter referred to as the DPP] is protected in the execution of her office under the provisions of the laws of Guyana.

The Claim is based on the contents of a letter written by the Defendant, in her capacity as the DPP, addressed to the Chancellor of the Judiciary of Guyana and copied to the Chief Justice of Guyana.

The Defendant contends in this Application that the Claim is an abuse of the process of the Court since it seeks to ignore or by-pass the provisions of the **Justice Protection Act; CAP 5:07** of the Laws of Guyana, which protection she is entitled to, which contention will be addressed instantly.

ISSUE I

Is the DPP protected by the **Justice Protection Act; CAP 5:07** of the Laws of Guyana.

FACTS

As stated above, the Claimant has clearly accepted that the Defendant was acting in her capacity as DPP when she authored the letter despite the fact that she is not so recognised in the rubric of the SOC.

LAW

Section 14 of the Justice Protection Act; CAP 5:07, which provides;

‘This act shall apply for the protection of all members of the police force, all constables, all district commissioners, and all other persons for anything done in the execution of their office under and by virtue of any Act; and in all other cases whatsoever, and whether protection is given or not to the members of the police force, constables, and district commissioners, or any of them, or any other person, by any Act, they, in each and every action brought against them, or any of them, for

anything done by them, or any of them, in the execution of their or his office, shall be entitled to the protection afforded by this Act.'

Article 116 of the Constitution of the Republic of Guyana; CAP 1:01, which provides;

(1) There shall be a Director of Public Prosecutions whose office shall be a public office.'

Article 232 of the Constitution of the Republic of Guyana; CAP 1:01, which provides;

'public officer means the holder of any public office and includes any person appointed to act in any such office.'

ANALYSIS

The provisions of **articles 116 and 232 of the Constitution** clearly establishes that the DPP is a public officer.

It is indubitably apparent that the words *'all other persons for anything done in the execution of their office under and by virtue of any Act'* in **section 14 of the Justice Protection Act** is intended to provide protection to persons in execution of a public office, to wit, public officers.

The Claimant has submitted that whether the Defendant was performing duties as the DPP when she penned the letter is an issue of fact to be determined at a trial.

This submission seems vacuous in light of the fact that at paragraph 2, subparagraph (d) of the Claim, the Claimant pleads clearly that the Defendant is the

DPP and in fact has not pleaded anywhere in the Claim that the Defendant penned the letter in any capacity other than as the DPP.

Additionally, the Claimant has reproduced the letter in his pleadings and therein the Defendant repeatedly refers to her office and does not in any way indicate that the concerns expressed therein were her personal complaints or opinions.

In fact, in the letter the DPP clearly states that the letter is written in accordance with the provisions of **section 12 of the Summary Jurisdiction (Magistrates) Act; CAP 3:05** [of the Laws of Guyana] thereby confirming the non-personal nature of the letter.

The Claimant cannot be allowed to disavow his pleadings to disingenuously argue that this is now a fact in issue.

CONCLUSION

The DPP is a public officer and therefore a person that is protected under the provisions of the **Justice Protection Act**.

The next issue that the Court must determine is whether the Claimant complied with the provisions of the **Justice Protection Act** in the institution of this Claim.

ISSUE II

Did the Claimant comply with the provisions of the **Justice Protection Act**.

LAW

Section 8 of the Justice Protection Act; CAP 5:07, which provides;

- (1) *No action shall be brought against a justice for anything done by him in the execution of his office unless the action is commenced within six calendar months next after the act complained of has been committed.*
- (2) *The action shall not be commenced against the justice until one calendar month at least after notice in writing of the intended action has been delivered to him, or left for him at his usual place of abode, by the party intending to commence the action, or by the party's attorney or agent, wherein the cause of action and the court in which the action is to be brought shall be clearly and explicitly stated; and upon the back thereof shall be endorsed the name and place of abode of that party, and also the name and place of abode or of business of his attorney or agent, if the notice has been served by the attorney or agent.'*

FACTS

The Claimant has pleaded that the letter that he finds offensive is dated December 5th 2019 and he in was in possession of the letter by December 7th 2019.

It is not disputed that the Claimant did not give the Defendant notice in writing of his intention to institute this Claim.

This Claim was instituted on July 22nd 2020.

ANALYSIS

The undisputed facts clearly show that the Claim was instituted more than seven months after the Claimant became aware of the letter which is in breach of **Section 8 (1) of the Justice Protection Act** and that he did not give the Defendant notice

in writing of his intention to institute this Claim which is on breach of **Section 8 (2) of the Justice Protection Act.**

CONCLUSION

There has been absolutely no compliance or attempt to comply with the provisions of the **Justice Protection Act.**

ISSUE III

What are the consequences of non compliance of the provisions of the **Justice Protection Act.**

LAW

Section 11 of the Justice Protection Act, which provides;

‘If, on the trial of the action, the Plaintiff does not prove that it was brought within the time hereinbefore limited in that behalf, or if he does not prove that the notice aforesaid was given one calendar month before the action was commenced, or if he does not prove the cause of action stated in the notice, or that the cause of action arose in the place laid in the claim, the plaintiff shall be nonsuited, or judgment shall be given for the defendant.’

ANALYSIS & CONCLUSION

There is no need for an analysis of the provisions of **section 11 of the Justice Protection Act.**

It is perspicuous that judgment must be given for the Defendant upon the Claimant's failure to comply with the provisions of **section 8 of the Justice Protection Act**.

ISSUE IV

In addition to the foregoing the Defendant contends that, assuming but not conceding, a tort has been committed, she is protected by the **State Liability and Proceedings Act; CAP 6:05** of the Laws of Guyana and therefore cannot be sued in her personal capacity, if at all.

LAW

Section 3 (4) of the State Liability and Proceedings Act; CAP 6:05, which provides;

'Where any functions are conferred or imposed upon an officer of the State as such by any rule of common law or by any written law and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the State in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the State.'

ANALYSIS

It is clear from the foregoing [ISSUES 1 to III] that the Defendant is a public officer, who at the time of writing the letter that the Claimant claims contains defamatory statements, did so in the course of the performance of her functions as a public officer, to wit, the DPP.

It is noted that the Claimant did not address the Court with respect to this submission by the Defendant.

CONCLUSION

The Defendant is protected by the **State Liability and Proceedings Act; CAP 6:05** of the Laws of Guyana and therefore is improperly named as a party.

ISSUE V

The Defendant contends that based on the pleadings in the Claim, whether or not any statement in the letter is defamatory, the defence of ‘**absolute privilege**’ is raised and has not nor cannot be overcome by the Claimant and therefore no reasonable cause of action can be found.

FACTS

The facts are as afore-stated and the Court has found [in the foregoing] that the Defendant was acting in her official capacity as the DPP when she penned the letter to the Chancellor of the Judiciary of Guyana and copied it to the Chief Justice of Guyana also in their official capacities seeking to invoke **section 12 of the Summary Jurisdiction (Magistrates) Act.**

LAW

The law recognises that in certain circumstances the public interest requires that a person should be protected from liability for a defamatory statement even though the cannot be proved to be true or defended as fair comment and one such instance is when statements are made by one officer of the State to another in the course of duty. [**Duncan & Neill. Defamation.** Butterworths, 1978.]

Chatterton v Secretary of State for India in Council [1895] 2 QB 189 @ 191 per

Lord Esher MR;

‘If an officer of State were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence necessary for the performance of his functions as an official of State. Therefore the law confers upon him an absolute privilege in such a case.’

Horrocks v Lowe [1975] AC 135 @ 149 - 150 per Lord Diplock;

‘The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue.’

Section 12 of the Summary Jurisdiction (Magistrates) Act; CAP 3:05 [of the

Laws of Guyana]which provides;

‘The Chancellor may direct that a particular magistrate shall not adjudicate on a particular cause or matter coming before him because of the magistrate’s personal interest in that cause or matter or for any other sufficient reason and shall in any case assign another magistrate to adjudicate on that cause or matter.’

ANALYSIS

The Claimant submits that the determination of whether the letter is subject to absolute privilege is a matter of fact that can only be determined at a trial, however the Court disagrees, since there is no realistic dispute with respect to the circumstances to be examined to determine if such a privilege exists.

Firstly, the Court must examine and consider the offices occupied by the sender and receiver of the letter.

As discussed before, the Claimant's submission that the Defendant may not have been acting as the DPP when she penned the letter cannot be sustained in light of his pleadings and further the pleadings clearly acknowledge that the letter was sent to the Chancellor of the Judiciary of Guyana and copied to the Chief Justice of Guyana in their official capacities.

Secondly, the Court must examine the nature of the communication.

As discussed before it cannot now be disputed that the letter was written by the Defendant in her capacity as DPP seeking to invoke **section 12 of the Summary Jurisdiction (Magistrates) Act.**

The DPP, who has conduct of all prosecutions in the State of Guyana by virtue of the provisions of the **Constitution** of Guyana, as a matter of public interest must be able to communicate frankly and freely with the Chancellor in order that the Chancellor can properly make an informed decision with respect to a request under **section 12 of the Summary Jurisdiction (Magistrates) Act.**

Following the reasoning of Lord Esher MR in Chatterton v Secretary of State for India in Council Lord Diplock in Horrocks v Lowe, the Claim raises the defence of ‘**absolute privilege**’ and there are no facts pleaded capable of rebutting such defence.

CONCLUSION

The Claim shows that the letter is irrefutably ‘absolutely privileged’.

In the circumstances, based on all of the foregoing, the Application filed by the Defendant on August 18th 2020 is granted in terms of paragraph 1 (a) (i) together with costs to the Defendant in the sum of \$200,000.00 to be paid on or before December 24th 2020.

Justice N. A. Singh