

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2012/0610

BETWEEN:

Leslie Fontenelle

Claimant

and

[1] The Fire Service Association

[2] Daher Broadcasting Service Limited

[3] Helen Television System Limited

[4] Choice Channel 39 Ltd

Defendants

Appearances:

Leslie Prospere of Counsel for the Claimant

Cynthia Hinkson Ouhla of Counsel for the First Named Defendant

Diana Thomas of Counsel for the Second Named Defendant

Dexter Theodore of Counsel for the Third Defendant

Leevie Herelle of Counsel for the Fourth named Defendant

2013: January 15th

2013: February 13th

MASTER V. GEORGIS TAYLOR-ALEXANDER

- [1] This is a decision on an application brought by the fourth named defendant pursuant to part 26.3 of the Civil Procedure Rules (CPR 2000), to strike out the claim brought by the claimant in defamation on the ground that there is no real prospect of succeeding on the claim as filed against the fourth named defendant.
- [2] The application dated the 21st November 2012 and amended on the 7th December 2012 is supported by further affidavit of Wayne Whitfield, which summaries the substance of the application. The defendant challenges whether the claimant has succeeded in proving publication of the defamatory statements referred to in the claim, as an essential element in the tort of defamation.
- [3] At the end of the arguments, I had expressed reservation as to whether the fourth defendant had satisfied the requirements of rule 26.3 of CPR 2000 as had been defined by case law emanating from time to time from this jurisdiction. I promised to review the authorities supplied by the claimant and the defendant and to give my decision thereafter. Having studied the authorities provided and other authority to which I will later refer, I am reinforced in my earlier view that at case management conference the obligation of the court is to satisfy itself that the elements of the tort have been properly pleaded and that there is, on the face of the pleadings, a case to answer.

The underlying facts

- [4] The underlying facts may be stated shortly. The claimant is the chief fire officer of the Saint Lucia Fire Service. The first defendant is an association responsible for the general welfare of the gazetted fire officers and the remaining defendants are media houses each with television news broadcasts airing nightly in Saint Lucia. The claimant alleges that on

the 21st of March 2012 between the hours of 7:00 pm to 9:00 pm each of the defendants maliciously caused to be broadcasted or published, of and concerning the claimant, words and images defamatory of him.

[5] The words and images were allegedly published on the website and television news broadcasts of the fourth named defendant in the words of Shane Felix of the Fire Service Association as follows :—

“We’re at the point where we have a head of department who has gone as far as committing fraud in terms of falsifying persons qualifications to get them promoted and deprive other people of the same opportunity. Umm all of the proof was presented to the ministry. We thought maybe the Prime Minister would of at least sit with the association, you know, to find out what sought of allegations we’re making and whether we have any proof of those. But instead we are just being sent onto the public service commission. Umm so it’s a case that we are very much concerned that nobody wants to hear our concerns . Nobody wants to deal with it. Firemen are demoralised, firemen are deeply grieved they are asking that the association take some sort of action to ensure that we are seen for who we are and so on and the morale continues to decline in the fire service and nobody seems to talk.....”

[6] The fourth named defendant in a defence filed on the 14th September 2012 avers that it did not publish, maliciously or otherwise, the defamatory words alleged or at all and puts the claimant to strict proof thereof.

[7] It is of and concerning the demand for proof that the instant application relates. The fourth defendant in support of its defence, and in consequence of an order on case management conference, supplied a transcript of its news broadcasts for the evening of the 21st March 2012, which interestingly does not reveal that there was a broadcast concerning the claimant at all. This, the fourth named defendant submits, shows that the claimant cannot prove publication as a fundamental element of the tort of defamation, and its claim must therefore fail.

[8] Seemingly undaunted by the application of the fourth named defendant the claimant fired back alleging that its claim is precisely as it had pleaded. The content of the transcripts provided are not consistent with what the claimant and many members of the general public saw and heard regarding the defamatory statements made. The claimant reiterates that its claim will be proven at the trial of the action and after receiving evidence of its witnesses. In short, the claimant intends to vigorously challenge the authenticity of the submitted transcript and DVD.

[9] During the hearing of the application, the issue in dispute on the application was narrowed to the adequacy of the pleadings of the claimant and whether the claimant has satisfied the requirement of proof of publication on filing of the claim and at case management conference.

The requirements of the pleadings of tort of defamation

[10] The Civil Procedure Rules 2000 at part 69.2 provides the requirements of the pleadings for defamation, and states thus:—

“69.2 The statement of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8—

- (a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified;*
- (b) if the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning —give particulars of the facts and matters relied on in support of such sense; and*
- (c) if the claimant alleges that the defendant maliciously published the words or matters — give particulars in support of the allegation.”*

[11] Part 8 of the CPR 2000 speaks generally to the clarity of the pleadings and provides at part 8.7 as follows:-.

“8.7(1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.

- (2) The statement must be as short as practicable.*

- (3) *The claim form or the statement of claim must identify or have annexed thereto a copy of any document which the claimant considers is necessary to his or her case.*
- (4) *If the claimant seeks recovery of any property, the claimant's estimate of the value of that property must be stated.*
- (5) *The statement of claim must include a certificate of truth in accordance with rule 3.12.” (My highlights)*

[12] It is an elementary rule that pleadings are *facta probanda* alleging the facts which are constitutive of the cause of action as distinguished from the mode in which that case is to be proved. That is also the stated requirement of CPR 69.2 and 8.7 of CPR 2000 applicable to these proceedings.

[13] I am satisfied that the claimant has provided in his pleadings sufficient particulars of the publication. He has provided full particulars as to the words spoken, the innuendo and intended malice, the place where, the time when and the person who on their broadcast allegedly spoke the defamatory words to allow the defendants to form a clear and precise picture of the nature and extent of the case that they will be facing at trial.

The Effect of Specific Disclosure on the Proceedings

[14] The application to strike out the claim was prompted by the specific disclosure of the transcript and DVD of the broadcast of the fourth named defendant which reveal no broadcast in relation to the claimant.

[15] With due deference for the submissions of the fourth named defendant, I am unconvinced that the disclosed transcript preclude the claimant from pursuing the action. The transcript was prepared and taken privately, behind closed doors as it were and has no more evidential value at this stage than the unsworn statements of the intended witnesses for the claimant. Like any other evidence in this case it would have to be introduced at trial and its

authenticity accepted by the court before it can be treated as better evidence than the statements of the witnesses of the claimant.¹

The Objective of Part 26.1 and 26.3 of the CPR 2000.

[16] In the recent authorities of **Citco Global Custody NV v Y2K Finance Inc HCVAP2009/022**, and **Ian Peters v Robert George Spencer HCVAP 2009/016**, the Court of Appeal reaffirmed that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence. I am satisfied that the issue of whether there was publication and whether the publication was defamatory of the claimant is a real issue to be tried, and which logically can only be amplified at trial. In the circumstances, the pleadings of the claimant do not warrant striking out at this stage.

The Affidavit of Wayne Whitfield

[17] During the hearing of the application I had ruled that the affidavit evidence of Wayne Whitfield that inaccurately had been submitted as an amended affidavit was to be corrected to reflect a “further affidavit” and going forward in the application and the proceedings was to be treated as such.

[18] CPR 20.1 as amended contemplates amendments to a party’s statement of case only. An affidavit being the factual allegations of a party can only be altered by further evidence of that party. The decision to treat the “amended affidavit” as a “further affidavit” was agreed by the parties to the proceedings.

[19] In conclusion I hereby;-

- (a) Dismiss the application of the fourth named defendant with costs to the claimant in the sum of \$750.00 to be paid within 14 days hereof.

¹ See also Part 29.2 of the CPR 2000.

- (b) I order that the “amended affidavit” of Wayne Whitfield by agreement is accepted as a “further affidavit”.
- (c) Case management conference to continue on Wednesday 10th April, 2013.

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V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER