



[2022] JMSC Civ.61

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020 CV 02836

BETWEEN	JENNES ANDERSON	CLAIMANT
AND	GENERAL LEGAL COUNCIL	DEFENDANT

IN CHAMBERS

Mr. Terrence Williams Ms. Carol Davis and Mr. John Clarke instructed by Carol Davis for the Claimant/Respondent

Mrs. Denise Kitson Q.C. and Mr. Kevin Williams instructed by Grant Stewart Phillips for the Defendant/Applicant

Heard: April 1, 2022 and May 13, 2022

Application to strike out statement of case – Application for summary judgment – Defamation – Whether the words and/or publication bears a defamatory meaning – Rule 69.4 of the Civil Procedure Rules – Absolute Privilege

CARR, J

Introduction

[1] The Claimant, Ms. Anderson, contends that the General Legal Council (**GLC**) posted on its website and in its annual report commencing sometime on or about July 31, 2018, defamatory matter which has been detrimental to her reputation and has subjected her to ridicule and contempt and lowered her reputation in the

estimation of others. In the Amended Particulars of Claim filed on the 29th of September 2021 she outlines that the statements are untrue and in their natural and ordinary meaning are capable of bearing the meanings that after the 31 July 2018;

- a) The Claimant's impugned conduct was of a certain level that as a sitting Judge of the Parish Court, she had been subject to the jurisdiction of the Disciplinary Committee,
- b) The Claimant's record in the legal profession included extant, valid and proper findings or orders that the Claimant was;
- c) The Claimant, then a sitting Judge of the Parish Court, is subject to the jurisdiction of the Disciplinary Committee.
- d) The Claimant is guilty of professional misconduct
- e) The Claimant is reprimanded and ordered to pay costs amounting to \$350,000.

[2] The defamatory matter consisted of a report of the Disciplinary Committee (**The Committee**) with respect to a complaint filed against the Claimant which was later overturned on appeal in the Court of Appeal. There was no reference made on the website to the Court of Appeal decision and the report was republished on numerous occasions as it was hyperlinked to footnotes which facilitated cross referencing. In essence when a user of the website searches for the name Jennes Anderson a link would take you straight to the report.

[3] The said defamatory material was also published in the annual report of the Defendant which was tabled in Parliament. Changes were only made to the website following a letter by the Claimant sometime in July 2020.

[4] The Defendant filed an application seeking the following orders:

1. The Court do determine whether the words and/or publication, the subject matter of this Claim:
 - a) Bears a defamatory meaning as alleged by the Claimant or at all;

- b) If the words/publication, the subject matter of this Claim, is capable of bearing a defamatory meaning as alleged by the Claimant or at all, whether those words were published on an occasion which attracts absolute and/or qualified privilege;
2. If the Court determines pursuant to paragraph 1 (a) hereof that the words/publication was either not capable of bearing a defamatory meaning as alleged or at all, that the Claim be struck out and there be judgment for the Defendant.
 3. In the alternative and/or in addition, if the court determines pursuant to paragraph 1 (b) hereof that the words/publication, the subject matter of this Claim, were published on an occasion which attracts absolute and/or qualified privilege that the Claim be struck out and there be judgment for the Defendant.
 4. Costs of this application to be that of the Defendant to be taxed, if not agreed.
 5. Such further and other relief and order as this Court shall think fit.

Issues:

- [5] a) Whether the report bears a defamatory meaning.
b) Whether the Defendant is entitled to summary judgment.

The Law

- [6] The Defamation Act as amended in 2013 defines defamatory matter as “**any matter published by a person that is, may be, or is alleged to be, defamatory of another person**”¹. The word matter includes a programme, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication.² A publisher means a person who has published a matter that is, may be, or is alleged to be defamatory

¹ Section 2 of The Defamation Act 2013

² Ibid.

of another person and “publish” and “publication”, in relation to a statement, subject to the provisions of this Act, have the meaning they have for the purposes of the law relating to the tort of defamation.

[7] Part V Section 19 (1) of the Act states:

“A defence under this Part is additional to any other defence or exclusion of liability available to the defendant apart from this Act and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability.” Part V then goes on to detail the defences of Truth, Fair Comment, Innocent Dissemination and Qualified Privilege, there is no mention of Absolute Privilege.

Whether the report bears a defamatory meaning

Discussion

[8] Rule 69.4 of the Civil Procedure Rules provides as follows:

“(1) At any time after the service of the particulars of claim, either party may apply to a judge sitting in private for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statements of case.

(2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statements of case, the judge may dismiss the claim or make such order or give such judgment in the proceedings as may be just.”

[9] The rule gives the court the power to strike out a claim in circumstances where it is found that the words complained of are not capable of bearing a defamatory meaning.

[10] The legal principles applied in making such a determination have been set out in several cases. Morrison, JA, as he then was in the case of **Deandra Chung v.**

Future Services Ltd. and Yaneek Page³ started with a review of the Privy Council decision of *Bonnick v. Morris* and stated:

“I take as a starting point *Bonnick v Morris et al* [2002] UKPC 31, in which Lord Nicholls explained (at para. 9) the correct approach to determining whether a statement can bear or is capable of bearing the defamatory meaning alleged: “As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in *Skuse v Granada Television Ltd* [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the [newspaper], reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant.”

[11] The facts of this case are not in dispute. The Claimant was the subject of a disciplinary hearing before The Committee of the General Legal Council for failing to comply with Regulation 16(1) of the Legal Profession Act relative to the filing of Accountant’s report and/or Declaration for the years 2000 and 2001. On the 26th of April 2014 The Committee issued its decision which found that the Claimant was guilty of professional misconduct, she was reprimanded and ordered to pay costs in the sum of Three Hundred and Fifty Thousand Dollars. The Claimant lodged an appeal with the Court of Appeal. The Court in handing down its decision found inter

³ [2014] JMCA Civ. 21 para. 16

alia that as the Claimant was a sitting judge of the Parish Court, it was the Judicial Services Commission that had jurisdiction over her and not The Committee. The appeal was allowed and the decision and orders were set aside.

[12] The Claimant by way of letter dated 22nd of July 2020, to the then Chairman of the GLC Allan Wood, complained about the continued posting of The Committee's decision on the website, the letter was headed "*Re: Defamation and Breach of Constitutional Rights of Jennes Vashti Anderson*".

[13] The report subsequent to the decision of the Court of Appeal falls squarely within the ambit of the definition of defamation as outlined in the Act. The report contains matter which the Claimant alleges is defamatory. The report is no longer true following the decision of the Court of Appeal, and there can be no doubt that it is injurious to the reputation of the Claimant.

[14] In applying the test as set out in **Bonnick v. Morris**, there can be no ambiguity as to the meaning or effect of the report. It charged that the Claimant was found guilty of professional misconduct, that she was reprimanded and fined. The ordinary reasonable reader having not had the benefit of the judgment of the Court of Appeal would accept the report and find that the Claimant was lawfully sanctioned by the GLC for misconduct. I find therefore that the report subsequent to the ruling of the Court of Appeal is defamatory matter which continued to be published on the website of the GLC.

Whether the Defendant is entitled to summary judgment.

[15] Rule 15.2 (a) of the CPR provides that: "**The court may give summary judgment on the claim or on a particular issue if it considers that – (a) The claimant has no real prospect of succeeding on the claim or the issue.**" The scope and

application of the rule was discussed in the Privy Council decision of **Sagicor Bank v. Taylor Wright**⁴. It was stated:

“Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court’s resources, all militate in favour of summary determination if a trial is unnecessary.”

[16] The utility in a court granting an application for summary judgment is to prevent a trial in a claim that has no real prospect of success. Brooks, P in the case of **Somerset Enterprises Ltd. V. Lindeerth Powell and National Export Import Bank of Jamaica Ltd.**⁵ concluded that;

“The party that seeks the summary judgment must assert that the respondent’s case has no real prospect of success. If that party asserts that belief, on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case “which is better than merely arguable”. In order to successfully resist the other party’s assertion, the respondent must prove that its case has “a ‘realistic’ as opposed to a ‘fanciful’ prospect of success” (see paragraphs [14] and [15] of ASE Metals NV v Exclusive Holiday of Elegance Limited [2013] JMCA Civ 37). In determining whether there

⁴ [2018] UKPC 12 p. 6 and 7

⁵ [2021] JMCA Civ. 12 para. 25

is any real prospect of succeeding, the judge should not conduct a mini-trial.”

- [17] At the heart of this application is the defence of absolute privilege. The Defendant alluded to the defence of qualified privilege in their Notice of Application however in their submissions they relied solely on absolute privilege. It was submitted that in the event that the court finds that the words are capable of bearing a defamatory meaning, the decision itself is clothed with absolute privilege and therefore the Claimant has no real prospect of success.
- [18] The Defamation Act as previously stated does not make reference to the defence of absolute privilege. The Act however preserves the right of persons to raise defences in law which are available under Tort. Absolute privilege means that the publisher has the right to make such a statement even though it may be defamatory and that they are immune from liability. The defence however, is only applicable on certain occasions. It has been established by case law that one such occasion is that of the proceedings of a court or tribunal.
- [19] Counsel on behalf of the Claimant, Mr. Terrence Williams, submitted that the defence of absolute privilege was not without exceptions. He argued that the matters in issue before the court would not make that defence available to the Defendant. He raised two particular points which he argued would show that the Claimant has a realistic prospect of success.
- [20] The first was that The Committee and the GLC are two distinct bodies. It was submitted that under the Legal Profession Act, the GLC's conduct in disciplinary hearings is limited to the appointment of members of The Committee and receiving fines and costs. A member of the GLC can submit a complaint against an Attorney-at-Law to The Committee. The Committee is a state organ mandated to conduct hearings into complaints against lawyers. It was further submitted that the GLC is constituted under s. 3(4) and the First Schedule of the LPA without any reference to The Committee. The Committee is constituted under s. 11 and the Third

Schedule without any reference to being a part of the GLC. If it is accepted that The Committee and the GLC are two separate bodies, then the GLC would not have a defence of absolute privilege as that would rest in The Committee only.

[21] In response to those submissions Counsel Mr. Kevin Williams argued that section 11 of the LPA makes it clear that it is the GLC that appoints The Committee. Nothing in section 11 of the LPA and/or the THIRD SCHEDULE to the Act incorporates and/or gives The Committee a separate legal existence and/or legal personality. Therefore, when The Committee is appointed, it is appointed as a committee of the GLC. The Committee's decisions are in fact decisions of the GLC.

[22] Further it was argued that the laws of Jamaica permit the incorporation of an entity by one (1) of four (4) means, namely:

- I. Incorporation under the Companies Act;
- II. Incorporation by Parliament pursuant to an Act of Parliament which creates and incorporates the body in question
- III. Incorporation by Letters Patent issued pursuant to the exercise of the royal prerogative; and
- IV. Incorporation by a sector-wide Act of Parliament which treats with and regulates specific entities in a particular sector, such as the Industrial and Provident Societies Act.

[23] If Parliament had intended to incorporate The Committee upon the promulgation of the Legal Profession Act, and make The Committee a separate legal entity from the GLC itself that would have been done.

[24] There is no doubt that the Judge, jury, witnesses and attorneys participating in a judicial proceeding or in this case a disciplinary proceeding before a tribunal are protected by the defence of absolute privilege. That legal principle has been set out in many cases before the courts and most notably so in the decision of Phillips, J.A. in the matter of **Oswest Senior Smith v. General Legal Council and Lisa**

Palmer Hamilton⁶. The history of the privilege was discussed and Phillips, J.A. found that the principle remained intact subject to the circumstances of each case.

“I find that statement of the law, which was developed so many years ago, remains extant today...I agree with counsel for the respondents that each particular case will have a different set of circumstances, and perhaps a different outcome in each case, bearing in mind the exceptions. However, the settled aspect of the law will continue to be applicable for the court to assess and grant absolute privilege to the conduct/words of judges, witnesses, parties and to counsel in the pursuit of contested litigation in and relevant to the judicial proceeding.”

[25] Mr. Terrence Williams has argued that the privilege does not extend beyond the members of The Committee to the GLC. That is his argument. It is important to note that the case relied on by the Defendant **Addis v. Crocker and Ors.**⁷ was a case which was brought against the members of the disciplinary committee set up by the Master of the Rolls under the Solicitors Act. There is no decision which has been presented to this court which addresses the issue of privilege in the context of the governing body which sets up the disciplinary committee.

[26] Secondly, Counsel for the Claimant, submitted that the Committee was permitted to publish its decisions where a lawyer has been suspended or struck off. Once the decision has been made The Committee must send it to the Registrar of the Supreme Court to publish the operative parts in the Gazette. The legislation did not expressly permit the GLC to publish reports of its decisions and therefore they acted ultra vires.

⁶ [2020] JMCA App. 35 para. 33

⁷ [1960] 2 ALL ER 629

- [27] In answer to the issue of the right to publish, Counsel submitted that the GLC, as the regulator of the legal profession in Jamaica, must be taken to be exercising a power that is necessary and consistent with its regulatory functions, when it publishes decisions of The Committee. This is consistent with the concept of open justice that is itself enshrined in the Constitution of Jamaica.
- [28] In any event, it was maintained that the publication of the decision of The Committee does not derogate from the immunity and privilege that is attached to the decision itself. It is accepted by both the Claimant and the Defendant in this matter that what was published on the website was in fact the actual decision of The Committee of the GLC. Upon publication on the GLC's website that privilege remained extant and intact.
- [29] The case of **Addis and Crocker**⁸ was also used to support this point. The subject matter of the decision was relative to the question as to whether or not the hearing fell within the definition of a tribunal which would be protected by the defence of privilege. It was argued that the case went on to discuss the issue of the irregularity of the proceedings which was an issue raised by the Claimant in this case. It was submitted that even if the proceedings were irregular that this would not remove the privilege. It was further argued that the privilege extended to the findings as well as the document itself. The judgment of Hodson, L.J. made reference to the argument of irregularity in the proceedings. The effect of the irregularity of the proceedings on the finding of the court that the hearing before the disciplinary committee was in fact a hearing before a tribunal was discussed. It is in that context that it was stated:

“If the findings and order, as a document, had contained anything which was not relevant or should not have been contained therein, it

⁸ Supra.

would not for that reason...have caused the proceedings to lose their character, which was such that the members of the tribunal, as well as the witnesses and all those who appeared before the tribunal, were protected by absolute privilege.”

[30] It can be gleaned from that passage in the judgment that an irregularity in the proceedings would not result in the privilege being waived. However, Queen’s Counsel Mrs. Denise Kitson went further to rely on another section of the judgment in which it was held at page 635;

“Perhaps, having said that, it may be convenient to postpone returning to the point about publicity and deal with the last point – that even if the hearing itself was protected the findings and order are not. I think that the short answer to that is that the findings and order were an intrinsic part of the hearing, and if the hearing itself is protected by absolute privilege the same applies to the findings and order; and the subsidiary point that matters irrelevant to the findings and orders were included in the document which is called “Findings and Order” really, I think comes under another point which the plaintiff has made to which I shall refer in a moment.”

[31] In the aforementioned paragraph the Judge was dealing with the issue of publicity. The plaintiff had argued that the matter was conducted in private but the decision or findings and order was delivered in public. As such the hearing could not be viewed as one which was similar to a judicial proceeding as those matters were dealt with in public. The court found that even though aspects of the hearing were dealt with privately it did not affect the finding that it was a hearing before a tribunal. As such, within the context of a ‘hearing’, the decision was protected by the privilege. In the instant case the hearing had already been concluded.

[32] The aspect of this case therefore, which I find most compelling is in relation to the timing of the publication. The report was published subsequent to the decision of

The Committee which was rendered on the 26th of April 2014. The Court of Appeal decision was delivered on the 31st of July 2018. The letter which was sent to the Chairman of the GLC was dated the 22nd of July 2020. Two years had passed since the decision and the orders of The Committee were set aside by the Court of Appeal. It is the contention of the Claimant that even after the receipt of the letter and the correspondence in response, the offending defamatory matter remained on the website and was still accessible via hyperlinks. Counsel for the Claimant has argued that the 'hearing' ended several years before and as such the privilege could not still be applicable to the report. There has been no authority presented which deals specifically with that issue and it raises a question which begs to be addressed.

- [33]** Having accepted that the words contained in the report are capable of causing harm to the reputation of the Claimant as she has outlined in her affidavit, it is my view that the issues raised on behalf of the Claimant are matters for determination by a court, as it requires an assessment of whether or not the privilege attaches to the report subsequent to the judgment of the Court of Appeal. To engage in such a discussion now would result in a mini-trial at this stage of the proceedings.

Conclusion

- [34]** The application to strike out cannot be maintained as the words are capable of a defamatory meaning. The sole issue for determination, based on this application, is that of the defence of absolute privilege and its applicability post the Court of Appeal decision. The Claimant has demonstrated in accordance with the authorities on summary judgment, a case which is better than merely arguable. In the circumstances therefore the application for summary judgment is refused.

Order:

1. The words and/or publication which is the subject matter of this claim are considered by this court as bearing a defamatory meaning.
2. The application to strike out the claim or in the alternative for summary judgment is refused.
3. Costs to the Claimant to be agreed or taxed.