

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016 – 03083

Between

DR ROODAL MOONILAL

Claimant

And

THE CEPEP COMPANY LIMITED

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Jagdeo Singh, Mr Larry Lalla, Mr Kiel Taklalsingh instructed by Mr Vivek Lakhan-Joseph for the Claimant

Mr Elton Prescott SC leading Mr Phillip Lamont instructed by Mr Farai Hove Masaisai for the Defendant

Date: 18 January 2017

RULING

1. The claimant is the Member of Parliament for Oropouche East and former Minister of Housing and Urban Development. The defendant is a limited liability company wholly owned by the State. The claimant was once the Minister to whom the defendant reported.

2. On 14 September 2016 the claimant brought a claim for defamation against the defendant. This was in relation to a newspaper advertisement placed by the defendant on 24 August 2016.
3. The defendant filed a defence and counterclaim for defamation on 20 October 2016. The counterclaim was in relation to statements made by the claimant on 16 August 2016 and on 5 September 2016. The advertisement by the defendant was to refute the statements made by the claimant on 16 August 2016 and went on to make certain allegations concerning the claimant.
4. The claimant has asked the court to strike out the counterclaim. Front and centre of this application is the argument that the defendant is prevented from bringing a claim for defamation because it is a state entity. This is on public policy grounds as laid down by the House of Lords in the case of **Derbyshire County Council v Times Newspapers Limited and Others [1993] 1 All ER 1011** and other cases cited from South Africa, the United States of America, Zimbabwe and Australia.
5. In the **Derbyshire** case, a local authority, a politically elected body, was held to be unable to bring a claim in defamation. It is important to examine the rationale for this decision. In the judgment of Lord Keith of Kinkel, certain comparisons were made. A trading company was considered to be entitled to sue in respect of defamatory matters which can be seen as tending to damage it in the way of its business. A bank or lending institution, for example, may be affected in ways that impede the recruitment of the best qualified workers or may make people reluctant to deal with it. Trade unions may be affected in their ability to keep members or to maintain a convincing attitude to employers. A charitable organisation defamed may be affected in their ability to get subscribers or may be impaired in how it does its charitable activities.
6. The restriction on being able to sue is based on the principle that a governmental body should be open to uninhibited public criticism. The fundamental right of freedom of speech is involved. There are public interest considerations in allowing uninhibited criticism.
7. The first rationale comes in the following statement from the judgment at page 1018:

“Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving these facts is not available.

This may prevent the publication of matters which it is very desirable to make public.”

8. The second rationale was extracted by their Lordships from the Privy Council case of **Hector v Attorney General of Antigua and Barbuda [1990] 2 A. C. 312**. Lord Keith quoted Lord Harwich at page 318 as follows at page 1018:

“In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism.”

9. The third rationale comes in this passage at 1019:

“...there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can show it is in the public interest to do so....

10. Further, Lord Keith stated at page 1019:

“In both cases I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it.”

11. In **Derbyshire** the learned judges referred to the South African case of **Die Spoorbond v South African Railways (1946) S.A.L.R. 999** where it was held that the South African Railways and Harbours, a governmental department, was not entitled to maintain a claim for defamation. That case did not confine the restriction to railways but also included governmental departments which “indulge in **some form of trading** on a greater or a lesser scale”: Schreiner JA at 1012-1013.

12. This was even where the department may have been “falsely and unfairly” criticised.

13. **Carter-Ruck on Libel and Slander, Sixth Edition**, a leading text on the subject, at paragraph 8.14 states:

“Although the Crown can be sued for defamation, it cannot, following *Derbyshire CC v Times Newspaper* sue for defamation (1). Identifying the ‘Crown’ for these purposes is not entirely easy. Clearly it includes government departments (2) as well as servants and agents of the Crown. Whether it includes agencies (3) or companies (4) to which formerly government-run functions were transferred or companies that were previously in the private sector but are now wholly or partially owned by the government (5) is more difficult. None of these entities of course have been, or indeed are capable of being, democratically elected and this was a factor considered of importance by Lord Keith in the *Derbyshire* case. Yet, that cannot be decisive and it is submitted that the **crucial question** remains whether the entity in question should be treated as a **governmental body** in the light of the **functions it undertakes and its legal nature**. The **legal form** taken by the entity, **though relevant, is not decisive.**” (Emphasis supplied)

14. Of interest, footnote 4 has as examples *British Gas* and *British Telecom*. An example of footnote 5 is “the complete or partial state ownership of companies like *Northern Rock*, *Royal Bank of Scotland* and *HBOS*”.

15. Finally, but by no means least, there was the local case of ***Trinidad and Tobago National Petroleum Marketing Company Limited v Trinidad Express Newspapers Limited*** **HCA No. S-862 of 1999**, unreported, delivered 11 March 2002, per Rajnauth-Lee J. In that case, the learned Judge held that National Petroleum could bring a claim for defamation where the plaintiff was: a limited liability company; a trading company carrying on the business in the sale and distribution of petroleum and petroleum products; wholly owned by the State; a company where the Board was appointed by a government Minister and removable at will; a company where the Board was subject to the policy directions of the government of the day through a Minister; a company which was run by staff who were not public servants. These were the “undisputed facts”. The learned judge cited Buckley J in ***Goldsmith v Bhojru*** **[1998] QB 459 at p 462 C**:

“To use what the court may regard as the public interest to prevent a legal person, individual or corporate, from suing for libel if it might otherwise have that right is an undertaking that requires great caution”.

16. It is in light of these cases and principles that it is now necessary to identify the facts about the defendant company.

17. The defendant is a limited liability company. It was established by the government pursuant to Cabinet Minute No. 1927 of 3 August 2006. Previously a programme for community based environmental protection and enhancement was established by Cabinet Minute No 1003 of 28 February 2002. The defendant manages this programme called CEPEP. The Defendant reports to a government Minister (the line Minister). It is wholly owned by the State. It is managed on a day to day basis by persons who are employees of the company and not public servants. The shares are vested in the Minister of Finance as corporation sole. All property is held in trust for the State. The board of directors is appointed by the relevant Minister of State. The Minister can remove the Board members at will. So far so good.

18. According to its General Manager, Mr Keith Eddy, one of its functions is to manage the CEPEP programme. To do so it hires contractors. He says the company also enters into contracts with private companies and state entities providing revenue for the company and creating business development opportunities for “our contractors and their employees” (paragraph 3 of affidavit filed 29 November 2016).

19. In the affidavit in support of the application to strike out the counterclaim filed 16 November 2016 by Mr Vivek Lakhani-Joseph, he referred to certain documents in support. One was allocations of expenditure by the government to the Social Sector Investment Programme 2017. In respect of CEPEP, the following approximate sums were spent by CEPEP since 2011:

2011	366,114,000.00
2012	494,419,288.00
2013	584,039,642.00
2014	532,557,459.00
2015	606,200,000.00
2016	531,000,000.00 (Revised Estimate).

20. Thus, in a 6 year period, CEPEP has spent over \$3.1 billion in State revenue.

21. Of importance, in this document CEPEP was listed among other government programmes such as Disability Assistance Grant, Government Assistance for Tertiary Expenses (GATE), National Schools Dietary Services Limited (formerly Schools' Nutrition Programme), On the Job Training (OJT), Public Assistance Grant, Senior Citizens' Pension, Target Conditional Cash Transfer Programme (Food Support Programme) and Unemployment Relief Programme (URP). The company that CEPEP keeps puts it squarely within the ambit of government social programmes.

22. Cabinet Minute 1003 of 23 May 2002 provided that:

“Cabinet agreed:

- (a) to the establishment of a community-based Environmental Protection and Enhancement Programme in all communities throughout Trinidad and Tobago for a period of one (1) year in the first instance;*
- (b) that the Ministry of Public Utilities and the Environment be the implementing agency for the Programme and the Trinidad and Tobago Solid Waste Management Company Limited (SWMCOL) be the executing agency;*
- (c) that SWMCOL be authorized to source a short-term loan in the sum of \$74,932,978 for the implementation of the Programme for the remainder of fiscal 2002 (the Appendix to the Note refers);*
- (d) that the Ministry of Finance negotiate and finalize the loan referred to at (c) above, the Minister of Finance to issue a Letter of Comfort in respect thereof;*
- (e) that funds be provided in the 2003 Budget to meet the debt servicing cost of the said loan.”*

23. Thus, in the first incarnation of the programme, a Ministry was considered the implementing agency and a State company was considered to be the executing agency for the programme.

24. Cabinet Minute No 1927 of 3 August 2006 provided:

“Establishment of a Limited Liability Company to manage and execute the Community-based Environmental Protection and Enhancement Programme

...

Cabinet having noted:

- (1) that by Minute No. 1003 of February 28, 2002, it agreed, inter alia:*

- (i) *to the establishment of a Community-based Environmental Protection and Enhancement Programme (CEPEP) in all communities throughout Trinidad and Tobago for a period of one (1) year in the first instance;*
 - (ii) *that the Ministry of Public Utilities and the Environment be the implementing agency for the Programme and the Trinidad and Tobago Solid Waste Management Company Limited (SWMCOL) be the executing agency;*
- (2) *in connection therewith, the objectives of the Programme are as stated hereunder (Minute No. 811 of April 10, 2003 refers):*
- (i) *the empowerment of communities to improve the condition of the local environment*
 - (ii) *the expansion of employment opportunities for the benefit of semi-skilled and unskilled citizens within their communities*
 - (iii) *the creation of opportunities for the development of small businesses;*
- (3) *that the governance structure of CEPEP as indicated in paragraph (1)(ii) above facilitated the rapid start-up of the Programme which was necessary to address a critical need in the country for the improvement of the state of the physical environment, the creation of small business opportunities and increased employment; towards that end, the organizational resources of SWMCOL were used to provide the support necessary for the implementation of the programme in the early stages of development;*
- (4) *that the Programme currently involves the engagement by SWMCOL of 113 contracted firms which manage their workforces in 34 approved Environmental Work Areas in Trinidad through the employment of 5,840 unskilled and semi-skilled persons; in Tobago, the Programme is executed through a special arrangement between SWMCOL and the Tobago House of Assembly (THA) and hiring is done directly by a project management group operated by the THA; the Programme operates in two (2) work areas in Tobago and currently employs 600 workers;*
- (5) *that apart from demonstrating its potential for realizing its original objectives, the Programme is also an effective mechanism for achieving sustainable development and environmental objectives contained in national policies and multilateral environmental agreements, especially the empowerment of local communities to take action to improve the environment, while concurrently creating small business development opportunities;*
- (6) *that promoting sustainability of the Programme would require its reconfiguration along several lines; this would be in keeping with the policy statement articulated in the Budget Statement for Fiscal Year 2006 by the Prime Minister and Minister of Finance who signalled that the time had come to re-organise CEPEP,*

agreed:

- (a) *to the establishment of a limited liability company with responsibility for the management and execution of the Community-based Environmental Protection and Enhancement Programme (CEPEP) in Trinidad and Tobago;*
- (b) *upon the establishment of the company as a going concern, to the termination of the role and function of the Solid Waste Management Company Limited (SWMCOL) as the executing agency for CEPEP;*
- (c)

(d)

Cabinet further noted that the undermentioned matters would be the subject of a subsequent Note for the consideration of Cabinet:

- (i) **the legal and regulatory, financial, human resource and other implications** involved in the establishment of the limited liability company referred to in (a) above and the termination of the role and function of SWMCOL as the executing agency
- (ii) the role of the limited liability company as it relates to the operation of CEPEP in Tobago
- (iii) ...

Original Signed by

A.LEUNG WOO-GABRIEL

Secretary to the Cabinet”

25. In the above Cabinet Notes, I have highlighted, in bold, certain key matters regarding the defendant. These extracts show the purpose of the establishment of the limited liability company. It was to facilitate the CEPEP programme. The programme was to be community based. It was an environmental protection programme. It aimed at empowerment of communities. It was to further expansion of employment opportunities for semi-skilled and unskilled workers. Thus, it was a form of unemployment relief. It was also intended to provide for opportunities of small businesses. The mechanism is that small contractors would undertake the obligation of hiring and managing the workers and the defendant would manage the companies. In this regard, SWMCOL originally managed 113 contracted firms. The Cabinet Notes demonstrated that CEPEP was formed as a mechanism to **achieve sustainable development and environmental objectives contained in national policies and multilateral environmental agreements.**

26. With the growth of the programme, the legal framework was reconfigured to place the programme under a limited liability company. The rationale has not been explained, but presumably the expansion of the programme created a need for more direct supervision to ensure greater efficiency. I observe, however, that the rationale for establishing a limited liability company could not have been for the purpose of avoiding scrutiny and obligations that would have applied if the programme remained strictly under State management and control.

27. I rely on these Cabinet Notes and place significant weight on them. The defendant had the opportunity to place before me other evidence about the nature and functioning of the programme and the rationale for establishing a limited liability company.
28. Whatever else CEPEP has become, it is clear that the limited liability company is principally the mechanism of executing the programme called the Community-based Environmental Protection and Enhancement Programme, CEPEP for short. This is a government programme. The funds used are State funds. The objectives of the programme are national goal objectives such as community development, employment creation and business development. There is therefore a strong public interest element on there being accountability and oversight of its operations.
29. This need is magnified by the increase in State spending on the programme over time. There is also a strong public interest element in that State funds are being spent in a manner consistent with the State's obligations to all its citizens. Thus, the management of the programme has to be subject to scrutiny to see if, for example, State funds are being spent in an equitable way or whether partisan interests are being furthered.
30. On the other hand, there is a competing concern. Of significant weight is the fact that CEPEP is a limited liability company. With this goes several considerations. It has a separate legal personality. It can suffer injury. This injury can be in relation to its reputation. This can affect its business interests. These matters, especially its separate legal personality, with all the attendant consequences, is a hallowed principle of company law. A court has, necessarily, to be slow to place any fetter on a company's ability to defend itself and to avail itself of any and all legal remedies open to a person or body having a legal personality.
31. However, as noted, there is the significant countervailing argument when the device of a limited liability company is used to execute state functions and particularly where the revenue for the execution of those functions is essentially all comprised of public funds. No evidence has been put before the court to suggest that CEPEP earns income from sources other than the government. If that were so, it would be easy for the company to do so.
32. The CEPEP Company Limited falls, squarely, in my view, under the rubric of "institution of central government", or "organ of government" or "governmental body" mentioned in the Derbyshire case. And while Buckley J's "caution" is noted, as well as the answer is "more difficult" to arrive at, as contemplated by Carter-Ruck regarding companies owned

by the government, CEPEP's operations, funding and mandate all justify the restriction on their right to sue for defamation in the public interest. This principle in no way restricts the rights of individuals employed by CEPEP who may be defamed from bringing claims. It also does not fetter its right as a company to defend itself in public through the media or other public relations devices from attacks made on it. Its best defence would be to be transparent and straightforward in the information it provides to the public.

33. The three rationales identified above in the Derbyshire case, namely, the difficulty of proving the truth of defamatory statements, the need for open criticism of public bodies and the non-availability to public bodies of all of the rights private citizens have, all apply to CEPEP having regard to its nature and functions. While CEPEP is not an elected body as a local government corporation is, its ultimate control is in the hands of elected officials. It reports to a Minister and the government can change its governing board at any time. Moreover, it is there to execute government policy. As governments change, its policies may change. Whatever changes are made may be in line with changing policies. A citizen must be free to criticise and raise questions when this happens. Both officials and those who they report to in government are free to defend themselves in public from those public criticisms. The forum is not necessarily the court.
34. Further, even though CEPEP and National Petroleum carry many similarities in terms of ownership and reporting, they differ in one very clear and material respect. National Petroleum was acknowledged to be first and foremost a trading company engaged in the sale and distribution of petroleum and petroleum products. CEPEP, as a company, first and foremost was set up to be the management and executing agency for a governmental social programme. They may both be "fruits", but fruits of a somewhat different character. I consider the **National Petroleum case** in this regard to be at least distinguishable from the present one. It follows that some State companies may fall within the restriction and others may not.
35. In this circumstance a limited restriction on CEPEP is justified on public policy grounds to ensure that there is freedom to ask questions about the use of public resources, to criticise how it may be done and even to err with false statements about how these funds are being used. As acknowledged by the cases, the threat of civil legal action can have a "chilling effect" on the right of freedom of speech in this context especially for a company having half a billion dollars of public funds at its disposal each year. Thompson CJ observed in **City of Chicago v Tribune Co (1923) 307 III 595 at page 606 to 607** quoted at page 1018 of the **Derbyshire** case:

"The fundamental right of freedom of speech is involved in this litigation and not merely the right of liberty of the press. If this action can be maintained against a

newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government he may be punished ... but all other utterances or publications against the government must be considered absolutely privileged. While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions ...'

36. CEPEP in this context is executing government functions with State funds and must therefore be placed in the same category as other government institutions.

37. Of course, the court at the same time must caution citizens who comment in public, including on social media, about making statements known to be false. As Wooding CJ stated in **Collymore v The Attorney General (1967) 12 WIR:**

“For the protection of his own freedom, everyone must pay due regard to the conflicting rights and freedoms of others. If not, freedom will become lawless and end in anarchy. Consequently, it is and has in every ordered society been the function of the law so to regulate the conduct of human affairs as to balance the competing rights and freedoms of those who comprise the society.”

38. Mr Prescott SC submitted that the court should be slow to strike out the claim until a full investigation is made of the circumstances of the defendant. While the court in the early stages of a claim must use the power to strike out a claim sparingly, when such an application is made it is equally the court's obligation to deal with it. The ethos of the CPR contemplates that where issues can be dealt with early on, they should be to more efficiently manage cases in keeping with the overriding objective. In this way the dispute between parties can be better managed with some issues being resolved earlier and with consequent saving of costs to the litigants. Each side had the opportunity of putting before the court all of the relevant evidence so the court could properly deal with the application. The court's duty has been to resolve the issue raised in light of the evidence put forward.

39. I hold that a limited incursion on CEPEP's legal rights by disallowing it from bringing a claim in defamation is justified in the public interest. CEPEP's counterclaim is therefore struck out. The defendant must pay the costs of the application by the claimant to strike out the counterclaim, to be assessed in default of agreement.

Ronnie Boodoosingh

Judge