**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2019-00055**

**DR KEITH CHRISTOPHER ROWLEY**

**Claimant**

**AND**

**DR ROODAL MOONILAL**

**Defendant**

**Before the Honourable Madame Justice Margaret Y Mohammed**

**Date of Delivery 30 August 2021**

**APPEARANCES**

**Mr Douglas Mendes S.C., Mr Michael Quamina and Ms Gabrielle Gellineau instructed by Ms Alatashe Girvan Attorneys at law for the Claimant.**

**Mr Anand Ramlogan S.C. and Mr Ganesh Saroop instructed by Mr Jared Jagroo Attorneys at law for the Defendant.**

**RULING**

1. The Claimant has applied ("the Claimant's Application") to strike out paragraphs 10, 14, 20 and 24 ("the challenged paragraphs") of the Defendant's Re-Amended Defence[1] ("the Re-Amended Defence") on the basis that they disclosed no grounds for

[1] Filed 6 March 2020

defending the claim. In support of the Claimant's Application was the affidavit of Ms Alatashe Girvan, Instructing Attorney at law. In response to the Claimant's Application, the Defendant filed an affidavit in opposition by Mr Jared Jagroo, Instructing Attorney ("the Defendant's Affidavit") on 22 February 2021.

**Context of the Claimant's Application**

2. In the substantive matter, the Claimant has claimed damages against the Defendant in defamation, for words initially spoken by the latter on 9 October 2019 during the Budget Debate in Parliament ("the Budget Debate"), which he subsequently repeated, republished, adopted and confirmed as true on several occasions outside of Parliament. The Claimant has not disputed that the words spoken in Parliament were on an occasion of absolute privilege. The Claimant's contention was that the words spoken outside of Parliament by the Defendant were not protected by absolute privilege. The occasions which the Claimant has pleaded were:

   a. The Defendant's telephone interview with Fazeer Mohammed which was broadcasted live on and recorded by the Morning Edition Programme on TV6 on 10 October 2018 ("the Fazeer Mohammed interview");

   b. The Defendant's press conference outside Parliament on 10 October 2018, which was recorded and published by TV6, CNC3, TTT and was reported in the Trinidad and Tobago Guardian Newspaper on 11 October 2018 ("the Press Conference");

   c. The Defendant's interview on the Morning Drive Show which was broadcasted live on and recorded by Power 102 FM on 11 October 2018 and which was reported in the Trinidad Express Newspaper on 15 October 2018 ("the Morning Drive Interview");

   d. The Defendant's presentation at the UNC's Monday Night Forum on 15 October 2018 which was broadcasted live and recorded by the United

National Congress and placed on their Facebook page ("the UNC Forum Speech").

3. The Claimant asserted that as a result of the Defendant's conduct he has suffered grave damage to his character and reputation, and has also suffered considerable distress and embarrassment. As a result, he is seeking general damages, aggravated damages and injunctive relief.

4. In the Re-Amended Defence, the Defendant has accepted that he spoke the words complained of at the Fazeer Mohammed Interview, the Press Conference, the Morning Drive Interview and the UNC Forum Speech. For each case the Defendant has asserted that the words he spoke were protected by absolute privilege.

5. The Defendant set out identical particulars in paragraphs 14, 20 and 24 of the Re-Amended Defence. The particulars which the Defendant pleaded in paragraph 10 of the Re-Amended Defence were:

> "10…The Defendant further avers that words complained of at Paragraph 11 are protected by absolute privilege since:
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> i) There is so close a nexus between the occasion of speaking in and then outside Parliament, that the prospect of the Defendant's obligation to speak on the second occasion (or the expectation that he would do so) was reasonably foreseeable at the time of the first speech in Parliament;
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> ii) The purpose of the Defendant's speaking on both occasions is the same or closely related; and
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> iii) There is a public interest in responding in respect of the Parliamentary utterance which the Defendant ought reasonably to serve.

Particulars:

a) the words complained of were spoken during a telephone interview which took place the day after the Defendant made his contribution in Parliament;

b) the Defendant's contribution occurred during the debate on the Appropriation (Financial Year 2019) Bill, 2018 (the budget debate);

c) during the Budget Debate the Defendant raised concerns regarding the closure of state owned oil refinery Petrotrin, the challenge to the Government's decision to close Petrotrin by the labour movement, and the relationship between A & V Oil and Gas Limited, its principal and/or owners and the Claimant, who is the Prime Minister of Trinidad and Tobago and the allegations of misconduct/theft made by former state-owned/funded oil company Petrotrin against A & V Oil and Gas limited resulting in the loss of approximately TT $100 million of public funds.

d) the Defendant further called upon the Claimant to respond and/or explain and/or investigate as to whether the matters raised were true or not.

e) during the interview referend to at Paragraph 11, the both Defendant and interviewer referred specifically to the Budget Debate and the need for the Government and/or the Claimant to respond and/or explain and/or investigate the concerns raised by the Defendant in the budget debate;

f) the Defendant is an experienced Parliamentarian, having been a Member of Parliament for over 17 years, and therefore would have also been involved in over 15 Budget debates of the years. He is also a senior member of the United National Congress, the party in opposition to the government of the day and a former Minister of Government.

g) The Budget debate, being the national debate over the allocation of public funds for expenditure over the next year, together with the closure of the state owned oil refinery Petrotrin, the challenge of the Government's decision to close the Petrotrin by the labour movement, the relationship between A & V Oil and Gas Limited, its principal and/or owners and the Claimant, who is the Prime Minister of Trinidad and Tobago and the allegations of misconduct/fraud made by former state-owned/funded oil company Petrotrin against A & V Oil and Gas limited resulting in the loss of approximately TT$100 million of public funds are obviously matters of public interest.

h) It was therefore reasonable in these circumstances that the Defendant be called upon to respond in respect of the statements made in Parliament."

**Relevant legal principles**

*Duty of the Defendant in pleading*

6. The Civil Proceedings Rules, 1998 ("CPR") places a duty on a Defendant to set out all the facts which he relies on to dispute his claim in his defence. Rule 10.5(1) CPR states that a Defendant is required to "include in his defence a statement of all the facts on

which he relies to dispute the claim against him.” Rule 10.6(1) CPR states that a Defendant “may not rely on any allegation which he did not mention in his defence, but which he should have mentioned there, unless to the court gives him permission to do so.”

*Striking out*

7. The principles which the Court is to apply in determining whether to strike out a pleading or part thereof were not in dispute by the parties. Paragraph 2 of the Claimant’s submissions in Reply[2] summarized the said principles which I adopt as:

   i) The power to strike out a pleading should be exercised sparingly and only in a clear case;

   ii) The power to strike out may be exercised where the defence (or part thereof) does not raise a valid defence. This may be the case where the defence is legally insufficient when either the allegations it contains do not give rise to a recognised defence or it fails to plead the necessary legal elements of an otherwise recognised defence;

   iii) A defence may be unsustainable where it is lacking a factual ingredient or it advances an unsustainable point of law, or does not raise a valid defence as a matter of law;

   iv) On an application to strike out, it is open to the court to conclude that the justice of the particular case militates against striking out and that the appropriate course is to order the Defendant to supply further details or to amend the defence;

[2] Filed 23 July 2021

v) The burden of proof that the case is appropriate for striking out rests on the Applicant who must satisfy the Court that no further investigation will assist the Court in arriving at the correct outcome.

*Absolute privilege*

8. The general rule is that an absolute privilege is attached to statements made during the course of Parliamentary proceedings[3]. However, this privilege is not extended if the exact words are repeated outside of Parliament. **Gatley on Libel and Slander**[4] explained the position at paragraph 13.30 as :

> "**Extent of the privilege**. […] Statements made outside Parliament are not protected by absolute privilege even if they simply repeat what has been said therein.
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> > "The right of members of Parliament to speak their minds in Parliament without any risk of incurring liability as a result is absolute, and must be fully respected. But that right is not infringed if a member, having spoken his mind and in so doing defamed another person, thereafter chooses to repeat his statement outside Parliament."
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> This is so even if the extra-Parliamentary statement does not literally repeat the words used in Parliament but merely adopts them by reference, for even though in such a case the record of Parliament must be examined to determine what the member said there and is treated as now repeating by implication, that does not amount to "questioning" the proceedings in Parliament."

[3] Gatley on Libel and Slander 12 ed at paragraph 13.1, section 55 of the Constitution of Trinidad and Tobago, Chapter 1:01 and section 3 of the House of Representatives (Powers and Privileges) Act, Chapter 2:02.
[4] 12 ed

9. In the Privy Council decision of **Buchanan v Jennings**[5] the Board set out the parameters of the defence of absolute privilege. In **Buchanan**, Jennings made certain comments in Parliament which impugned Buchanan's personal and professional integrity. Subsequently, in an interview with a newspaper, Jennings stated that he did not "resile from" his claim made in Parliament. Buchanan sued him in defamation for the words he uttered during the interview. Jennings relied on the defence of absolute privilege. The High Court and the Court of Appeal rejected the defence.

10. The Defendant then appealed to the Privy Council, which held as follows at pages 273-274:

> "A member of Parliament could be held liable in defamation if the member made a defamatory statement in Parliament which was protected by absolute privilege under art 9 of the Bill of Rights and later affirmed the statement (without repeating it) on an occasion which was not protected by privilege. The right of members of Parliament to speak their minds in Parliament without any risk of incurring liability as a result was absolute, but that right was not infringed if a member, having spoken his mind and in so doing defamed another person, thereafter chose to repeat his statement outside Parliament. In a case such as the instant case reference was made to the parliamentary record only to prove the historical fact that certain words were uttered and the claim was founded on the later extra-parliamentary statement, so that the propriety of the member's behaviour as a parliamentarian would not be in issue."

11. At paragraph 20 the Board stated:

> "[20] In reaching the conclusion he did, Tipping J was oppressed by the difficulty of drawing a bright line and by the problems which would face parliamentarians if the rule he favoured were not adopted. The Board

[5] [2005] 2 All ER 273

does not share his apprehension. A statement made in Parliament is absolutely privileged (and it is not necessary in this case to consider how far the definition of parliamentary proceedings may extend). A statement made out of Parliament may enjoy qualified privilege but will not enjoy absolute privilege, even if reference is made to the earlier privileged statement. A degree of circumspection is accordingly called for when a member of Parliament is moved or pressed to repeat out of Parliament a potentially defamatory statement previously made in Parliament. The Board conceives that this rule is well understood, as evidenced by the infrequency of cases on the point." (Emphasis added)

12. In a subsequent judgment by the English Court of Appeal in **Makudi v Baron Triesman of Tottenham**[6], the Court found that certain words spoken strictly outside of Parliament were still protected by parliamentary absolute privilege. In **Makudi** the Defendant gave evidence to a committee of the House of Commons with respect to the behaviour of some members of the Federation Internationale de Football Association (FIFA). While giving his evidence, the Defendant undertook that he would take his concerns to FIFA. Almost immediately following the evidence before the committee of the House of Commons, FIFA appointed a third party (a Mr Dingemans) to conduct a review, in order to look into the allegations made. The third party interviewed the Defendant who did not add to the evidence already given in the House of Commons. The Claimant brought an action in malicious falsehood and defamation against the Defendant for the words spoken to the third party hired to conduct the review.

13. The Court of Appeal in **Makudi** concluded that words complained of were covered by the absolute privilege rule, as based on the facts of the said case "there was plainly a public interest in Mr Dingemans' inquiry, which would be served by the respondent's contribution and there was a very close nexus between his evidence to the CMSC and his interview with Mr Dingemans. The prospect that he might be called on to repeat his allegations was not only reasonably foreseeable but actually foreseen: he undertook, in

[6] [2014] 3 All ER 36

effect, to do so. And the judge's finding at para [101] points to an identity between his state of mind on the two occasions of his speaking."[7]

14. In arriving at the aforesaid position, the Court of Appeal explained the process which was used in finding that it was only in exceptional circumstances that words spoken outside of Parliament would attract absolute privilege. At paragraphs 21 to 27, the Court stated:

> "[21] … a member who for his own purposes chooses to repeat outside Parliament, whether by quotation or cross-reference, what he has said within its walls has no claim to the protection of art 9. He does not deserve it for himself, and the integrity of Parliament's process does not require it …
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> [22] But not all such repetitions are the gratuitous choice of the speaker. There will be occasions when it will be in the public interest that he should repeat or refer to his earlier utterance in Parliament; and it may be a public interest which he ought reasonably to serve, because of his knowledge or expertise as a Parliamentarian, or an expectation or promise (arising from what he had said in Parliament) that he would do so. In those circumstances it is by no means obvious that his later speech should lack the protection of art 9.
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> [23] However it is in my judgment clear, with respect to Tugendhat J, that the issue of art 9 protection in such cases cannot be concluded in favour of the speaker merely by a finding of fact such as the judge made at para [101] of his judgment, namely that art 9 would be violated by inquiry into the speaker's state of mind outside Parliament on the ground that that would also constitute inquiry into his state of mind when he spoke within Parliament. Such a state of affairs might readily be proved in a case like R v Abingdon, R v Creevey or Buchanan v Jennings, as Lord Bingham

[7] Para. 30

suggested ('if the defendant's extra-parliamentary statement is found to have been untrue or dishonest the same conclusion would ordinarily, although not always, apply to the parliamentary statement also': Buchanan's case para [13]). But in such cases, as Lord Bingham made plain, an identity of motive or purpose as between the speaker's utterances within and outside Parliament will not justify art 9 protection. It will be roundly held that the claim (against the speaker) is 'directed solely to the extra-parliamentary re-publication' (Buchanan's case para [18]) and it is only the speaker's state of mind on that later occasion that matters.

[24] Equally, in my judgment art 9 will not bite merely because there is a public interest, which he ought reasonably to serve, in the speaker's repeating or referring to what he had earlier said in Parliament. The later, extra-Parliamentary occasion might be quite remote from the earlier utterance. The public interest in his repeating what he had said might be different from the whys and wherefores of the Parliamentary occasion. When speaking in Parliament, he might have no reason to apprehend that he might be required (or think himself obliged) in the public interest to repeat on a later occasion what he had said. In short, the integrity of the legislature's democratic process may not need the protection of art 9 at all.

[25] I accept, however, that there may be instances where the protection of art 9 indeed extends to extra-Parliamentary speech. No doubt they will vary on the facts, but generally I think such cases will possess these two characteristics: (1) a public interest in repetition of the Parliamentary utterance which the speaker ought reasonably to serve, and (2) so close a nexus between the occasions of his speaking, in and then out of Parliament, that the prospect of his obligation to speak on the second occasion (or the expectation or promise that he would do so) is reasonably foreseeable at the time of the first and his purpose in speaking

on both occasions is the same or very closely related. The first element reflects the respondent's notice. The second in part reflects para [101] of Tugendhat J's judgment. This is the true relation between these two aspects of the respondent's case.

[26] I do not mean to suggest a hard and fast rule. There may be instances which justify the protection of art 9 which do not precisely demonstrate these two characteristics. The notion of public interest is not, I acknowledge, sharp-edged. Nor is the category of cases in which a member of Parliament or witness ought reasonably to serve such a public interest. As always, the common law will proceed case by case.

[27] I would wish to emphasise as firmly as I may that these cases will be infrequent and the courts will look for a very strong case on the facts if art 9 is to run. They will be concerned to see that the protection of the article is not extended to speech outside Parliament more than is strictly necessary, given the high importance of the two other public interests which must however take second place to the legislature's untrammelled freedom of debate: 'the need to protect freedom of speech generally [and] the interests of justice in ensuring that all relevant evidence is available to the courts', as Lord Browne-Wilkinson described them in Prebble's case …" (Emphasis added)

**Analysis and Findings**

15. It was submitted on behalf of the Claimant that paragraphs 10,14,20 and 24 of the Re-Amended Defence, which set out the defence of absolute privilege should be struck out for the following reasons: (a) the Defendant has not pleaded any facts which are different from the run of the mill circumstances in which explosive statements are made in Parliament and repeated in the public domain which do not attract the defence of absolute privilege; (b) the Defendant failed to plead any facts which indicate that it was reasonably foreseeable when he made his speech in Parliament

that he would be obliged to speak on the subsequent occasions outside of Parliament, which is one of the exceptions stated in **Makudi**; (c) the Defendant did not set out any facts that he gave any undertaking in Parliament that he would share his statements with the media or on a political platform; (d) the public interest in having the allegations uttered outside of Parliament is insufficient to raise the defence of absolute privilege; (e) the Defendant has not pointed to the evidence in the Defendant's Affidavit or in his written submissions which would establish his defence of absolute privilege; and (f) it is pointless to order further and better particulars as the Defendant has not hinted to the nature or description of such particulars.

16. The Defendant's position was that: (a) a difference in the facts or circumstances of the instant case from **Makudi** cannot act as a complete bar to the availability of the defence; (b) the statements made were a matter of public interest; (c) when the Defendant spoke to the media he called for an investigation to be carried out both inside and outside of Parliament, following which a police investigation was launched; (d) it was reasonably foreseeable that the media would question him once he left Parliament; and (e) the Defendant has pleaded that the statements were made in the context of a contribution in Parliament which concerned not only the budget but also allegations of misconduct and public expenditure.

17. I accept that a court should act sparingly when considering whether to strike out any part of a defence, as the consequences of doing so is that the Defendant is shutout from defending this aspect of the case. The recognized defence which the Defendant has relied on is the exceptional circumstances as set out in **Makudi**. At its highest the defence as pleaded by the Defendant is that he is entitled to rely on absolute privilege because there was so close a nexus between the occasion of speaking in and out of Parliament, the prospect of his obligation to speak on the second occasion was reasonably foreseeable, the purpose for speaking is the same or closely related and there is a public interest. The words used by the Defendant in his pleading are almost identical to those set out in **Makudi** and to this extent he has set out a pleading which has raised a defence in law.

18. However, the defence of absolute privilege as set out in the challenged paragraphs, without particulars is still deficient, as the Defendant has not pleaded any facts that when he uttered the statements in Parliament, he gave an undertaking there that he would share his allegations in any other public domain, such as the media or on a political platform. In my opinion, it is necessary to plead the details of these facts if the Defendant is relying on the characteristic of nexus as established by **Makudi**. In the absence of any such pleaded facts there is no factual basis that there was so close a nexus between the utterance of the statement in and out of Parliament. Further, there was also no facts to assert that it was reasonably foreseeable that the statements made by the Defendant in and subsequently outside of Parliament were the same or very closely related.

19. In my opinion, while the facts as pleaded in the Re-Amended Defence are deficient and I accept that the Defendant has not hinted in his submissions to the nature of the particulars in support of the general averments with respect to the defence of absolute privilege, the justice of this case based on the issue which have been raised thus far from the pleadings and the overriding objective of keeping the parties on an equal footing tip the scales in favour of granting the Defendant the opportunity to set out the specific details of the facts he relies on to prove that: (a) there was so close a nexus between the occasion of speaking in and out of Parliament; (b) the prospect of his obligation to speak on the second occasion was reasonably foreseeable; and (c) the purpose for speaking is the same or closely related.

20. I have noted that the Defendant has already set out particulars with respect to the public interest in responding in respect of his Parliamentary utterance which he ought to reasonably serve under paragraphs 10 (iii), 14, (iii), 20 (3) and 24(3) of the Re-Amended Defence. Nonetheless, I give the Defendant permission to provide any further particulars to paragraphs 10 (iii), 14, (iii), 20 (3) and 24(3) of the Re-Amended Defence, as this aspect of the Re-Amended Defence is weak and **Makudi** is clear that "art 9 will not bite merely because there is a public interest which ought reasonably to serve, in the speaker repeating or referring to what he had earlier said in Parliament".

21. Further, I agree with Senior Counsel for the Claimant that the Defendant's plea that when he spoke to the media, he called for an investigation to be carried out inside and outside of Parliament and that a police investigation had already been launched is not relevant to a defence of absolute privilege. In my opinion, these facts do not fall within the characteristics set out in **Makudi.** The facts appear to be more applicable to a defence of qualified privilege.

22. According to **Gatley on Libel and Slander**[8], an individual in a defamatory action may avail himself of the defence of qualified privilege on grounds of public policy and convenience without incurring liability for defamation, in circumstances less compelling than those which give rise to absolute privilege. An individual may have the benefit of this defence, where he has made a statement of fact about another, which is defamatory and in fact untrue, if it was fairly warranted by the occasion (that is to say, the statement falls within the scope of the purpose for which the law grants a privilege). Further, the defence may apply in such a circumstance, once it is not shown that the statement was made with malice, that is with some indirect or improper motive or knowing it to be untrue, or with reckless indifference as to its truth.[9]

23. Finally, I have noted that Senior Counsel for the Defendant submitted that one of the reasons the challenged paragraphs ought not to be struck out, is that even a weak defence can be buttressed by evidence. In my opinion, this submission did not assist the Defendant's position as Senior Counsel did not state in the closing submission what evidence the Defendant would rely on to prove the elements of his defence. Further, it is my belief that if there was any evidence to support the pleadings set out in the challenged paragraphs of the Re-Amended Defence, Senior Counsel for the Defendant would have stated in his closing submissions the nature of the evidence and the persons who would most probably give that evidence at the trial. However, Senior Counsel did not even indicate that the Defendant would be giving evidence of

[8] 11th Edition, paragraph 14.1
[9] Paragraph 14.2

a particular nature that would support this aspect of his defence. The only conclusion I can arrive at based on the Defendant's failure to provide these details at this stage of the proceedings is that there is no such evidence.

**Costs**

24. In my opinion, the Claimant has been able to demonstrate that the challenged paragraphs were deficient and for this reason I am of the view that he is entitled to the costs of the Claimant's Application.

**Order**

25. The Defendant to provide to the Claimant particulars of paragraphs 10, 14, 20 and 24 of the Defendant's Re-Amended Defence within 14 days of this order. In default paragraphs 10, 14, 20 and 24 are struck out.

26. The Defendant is to pay the cost of the Claimant's notice of application filed 7 January 2021 to be assessed by this Court in default of agreement.

27. The second case management conference is scheduled for 14 March 2022 at 10:30 am virtual hearing.

**/s/Margaret Y Mohammed**

**Judge**