THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-01531

DAVLIN THOMAS

Claimant

AND

NARESH SIEWAH

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 29 July 2020

APPEARANCES

Mr. Farai Hove Masaisai instructed by Mrs Jennifer Farah-Tull of Hove and Associates Attorneys at law for the Claimant.

Mr. Leon Kallicharan Attorney at law for the Defendant.

RULING

1. On the 24 June 2020 the Claimant instituted a claim against the Defendant seeking: damages included aggravated and exemplary damages for libel published via Facebook posts ("the Facebook posts") from the 25 March 2020 to the 10 June 2020; special damages; and damages for the republication of the Facebook posts by Third Parties and by the Defendant posting onto the Facebook Pages "TrinbagoLivesMatter" and "THE VOICE OF THE TnT 99%"at: https://www.facebook.com/groups/anon.trinidad.tobago and https://www.facebook.com/groups/348636452001635/ respectively.

2. The Claimant also seeks an injunction to prohibit the Defendant, whether by himself, his servants, agents or otherwise from further publishing or causing to be published

any words, statements and/or innuendos defamatory of the Claimant as complained of in the Pre-Action Protocol Letter of Davlin Thomas dated 9 June 2020 ("the Pre-Action Protocol Letter") and in the statement of case filed therein and in particular the posts posted by the Defendant on his Facebook profile at www.facebook.com/naesh.n.siewah/; an apology and public retraction in writing by the Defendant, to the Claimant of the allegations made in the Facebook posts posted by the Defendant and published on his Facebook profile and other third party Facebook profiles during the period 25 March 2020 to 10 June 2020. The public statement should take the same form of the original defamatory publication, being an equally highlighted post published on his Facebook profile and the other Facebook profiles that the Defendant shared the posts on; interest and costs.

3. Before the Court is the Claimant's application filed on the 3 July 2020 ("the application") wherein he seeks two injunctive reliefs and his costs of the application.

4. At the hearing of the application, Counsel for the Claimant indicated that only one of the injunctive relief was being pursued as the Facebook posts complained of had been removed from the respective Facebook pages. The injunctive relief being pursued was an order to prohibit the Defendant, whether by himself, his servants, agents or otherwise from further publishing or causing to be published any words, statements and /or innuendos defamatory of the Claimant as complained of in his affidavit dated 3 July 2020 and in particular the Facebook posts made by the Defendant on the Facebook Groups " TrinbagoLivesMatter" and "THE VOICE OF TnT 99%" at https://www.facebook.com/groups/anon.trinidad.tobagoandhttps://www.facebook.com/groups/348636452001635/ respectively.

5. The Claimant filed an affidavit on the 3 July 2020 ("the Claimant's affidavit") in support of the application and in opposition the Defendant filed an affidavit on the 17 July 2020 ("the Defendant's affidavit").

6. The principles in law which the Court must consider in granting an injunction were not in dispute by the parties. In this jurisdiction Aboud J in **Niquan Energy Trinidad**

Limited v World GTL Trinidad Limited and others [1] considered the principles in **Jetpak** and **National Commercial Bank v Olint Corp Ltd**[2] and observed at paragraph 81:

> "81. In applying these principles, as I understand them, to the facts of this case I must first evaluate the relative strengths of each party's cases as disclosed on the affidavits, paying particular regard to the evidence against which there is no credible dispute, and being cautious, where there is such dispute, to void a mini-trial on untested affidavit evidence. All the authorities agree that this first step is a threshold test and a "fail" here on the relative strengths of each party's cases will certainly be fatal. The question to be asked is whether there is a serious issue to be tried. As Lord Hoffman said in Olint, echoing his earlier words in Films Rover that were approved by Chief Justice de La Bastide in Jetpak (page 370), the court must feel a "high degree of assurance" that the injunction sought at the interlocutory stage will be granted at the trial. I am also guided by the way Sir Robert Megarry V.C put it in Mother Care Ltd v Robson Books Ltd [1979] FSR 466:
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> > "The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called 'serious' and no prospect of success which can be called real."

7. More recently in **Tricia Brown v Elroy Julien and Anor**[3] Kokaram J (as he then was) provided the following guidance for a Court when exercising its discretion in granting interim orders as:

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[1] CV2013-02699
[2] [2009]UKPC 16
[3] CV2019-00550

(a) The Court's freedom to do justice at the trial;

(b) Whether there is a serious issue to be tried is determined upon an evaluation of the relative strength of the parties case;

(c) The weaknesses of a party's case must be taken into an account;

(d) The Court should consider the prejudice the Claimant may suffer if no injunction is granted or the Defendant may suffer if it is;

(e) The likelihood of such prejudice actually occurring;

(f) The extent to which a party may be compensated by an award of damages or enforcement of the undertaking in damages. However there is no general rule that if damages are an adequate remedy an injunction will not be granted;

(g) The likelihood of whether a party is able to satisfy such an award. However the indigent ought not to be penalised where there are merits in their claim or in the balance of it is just to grant interim relief;

(h) Where the balance of convenience lie;

(i) The likelihood that the injunction will turn out to have been wrongly granted or withheld i.e. the court's view of the relative strengths of the parties' case. This last matter should only be considered if the other matters are evenly balanced or where it is possible to form such a view on facts which are clear or not in dispute;

(j) The overriding objective is relevant in the exercise of the power to grant injunctive relief.

8. In **Southern Medical Clinic Limited and Anor v Cherry Ann Rajkumar**[4] the local Court of Appeal determined that in determining an application for interim relief for defamation claims the rule in **Bonnard v Perryman** is no longer justified in this jurisdiction. The principle in **Bonnard v Perryman** was that an interlocutory injunction ought not to be granted when the Defendant swears an ability to justify the libel unless the court is satisfied that the defence cannot succeed at trial. Rajkumar JA explained the rationale at paragraphs 47 and 48 of the judgment as:

[4] CA S 062 of 2019

"47. The rigid rule in Bonnard v Perryman can no longer be justified in this jurisdiction. The bases for the justification for a prima facie refusal of an injunction when, for example, the defence of justification is raised, inter alia:
a. have been superseded by developments in law, including:
i. the abolition of jury trials in defamation actions and
ii. the expansion upon the right to freedom of expression by the development of the defence of Reynolds privilege. b. do not withstand closer scrutiny of the assumption that seriously damaged reputations can always be vindicated by recovery of damages awarded at trial, c. ignore the requirements of the Supreme Court of Judicature Act Chapter 4:01.

48. Provided that the right to freedom of expression is adequately safeguarded, there is no sufficient reason why separate considerations should apply in the case of pre-trial non-mandatory injunctions in actions for defamation, as distinct from other civil actions. The greater flexibility available to a court liberated from the rigidity of the rule in Bonnard v Perryman to consider the justice of the individual case before it would justify the replacement of that outdated rule without sacrificing or infringing upon the right to freedom of expression."

9. In deciding whether to grant the injunctive relief sought in the application, the Court has to decide what order would preserve a state of affairs which would result in least risk of irremediable prejudice, while allowing the Court to do justice to the parties at the end of the trial. I have decided to grant the injunction sought by the Claimant for the following reasons.

10. First, the Defendant has not denied that he admitted in his email dated 10 June 2020, in response to the Claimant's Pre-Action Protocol Letter, that he had made the Facebook posts. On the 15 November 2005, the Practice Direction on Pre-Action Protocol Letters for various types of matters, including defamation actions was issued pursuant to the Civil Proceedings Rules 1998. It directed a party who intended to

institute an action in defamation to first issue a Pre-Action Protocol Letter in accordance with the direction set out in Appendix C. The purpose for issuing the Pre-Action Protocol Letter before instituting any defamation action is to save costs, judicial time and to give a Defendant the opportunity to apologize and take any remedial steps.

11. At paragraph 26 of the Claimant's affidavit, he stated that he caused his attorneys at law to issue the Pre-Action Protocol Letter to the Defendant calling upon him to answer the Claimant's concerns, to publish an apology and public retraction and to have all posts referenced in the Claimants affidavit removed from Facebook with immediate effect. It was exhibited as "D.T. 6" of the Claimant's affidavit. In the Pre-Action Protocol Letter, the Facebook posts complained of were in www.facebook.com/naresh.n.siewah. The Pre-Action Protocol Letter was hand delivered to the Defendant.

12. According to paragraph 27 of the Claimant's affidavit, on the 10 June 2020 the Defendant responded to the Pre-Action Protocol Letter by way of email to the email address of the Claimant's attorney at law trinbagolawyers@gmail.com. This was the email address stated in the Pre-Action Protocol Letter for the Defendant to respond to. The Defendant's email which was exhibited as "D.T.7". It stated:

"Hello Goodnight,

My name is Naresh Siewah and I have received a preaction letter from your law firm.

Firstly I will like to humble apologise to your client for any discomfort cause by my immature nature.

Secondly, I have removed all post from my facebook account immediately and is even prepared to deactivate the account.

Thirdly, the letter stated to connect here to apology via the same medium. I am prepared to post any letter your office deem fit on my account apologising for all the comments post etc.

Fourthly, I am prepared to sign any agreement letter as a legal document not to post any other things about your client. I am humble requesting this letter or document be send via my email and I will sign and send back to you. I am really sorry for my behaviour.

Lastly, regarding compensation I beg of you and our client I am unemployed and I have accepted all my mistakes and will never let that happen again. Today on receiving the letter it cause a lot of discomfort to my 70 year old day (sic) who is unwell. I am honestly in no position financially to offer any money but I promise never to do such again.

I await you guidance and will post the apology as guided by your good office.

Thanks in advance and hope this matter could be resolved privately. Again, I am very sorry for the pain I caused. I regret it very much. I am ashame and sad. I am depress also. Life is really really hard. I plea and beg onto your client to please have mercy and forgive me for my wrong doingings.

Regards

Naresh

Tel 726 3037"

13. Paragraph 28 of the Claimant's affidavit stated that on the 15 June 2020, 5 days after the Defendant's admission, he sent an email to the Claimant's Attorney at law with an attached letter and supporting documents which claimed that the Facebook posts were the result of his Facebook profile being hijacked and compromised by someone

with the Facebook profile entitled **"JOHNNY WALKER"** also called "John Narine". Paragraph 29 of the Claimant's affidavit attached as "D.T.8" a copy of the said email and attachments. In the said email the Defendant stated that the Facebook posts complained off in the instant action were posted by "Jonny Walker" for a period of two months and they were posted at a time when he was not in use of his profile. Notably, the Defendant admitted that he had posted the salaries of the CEO and CFO of the NCRHA as information pertaining to an IDB Loan. He also stated that he was ready to apologise only for the postings which he made and not the ones made by "Johnny Walker" and he wanted to resolve the matter immediately.

14. The Defendant's affidavit did not respond to the matters set out at paragraphs 27 to 29 of the Claimant's affidavit. In particular, he said nothing about the email he sent on the 10 June 2020 which contained his admission and willingness to apologise.

15. In my opinion, the Defendant's failure to respond in the Defendant's affidavit to his admission in his email of 10 June 2020 means that this admission remained unanswered and still stand. Further, the fact that at the time of the hearing, the Facebook posts had been removed is consistent with the Defendant's email of the 10 June 2020 which contained his admission. In any event, the Defendant provided absolutely no explanation in the Defendant's affidavit when and how he became aware that "Johnny Walker" posted the Facebook posts and that during a two month period the Defendant was not in use of his profile page. In the absence of any explanation, I am of the view that the Defendant's admission made in his email dated 10 June 2020 still stand.

16. Second, there are serious issues to be tried but the defences raised in the Defendant's affidavit are bare. The Defendant raised four defences in the Defendant's affidavit: (a) authorship of the Facebook posts; (b) the words complained of were neither referable to nor defamatory of the Defendant; (c) qualified privilege; and (d) fair comment on a matter of public interest.

17. In the Defendant's affidavit he has raised the defence of the authorship of the Facebook posts on the Facebook Group "TrinbagoLivesMatter during the period 24

March 2020 to 31 May 2020 which were exhibited as "D.T. 2" to the Claimant's affidavit; authorship of the Facebook posts on the Facebook Group "TrinbagoLivesMatter" during the period 8 and 9 June 2020 ; authorship of the Facebook posts on the Facebook Group "THE VOICE of TnT 99%" on the 1 June 2020 repeated until 9 June 2020 which were exhibited as "D.T.3" of the Claimant's affidavit. I accept that this is a substantive issue to be determined at the trial. However, at this stage of the proceedings the Court cannot ignore the admission made by the Defendant in his email dated 10 June 2020 in response to the Claimant's Pre-Action Protocol Letter that he made the Facebook post on his personal Facebook page www.facebook.com/naresh.n.siewah . In my opinion this admission at the very least at this stage of the proceedings demonstrated that he was the author of the Facebook posts. The same Facebook posts made by "Naresh N Siewah" eventually made their way unto the "TrinbagoLivesMatter and "THE VOICE of TnT 99%" Facebook pages.

18. Further, the Defendant did not set out in any particulars in the Defendant's Affidavit to demonstrate how his defence that the words complained of were neither referable to nor defamatory of the Defendant. In my opinion in the absence of those details, this defence is bare.

19. The other two defences are qualified privilege and fair comment on a matter of public interest. The facts which the Defendant relied on to demonstrate that there is merit in these defences were set out at paragraphs 6 to 8. These paragraphs state:

> "6. I further say, without admitting the authorship of the posts, that the information therein is information on a matter of public interest. The expenditure of public money and the proper management of the Regional Health Authority is a matter on which the public is entitled to uninhibited comment. Freedom of expression on matters relating to the expenditure of public money is important to me and I believe that the Constitution protects such expression. I am a taxpayer and a publicly spirited individual.
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> 7. I further say that it appears that the Minister of Health and North Central Regional Health Authority have involved themselves in the outcome of this

claim. I attach a copy pf the Trinidad Express Newspaper article by Nikita Braxton-Benjamin dated Jun 16, 2020 in which the Minister of Health is reported to have said "That is not the first time he has posted stuff about North Centre RHA and, in talking to the CEO, we are going strongly on the legal route because what he did, forget the reputational damage to myself and the CEO, we had to stop what we were during for half a day to respond to the media to debunk the theories". A true copy of the article is attached as **"N.S.1".**

8. The North Central Regional Health Authority published a press release on 12 June 2020 on the NCRHA's letterhead referring to statements made about the NCRHA. A true copy of the press release is attached as **"N.S.2".** I say that both the Minister and the NCRHA are public entities which are subject to scrutiny."

20. The Defendant failed to set out what aspects of and how the Facebook posts are fair comment. In my opinion in the absence of such details, this is a bare defence with little merit at this stage of the proceedings.

21. With respect to the defence of qualified privilege on the basis of public interest, I accept that the Defendant has set out a sufficient basis which is that the expenditure of the Regional Health Authority is a matter of public concern. However, this is also a general defence which is lacking in any detail with respect to each of the Facebook posts in issue.

22. Third, it maintains the status quo. At the time of the hearing of the application, the Facebook posts were not on the Facebook pages complained of In my opinion, the granting of the injunction would maintain the status quo as it would preserve the state of affairs until the trial of the action.

23. Fourth, the greater prejudice is to the Claimant if the injunction is not granted. The prejudice to the Claimant if the injunction is not granted is that there would be further

damage to his reputation. The prejudice to the Defendant if the injunction is granted is it would restrict his freedom of expression with respect to the matters which were set out in the Facebook posts. In my opinion, the Defendant's admission in his email response dated 10 June 2020 to the Claimant's Pre-Action Protocol Letter that he had already removed the posts on his Facebook page shows a willingness on his part to restrain himself with respect to the Facebook posts which is a good indicator to guide me in balancing the issue of prejudice. In my opinion, in granting the injunction it would limit any further damages to the Claimant's reputation and restrain or limit on the Defendant with respect to the matters set out in the Facebook posts. The injunction certainly does not restrict the Defendant from commenting on the Claimant's actions with respect to other matters.

ORDER

24. The Defendant, whether by himself, his servants, agents or otherwise from further publishing or causing to be published any words, statements and/or innuendos defamatory of the Claimant as complained of in his affidavit dated 3 July 2020 and in particular the posts made by the Defendant on the Facebook Groups "TrinbagoLivesMatter" and "THE VOICE OF TnT 99%" at https://www.facebook.com/groups/anon.trinidad.tobagoandhttps://www.facebook.com/groups/348636452001635/ respectively.

25. The Defendant to pay the Claimant the costs of the application to be assessed by this Court in default of agreement. If there is no agreement, the Court will hear the parties on the issue of quantum at the end of the trial.

Margaret Y. Mohammed

Judge