

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2019-00460**

**BETWEEN**

**ROODAL MOONILAL**

**Claimant**

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**Defendant**

**THE SPEAKER OF THE HOUSE OF REPRESENTATIVES**

**Interested Party**

**Before the Honourable Mme. Justice Jacqueline Wilson QC**

**Date of Delivery: November 1, 2019**

**APPEARANCES:**

Mr. Anand Ramlogan SC, Mr. Gerald Ramdeen, Ms. Dayadai Harripaul  
Attorneys at law for the Claimant

Mr. Douglas Mendes SC, Mr. Michael Quamina and Mr. Sean Julien  
Attorneys at law for the Defendant

Ms. Deborah Peake SC & Mr. Ravi Heffes-Doon and Ms. Kendra Mark  
Attorneys at law for the Interested Party

**JUDGMENT**

**BACKGROUND**

1. The claimant is the Member of Parliament for Oropouche East. In the course of a parliamentary debate in October 2018 he is alleged to have

made statements against the Prime Minister and the Member of Parliament for Laventille West which were referred by the Speaker to the Committee of Privileges for investigation into whether the statements constituted a contempt.

2. Two of the Committee's members subsequently recused themselves and temporary members were appointed to replace them. The claimant alleges that the appointment of the temporary members increased the Committee's membership from the prescribed number of six to eight and that the Committee was thereby unlawfully constituted and its decisions, including any action taken on them, invalid and in breach of his right to the protection of the law and to a fair hearing guaranteed under the Constitution.
3. The claimant raises a further challenge to the validity of the Committee's decisions on the ground that the Speaker, in referring the matter to the Committee, made prejudicial statements against him and was thereby guilty of apparent bias.
4. The Speaker was joined as an Interested Party to the proceedings. She denies the allegations made by the claimant and asserts that the appointment of temporary members to the Committee falls within the scope of a parliamentary privilege and is not subject to review by the courts.
5. Several applications were filed by the claimant in the proceedings. Included among them was an application filed on 4 February 2019, together with the substantive claim, seeking an injunction and/ or conservatory order to prevent the Committee from proceeding with the

hearing into the contempt allegations. The application came on for hearing on 5 February 2019 when the Interested Party gave an undertaking that the Committee would not proceed to hear the allegations until the injunction application was heard and determined, or until further order, provided that the matter was dealt with expeditiously. The undertaking was withdrawn on 10 May 2019 and on 17 May 2019 the Committee proceeded to hear the allegations. The claimant was given notice of the hearing but did not attend and the Committee proceeded in his absence.

6. The Committee's report was laid in the House on 18 June 2019. In its report the Committee concluded that the claimant had used threatening language which brought the House and its proceedings into public odium. The Committee recommended that the claimant should apologise to the House and to the Member of Parliament for Laventille West by way of Personal Explanation.
7. The Committee had previously recommended that no further action be taken in respect of the statements that were made against the Prime Minister, as defamation proceedings were subsequently instituted by him. Therefore, that matter is not the subject of this decision.
8. On 24 June 2019 the claimant filed an application to restrain Parliament from debating or taking any action on the Committee's report. The application was heard on 25 June 2019 and dismissed on 26 June 2019. On the said 26 June 2019 the House passed a resolution adopting the Committee's report and calling upon the claimant to apologize to the House and to the Member of Parliament for Laventille West by way of Personal Explanation at the next sitting.

9. The next sitting of the House took place on 28 June 2019. The claimant did not give a Personal Explanation to the House on that date. At the sitting on 3 July 2019 the House passed a motion that the claimant would not be recognised until he apologised by way of Personal Explanation. The claimant ultimately apologised on 13 September 2019.
10. Prior to his apology, on 8 July 2019, the claimant filed an application for permission to amend his claim to seek declarations that the Committee's report and the action taken by the House on it were in breach of his rights to the protection of the law and to a fair hearing. The parties filed written submissions on the application and on 9 October 2019 the claimant was granted permission to make the proposed amendments.

#### **THE ISSUES**

11. The following questions arise for determination:
  - i. Whether the Speaker's decision to appoint temporary members to the Committee falls within the scope of parliamentary privilege;
  - ii. Whether the decision is subject to review by the courts;
  - iii. Whether the Speaker's decision to refer the allegations of contempt to the Committee is vitiated by apparent bias; and
  - iv. Whether the Committee's decision, including any action taken on it, is unlawful and in breach of the claimant's fundamental rights.

***Whether the decision to appoint temporary members to the Committee falls within the scope of parliamentary privilege***

12. The general principles of parliamentary privilege must first be stated as they outline the parameters within which this case is to be determined. The provisions that govern the Committee’s duties and membership are also material.

### The Standing Orders

13. The Committee is established under the Standing Orders of the House of Representatives. The Standing Orders are made under section 56(1) of the Constitution which confers on each House of Parliament the power to regulate its own procedures. Section 20 of the Constitution provides that the Standing Orders “shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity” with the Constitution.
14. The Committee is one of five Sessional Select Committees of the House.<sup>1</sup> As is the case with the other Sessional Select Committees, the Speaker appoints Members of the House to the Committee at the beginning of each parliamentary session.<sup>2</sup>
15. The Committee’s duties and membership are prescribed by Standing Order 92 as follows:

### **92. COMMITTEE OF PRIVILEGES**

- (1) The Committee of Privileges shall have the duty of considering and reporting on any matter referred to it by the

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<sup>11</sup> Standing Order 89(1)

<sup>2</sup> Standing Order 89(2)

Speaker or the House, in accordance with Standing Order 32 (Privilege Matters) and Standing Order 55 (order in the House and in Committee). It shall be the duty of the Committee to consider any matter so referred and to report thereon to the House.

(2) The Speaker shall be a member and the Chairman of the Committee of Privileges.

(3) The Committee of Privileges shall consist of six (6) members inclusive of the Chairman.

16. Standing Order 32 provides that a matter that directly concerns the privileges of the House takes precedence over all other business. A Member must first obtain the Speaker's permission to raise a matter of privilege. If permission is granted the Member may request that the matter be referred to the Committee.

17. Standing Order 55 sets out the forms of behaviour that may be referred to the Committee. They include the use of "objectionable, abusive, insulting or offensive words or language or unparliamentary expressions" and "gross disorder." Gross disorder is committed if during proceedings the Member concerned

(a) creates actual disorder;

(b) uses or threatens violence against a Member or other person;

(c) acts in a manner that displays flagrant disobedience to the rulings of the Chair; or

(d) acts in any other way to the serious detriment of the dignity or orderly procedure of the House.

## Parliamentary Privilege

18. Section 55 of the Constitution sets out the privileges and immunities of Parliament. It provides for freedom of speech in the Senate and the House of Representatives and for immunity from civil or criminal proceedings in the exercise of such freedom. It provides also that the powers, privileges and immunities of each House, its members and committees, “shall be such as may from time to time be prescribed by Parliament after the commencement of th(e) Constitution and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and its members and committees at the commencement of th(e) Constitution.” Persons who give evidence before a House or committee enjoy the same privileges as its members.
  
19. Parliamentary privilege is defined in *Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 24 edn., 2011, at p. 203, in the following terms:

“Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High court of Parliament; and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.”
  
20. As the definition explains, parliamentary privilege confers rights and immunities on Members of Parliament which exceed those that they would otherwise enjoy and exempts them from duties and liabilities to which they would otherwise be subject. Parliamentary privilege is a principle common to all countries based on the Westminster system. It is one of the ways in which the fundamental principle of separation of

powers is respected by granting the legislative branch of government the autonomy it requires to discharge its constitutional function: *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, at p. 354 and 381-385; *Canada (House of Commons) v Vaid*, [2005] 1 SCR 667, at paras. 21 and 41; *Chagnon v Syndicat de la fonction publique et parapublique du Quebec* 2018 SCC 39 at para. [23].

21. Decisions that fall within the scope of a parliamentary privilege cannot be reviewed by a body external to Parliament, including a court *Stockdale v. Hansard* (1839), 9 AD. & E.1, 112 E.R. 1112 (Q.B.) at p. 1168; *New Brunswick Broadcasting* at pp. 350 and 382-84; *Vaid* at para 29(9); *Chagnon* at para. [19].
22. The existence and scope of a privilege are determined by the necessity test. In conducting the necessity test a court must ensure that the existence and scope of a privilege are *strictly anchored to its rationale*. This involves an assessment whether the *sphere of activity* for which the privilege is claimed is so closely and directly connected with the fulfilment of Parliament's functions as a legislative and deliberative body, including its role in holding the government to account, that outside interference would undermine the level of autonomy required to do its work with dignity and efficiency. Where the court has determined that a *sphere of activity* is necessary to the proper functioning of Parliament, the inquiry ends as the privilege has been established. No court or external body may inquire into the manner of its exercise: *Vaid* at para. 29(7), (11) and 40; *New Brunswick Broadcasting* at p. 383; *Chagnon*, at paras. [32], [47] and [48].

23. The party seeking to rely on the immunity from external review conferred by parliamentary privilege bears the burden of establishing its necessity. It must demonstrate that the scope of the protection it claims is necessary in light of the purpose of the privilege. It is the role of the courts to determine whether a category of privilege exists and to delimit its scope, whereas it is for Parliament to determine whether in a particular case the exercise of the privilege is necessary or appropriate: *Chagnon* at paras. [25] and [32]; *Vaid* at para. 29(9); *New Brunswick Broadcasting* at p. 343.
24. The distinction between defining the scope of a privilege, which is the function of the courts, and judging the appropriateness of its exercise, which is a matter for the legislature, strikes a compromise between the fundamental purpose served by the privilege and the need to ensure that the autonomy afforded by the privilege does not undermine its purpose: *New Brunswick Broadcasting*, at pp. 348-350 and 382-384.
25. Established categories of privilege include freedom of speech, the exercise of disciplinary authority over members and non-members who interfere with the discharge of parliamentary duties, the power to exclude strangers from proceedings, and the immunity from sub-poenas during a parliamentary session. Such general categories have historically been considered to be justified by the exigencies of parliamentary work: *Vaid* at para 29(10).
26. However, given its rationale, the necessity of a privilege must be assessed in the contemporary context. Even if a certain area has historically been considered as subject to a privilege, it may only continue to be so if it remains necessary to the independent functioning of the legislature

today: *New Brunswick Broadcasting*, at p. 387; *Vaid*, at para. 29(6); *Chagnon* at para. [31].

27. Parliament's prerogative to maintain the integrity of its processes by disciplining, purging and disqualifying those who abuse them is as old as Parliament itself. When faced with behaviour that undermines its fundamental integrity, Parliament is required to act. Its action may range from discipline for minor irregularities to expulsion and disqualification for more serious violations: *Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876 at paras. 62-64.
28. Because the courts cannot review the exercise of parliamentary privilege, even on breach of human rights grounds, they must ensure that the protection afforded by a privilege does not exceed its purpose. Therefore, a purposive approach must be taken when assessing a claim of privilege. Such an approach helps to reconcile the privilege with fundamental human rights, by ensuring that the privilege is only as broad as is necessary for the proper functioning of a constitutional democracy: *Chagnon* at para. [28].
29. It has been suggested that the task of defining the scope of a privilege may sometimes be difficult in practice. In *Vaid* at para. 37, Binnie J had this to say:

“The scope of Parliamentary privilege in the UK is a matter of controversy in the UK itself. Parliamentary privilege in that country has evolved over time and continues to evolve within a society, institutions and constitutional arrangements different from our own. As an Australian parliamentary committee noted, the

privileges of the Parliament at Westminster are “a mirror of the times when they were gained” ...Nevertheless, the framers of the Constitution Act, 1867 thought it right to use Westminster as the benchmark for parliamentary privilege in Canada, and if the existence and scope of a privilege at Westminster is authoritatively established (either by British or Canadian precedent), it ought to be accepted by a Canadian court without the need for further inquiry into its necessity.”

### **THE SUBMISSIONS**

30. Counsel for the claimant argues that Standing Order 92(3) fixes the Committee’s membership at six and reflects a deliberate policy to do so when compared with its earlier formulation which stated that the Committee “shall consist of not less than six, and not more than ten, members inclusive of the Chairman.”<sup>3</sup>
  
31. Counsel argues that the existence of a vacancy in the Committee’s membership is a pre-requisite for the appointment of a temporary member, in the absence of which any such appointment is unlawful and any action flowing from the appointment, invalid. Counsel submits that the Speaker therefore acted unlawfully in appointing temporary members to the Committee; that the appointment increased the Committee’s membership from six to eight; that there was no power for the Committee to convene or to conduct business with more than six members; and that the Committee’s decisions and any action taken on them are thereby invalid and unlawful.

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<sup>3</sup>Standing Order 75(3) of the House of Representatives made by the Governor under section 8 of the Trinidad and Tobago (Constitution) Order in Council 1961

32. Counsel relies on the decisions in *R v Secretary of State for Education, ex p Prior* [1994] I.C.R. 877; and *Attorney General of Trinidad and Tobago v Maharaj* [2019] UKPC 6 to support the argument. Their application to this case is discussed further below.
33. Counsel for the Speaker argues that, by virtue of its incorporation into a constitutional provision, parliamentary privilege is given constitutional status and is on equal footing with, and not subordinate to, the fundamental rights provisions of the Constitution: *Vade; Chagnon; New Brunswick Broadcasting*.
34. Counsel submits that where the court finds that Parliament or one of its committees is exercising a power that is within the scope of an established privilege, the manner of its exercise cannot be enquired into by the court, even where a breach of fundamental rights is alleged. In such a case Parliament has exclusive jurisdiction over the committee's proceedings and any irregularities in the procedure adopted by the committee are to be dealt with by Parliament, and not the court: *The Bahamas Methodist Church v Symonette* [2005] 5 LRC 196.
35. Counsel argues that the Committee's power to discipline the claimant was within the scope of the privileges of the Parliament of the United Kingdom at the commencement of the Constitution and that, as the category of privilege is established, it is for Parliament and not the court to determine whether its exercise was appropriate or necessary. Any irregularities in the conduct of parliamentary business are for Parliament alone.

36. Counsel submits that it is the settled practice of the Parliament of the United Kingdom and throughout the Commonwealth to appoint a temporary member to a committee where a member recuses himself, in order to ensure that the committee continues to reflect the composition of the House: *House of Representatives Practice*, 5<sup>th</sup> edn., pp 636-638.
37. Counsel argues that as the Standing Orders are silent on what should transpire where a member recuses himself, the Speaker should assume the authority to do what is appropriate and act in accordance with the traditional practice of the House, leaving it to Members to challenge the decision: *Browning, House of Representatives Practice*, 2<sup>nd</sup> Edn., at p. 207; *Nicholls Esprit v Speaker of the House of Assembly* Claim No. DOMHCV 2007/0025. Having failed to do so, the claimant's application for constitutional relief is an abuse of the process of the court.
38. Counsel for the Attorney General's submissions were materially consistent with the submissions of Counsel for the Speaker.

## **DISCUSSION**

39. While the existence of Parliament's privilege to exercise disciplinary control over its members is not in question, this Court must apply the necessity test to determine whether its scope includes the appointment of temporary members to the Committee. This involves consideration whether the work of the Committee, which implements the privilege on Parliament's behalf, must be immune from external review in order for Parliament to be able to discharge its functions efficiently.
40. As discussed above, the Committee's role is to consider any matter of privilege that is referred to it by the Speaker or the House and to report

to House on its decision. Therefore, the Committee's work has the shared objective of ensuring, preserving and protecting the fundamental integrity of Parliament. Viewed in this context, the Committee's work, including decisions made by the Speaker on the appointment of its members, falls within a *sphere of activity* that is necessary to the proper functioning of Parliament – namely, the exercise of disciplinary authority over its members. Therefore, any departure from the Standing Orders in making appointments to the Committee, if there was such a departure, is a matter for Parliament and not the courts.

41. Counsel for the claimant does not dispute the Speaker's authority to appoint members to the Committee. Neither does he dispute that, barring the question whether a vacancy existed, the temporary members were otherwise qualified for such appointment. In response to questions raised by the Court, Counsel submitted that no illegality would arise had the temporary members been appointed upon the resignation, rather than the recusal, of members of the Committee.
42. I find no support for Counsel's argument, either in principle or authority. The flaw in Counsel's argument is that it ignores the point that when the legitimacy of a decision of Parliament is called into question, the analysis must focus on the *sphere of activity* within which the impugned decision is made and not on the decision itself. If the decision falls within a *sphere of activity* that is protected by privilege the courts do not have the jurisdiction to intervene.
43. As the authorities demonstrate, the necessity test is applied in a general sense to a category of privilege. It avoids the need to consider each specific instance that the privilege is exercised.

44. It has long been established that Parliament has the exclusive power to discipline its members. As the Committee plays a key role in the exercise of the disciplinary function, the full spectrum of its work, including the Speaker's decisions on the appointment of its members, falls within the exclusive domain of Parliament. If it were otherwise, every decision of the Committee would be open to review by the court. This would defeat the protection afforded to Parliament in exercising disciplinary control over its members and render the privilege artificial.
  
45. In *Bahamas Methodist Church v Symonette* one of the questions for determination was whether the courts had jurisdiction to review the application of the Rules of the House of Assembly relating to the introduction of a private Bill. Lord Nicholls of Birkenhead held at p. 213(h) that the question whether the procedural safeguards of the Rules were properly applied was a matter for Parliament to resolve and not for the courts.
  
46. Even if Counsel for the claimant were able to surmount the justiciability hurdle, the cases on which he relies do not support the position for which he advocates. In *R v Prior* a defect in the appointment of the Chairman of a staff committee arose by virtue of the lack of authority in the person making his appointment. As the staff committee had not been properly established, the court found its decisions to be ultra vires. In *Attorney General v Maharaj* the invalidity of the appointment of a member of the Judicial and Legal Service Commission, made under section 110(3)(b) of the Constitution, was found to exist where the criteria for appointment were not fulfilled.

47. In both *Prior* and *Maharaj* the relevant concern was that the appointed persons did not satisfy the criteria for their appointment. In this case, however, the temporary members' eligibility for appointment is not in question. More importantly, however, the cases are of no relevance in so far as the issue of justiciability is concerned.

***Whether the Committee's decision or any action taken on it is subject to review by the courts***

48. For the reasons discussed above, the Committee's decision and any action taken by the House on the decision fall within the scope of a parliamentary privilege and are not subject to review by the courts.

***Whether the Speaker's decision to refer the allegations of contempt to the Committee were vitiated by apparent bias***

49. As is the case with the appointment of members to the Committee, the referral of matters to the Committee for consideration and report falls within the scope of a parliamentary privilege. Any irregularity in the exercise of the privilege is a matter for Parliament and not the courts.

***Whether the Committee's decision or any action taken on it was in breach of the claimant's fundamental rights***

50. There is no doubt that tensions may arise between the protection that is afforded by a privilege and the enjoyment of fundamental rights. The courts have affirmed that such conflicts must be resolved by taking a purposive approach in assessing claims of privilege so that the scope of the privilege is only as broad as is necessary to ensure the proper functioning of a constitutional democracy. This approach helps to

reconcile the privilege with the enjoyment of rights guaranteed under the Constitution.

51. Counsel for the claimant places strong reliance on the decision of the Court of Appeal of the Republic of Vanuatu in *Tari v Natapei* [2001] VUCA 18. In *Tari*, the Court of Appeal found decisions of the Speaker of Parliament to be in breach of the fundamental rights of six members. The Speaker had expelled the members in question for behaviour they had committed outside of Parliament when the Standing Order under which the Speaker purported to act was directed only to conduct within the chamber in the course of a parliamentary sitting. The Court held that the Speaker's further decision to close the First Extraordinary Session of Parliament in the absence of a quorum was also in breach of the rights of the expelled members, as the relevant Standing Order conferred only the power to adjourn Parliament to the next sitting date. An issue arose as to whether the Court could intervene with respect to the calling of a Second Extraordinary Session of Parliament. The Court held that, as a result of the unlawful closing of the first session, the second session was not lawfully convened.
  
52. The Court expressed the view that, notwithstanding the supremacy of Parliament, the exceptional circumstances of the case warranted its intervention:

“...we are satisfied that in the very unusual circumstances which had developed, notwithstanding the reluctance which the Court will always have about any interference with the sovereignty of the Parliament when it has applied all proper rules and procedures, and even recognising the essential supremacy of Parliament within the framework of rights and duties in the Constitution, there was no

option but for the Court to intervene to ensure that the rule of law was adhered to and maintained.” [Emphasis added.]

53. The above dicta suggests that the Court’s decision was made in the light of the exceptional circumstances then prevailing and as a matter of last resort. As a result, I do not consider that the decision is intended to be of general application.
54. Counsel for the claimant has indicated that he relies on the recent decision of the United Kingdom Supreme Court in *R v Miller* [2019] UKSC 41. The decision in *Miller* was issued after the proceedings were heard and there were no submissions by Counsel for any of the parties on its application. However, in light of Counsel’s indication I would make only a few general observations on how, in my view, the decision applies to this case.
55. The decision in *Miller* demonstrates the importance of defining the scope of a prerogative power in accordance with its purpose. As the cases discussed above demonstrate, this principle is equally applicable in defining the scope of a privilege. In giving the unanimous decision of the Court, Lady Hale reasoned that the prerogative powers of the Crown were limited by the constitutional principle of Parliamentary sovereignty and must be exercised in a way that was compatible with that sovereignty. The Court struck down as unlawful, the decision of the Prime Minister to prorogue Parliament (or legal advice to that effect) as it was considered that the exercise of the prerogative power exceeded its lawful limits of facilitating the exercise of Parliament’s function as a legislative body and as a body responsible for holding the government to account. The Court rejected the argument that it was precluded by

parliamentary privilege from considering the validity of a decision to prorogue Parliament on the basis that prorogation was not the core or essential business of Parliament, but in fact brought Parliament's core and essential business to an end.

56. The decision in *Miller*, therefore, re-affirms the role of the court when it is called upon to determine the legitimacy of the exercise of a prerogative power. The necessity test is the relevant test in determining the existence and scope of both a prerogative power and a parliamentary privilege.

#### **CONCLUSION**

57. For the reasons given above, the decisions that are the subject of challenge by the claimant fall within the scope of a parliamentary privilege. Therefore, the decisions are not subject to review by the courts. The claimant's claim therefore fails and is hereby dismissed.

Jacqueline Wilson QC

Judge