

**IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION**

**ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Application No GY/A/CV2022/003
GY Civil Appeal No 53 of 2021**

BETWEEN

BASIL WILLIAMS

APPLICANT

AND

PRITHIMA KISSOON

FIRST RESPONDENT

GUYANA NATIONAL NEWSPAPER LTD

SECOND RESPONDENT

THE ATTORNEY GENERAL OF GUYANA

THIRD RESPONDENT

**Before the Honourable: Mr Justice Saunders, PCCJ
 Mr Justice Wit, JCCJ
 Mr Justice Anderson, JCCJ**

Appearances

Mr Basil Williams, SC appearing as a litigant in person

Mr Nigel Hughes and Mr Jed Vasconcellos for the First Respondent

Mr Siand A Dhurjon for the Second Respondent

Mr Nigel Hawke for the Third Respondent

Practice and Procedure – Appeal – Leave to Appeal Special Leave – Application for Special Leave to Appeal Interlocutory Order of Court of Appeal – Whether realistic prospect of appeal being successful.

Practice and Procedure – Proper party to proceedings – Whether agent or servant of State immune to suit in their personal capacity for acts or omissions committed during course of execution of their duties – State Liability and Proceedings Act, Cap 6:05, ss 3,9,10.

SUMMARY

Prithima Kissoon, the former Deputy Solicitor General in the Attorney General's Chambers initiated defamation proceedings against Basil Williams, the former Attorney General of Guyana; and Guyana National Newspaper Ltd for alleged defamatory words written by Mr Williams and published by the Guyana National Newspaper ('the proceedings'). The dispute arose as Basil Williams, while holding the office of Attorney General, believed that Prithima Kissoon was sympathetic to the opposition political party and these sympathies extended to deliberately undermining court cases involving the Attorney General's Chambers and the opposition. After the appeal, *Attorney General v Jagdeo*, which was under Ms Kissoon's care and control, was dismissed, Mr Williams ordered Ms Kissoon off all political cases. According to Ms Kissoon, Mr Williams abused and vilified her in the press. Ultimately, each of them published in the press their side of this sorry episode resulting in the proceedings.

Mr Williams was joined to the proceedings in his personal capacity as first named defendant. He objected to this and applied to the High Court of Guyana to have the case struck out against him. On 9 April 2019, the High Court dismissed his application but gave permission to Ms Kissoon to amend her claim to add the office of the Attorney General as a third defendant, which she did. On 5 June 2020, the Attorney General applied to the High Court for an order striking out the claim against Mr Williams in his personal capacity. It was contended that the joinder of Mr Williams in his personal capacity breached the *State Liability and Proceedings Act Cap 6:05* ('the Act'). On 26 June 2020, the High Court granted this application and struck Mr Williams out from the claim. Ms Kissoon appealed this decision to the Full Court of the Supreme Court of Justice, which comprised of two judges, one of whom was Ms Kissoon's brother-in-law. The Full Court of the Supreme Court allowed Ms Kissoon's appeal and restored Mr Williams as first defendant in the proceedings. The decision was delivered to the parties via email on 31 March 2021, but Mr Williams alleges that the decision was emailed to an incorrect email address, therefore he did not learn of the decision until 13 April 2021.

On 28 April 2021, Mr Williams filed an application for leave to appeal the decision of the Full Court to a judge in chambers in the Court of Appeal. This application was filed outside of the fourteen-day time period and so he also filed an application to extend the time to lodge that appeal. This application was struck out by the judge sitting in Chambers on the basis that he did not have any jurisdiction. Mr Williams then moved a full Panel of the Court of Appeal seeking leave to appeal the decision of the Full Court and an extension of time to lodge that appeal. Mr Williams relied on the fact that the decision was sent to an incorrect email address and that he did not learn of it until 13 April 2021. The full Panel dismissed the appeal and found that the intended appeal had no merit as the provisions of the Act did not prevent a person from suing Mr Williams in his personal capacity.

Mr Williams applied to this Court for special leave to appeal the decision of the full Panel of the Court of Appeal. He argued that the composition of the Full Court justified him being granted special leave to appeal the decision of the full Panel of the Court of Appeal which affirmed the Full Court's decision. In essence, Mr Williams seeks to have the order of the High Court striking him from the claim in his personal capacity restored. This application for special leave is only opposed by Ms Kissoon.

In respect of the constitution of the Full Court, this Court considered the authorities relating to bias and the Bangalore Principles of Judicial Conduct. The Court found that the judge of the Full Court ought to have recused himself given his close relationship with Ms Kissoon, the appellant before him. Nevertheless, the Court found that this issue was not determinative of the application for special leave because this Court must still assess whether Mr Williams has otherwise met the test for being granted special leave, that test being whether the intending appellant demonstrates a realistic prospect of the appeal being successful. The intending appellant may do so if for example there appears to be an egregious error of law or there was a possible miscarriage of justice.

To determine the prospects of success of the appeal, this Court then considered and interpreted ss 3, 9, and 10 of the Act. The Court noted that the Act was modelled after the United Kingdom's, Crown Proceedings Act 1947 'the UK Act'. The UK Act was enacted to make the Crown vicariously liable in tort for the acts of their servants and agents. Section 2 of the UK Act and s3 of the Act impose liability on the Crown (the State in the

case of republican Guyana) in cases where torts are committed by the agents or servants of the Crown, or State as the case may be, in the course of the execution of their duties. The Court further considered the Act and found that there was nothing in the Act or any authority that removed the right to sue the actual tort-feasor for acts or omissions in the performance of their duties as agent or servant of the State. The Court found therefore that the Full Court was entitled and right to restore Mr Williams to the suit as a defendant in his personal capacity. The Court dismissed the application for special leave and ordered Basil Williams to pay Prithima Kissoon's costs, to be assessed in accordance with r 17.13 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2021.

Cases referred to:

Adams v Naylor [1946] AC 543 (HL); *Barbados Rediffusion Service Ltd v Mirchandani (No 1)* [2005] CCJ 1 (AJ) (BB), (2005) 69 WIR 35; *Barbados Turf Club v Melnyk* [2011] CCJ 14 (AJ) (BB), (2011) 79 WIR 153; *M v Home Office* [1994] 1 AC 377; *Ramdehol v Ramdehol* [2013] CCJ 9 (AJ) (GY); *Ramsahoye v Linden Mining Enterprises* [2019] CCJ 07 (AJ) (GY), (2019) 96 WIR 425; *Royster v Cavey* [1947] KB 204 (CA); *Sankar v Guyana Rice Development Board* [2019] CCJ 11 (AJ) (GY); *System Sales Ltd v Browne-Oxley* [2014] CCJ 16 (AJ) (BB); *Walsh v Ward* [2015] CCJ 14 (AJ) (BB), (2015) 87 WIR 101.

Legislation referred to:

Guyana – Constitution of the Co-operative Republic of Guyana Act, Cap 1 :01, State Liability and Proceedings Act, Cap 6:05; **United Kingdom** - Crown Proceedings Act 1947.

Other Sources referred to:

Grubb A (ed), *The Law of Tort* (3rd edn, LexisNexis 2014); Hogg P, Monahan P, and Wright W, *Liability of the Crown* (4th edn, Carswell 2011); Bangalore Principles of Judicial Conduct 2002.

JUDGMENT

of

**The Honourable Justice Saunders, President and The
Honourable Justices Wit and Anderson**

Delivered by

The Honourable Justice Saunders

On 24 January 2023

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ:

- [1] On 18 December 2017, Prithima Kissoon initiated proceedings against Basil Williams and Guyana National Newspaper Ltd (GNN) seeking, among other relief, damages for alleged defamatory words written by Mr Williams and which were published by the GNN.

- [2] Mr Williams was at the material time the Attorney General and Minister of Legal Affairs of Guyana. Ms Kissoon was the former Deputy Solicitor General in the Attorney General's Chambers. The dispute between them arose as Mr Williams, while holding the office of Attorney General, believed that Ms Kissoon was sympathetic to the then opposition political party (comprising Mr Bharrat Jagdeo and others) and that her sympathies extended to deliberately undermining court cases involving the Attorney General's Chambers in which high ranking members of the opposition were parties. After the appeal, *Attorney General v Jagdeo*, which was under Ms Kissoon's care and control, was dismissed, Mr Williams ordered Ms Kissoon off all political cases. According to Ms Kissoon, Mr Williams abused and vilified her in the press. Ultimately, each of them published in the press their side of this sorry episode and Ms Kissoon initiated proceedings against Mr Williams, in his personal capacity, for alleged defamatory words written about her. GNN was also sued for publishing the words.

- [3] Mr Williams objected to being sued in his personal capacity. He applied to the High Court of Guyana to have the case against him struck out. On 9 April 2019, the High Court dismissed his application but gave permission to Ms Kissoon to amend her claim to add the office of the Attorney General as a third defendant, which she did.

- [4] On 5 June 2020, the Attorney General applied to the High Court of Guyana for an order striking out the claim against Mr Williams in his personal capacity. It was

contended that the joinder of Mr Williams in his personal capacity breached *the State Liability and Proceedings Act Cap 6:05* ('the Act'). On 26 June 2020, the High Court granted this application. Mr Williams in his personal capacity was struck from the claim. Ms Kissoon appealed this decision to the Full Court of the Supreme Court of Justice.

- [5] The Full Court hearing the appeal comprised two judges. One of the two was Ms Kissoon's brother-in-law. On 31 March 2021, the Full Court set aside the decision of the single judge and gave judgment in Ms Kissoon's favour. The Full Court restored Mr Williams as the first defendant in the case. The decision was delivered to the parties via email on 31 March 2021, but Mr Williams alleges that he did not learn of it until 13 April 2021 as the decision was emailed to an incorrect email address.
- [6] On 28 April 2021, Mr Williams filed an application for leave to appeal the decision of the Full Court to a judge of the Court of Appeal in chambers. His application was out of time and so he also filed an application for an extension of time to lodge that appeal. The latter application was premised on the fact that the Full Court's judgment had been sent to him at an incorrect email address. A Court of Appeal judge sitting in chambers struck out his application on the basis that he (the appellate judge) did not have any jurisdiction. Mr Williams then moved a full Panel of the Court of Appeal to review the decision of the single judge of the Court of Appeal.
- [7] On 14 July 2022, the full Panel dismissed Mr Williams' application. The full Panel found that Mr Williams' delay in making the application was neither slight nor inordinate as the motion was filed almost 7 weeks out of time. The delay was due in part to the erroneous filing of a summons to the single judge and partly to Mr Williams' late receipt of notice of the decision of the Full Court. In dismissing the application on grounds of delay, the full Panel considered the merits of the appeal and the interests of justice. The court assessed whether there was sufficient merit in the intended appeal to justify the extension of time sought. On this issue the full

Panel found that the intended appeal had no merit as the provisions of the Act did not prevent a person from suing Mr Williams in his personal capacity.

[8] On 23 August 2022, Mr Williams applied to this Court for special leave to appeal the decision of the full Panel of the Court of Appeal. He argued that the Court should restore the order of the High Court of 26 June 2020 striking him from the claim in his personal capacity. Ms Kissoon objected to the grant of special leave. Both the Attorney General and GNN respectively filed notices of non-opposition to Mr Williams' application.

[9] In his oral submissions before this Court, Mr Williams re-visited the issue of the constitution of the Full Court whose decision the Court of Appeal upheld. Mr Williams submitted that the conflicted circumstance of a member of the Full Court was a ground that justified him being granted special leave to appeal the Court of Appeal's decision to affirm the Full Court's judgment. Indeed, there is no shortage of authority to indicate that the judge of the Full Court in question ought to have recused himself given his close relationship with Ms Kissoon, the appellant before him.

[10] This Court has in the past considered and affirmed the test for bias as 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased¹.' In the case of *Walsh v Ward*² at [95] the Court stated:

The law on apparent bias is well settled. In determining whether, in instances such as these, a judge is disqualified from hearing a case, the reviewing court must place itself in the position of an objective and fair-minded lay observer fully informed of the facts. The pertinent question is whether such an observer would conclude that there was a real *possibility* of bias. What matters is not so much the reality of bias or prejudice on the part of the judge but its appearance. This test is aimed at preserving confidence in the administration of justice and not at censure of the judge. If

¹ *Barbados Turf Club v Melnyk* [2011] CCJ 14 (AJ) (BB), (2011) 79 WIR 153.

² [2015] CCJ 14 (AJ) (BB), (2015) 87 WIR 101.

an objective by-stander thought that there was a real (as opposed to a fanciful) possibility a judge might be biased, justice delivery is compromised. This remains the case even when the judge himself, and his peers, might confidently consider that the judge was a competent and impartial judge. What is at stake is not the integrity of the judicial officer but that of the administration of justice. It is important to stress that for a judge to recuse herself [or himself], or be asked to do so, does not reflect negatively on the probity or competence of the judge.

- [11] Value 2.5 of the Bangalore Principles of Judicial Conduct 2002 also indicates that ‘a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially’. The Bangalore Principles give as one instance of this where ‘the judge, or a member of the judge’s family, has an economic interest in the outcome of the matter in controversy’. In all the circumstances, this Court is satisfied that the Full Court was improperly constituted when it decided to decline Mr Williams’ application to be dismissed as a party.
- [12] Notwithstanding the merit in Mr Williams’ submissions on this issue of apparent bias, it is not determinative of his application before us because this Court must still assess whether he has otherwise met the test for being granted special leave. The test for special leave has been elaborated upon in several cases including *Sankar v Guyana Rice Development Board*³, *Ramsahoye v Linden Mining Enterprises*⁴, *Barbados Turf Club v Melnyk*⁵, *System Sales Ltd v Browne-Oxley*⁶ and *Barbados Rediffusion Service Ltd v Mirchandani (No 1)*⁷. The Court bears in mind that in this case, the application is for special leave to appeal an interlocutory order of the Court of Appeal. Special leave to appeal an interlocutory order will not be granted unless the intending appellant demonstrates a realistic prospect of the appeal being

³ [2019] CCJ 11 (AJ) (GY).

⁴ [2019] CCJ 07 (AJ) (GY), (2019) 96 WIR 425.

⁵ *Barbados Turf Club* (n 1).

⁶ [2014] CCJ 16 (AJ) (BB).

⁷ [2005] CCJ 1 (AJ) (BB), (2005) 69 WIR 35.

successful. The intending appellant may do so if for example there appears to be an egregious error of law or there was a possible miscarriage of justice.⁸

[13] This Court must therefore assess for the purpose of this application what are Mr Williams' prospects of persuading this Court that he should be dismissed from the claim in his personal capacity. This involves a consideration of the interpretation and application of the Act.

[14] Mr Williams relies on the following sections of the Act in support of his view that the Full Court (and by extension the Court of Appeal) were in error in restoring him as a party to the proceedings:

3. (1) Subject to this Act, the State shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-

(a) in respect of torts committed by its officers or agents...

(2) no proceedings shall lie against the State by virtue of subsection (1)
(a) in respect of an act or omission of an officer or agent of the State unless the act or omission would, apart from this Act, have given rise to a cause of action in tort against that officer or agent of his estate...

9. (1) All claims against the State which, before the commencement of this Act, might with the consent of the Minister, have been-

(a) brought in the High Court in a suit instituted by the claimant as plaintiff against the Attorney General as defendant...
may after the commencement of this Act, be enforced subject to the provisions of this Act, as of right, and without the fiat of the Minister, by proceedings instituted against the State in accordance with this Act.

10. (1) Except as otherwise provided in any written law before the commencement of this Act, not being any provision of a written law repealed by this Act, proceedings for the enforcement of any claim by or against the State shall be brought by or against the Attorney General and may be instituted-

⁸ *Ramdehol v Ramdehol* [2013] CCJ 9 (AJ) (GY).

(b)... in the High Court in accordance with the High Court Act (including the rules of court regulating the practice and procedure of the High Court in exercise of its civil jurisdiction), as if the claim is a claim by or against a private party.

[15] The provisions of the Act are similar to those contained in the *Crown Proceedings Act 1947* ('the UK Act'). As is the case in Guyana, the UK Act was the model for similar statutes in New Zealand and Australia. It was also heavily relied upon by Canada. In the United Kingdom, prior to the passage of the UK Act, a person injured by the tortious act or omission of Crown servant had to sue the particular Crown servant and was unable to sue the Crown. The informal practice was that in 'a proper case' the Crown would 'stand behind' and defend its servant and pay any damages awarded. This practice was not without its problems. Difficulties arose where it was not possible to identify the allegedly errant Crown servant or where a Crown servant was artificially nominated to be sued⁹. To address these challenges, the UK Act was enacted to make the Crown vicariously liable in tort for the acts of their servants and agents. Section 2 of the UK Act is similar to s 3 of the Act. Both sections impose liability on the Crown (the State in the case of republican Guyana) in cases where torts are committed by the agents or servants of the Crown, or State as the case may be, in the course of the execution of their duties. Claimants in such cases are therefore assured that there is a solvent party against whom any damages awarded might be enforced.

[16] *The Law of Tort*¹⁰ explains the doctrine and application of vicarious liability in this way:

... The essence of vicarious liability is that it is imposed on the employer without the need for fault on the employer's part – the employer is strictly liable as long as the elements needed for vicarious liability are present. *Vicarious liability does not, however, replace the defaulting employee's primary liability for his own tort, so that the employer and the employee are*

⁹ *Adams v Naylor* [1946] AC 543 (HL); and *Royster v Cavey* [1947] KB 204 (CA).

¹⁰ Andrew Grubb (ed), *The Law of Tort* (3rd edn, LexisNexis 2014) para 3.1.

jointly and severally liable for the employee's tort. In theory, the employer (and, by subrogation, his indemnity insurer) may claim an indemnity from the employee for any damages paid, on the basis of an implied term in the employment contract that the employee will take reasonable care when performing his duties or as joint tortfeasors ... (emphasis added).

[17] Similarly, Hogg, Monahan, and Wright¹¹ explain that ‘a plaintiff who sues the Crown for the tort of a Crown servant need not bring proceedings against the servant personally (although sometimes the plaintiff will see advantages in adding the individual servant as a defendant)’. Some of the advantages noted include instances where there may be some doubt as to whether the individual wrongdoer was a servant or was at the time acting in the course of employment. Additionally, joining the individual alleged tortfeasor, could guarantee that he or she could be made to attend the trial for cross examination or for discovery.

[18] In *M v Home Office*,¹² Woolf LJ reiterated the continuing liability of the actual wrongdoer. He stated at 410:

Section 1 [of the UK Act] enabled the Crown to be sued directly in those situations where prior to the Act a claim might have been enforced by petition of right. Section 2 in general permitted actions to be brought against the Crown in respect of torts committed by its servants or agents for any breach of its duties which gave rise to a tortious liability (including a breach of statutory duty where the breach created a cause of action). *Section 2 did not remove the right to sue the actual tortfeasor* (emphasis mine).

[19] In light of these and other authorities, the Court is of the view that nothing in the Act prevents an alleged wrongdoer employed by the State from being sued in their personal capacity for acts or omissions in the performance of their duties as agent or servant of the State.

¹¹ Peter Hogg, Patrick Monahan, and Wade Wright, *Liability of the Crown* (4th edn, Carswell 2011) 162.

¹² [1994] 1 AC 377.

[20] Mr Williams may not have expressly couched his arguments in this way but, essentially, what he is claiming is that the Act has the effect of immunising him personally from suit on account of his then status as Attorney General. That is a fallacy. No one is above the law. It would be a remarkable thing for a court to hold that any office holder should be so immunised unless the Constitution clearly so prescribes, as it does in relation to the President while the latter holds that office¹³. If a public official is vexed by the bringing of unmeritorious suits against them, the rules of court contain adequate provisions for the court summarily to strike out actions that are frivolous or that stand no realistic chance of success.

[21] The fundamental purpose of the State Liability Act is not to immunise public servants from suit for such a public servant's allegedly tortious acts, but to assure any person who is harmed by such acts, once they are carried out in the due execution of their official duties, that the State will be liable for any damages awarded and that the public official will not personally have to pay the same. As indicated above at [17], there are cogent reasons why it is useful for a claimant to have the State official as an additional party in actions where the State Liability Act is or may be in play. The Full Court was therefore entitled and right to restore Mr Williams to the suit as a defendant in his personal capacity.

Conclusion

[22] Given that the substantive appeal lacks merit, without prejudice to our observations made at paragraphs [9] – [11], the application for special leave is dismissed.

[23] The following are the Orders of this Court:

- i. The application for special leave is dismissed.
- ii. That there be no order as to costs.

¹³ See Constitution of the Co-operative Republic of Guyana, art 182.

/s/ A Saunders

The Hon Mr Justice Saunders (President)

/s/ J Wit

/s/ W Anderson

The Hon Mr Justice Wit

The Hon Mr Justice Anderson