THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P024 of 2017

Claim No. CV 2016-03083

Between

THE CEPEP COMPANY LIMITED

Appellant

And

DR. ROODAL MOONILAL

Respondent

Panel: A. Mendonça, J.A.

P. Moosai, J.A.

A. des Vignes, J.A.

Date of delivery: October 28, 2020

Appearances:

Mr. E. Prescott SC, Mr. P Lamont and Mr. Farai Hove Masaisai of Hove and Associates appeared on behalf of the Appellant Mr. L. Lalla and Mr. Vivek Lakhan-Joseph appeared on behalf of the Respondent

I have read the judgment of Mendonça J.A. I agree with it and have nothing to add.

P. MOOSAI, J.A.

I have read the judgment of Mendonça J.A. I agree with it and have nothing to add.

A. des VIGNES, J.A.

JUDGMENT

Delivered by A. Mendonça, J.A.

1. The Appellant, The CEPEP Company Limited (hereinafter referred to as the Appellant), is a private limited liability company incorporated under the Companies Act.

2. The Respondent, Dr. Roodal Moonilal (hereinafter referred to as the Respondent), has been a member of Parliament since 2001 and from 2010 to 2015 was the Minister of Housing and Urban Development and the Leader of Government Business in the House of Representatives.

3. On or about August 24, 2016 the Appellant published in local daily newspapers of general circulation an advertisement/media release. The advertisement/media release was in response to statements published by the Respondent. Some of the statements contained in the Appellant's advertisement/media release were set out under the heading "misappropriation of CEPEP funds in Oropouche constituency". The Respondent was then and still is the Member of Parliament for the Oropouche East constituency.

4. The Respondent, being of the view that the advertisement/media release published by the Appellant contained statements defamatory of him, on September 14, 2016 began these proceedings claiming damages for libel arising out of the publication of the advertisement/media release by the Appellant.

5. In his statement of case the Respondent pleaded that the advertisement/media release contained defamatory and false allegations in the form of direct statements and innuendo concerning him.

6. The Appellant filed a defence and counterclaim which was subsequently amended. In its defence the Appellant denied that the advertisement/media

release contained defamatory or false allegations in the form of direct statements or innuendo of and concerning the Respondent. Further or alternatively, the Appellant averred that the words in the advertisement/media release were true in substance and fact and/or fair comment on a matter of public importance and/or were published on an occasion of qualified privilege.

7. The Appellant in its counterclaim alleged that the Respondent on August 16 and September 5, 2016 published on his Facebook page statements of and concerning the Appellant which were false, malicious and defamatory. The Appellant further alleged that the Respondent on August 17 2016 published on his Facebook page an article from the Trinidad Express which commented on and further published the statements made by the Respondent on August 16, 2016. The gist of the allegations made by the Respondent was that the Appellant intended to dismiss contractors and almost 12,000 workers and replace them with friends, relatives and political associates of the political party in power. The Appellant averred that the allegations were false, malicious and defamatory of it in its professional capacity and the conduct of its affairs and heavily disparaged its reputation, were published maliciously and calculated to cause and did cause pecuniary damage to the Appellant in its business. The Appellant claimed, inter alia, damages for libel and for malicious/injurious falsehood.

8. By notice of application filed on November 16, 2016 the Respondent applied to the court for an order that:

    a. The Appellant's counterclaim be struck out on the basis that it is an abuse of process of the court and/or that the Appellant is not entitled as a governmental body to maintain the counterclaim in law being a counterclaim in defamation and/or it discloses no grounds for bringing

the claim against the Respondent and/or that the relief sought and matters which fall for determination are not sustainable in law; and

b. The court do grant summary judgment on the entirety of the Appellant's counterclaim.

The main ground in support of the application was that the Appellant is a governmental body and as such cannot initiate and maintain legal proceedings in a defamation suit.

9. The notice of application was supported by an affidavit sworn by Mr. Vivek Lakhan-Joseph, attorney-at-law for the Respondent. The Appellant filed a notice of objection to the relief sought in the Respondent's application to which it is not necessary to refer in any detail. The Appellant also filed an affidavit sworn by Mr. Keith Eddy, the then General Manager of the Appellant, in opposition to the application.

10. From a perusal of the affidavits of Mr. Vivek Lakhan-Joseph and Mr. Keith Eddy in support of and in opposition to the notice of application the following material facts are not in dispute:

a. The Appellant is a limited liability company incorporated under the Companies Act;

b. The Appellant is wholly owned by the State. Its issued shares are vested in the Minister of Finance who under section 3 of the Ministry of Finance (Incorporation) Act is constituted a corporation and holds the shares vested in him in trust for the State;

c. The directors of the Appellant are appointed by the Minister who pursuant to the provisions of the Companies Act has the power as the sole shareholder to remove any director (see section 75);

d. The Appellant was established with the agreement of the Cabinet of Trinidad and Tobago, as minuted in Cabinet Note 1927 dated August 3, 2006, with the responsibility for the management and execution of the Community-based Environment Protection and Enhancement Programme (the CEPEP programme);

e. Prior to the incorporation of the Appellant, the Ministry of Public Utilities and the Environment was the implementing agency for the CEPEP programme and the Trinidad and Tobago Solid Waste Management Company Limited, another state-owned company, was the executing agency;

f. The CEPEP programme was established by the Cabinet of Trinidad and Tobago in 2002. The objectives of the programme are:

   i. The empowerment of communities to improve the conditions of the local environment;

   ii. The expansion of employment opportunities for the benefit of semi-skilled and unskilled citizens within their communities;

   iii. The creation of opportunities for the development of small businesses.

In the 2006 Cabinet note by which Cabinet agreed to the establishment of the Appellant, it is noted at paragraph 5 of the note:

> "That apart from demonstrating its potential for realizing its original objectives, the Programme is also an effective mechanism for achieving sustainable development and environmental objectives contained in national policies and multilateral environmental agreements, especially the empowerment of local communities to take action to improve the environment while concurrently creating small business development opportunities."

g. In the Trinidad and Tobago gazette dated November 20, 2015 notice was published of the assignment to Ministers of Government of responsibility for the business and departments of government. The assignment of responsibility was done pursuant to section 79(1) of the Constitution which provides as follows:

> "The President, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for any business of the Government of Trinidad and Tobago, including the administration of any department of Government."

The Appellant was among the entities listed.

h. The CEPEP programme is funded by the government. It accounted for one of the highest expenditures in the social sector between 2011 and 2016 averaging over five hundred million dollars ($500,000,000) per year. In 2016 the CEPEP programme was allocated the sum of five hundred and thirty-one million dollars ($531,000,000);

i. The management and execution of the CEPEP programme is one of the functions of the Appellant;

j. The Appellant enters into contracts with private and state entities providing revenue for the Appellant and also creating business development opportunities for contractors employed by it and their employees;

k. The operations of the Appellant are managed and run by its permanent staff who are not public servants;

l. The Appellant is not similar to any local authority neither is it a representative body nor are there elected public officials representing the company either at management or board level.

11. The application was heard before Boodoosingh J (as he then was). He noted that "front and centre" of the application "is the argument that the [Appellant] is prevented from bringing a claim for defamation because it is a state entity….on policy grounds as laid down by the House of Lords in the case of **Derbyshire County Council v Times Newspapers Limited and Others** [1993] 1 All ER 1011 and other cases from South Africa, the United States of America, Zimbabwe and Australia". He stated that the restriction on being able to sue in defamation is based on the principle that a governmental body should be open to uninhibited public criticism. There are public interest considerations in allowing uninhibited criticism.

12. The Judge considered the Derbyshire case and came to the view that if the Appellant was an "organ of government", "a governmental body" or "an institution of central government" mentioned in the Derbyshire case then it should be open to uninhibited public criticism and it should not be able to institute and maintain a claim in defamation which can have a chilling effect on public criticism. The Judge having considered the evidence before him stated:

> "28. …it is clear that the limited liability company is principally the mechanism of executing the programme called the Community-based Environmental Protection and Enhancement Programme, CEPEP for short. This is a government programme. The funds used are State funds. The objectives of the programme are national goal objectives such as community development, employment creation and business development. There is therefore a strong public interest element on there being accountability and oversight of its operations.
>
> 29. This need is magnified by the increase in State spending on the programme over time. There is also a strong public interest element in that State funds are being spent in a manner consistent with the State's obligations to all its citizens. Thus, the management of the programme has to be subject to scrutiny to see if, for example, State funds are being spent in an equitable way or whether partisan interests are being furthered.

30. On the other hand, there is a competing concern. Of significant weight is the fact that CEPEP is a limited liability company. With this goes several considerations. It has a separate legal personality. It can suffer injury. This injury can be in relation to its reputation. This can affect its business interests. These matters, especially its separate legal personality, with all the attendant consequences, is a hallowed principle of company law. A court has, necessarily, to be slow to place any fetter on a company's ability to defend itself and to avail itself of any and all legal remedies open to a person or body having a legal personality.

31. However, as noted, there is the significant countervailing argument when the device of a limited liability company is used to execute state functions and particularly where the revenue for the execution of those functions is essentially all comprised of public funds. No evidence has been put before the court to suggest that CEPEP earns income from sources other than the government. If that were so, it would be easy for the company to do so.

32. The CEPEP Company Limited falls, squarely, in my view, under the rubric of "institution of central government", or "organ of government" or "governmental body" mentioned in the Derbyshire case….CEPEP's operations, funding and mandate all justify the restriction on their right to sue for defamation in the public interest….

33….While CEPEP is not an elected body as a local government corporation, its ultimate control is in the hands of elected officials. It reports to a Minister and the government can change its governing board at any time. Moreover, it is there to execute government policy. As governments change, its policies may change. Whatever changes are made may be in line with changing policies. A citizen must be free to criticise and raise questions when this happens. Both officials and those who they report to in government are free to defend themselves in public from those public criticisms. The forum is not necessarily the court.

35. In this circumstance a limited restriction on CEPEP is justified on public policy grounds to ensure that there is freedom to ask questions about the use of public resources, to criticise how it may be done and even to err with false statements about how these funds are being used….

> 39. I hold that a limited incursion on CEPEP's legal rights by disallowing it from bringing a claim in defamation is justified in the public interest…."

Accordingly, the Judge struck out the Appellant's counterclaim.

13. The Appellant has appealed. Mr. Prescott, counsel for the Appellant, in his written submissions argued that the Derbyshire case did not apply to the facts of this case. He submitted that it was held in the Derbyshire case that a democratically elected body should be open to public criticism and should not be able to initiate and maintain a defamation suit which could stifle such criticism. The Appellant was, however, not a democratically elected body but a limited liability company incorporated under the Companies Act and accordingly Derbyshire did not apply. In the course of his submissions before this court however, Mr. Prescott accepted that Derbyshire also applied to bodies that were not democratically elected. But he submitted, the bodies to which the Derbyshire case applied did not include the Appellant. Further he submitted that it is settled law that trading companies may initiate and maintain a suit in libel or slander for any words which have a tendency to damage it in respect of its business. He argued that the Appellant is a trading corporation. Mr. Prescott also argued that the Appellant could maintain a claim in malicious falsehood whether or not it was a governmental body. There was such a claim in the counterclaim but the Judge paid no regard to it. In all the circumstances he submitted that the Judge was wrong to strike out the Appellant's counterclaim.

14. Mr. Lalla, counsel for the Respondent, submitted that Derbyshire applied to the Appellant. It was a governmental body or organ of government referred to in Derbyshire and the Judge was therefore correct to hold that the Appellant could not maintain its counterclaim in libel against the Respondent. With respect to the claim in malicious falsehood, Mr. Lalla submitted that the same

considerations which applied to prohibit a governmental body or organ of government from suing for libel also prohibits a claim in malicious falsehood.

15. The Respondent also raised two preliminary objections. The first relates to section 38(2)(c) of the Supreme Court of Judicature Act. This section is as follows:

> "(2) No appeal shall lie, except by leave of the Judge making the order or of the Court of Appeal from—
>
> (c) a final order of a Judge of the High Court made in a summary proceeding."

It was contended that the Appellant ought to have obtained leave pursuant to 38(2)(c). Further, the application for leave should have been made within 14 days of the order of the Judge pursuant to rule 64.2(1) of the Civil Proceedings Rules 1998 (the CPR). The Appellant failed to apply leave and as such the appeal is a nullity and ought to be dismissed.

16. The second preliminary objection raised by the Respondent was that this appeal was filed as a procedural appeal but it is not a procedural appeal within the meaning of the CPR. According to that definition an appeal which is from a decision of a Master or Judge which does not directly decide the substantive issues in a claim is not a procedural appeal. The Respondent contended that this appeal is from a decision of a Judge which directly decided the substantive issues in the claim and accordingly is not a procedural appeal. On that basis too, the appeal ought to be dismissed.

17. In brief summary and meaning no disrespect to the Appellant's submissions in response to the preliminary objections, the Appellant argued to the contrary that leave was not required pursuant to section 38(2)(c) of the Supreme Court of Judicature Act and in any event, this court may grant leave and cure that defect if necessary, and that this appeal is a procedural appeal

18. I will first consider the two preliminary objections advanced by the Respondent. I will begin with the objection that this appeal is not a procedural appeal.

19. The Appellant filed this appeal as a procedural appeal. The CPR defines a procedural appeal to mean an appeal from a decision of a Master or Judge which does not directly decide the substantive issues in the claim (see rule 64.1(2)). Certain types of decisions and orders that may fall within the definition are specifically excluded but they are not relevant to this appeal. It was not disputed that the "claim" in rule 64.1(2) includes a counterclaim. The question therefore is whether this is an appeal from a decision of the Judge which directly decides the substantive issues raised in the Respondent's claim or Appellant's counterclaim. If it is, it is a not procedural appeal then Appellant erred in filing the appeal as a procedural appeal. If the decision does not directly decide the substantive issues, then it is a procedural appeal and the Appellant was correct to file the appeal as a procedural appeal.

20. What then are the substantive issues in the claim and the counterclaim? I think it is clear that the substantive issues raised are: (1) whether the words of which the Respondent complains constituted a libel; and (2) whether the words of which the Appellant complains constitute a libel or amounts to malicious falsehood. These issues emerge clearly from the pleadings. The issues do not include whether the Appellant can initiate or maintain a claim in libel or malicious falsehood and as to be expected, the Judge's decision did not determine those issues. While the Judge's decision, if upheld on this appeal, means that the issues raised on the Appellant's counterclaim – whether the words published by the Respondent on his Facebook page of which the Appellant complains constitute a libel or malicious falsehood – do not arise for decision, the fact remains that those issues were not determined by the Judge.

21. In any event, even if this is not a procedural appeal, it is not the practice of this court to dismiss a substantive appeal on the basis that it was wrongly filed as a procedural appeal. The approach consistently adopted by this court is to remove the appeal from the list of procedural appeals and have it take its place on the list of substantive appeals or in other words those appeals that directly decide the substantive issues in a claim. If this were not a procedural appeal, that approach in this case would however not be appropriate for the simple reason that this court has heard the appeal. On the assumption that by hearing the appeal what the court heard was a substantive appeal that appeared on the list of procedural appeals, it would not be a proper use of judicial resources to take the appeal off the procedural list and place it on the list of substantive appeals to await a renewed hearing. The fact is that we have heard the appeal. Full arguments were presented to the court on all issues raised in the appeal. In the circumstances, the proper approach would dictate that we decide the appeal even if it were not a procedural appeal.

22. We therefore do not find that there is any merit in the first preliminary objection.

23. The second preliminary objection asks the question whether leave under section 38(2)(c) of the Supreme Court of Judicature Act is required for this appeal. It is clear from that section that if the order of the Judge to strike out the Appellant's counterclaim is a final order made in a summary proceeding an appeal from that order would lie only with leave of the judge making that order or of the Court of Appeal. It is not disputed that leave was not obtained before the appeal was filed. There are therefore two issues to be determined: (1) was the order of the Judge a final order; and (2) was it made in summary proceedings.

24. It was submitted by the Appellant that the Judge's order is not a final order since it does not determine the substantive issues in these proceedings. That,

as appears from the above, approximates the test to determine whether an appeal is a procedural appeal. However, an order that does not determine the substantive issues in a claim may yet be a final order within section 38(2)(c). It seems to me, that an order striking out the Appellant's counterclaim on the basis that it is not maintainable as a matter of law is a final order. I will therefore proceed on the basis that the Judge's order was a final order within the meaning of section 38(2)(c). The question then is whether it was made in a summary proceeding.

25. A similar question arose in Civil Appeal 128 of 1999 **Kenneth Lalla and others v Dougnath Rajkumar**. In that case, the question was whether leave to appeal from an order made by a Judge in judicial review proceedings was required. Nelson JA in considering whether judicial review proceedings are a summary proceeding for the purposes of section 38(2)(c) stated (at page 7):

> "In my judgment it is better to treat the phrase "summary proceeding" in section 38(2)(c) of the Act as referring to interlocutory applications which finally dispose of a cause or matter without the formality of a trial. For example, an application for summary judgment under Order 14 is a summary proceeding. Where leave to enter summary judgment is granted a defendant will require leave to appeal. Judicial review proceedings are only summary in the sense that access to the court is speedy and attended with less formality than an action by writ with adversarial pleadings. However, judicial review proceedings are largely confined to Order 53, and there is no other more abbreviated or speedy procedure for obtaining relief in public law."

He therefore concluded that judicial review proceedings are not a summary proceeding and leave was not required.

26. Further, Nelson JA noted that if leave is required and is not given by the Judge of the High Court, the Court of Appeal may do so. The jurisdiction of the Court of Appeal to grant leave is "concurrent with that of the High Court". It is not a condition precedent to the jurisdiction of the Court of Appeal that an

application must first be made to the High Court. He stated that "it would be open to the appellant to seek leave after the filing or for the Court of Appeal in its inherent jurisdiction to grant such leave". In relation to the case before him he said that if leave were necessary he would grant leave and treat the notice of appeal as effective from the date of its filing.

27. On appeal to the Privy Council (see Privy Council Appeal Number 1 of 2001 **Rajkumar v Lalla and others**) Lord Mackay speaking on behalf of the Privy Council noted that the point that leave to appeal was required under section 38(2)(c) of the Supreme Court of Judicature Act was taken before the Court of Appeal and while the Court of Appeal took the view that leave was not required, the court stated that having regard to its powers it could itself grant leave even though it was beyond the time normally specified for so doing. In those circumstances, Lord Mackay said that the point was of no ultimate importance but having regard to the fact that it is a matter of general practice he thought it right for the Board to express their opinion on what constitutes a summary proceeding within section 38(2)(c). He stated:

> "…In the absence of any applicable statutory definition of "summary proceeding" their Lordships take the view that in essence a summary proceeding is one which can be distinguished from a more formal proceeding such as occurs in the distinction between trials on indictment in the criminal law and summary proceedings where no jury trial with its attendant procedure is required but the judgment is committed to another tribunal with the expectation that the proceedings will take less time and that they will not require the same elaboration of procedure which is attendant on a jury trial. In the civil law a summary judgment under Order 14 of the Rules of the Supreme Court is an illustration of summary proceedings. Although in judicial review there are various parts of the full trial process that may apply in an ordinary action which in general will not be used in a judicial review, the judicial review procedure is not an optional procedure in order to secure a result without the procedures of an ordinary action but is a procedure, as was very clearly decided in *O'Reilly v Mackman* [1983] 2 AC 237, which has protections built into it for authorities which may be subject to judicial review which would

> not apply to an ordinary action. In consequence judicial review is in no sense an optional less formal procedure for the decision of a matter than an ordinary action but rather is a proceeding for dealing with matters of public law for which an ordinary action is not appropriate, lacking as it does the safeguards to which their Lordships have referred."

28. I believe it is correct to say from what Lord Mackay described as a summary proceeding, the Board did not wholly endorse the views of Nelson JA that a summary proceeding is an interlocutory application that finally disposes of a case or matter without the formality of a trial. In the Board's view a summary proceeding is an optional procedure to which the judgment is committed to secure a result without the elaboration of procedure attendant on the usual ordinary trial of the action. The Board gives as an example of a summary proceeding a summary judgment under Order 14 of the Rules of the Supreme Court 1975 for which may be substituted Part 15 of the CPR, which deals with the granting of summary judgment.

29. On an application for summary judgment under Part 15, the court considers the merits of the claim and defence and may give final judgment without the elaboration of procedure usually attendant on a normal trial. The application in this matter sought summary judgment on the entirety of the Appellant's counterclaim. However, summary judgment cannot be granted in proceedings for defamation (see rule 15.3 of the CPR) and it is fair to say that the application for summary judgment was not pursued. Instead what was raised before the Judge was a preliminary issue that the counterclaim of the Appellant was not maintainable for the reasons identified earlier. There was no consideration of the merits of the claim in libel and malicious falsehood as pleaded by the parties. In my view, that proceeding cannot be characterised as an optional proceeding to which the judgment is committed as in an application for summary judgment. It is therefore my view that leave was not required for this appeal under section 38(2)(c).

30. However, as Nelson JA pointed out and with which the Privy Council took no issue, if the Judge does not grant leave, the Court of Appeal may do so. The Court of Appeal exercises a concurrent jurisdiction that is not dependent on an application first being made to the Judge of the High Court.

31. In this case, the Appellant submitted that the Court of Appeal may cure the defect or in the words of the written submission, the Court of Appeal has jurisdiction "to heal all matters of procedure". I understand by that the Appellant is submitting that the Court of Appeal may grant leave and has sought such leave from this Court.

32. Leave may be granted by the Court of Appeal if the intended Appellant has a realistic prospect of success (see Civil Appeal No. 5 of 2005 (Court of Appeal St. Vincent and the Grenadines) **Sylvester v Faelleseje, a Danish Foundation**). Further, the Respondent has drawn to the court's attention rule 64.2 which in essence provides that where an appeal may be made only with the leave of the Judge making the order or the Court of Appeal a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought. Despite the mandatory nature of the wording of the rule, the court has the jurisdiction to extend the time for the making of the application.

33. If leave were necessary, I would extend the time for the making of the application, grant leave to appeal, and treat the notice of appeal as effective from the date of its filing.

34. In view of the above, both preliminary objections advanced by the Respondent are overruled.

35. I turn now to what is the substantive issue in this appeal. The question in general terms is whether the Appellant can initiate and maintain a claim in libel and malicious falsehood. I will first consider whether the claim in libel can be initiated and maintained by the Appellant.

36. It is appropriate to begin with a consideration of the Derbyshire case. In that case, a local authority, the Derbyshire County Council an incorporated body (the Council), commenced libel proceedings against Times Newspapers Limited, the publisher of The Sunday Times, its editor and two journalists in respect of two articles published in the Sunday Times which had questioned the propriety of certain investments made by the Council of monies in its superannuation fund. On a preliminary issue, the question arose whether the Council had a cause of action against the defendants. The preliminary point was expressed as whether a local authority is entitled to maintain an action in libel for words which reflect on its governmental and administrative functions. But in the course of argument, the question was opened into an investigation of whether a local authority can sue in libel at all. The House of Lords decided that it would be contrary to the public interest to allow the Council the right to sue for libel since this would place an undesirable fetter on freedom of speech.

37. Lord Keith, with whom the other Law Lords agreed, noted that a trading corporation is entitled to sue in respect of defamatory matters which can be seen has having a tendency to damage it in the way of its business. Non-trading corporations such as trade unions and charitable organisations are also entitled to take proceedings in defamation. There were however features which distinguish a local authority from other types of corporations whether trading or non-trading. Lord Keith stated at page 1017:

> "The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines."

He then stated that:

> "It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism."

38. Lord Keith then referred to authorities which lent support to those statements by their emphasis on the importance of freedom of speech in a democratic society, the right of citizens to freedom of speech to criticise their government and the chilling effect upon freedom of speech civil actions in defamation can have. Among the cases to which Lord Keith made reference are two cases from the United States of America namely, **City of Chicago v Tribune Co**. (1923) 139 N.E. 86 a case decided by the Supreme Court of Illinois, USA and **New York Times Co. v Sullivan** (1964) 376 U.S. 254 a decision of the Supreme Court of the USA. In relation to those cases he said:

> "In *City of Chicago v. Tribune Co*. (1923) 139 N.E. 86 the Supreme Court of Illinois held that the city could not maintain an action of damages for libel. Thompson C.J. said, at p. 90:
>
> > "The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished … but all other utterances or publications against the government must be considered absolutely privileged. While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions…"
>
> After giving a number of reasons for this, he said, at p. 90:

"It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely."

These propositions were endorsed by the Supreme Court of the United States in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 277. While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public."

39. Lord Keith also referred to **Die Spoorbond v. South African Railways**, 1946 A.D. 999 a decision of the Supreme Court of South Africa in which it was held that the South African Railways and Harbours, a governmental department of the union of South Africa, was not entitled to maintain an action for defamation and quoted with approval the following from the judgment of Schreiner J.A.:

"I am prepared to assume, for the purposes of the present argument, that the Crown may, at least in so far as it takes part in trading in competition with its subjects, enjoy a reputation, damage to which could be calculated in money. On that assumption there is certainly force in the contention that it would be unfair to deny to the Crown the weapon, an action for damages for defamation, which is most feared by calumniators. Nevertheless it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political

action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the state's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the state actions for defamation will lie at their suit. But subject to the risk of these sanctions and to the possible further risk, to which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the state, derived from the state's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. Such actions could not, I think, be confined to those brought by the railways administration for criticism of the running of the railways. Quite a number of government departments, as appeared in the course of the argument, indulge in some form of trading on a greater or a lesser scale. Moreover, the government, when it raises loans, is interested in the good or bad reputation that it may enjoy among possible subscribers to such loans. It would be difficult to assign any limits to the Crown's right to sue for defamation once its right in any case were recognised."

40. Lord Keith then said:

> “These observations may properly be regarded as no less applicable to a local authority than to a department of central government. In the same case Watermeyer C.J., at p. 1009, observed that the reputation of the Crown might fairly be regarded as distinct from that of the group of individuals temporarily responsible for the management of the railways on its behalf. In the case of a local authority temporarily under the control of one political party or another it is difficult to say that the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation. Further, it is open to the

> controlling body to defend itself by public utterances and in debate in the council chamber."

41. He then concluded (at page 1020):

> "The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation."

42. It is clear from the above extracts from Derbyshire that it is authority for the proposition that a governmental body cannot maintain an action in defamation. Lord Keith did at page 549 refer to "organs of government" and not a governmental body. I however do not think that there was intended to be any distinction between the two terms. Although the claimant in Derbyshire was a democratically elected body, I think it is clear from the dicta of Lord Keith that the decision cannot be limited to democratically elected bodies. Mr. Prescott was correct to depart from his initial submission in that regard.

43. Derbyshire was decided on an analysis of the common law in England. The underlying principle is that in a free democratic society governmental bodies, local or central, whether democratically elected or not, should be open to free and uninhibited public criticism which can be muted if they were entitled to commence civil actions in defamation. The common law of England provided that they should not be free to initiate and maintain actions in defamation.

44. The reasoning in Derbyshire may be summarised as follows:

    a. In a free and democratic society freedom of speech is of fundamental importance. People are entitled and encouraged to express their criticisms of government in the expectation that would aid in the improvement of the quality of government;

    b. A democratically elected body, whether local or central, that owes its existence to the democratic process cannot initiate and maintain an action

in defamation since to do so would have a chilling effect on freedom of speech which is incompatible with the democratic process;

c. The same applies to governmental bodies, whether local or central, and which are not democratically elected since it is part of the public administration or governance at the local or national level;

d. It is open to the controlling body of the governmental body to defend itself by public utterances and/or debate whether in Parliament or its appropriate Chamber; and

e. Where the words complained of are an attack on an individual within the governmental body, that person can initiate and maintain proceedings in defamation.

45. In my judgment, the common law in this jurisdiction is no different on this issue than that of England. Of course in this jurisdiction there is a written constitution that guarantees the right to freedom of expression. That is not an absolute right and is subject to legal restrictions, the law of defamation being one of them. The common law position as determined by Derbyshire supports the constitutional right of freedom of expression. If it were otherwise and governmental bodies are entitled to initiate and maintain proceedings in defamation, which can have a chilling effect on the right to freedom of expression, that would create an unwarranted restriction or fetter on the constitutional right.

46. Lord Keith did not define what is a governmental body but by his reference to "organs of government", those with "the responsibility for public administration" and government departments, it is fair to say that a feature of a governmental body is that it is a body that performs functions that may be described as governmental functions. They would include a local council as was the claimant in Derbyshire, and statutorily created departments of central government referred to in Derbyshire. The Appellant however is neither a local

council nor a statutorily created department of government. It is a private company limited by shares incorporated under the Companies Act. But that by itself cannot lead to the conclusion that it is not a governmental body. The legal form of the body should not matter. In **British Coal Corporation v National Union of Mineworkers and another** [1996] Lexis Citation 5736, a statutory corporation was held to be a governmental body because of the functions it performed and the closeness of the control exercised by or on behalf of the relevant Minister, a member of the democratically elected government, over the activities of the corporation. In **PTC v Modus Publications (PVT) Limited** 1997 (2) ZLR 492 (S) (a decision of the Zimbabwe Supreme Court) a statutory corporation with responsibility for, inter alia, the provision of postal and telecommunication services and under extensive control of a Minister of government was also held to be within the rule in Derbyshire. The focus of the court in the **British Coal Corporation** case was on the functions of the corporation and the control exercised by the Minister on behalf of the government and not its legal form. In **PTC v Modus** these were also important considerations. In neither case was any emphasis placed on the legal form of the entity.

47. In **PTC v Modus**, Derbyshire was applied. The court asked itself whether the claimant was the "State" by which it meant an entity that could be considered "an organ of the State" or other similar expression such as an "instrumentality of the State" or an "instrument of governance". The court in determining that question set out some criteria which in its view would be useful in deciding whether the claimant is the State. The question posed by the court in that case would have meant the same if it had asked whether the claimant was a governmental body and in my judgment criteria used by the court in that case are helpful in determining that question in this case. The relevant criteria are:

    a. Whether the body has any discretion of its own; if it has, what is the degree of control by the executive over the exercise of that discretion;

b. Whether the property vested in the corporation is held by it for and on behalf of the government;

c. Whether the corporation has any financial autonomy;

d. Whether the functions of the corporation are government functions.

I will consider each of these in turn.

48. In relation to (a) it cannot be disputed that the central government has a level of control over the Appellant. The Appellant is owned by the State and the Minister of Finance in his capacity as corporation sole is the sole shareholder. As the sole shareholder he has the power to appoint and remove directors. The evidence in relation to the appointment of directors is that persons are recommended for appointment by the line Minister with responsibility for the Appellant as well as by other State officials and members of government. Those recommendations are considered and approved by the Cabinet and the formal appointment is made by the Minister of Finance as the shareholder of the Appellant. However, the board of directors is responsible for the management of the company and it is within the board's powers, duties and discretion to make a number of decisions that would impact on the business of the company. I accept that the sole shareholder of the company is in a position to exercise control over the directors. But what is the evidence of the shareholder exercising such control? This is not really addressed in any way in the affidavits before the court.

49. There is a letter from a Member of Parliament to the secretary of the tenders committee of the Appellant directing that the names of contractors be placed on the priority list for projects within the Point Fortin constituency as they are well known to the Member of Parliament and "have a record of performance in keeping with the highest level of reliability, cost efficiency and quality of work done". There is however no indication on the evidence before the court that this direction was adhered to. Nor is there any evidence that the

contractors were awarded contracts. But even if the names of the contractors were placed on the priority list for projects, that in itself is not evidence that the board had no discretion of its own in the affairs of the company. It is not possible on the evidence to determine how close was the control over the board and whether it exercised any discretion of its own, and if so the extent to which it did so. The fact that a Minister is assigned responsibility for the Appellant under s 79(1) of the Constitution does not address this issue.

50. This consideration is of importance given the level of involvement of the State in the economy. The fact is that there are a number of state-owned enterprises and among them are trading companies. For example, in **Trinidad and Tobago National Petroleum Marketing Company Limited v Trinidad Express Newspapers Limited** HCA S862 of 1999 the question was whether the claimant company, which is a state-owned corporation responsible for the sale and distribution of petroleum and petroleum products, was caught by the rule in Derbyshire. It was held (and in my view correctly so) that the company was a trading company and not a governmental body. The fact therefore that a company may be wholly owned by the State does not in itself answer the question whether it is a governmental body. The extent to which control is in fact exercised by government over the entity is an important consideration. The Judge did not consider whether the Appellant exercised any discretion of its own but only considered the question of control from the narrow viewpoint that the shares of the Appellant were vested in the Minister on trust for the State.

51. In relation to (b) in so far as the State is the sole shareholder, I would answer this question in the affirmative.

52. With respect to (c), which asks the question whether the company has any financial autonomy, it is not disputed that the CEPEP programme is funded by the government. The government's funding of the CEPEP programme

accounted for one of the highest expenditures by government in the social sector between 2011 and 2016 averaging over five hundred million dollars per year. In 2016, the government allocated five hundred and thirty-one million dollars to the CEPEP programme. However, the fact that a body receives funding from government does not by itself mean that it is a governmental body (see **Duke v The University of Salford** [2013] EWHC 196). Of importance to that issue is the extent of the independence it enjoys to manage its funds. In this case however it is reasonable to infer that the Appellant would be required and would have no choice but to use the money allocated to the CEPEP programme by government in the management and execution of the CEPEP programme. To that extent, the Appellant would have little to no financial autonomy. However, according to Mr. Eddy, the Appellant enters into contracts with private companies and state entities and earns revenue for the company. This is separate and apart from the management and execution of the CEPEP programme. The Judge in his judgment stated that there is no evidence before the court "to suggest that [the Appellant] earns income from sources other than the government". In so saying, he appears to have overlooked that evidence of Mr. Eddy.

53. What Mr. Eddy's evidence reveals is that the Appellant earns revenue from sources other than the government. There is nothing to suggest that the Appellant does not enjoy the autonomy that any trading company would have in relation to that revenue or the sources from which it is derived. Unfortunately, it is not stated in the affidavit what is the amount of the revenue earned by the Appellant from its contracts with private companies and state entities. It may be de minimis and may be ignored in the light of all relevant circumstances. But until that can be ascertained, that evidence should not be ignored.

54. With respect to (d), i.e. whether the functions of the company are government functions, the objectives of the CEPEP programme have been outlined earlier.

These objectives may be described as governmental. But more to the point, the way they are achieved on the evidence before the court is that the government provides the funds necessary for the Appellant to retain contractors to perform functions who in turn will employ persons to execute the functions. In the course of argument, Mr. Prescott accepted that the functions that the contractors perform are largely maintaining public areas such as open spaces and public parks. Those, Mr. Prescott agreed, would be associated with the functions of government either local or national. So in the management and execution of the CEPEP programme, the Appellant is performing government functions. But material here too, is that the Appellant enters into contracts with private and state entities to earn revenue. Those are functions of a trading company. As I have mentioned, the evidence does not disclose the amount of revenue earned to gauge the extent of its trading operations. I would think that the fact that the Appellant may engage in some trading would not automatically make it a trading company. The matter must be looked at in the round in the light of all the evidence and the relevant criteria and a determination made whether the Appellant is a trading corporation and has a reputation to protect as such notwithstanding it may manage and execute the CEPEP programme. It is not possible to arrive at a proper determination of that only on the affidavit evidence before the court.

55. The Judge seemed to think that the function of the Appellant was to execute government policy and stated that if government changes the Appellant's policies may change. While that may be true in respect of the management and execution of the CEPEP programme, according to Mr. Eddy, that is one of the functions of the Appellant. In addition, the Appellant earns revenue of its own from contracts entered into with State and private entities. Here too the other functions may be insignificant or themselves may be considered to be government functions. But on the evidence as it stands before the court I do

not think that it is a reasonable inference to say that the role of the Appellant is no more than to execute government's policy.

56. In view of the above, the Judge on the assessment of the evidence before him, overlooked the evidence that the Appellant earned revenue from contracts entered into with private and state entities and that the management and execution of the CPEP programme was one of the functions of the Appellant, and consequently did not consider the relevance of that to the functions of the Appellant, the financial autonomy of the Appellant and whether the Appellant might be considered a trading corporation with the freedom to initiate and maintain defamation proceedings in relation to words that may have a tendency to damage it in the way of its business. He viewed the element of control form the narrow confines of the ability of the Minister to appoint and remove directors and paid no attention to the extent to which, if at all, the discretion of the board may be constrained by the Minister. He also considered that the function of the Appellant is to execute government policy without any real basis to enable that conclusion to be drawn. These matters are all material to the determination of whether the Appellant is a governmental body. In the circumstances, I am unable to support the Judge's conclusion that the Appellant is a governmental body.

57. In the course of his argument before the Judge, Mr. Prescott urged that the court should be slow to strike out the Appellant's counterclaim on the basis that it is caught by Derbyshire without a full investigation of the facts. He repeated that submission before this court. The Judge did not agree with the submission. In my judgment, in view of the evidence as it stands, he was wrong to do so. There are aspects of the evidence to which I have referred above, which would have benefitted from a fuller investigation. The Judge ought to have directed that the issue as to whether the Appellant can maintain a claim in defamation be tried as a preliminary issue.

58. In **Goldsmith v Bhoyrul** [1997] 4 All ER 268 Buckley J noted at page 270 that to prevent a body corporate from suing in defamation "if it might otherwise have that right is an undertaking that requires great caution". That is undoubtedly true and such caution would have dictated in this case a fuller investigation of the evidence as suggested by Mr. Prescott likely requiring directions at to disclosure and cross-examination. It should be however also true that the court should be cautious to permit a governmental body to sue in defamation which may suppress the right to freedom of expression especially where the defamation suit may be funded by public funds. In those circumstances, I would (a) set aside the judgment of the court, (b) direct that there be a trial before a Judge of the High Court of the preliminary issue whether the Appellant is a governmental body and so cannot initiate and maintain a claim in defamation, and (c) remit the matter to a Judge of the High Court for all necessary and appropriate directions in that regard and the trial of the issue.

59. I turn now to the second issue on the appeal, i.e. whether the Appellant can maintain the claim in malicious falsehood made in its counterclaim. This issue can be disposed of in a more expeditious and summary manner.

60. The amended counterclaim of the Appellant contains a claim for damages for malicious/injurious falsehood (malicious falsehood). There is no dispute that the counterclaim was properly amended and was before the Judge when he heard the Respondent's application. The Judge in his judgment makes no mention of the counterclaim and it appears that he overlooked it and consequently failed to deal with it in any way.

61. There is no doubt that a company that is not a governmental body can maintain a claim in malicious falsehood. I do not accept the Respondent's submission that if the Appellant is a governmental body it cannot do so. That is against the weight of authority. In Derbyshire**,** Lord Keith referred to the judgment of the Court of Appeal where that court considered that the Council,

being the claimant in Derbyshire, was entitled to sue for malicious falsehood. Lord Keith took no issue with that statement. Similar conclusions have been arrived at in **PTC v Modus Publications (PVT) Limited** (supra) and **Ballina Shire Council v Ringland** 83 LGERA 115. I see no reason to depart from them.

62. There was no argument before this court that the elements necessary to establish a claim in malicious falsehood were not pleaded in the amended counterclaim. In the circumstances, I hold that the Appellant is entitled to maintain its claim in malicious falsehood.

63. In view of the above, I would allow the appeal, set aside the Judge's order, make the order referred to in paragraph 58 above and hear the parties on costs.

A. Mendonça, J.A.