THE REPUBIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2013-05221

Between

AFRICAN OPTION

First Claimant

And

DAVID WALCOTT

Second Claimant

And

BANK OF BARODA TRINIDAD AND TOBAGO LIMITED

Defendant

Before the Honourable Mr. Justice Robin N Mohammed

Appearances:

Claimant (David Walcott) appearing in person

Mr Anthony Manwah and Mr Ronald Dowlath instructed by Mr Srinivasa Rao Kadem for the Defendant

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JUDGMENT

I. INTRODUCTION AND PROCEDURAL HISTORY

1. On the 23rd December, 2013 the claimants initiated a claim for damages against the defendant for libel and breach of duty. In the claim form and statement of case the claimants claimed the following relief:

    i. *The claimant African Option, claims damages against the Defendant Bank of Baroda of Trinidad and Tobago Limited for Breach of Duty, in that the Defendant in breach of its said services rendered in the sum of $500.00 to be wrongfully returned with a False Notation, on the face of the cheque.*

    ii. *Damages against the Defendant Bank of Baroda of Trinidad and Tobago Limited for Libel, as the said false notation, misrepresented the true status of the claimant's Chequing Account which conveyed false information to Ms Baptiste and gave her the impression that the Claimant's Managing Editor had committed a fraudulent act against her, intent on defrauding her compensation for her professional service.*

    iii. *That the said False Notation place (sic) on the face of the cheque was a grave Breach of Duty on the part of the Defendant which also constituted an act of Bank Libel against the Claimant, which caused its image and reputation as a corporate entity in the field of professional publishing, to be adversely affected and its Managing Editor, who is the principal of the Defendant to be subjected to criminal prosecution.*

    iv. *Costs: that the Defendant pay the claimant's cost.*

    v. *Such further and/or other relief as the Court deems fit.*

2. The defendant entered an appearance on the 30th December, 2013 giving notice of its intention to defend and thereafter filed its defence on the 22nd January, 2014.

3. On April 7th 2014, the claimants made an application supported by affidavit for summary judgment. As directed by the court on the 9th April, 2014, written submissions regarding the said application were filed on 15th May, 2014 on behalf of the claimants and on the 2nd June, 2014 in opposition on behalf of the defendant. Submissions in reply were filed on the 9th June, 2014 by the claimants. By order dated 10th June, 2014 the application for summary judgment dated 7th April, 2014 was dismissed with an order for assessed costs to be paid by the claimant to the defendant.

4. Thereafter, on the 24th June, 2014 the defendant filed an application to have the claimants' statement of case struck out together with written submissions. The claimants filed their submissions in response on August 22nd 2014.

5. By order dated 14th October 2014 contained in a written decision, the First Claimant, African Option, was struck out as a claimant to the action as the court held that it was not a proper party to the claim on the basis that it had ***no locus standi*** to initiate such claim**.** With respect to the Second Claimant, David Walcott, the claim for breach of duty was struck out as it disclosed no cause of action. However, the claim for libel survived.

6. The second claimant also filed a Notice of Application on the 28th April 2015 to have the defence struck out which was dismissed by order dated 11th June, 2015 with an order for assessed costs in favour of the defendant. Directions were given for the further management of the case and the trial was fixed for the 29th September, 2015.

7. On the date fixed for the trial, the court was informed that the claimant had filed a procedural appeal of the court's earlier decision and such appeal was still pending before the Court of Appeal. The trial was therefore vacated and rescheduled to 1st December, 2015, which said date was also vacated as the court was again informed that the procedural appeal had not yet been determined. The trial finally proceeded and was completed on the 8th March, 2016.

8. Principal submissions on behalf of the second claimant were filed on the 5th April, 2016 and the submissions of the defendant were filed on June 7th, 2016. The claimant filed submissions in reply on the 22nd June, 2016.

II. NATURE OF THE CASE

9. According to the claimants, the first claimant herein is a professional publishing company with its registered office address at #71 Frederick Street, in the City of Port of Spain and it is the publishers of African Voice Newspapers and Stage Lights Entertainment Magazine. The second claimant is the owner/Managing Editor of the company.

10. The first claimant operates a chequing account at the defendant Bank which it has maintained consistently for the past four years and on the 27th day of November, 2013 a cheque, issued to the first claimant by a State Institution for the sum of $15,000.00, was deposited into the said chequing account.

11. The claimants allege that on the 2nd day of December, 2013 the first claimant company issued a cheque for **$500.00** payable to Ms. Alicia Baptiste for services rendered. The second claimant maintains that the defendant's servants refused to make payment on the cheque. Ms Baptiste requested a formal reason for the defendant's refusal to cash her cheque and the teller, directed by the senior personnel, made the notation ***"NSF"*** on the face of the cheque. The claimants claim that the ***"NSF"*** notation which means ***"Not Sufficient Funds"*** was a grave misrepresentation of fact, relative to the status of the claimants' chequing account.

12. The claimants aver that the notion conveyed a wrongful status rating of the first claimant's chequing account which caused grave embarrassment to the second claimant and damage to the professional integrity of both claimants.

13. The defendant's case is that on the 28th November 2013, the first claimant deposited a First Citizens cheque in the sum of **$15,000.00** into its bank account with the defendant. The defendant avers that the said cheque was forwarded for clearing which usually takes four (4) working days. The defendant highlighted that the 28th November, 2013 was a Thursday and that 4 working days would have ended on the following Tuesday, taking into account the intervening weekend. The cheque was therefore cleared on Tuesday 3rd December, 2013.

14. Subsequently, a cheque dated 2nd December, 2013, issued by the claimants to Ms Alicia Baptiste, for the sum of $500.00 was presented by Ms. Baptiste to the defendant on the same day of issue for encashment. The defendant submits that the cheque was not cleared by the defendant since the claimant did not have sufficient funds in his account at the material time.

III. ISSUES

15. The issues now arising for determination by this court are:

(i) Whether on the 2nd December, 2013 there were sufficient available funds in the account in question to immediately pay the value of the $500 cheque?

(ii) Whether the marking of the cheque with the notations "NSF" and "RTD" were defamatory of the claimant, David Walcott?

IV. LAW AND ANALYSIS

Issue 1: Whether on the 2nd December, 2013 there were sufficient available funds in the account in question to immediately pay the value of the $500 cheque?

(a) Submissions

16. The claimant submits that the Central Bank Clearing House has a 24-48 hour clearance of all cheque transactions but the defendant unlawfully maintains a four day holding policy,

without presenting any logical reason as to why it needs to keep clients' monies for two extra days. He goes further to state that all cheques issued by one bank to another has automatic bank clearance and as a consequence, the defendant would have had custody of the money from the claimant's deposit in 24 hours. He submits that the defendant enjoys the Central Bank inter-bank protection facility of up to **$15,000** if a cheque is returned. He therefore submits that the Defendant was faced with absolutely no risk if it had paid the **$500.00** cheque.

17. The claimant submits that the defendant had the $15,000 in their custody for over three days and still decided to return the $500 cheque. The claimant maintains that the Central Bank established a holding period of 24-48 hours and that the defendant had no legal or moral right to extend the holding period beyond that time and enforce a 4-day holding policy. He avers that such a policy cannot supersede the Central Bank Laws and Rules.

18. The defendant submits that a $15,000 cheque was deposited on the 28th November, 2013. The defence states that at the time of the deposit, the account had in it a balance of **$27.55**. The defendant avers that it takes 4 working days for a cheque to clear after it has been deposited and that this is in accordance with the procedure set by the Central Bank. Consequently, the cheque having been deposited on Thursday 28th November, 2013 would have cleared on Tuesday 3rd December, 2013. This would have been the fourth working day inclusive of the date of deposit of the cheque. The defendant maintains that on the 2nd December, 2013 when Alicia Baptiste presented the cheque for payment, the $15,000 funds were not yet available and so the cheque was righty dishonoured.

(b) The application of the law to the instant issue

19. The defendant attached to its defence a copy of the **Central Bank of Trinidad and Tobago's Guidelines for the Collection and Clearing of Cheques**. Paragraphs **2, 24** and **25** state the following:

> *"2. The Central Bank and the Main Office or Data Centre of each bank will receive through the respective Main Offices or Data Centres of the other*

banks, all cheques, drafts or other negotiable instruments drawn on it and/or its branches in Trinidad and Tobago and deposited with the respective branches of banks (including all return items), on the same day of deposit, and/or magnetic or electronic media with cheque data no later than 9.00p.m for the first exchange or no later than 8.30a.m on the next business day."

"24. Paragraph 25 specifies the number of business days within which an instrument to be returned by the drawee bank would normally be received by the presenting bank after the date of the deposit with the presenting bank for collection

25. The time limits governing the return of instruments by branches of all banks shall be set out hereunder:

(a) The Data Centre or Main Office of a presenting bank will deliver instruments and or/magnetic or electronic media to the Data Centre or Main Office of the drawee bank by 9.00p.m on the same day of deposit or, not later than 8.30a.m the next business day.

(b) Upon receipt of the items as to sub-paragraph (a) above, the drawee bank may exercise the option to return any such instrument within (3) three business days (inclusive of the day the item was presented to the paying bank's Data Centre or Main Office) to the Data Centre of the presenting bank. Under normal circumstances therefore, an item which has been dishonoured ***must be received by the presenting branch of the bank where the said item was first deposited no later than four (4) business days inclusive of the date that the item was deposited.****"* [Emphasis added]

20. From the above paragraphs, it is clear that the Central Bank's time limit for cheques to be cleared is a maximum of four (4) working days, inclusive of the day the cheque was deposited. From the evidence, the claimant deposited the cheque for $15,000 on Thursday

28th November, 2013. Discounting the weekend, four (4) working days would have elapsed on Tuesday 3rd December, 2013. Ms Alicia Baptiste tried to cash the cheque for $500 on Monday 2nd December, 2013 which was one day short of the date when the funds would have been cleared and available. In these circumstances, I must agree with the defendant that on the 2nd December, 2013 when Ms Alicia Baptiste presented her check to the defendant, the cheque was not yet cleared and the funds were not yet available.

21. The claimant has purported that the Central Bank Clearing House has a 24-48 hour clearance policy of all cheque transactions. The claimant has failed to exhibit any documentation or evidence of his assertions. Under the circumstances, I find his assertions that the defendant had the funds cleared and in their possession for three days, to be baseless and without merit. Immediately prior to the deposit of the $15,000 cheque, the balance on the account was **$27.55**. Consequently, there was insufficient money available in the account in question to honour the cheque of $500.

Issue 2: Whether the marking of the cheque with the notations "NSF" and "RTD" were defamatory of the claimant, David Walcott?

(a) Submissions

22. The second claimant submits that he operates a chequing account under the Registered Trade Name African Option and he has operated the said account for over 10 years. He claims that during that 10-year period he has disbursed an average of 3,000 cheques and he holds the distinction of having only three cheques being returned. He claims that the claimants had an excellent credit rating of 1,000 to 1, ratio of HONOURED cheques.

23. The second claimant claims that the defendant's decision to return the cheque in question was a scandalous breach of its fiduciary duty of the claimant's right to protection of property and a betrayal of the confidence and comfort which the defendant is mandated to provide to its customers. It is the second claimant's contention that the abbreviated notations **"RTD"** and **"NSF"** painted a false and malicious image of the claimants' chequing account and tarnished their image in the eyes of Ms. Alicia Baptiste who presented the cheque for payment and all other persons who would have been privy to the information.

24. The defendant, on the other hand, submits that on the 2nd December, 2013 the available amount in the account was **$27.55** and therefore the notation **"NSF"** and **"RTD"** were true as there were insufficient funds to honour the $500.00 cheque.

25. It is the defendant's submission that **"words"** can only refer to the **holder of the account**, which is **African Option**. The defendant states that David Walcott is only a signatory to the account and not the account holder. **African Option is not a party to the action** any more, having been struck out as a claimant by order of the court dated 14th October, 2014 pursuant to a written judgment delivered by the court on the said date. The defendant further maintains that the "words" published were only to one person, Alicia Baptiste, who herself states that she is of the opinion that the cheque was dishonoured as it was in its final day of hold. The defence avers that the issue of anyone's reputation be lowered in the estimation of right thinking people does not arise.

(b) The application of the law to the instant issue

26. In **Paget's Law of Banking 14th Edition** at **page 636, paragraph 22.115** the following was stated:

> *"Libel is the tort of making a defamatory statement in writing or printing which without justification disparages a man's reputation to a third party. When a cheque is dishonoured it is usual for the drawee bank to put a note on it indicating the reason for the dishonour.*
>
> *In **Sim v Stretch [1936] 2 ALL ER 1237, HL**, Lord Atkin said that if the words tend to lower the claimant in the estimation of right thinking people generally, they are defamatory. The common answer where a bank decides to dishonour a cheque conveys to many people's minds that he has no money in his account to meet it, or that he did not draw in good faith, or that he drew recklessly or in fraud……*
>
> *In **Frost v London Joint Stock Bank Ltd (1906) 22 TLR 760, CA**, the Master of the Rolls said that in order to found a libellous interpretation of an answer there must be extrinsic evidence that the answer was calculated*

> *to lead reasonable people to attach an injurious meaning to it……The Court of Appeal held that where words are not obviously and directly defamatory the test is not what it might convey to a particular class of persons who by their calling, might attach a special significance thereto, but what they would suggest to the mind of any person of average intelligence who read them……."*[Emphasis added]

27. Further, on **page 638** it is stated:

> *"Claims in respect of dishonoured cheques are often brought both in contract and libel. If the claim for breach of contract fails, i.e. if the refusal to pay is justified, the claim for libel must also fail……"*

28. From the above paragraphs it is understood that where the dishonoured cheque is justified, the claim for libel will fail. In the present instance, there were insufficient funds in the account at the material time and so it should follow that the claim for libel will fail since the information was not inaccurate. The claimant has gone a step further to submit that the notations **"NSF"** and **"RTD"** are misrepresentations and that the proper notation should have been **"un-cleared effects"**. He claims that this would have shown that there is money available in the account but which has not yet been cleared.

29. It would follow that the court must determine whether the words **"NSF"** and **"RTD"** placed on the cheque were in fact libellous. In **Hardlines Marketing Limited v Republic Bank Limited C.V. No. 2014-00429** this Honourable Court considered a similar matter. In that case this Court found that the claimant had successfully established a claim for libel against the defendant. An order for damages was granted since it was determined that two cheques stamped and returned to the Board of Inland Revenue with the notation "un-cleared effects" were libellous as it was found that the claimant did have sufficient available funds in its account at the material time.

30. As shown above, when the words are not obviously and directly defamatory, the test to determine whether the notations are libellous is to consider what the words would suggest to the mind of any person of average intelligence who reads them. In the witness statement of Ms Alicia Baptiste, at paragraph 9, she said the following:

> *"The claimant then provided me with documentary evidence to prove that his balance was in fact, in excess of $15,000 and that he did not issue any cheques apart from mine. As a consequence, I formed the opinion that the monies in the account may have been in its final day on hold and had to be cleared the same night."*

31. I am of the view that the notations placed on the cheque were not done to lead persons to place an injurious meaning to them. Ms Alicia Baptiste, whom this court would consider to be a right thinking person, came to the conclusion on her own accord that the cheque was in its final day on hold and would be cleared the same night. The evidence is that this was in fact done and Ms. Baptiste went to the Bank on the very next day and her cheque for $500 was honoured. I do not agree with the claimant's contention on this regard that the notations caused him any injury. The notations **"NSF"**, **"RTD"** and **"un-cleared effects"** all have the same underlying meaning, which is, that the account does not contain sufficient funds to honour the cheque at the material time.

32. Furthermore, **the account held at Bank of Baroda is in the name of African Option**. By order dated 14th October, 2014, the first claimant African Option was struck out of the claim pursuant to **Part 26.2(1)(a) of the Civil Proceedings Rules 1998** since it is found it was not a proper party to the action and had **no *locus standi*** to initiate a claim in its own right. In this Court's written decision, made in favour of the application by the defendant to strike out the first claimant, at page 6, paragraphs 15 and 16, the following is stated:

> ***"A search of the Companies Registry of Trinidad and Tobago reveals no company or business registered as "Afrikan Option". Despite the Second Claimant's assertions, the First Claimant appears to have no legal***

standing to bring an action in its own name. It does not have a separate legal personality which entitles it to sue and be sued in its own name. The Second Claimant did not suggest that he is a sole trader and in any event did not bring the claim as "David Walcott trading as Afrikan Option". At no point did he seek to amend his claim to reflect this. In the Statement of Case, Afrikan Option is referred to as a professional publishing company with a registered office address and the Statement of Case goes on to say that the Second Claimant is the owner/Managing Editor. The Claim Form refers to the Claimant as a "corporate entity in the field of professional publishing".

16. The term "company" has a specific meaning in law. The Companies Act Chap. 81:01 defines a company as "a body corporate that is incorporated or continued under this Act". Afrikan Option does not appear to satisfy this definition of a company and as such does not appear to have any locus standi. If Afrikan Option is in fact a business being carried on by the Second Claimant in another name, then the requirements of Part 22.2 of the CPR have not been complied with. It is not for this Court to conduct the Claimants' case for them. No application to amend was ever sought. In the circumstances of this case, I find the failure of the First Claimant to constitute a proper party to the action cannot be rectified, particularly at this late stage. Accordingly, I am of the view that the claim of the First Claimant ought to be struck out pursuant to Part 26.2(1)(a) of the CPR."

33. African Option is not a registered company and has no standing to sue or be sued. In **Pan Trinbago Inc. T.C. et al v. Maharaj et al H.C.A. No. 1071 of 1995** at page 6, Justice Bereaux (as he then was) said the following:

"The other two issues of law are quite easily disposed of. As to whether the first plaintiff can maintain an action in libel, the short answer is that

it can. The dictum of Lord Reid in Lewis provides the long answer. At pg. 262 of his speech in discussing the question of injury to a non-natural person as a result of words said or printed, he said: ***"A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured."*** **[Emphasis added]**

Lord Reid's' speech was made almost forty years ago. We now live in an era in which the non-natural person is described as a "corporate citizen". It has civil rights. Marketing and advertising contribute significantly to the burnishing of the corporate image. Companies including those set up for charitable or altruistic purposes depend on their goodwill for reputability. In this case the first plaintiff, a corporate body, is involved in the development and promotion of the steelband. As an entity having an (end of page 6) image and identity of its own it is capable of being libelled. An article which imputes improper action and motives to it is bound to be damaging to its goodwill and reputation and may affect such things as sponsorship and other forms of assistance in promoting its objects."

34. Based on all of the above, it would follow that the second claimant does not have the standing to bring an action for libel on behalf of "African Option". Since the bank account is in the name of African Option, any alleged libel would be against the owner of the account. African Option is no longer a claimant in this action and in any event was found not to be a company under the laws of Trinidad and Tobago (not registered under the **Companies Act Chap. 81:01**) and therefore does not have a separate legal personality. ***Pan Trinbago*** shows that a Corporation is able to suffer libel but African Option does not meet this standard. For all of the above reasons, the second claimant's claim for libel against the defendant must fail.

V. DISPOSITION & ORDER

35. In light of the above analyses and findings, the order of the court is as follows:

ORDER:

I. The claimant's claim against the defendant for libel be and is hereby dismissed.

II. The claimant shall pay to the defendant its costs to be quantified on the prescribed scale, in default of agreement.

COSTS

Since the claim is one which has no monetary value and neither party has applied to the court under **CPR 1998 Part 67.6(1)(a)** to determine the value to be placed on the claim, the claim must be treated as one for **$50,000.00** pursuant to **CPR Part 67.5(2)(c)**, the prescribed costs for which is **$14,000.00**, calculated in accordance with the **Scale of Prescribed Costs at CPR Part 67 Appendix B**. Having considered all the circumstances of the case including the matters set out **CPR Part 66.6(4), (5) and (6)**, I find that there is no justification under **CPR Part 67.5(4)** for reducing the amount of costs to which the defendant is entitled.

IT IS THEREFORE FURTHER ORDERED that the prescribed costs to which the defendant is entitled is the sum of $14,000.00.

Dated this 27th day of July, 2016

Robin N Mohammed
Judge