

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO. ANUHCV 0007/2011

BETWEEN

GEORGE RICK JAMES

Claimant

AND

MOLWYN JOSEPH

Defendant

Appearances:

Ms. E. Deniscia Thomas for the Claimant

Ms. Samantha Marshall for the Defendant

2012: March 6
June 25

JUDGMENT

INTRODUCTION

- [1] **REMY J.:** The Claimant George Rick James is the Secretary of the Free & Fair Election League Inc., a non-profit organization incorporated under the laws of Antigua and Barbuda. The Defendant Molwyn Joseph is a Parliamentarian, a member of the Antigua and Barbuda Labour Party (ALP) and the host of "Fire & Steel" a program aired on Grenville Radio, also referred to as ZDK radio.

BACKGROUND

- [2] On or about September 2010, a Tribunal was established to investigate the conduct of certain members of the Antigua and Barbuda Electoral Commission. The Tribunal commenced hearings on or about the 20th September 2011. Several persons attended these hearings. The Claimant Rick James was present every day from and since the

commencement of the hearing. Lionel Max Hurst, a co-host of the Fire & Steel Programme was one of the persons whose conduct was being investigated by the Tribunal. The Defendant regularly attended the hearings and gave summations on the said programme in the evening with respect to what transpired at the hearings.

- [3] On the 6th October 2011, there was a request by Mr. Datadin, a lawyer who was representing the Government, for the Claimant to give evidence at the hearing. That request was denied.
- [4] That evening, namely the 6th October 2011, during his regular summation on the Fire & Steel programme, the Defendant reported and commented on the Tribunal hearing, and, in particular, the events surrounding the request made to the Tribunal to permit the Claimant to give evidence. It is the Claimant's contention that the Defendant made statements during that broadcast that defamed him.

PLEADINGS

- [5] In his Statement of Claim, the Claimant avers that on the 6th day of October 2010, during the Fire & Steel broadcast, the Defendant falsely published and caused to be published defamatory statements of and concerning him, designed to damage his professional reputation and expose him to ridicule. The Claimant's claim is for:-

- 1) General damages
- 2) Aggravated damages
- 3) Interest on the amounts found due to the Claimant
- 4) A public apology from the Defendant
- 5) Legal fees
- 6) Costs.

- [6] In his Defence, the Defendant admits publishing a statement on or about the 6th day of October 2010, and as contained in the transcript attached to the Defence as Exhibit "A". The Defendant states that the statements complained of by the Claimant do not all refer to the Claimant and in the instances that the statements do refer to the Claimant, the statements and or words spoken are not defamatory as they were fair comment by the

Defendant on a matter of public interest. It is the Defendant's claim that the Claimant's claim should be dismissed as being "frivolous and vexatious", with costs to the Defendant.

[7] The Claimant in his Reply to the Defence denied that the words constituted fair comment on a matter of public interest.

[8] The words complained of by the Claimant are set out in paragraph 3 of his Statement of Claim and are as follows:-

"...the Government... the lawyer of the Government attempted to get Rick James to give testimony... to give evidence in spite of the fact that Rick James sat in that tribunal for the entire duration of the tribunal from the very first day and listened to the evidence of all those who was sworn to give testimony. It was an amazing development and... ah... **it is something that we need to expose because it really reflects ...ah ... a consistent pattern of backdoor dealings by the U.P.P Government...**"

"Now let me deal with another matter that came up today. The Attorney for the Government early in the morning attempted to get Mr. Rick James to give evidence. I must tell you I was right there. The tribunal was caught off guard because they had no indication because from the attorney that he had any more individual to give evidence than what he had on the original list. As a matter of fact even yesterday Mr. Datadin did not give the tribunal a hint that he was going to make a request for Mr. Rick James to take the witness box to give evidence. We later found out that Rick James did not volunteer. According to him, he was invited by Council to the tribunal by letter of 29th September, 2010. So the Secretary to tribunal as well as the Attorney to the Government knew even before the 29th September 2010 that they had invited Rick James to give evidence but only today the 6th October 2010 that the tribunal was informed and a request was presented the tribunal.

Well the three members of the tribunal asked questions and in asking questions they found out that Rick James sat there in the tribunal all day since the tribunal ... ah ...started. Even today when the request was made Rick James was right there and stood up so that the tribunal could see him in person. Notwithstanding that, this brazen attempt by Mr. Datadin, the lawyer for the ...ah ... Government and **Mr. Rick James attempted to justify or give reasons why he should take the stand to give evidence and** so it did not take long for the tribunal to rule that it would be unfair to everyone especially, Sir Gerald, Nathaniel Paddy James and to some extent my friend Lionel Max Hurst for Rick James to give evidence. That request was denied; but for me, someone looking-on on these hearings and listening what looking at everything I believe that **it was a shameful display of unethical conduct not only on the part of the Attorney but all involve including Rick James**, that they would do such a thing

that would obviously be **unjust to individuals prominent people of this society. We wonder when people will be guided by some morality and ethics in this country.** How could someone sit in the hearing of the tribunal and want to give evidence after they have heard the evidence of everyone else and I was told informally, that one of the issues Rick James wanted to pursue had to do with evidence given in the tribunal that he had heard while sitting there. I was told that and I would say that it's shocking. So today was a good day in my estimation for Lionel Max Hurst and Mr. Paddy James..."

ISSUES

[9] The issues that fall to be determined by the Court are as follows:-

- 1) Whether the words complained of are and were capable of being defamatory.
- 2) Whether the words complained of were defamatory in the circumstances.
- 3) Whether the words complained of were defamatory of the Claimant.
- 4) Whether the Defendant can avail himself of the defence of fair comment.
- 5) Whether the Defendant is liable in damages.

ISSUES 1, 2 and 3.

[10] Issues 1, 2 and 3 will be dealt with collectively.

[11] Barrow J.A. in the case of **Vaughn Lewis v Kenny Anthony**¹, reviewed the learning on the meaning of words in defamation cases, and the proper method to be adopted by the Judge, and in particular, the "proper two-step method" to be used. In paragraph 6 of his Judgment, the Learned Judge had this to say:-

"Paragraph 6 -When the trial is by a judge sitting without a jury the judge is still required to first decide the question what, if any, defamatory meanings the words were capable of bearing. Rule 69.4 of the Civil Procedure Rules 2000 puts on statutory footing the procedure of applying to a judge in chambers, at any time after the service of the statement of claim, for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to in the statement of claim. It is only if the Judge is so satisfied (whether she makes the ruling in chambers or at the trial) that she can then go on to consider the second question, whether in fact the words bore the alleged or any defamatory meanings."

¹ - Civil Appeal No. 2 of 2006

- [12] The Claimant pleaded that the words complained of in their natural and ordinary meaning and in the context in which these words were spoken were understood to mean that the Claimant was involved in "backdoor dealings"; that he is unethical and immoral; that he colluded with the Government to thwart the process of the investigation by the tribunal; that he attempted to undermine the process with respect to the investigation into the conduct of the Electoral Commissioners; that he is guilty of sharp practices; and that he is partisan in his dealings.
- [13] By Order dated 24th May 2011, Master Mathurin ruled that the words complained of were capable of bearing the meanings ascribed to them or attributed to in the Statement of Claim. There has been no appeal against that Order. Accordingly, the fact that the words complained of are capable of being defamatory, is not in issue.
- [14] The next issue to be determined by the Court is whether the words complained of in fact bore the alleged or any defamatory meanings. If the answer is in the affirmative, whether the words were defamatory of the Claimant. In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary person. According to Halsbury "having determined the meaning, the test is whether, under the circumstances in which the words were published, the reasonable person would be likely to understand them in a defamatory sense."²
- [15] The essence of a defamatory statement is its tendency to injure the reputation of another person..... Generally speaking, a statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally or if it exposes him to public hatred, contempt or ridicule or if it causes him to be shunned or avoided. – (Halsbury, (supra) page 22, paragraph 42.) Words will be defamatory if they impute conduct the reasonable person considers discreditable.
- [16] The onus is on the Claimant to show that he was defamed; he must prove that the defamatory words did in fact bear a meaning defamatory of **him**. (my emphasis). This is an essential ingredient of the cause of action for defamation.

² Halsbury's Laws of England, Vol. 28, 4th edition Re-Issue, page 22, paragraph 43.

[17] I will now deal with the words contained in Lines 2-12, page 109 of the Bundle of Agreed Documents and which form part of the words complained of :-

".....And third one is the great surprise to the Tribunal when the Government.....the Lawyer for the Government attempted to get Rick James to give testimony, to give evidence in spite of the fact that Rick James sat in that Tribunal for the entire duration of the Tribunal, from the very first day, and listened to the evidence of all those who were sworn to give testimony. It was an amazing development **and its something that I think that we need to expose because it really reflects a consistent pattern of the back-door dealings by the UPP Government.**"

[18] It is the submission of Ms. Thomas that on this issue of "backdoor dealings", "the Defendant stated in his examination in chief that he was speaking "solely of the UPP Government", and that later in cross examination, the Defendant again stated that when he used those words, he was "referring to the UPP Government and no one else." Counsel states that the Claimant "takes issue with this interpretation." She states that whereas the name, "UPP Government" is used, that the context in which the words were spoken and the relationship that the Defendant suggests exists between the Claimant and the UPP by the words spoken, that a reasonable man would understand the reference to include also the Claimant herein." She states that it is the "development" that reflects the consistent pattern of backdoor dealings. She states that "the fact that the Defendant states: "by the UPP Government", does not take away from the implication already given that the Claimant is part and parcel of the backdoor dealings. She submits that "the statement in its relevant context refers to the Claimant."

[19] With respect, I have to disagree with Counsel's submission. In cross examination, during which the Claimant was referred to the above statement, the following exchange took place between Counsel for the Defendant and the Claimant:-

"Question - "You see that?"

Answer - "I do."

Question - Who do you understand did Mr. Joseph relate back door dealings to?

Answer - "The UPP."

[20] Based on the above, it is evident that the Claimant himself testified that he understood the words "backdoor dealings" to be referring "to the UPP Government" and not to him. The Court accepts and agrees with the submission of Ms. Marshall, Counsel for the Defendant, that "if the Claimant accepts that the Defendant was not speaking of him, but rather of "the UPP Government", then the issue as to whether the words were defamatory as against the Claimant will not arise as the words do not relate to the Claimant." I find therefore, that if the "back door dealings" refer to the UPP Government and not the Claimant, the words complained of cannot be defamatory of the Claimant. Notwithstanding the fact that the Claimant in cross-examination testified that the words "back door dealings" refer to the UPP Government, the Claimant testified that the words referred to in paragraph 17 above meant that he (the Claimant) was "guilty of sharp practices". He testified that "sharp practices" meant "underhand dealings and back door dealings." He also testified that the above words meant and were also understood to mean that he colluded with the government to thwart the process of the investigation of the tribunal.

[21] It is the submission of Counsel for the Claimant that "in the context of the statement, the referral to the Claimant and his involvement in the activity could lead a reasonable man to the conclusion that the Claimant colluded with the Government to thwart the process of the investigation by the tribunal and given the manner in which it was done, the Claimant is guilty of sharp practices." I find myself unable to endorse this submission. I do not think that the ordinary, reasonable citizen of Antigua and Barbuda hearing those words uttered would come to the conclusion that the Defendant was accusing the Claimant of having colluded with the Government or of being guilty of sharp practices.

[22] I now move on to consider whether the following words contained at page 118 (the Court's page 117) lines 3-11 of the Agreed Bundle of Documents did in fact bear a meaning defamatory of the Claimant:-

"..... But for me, someone looking-on on these hearings and listening and looking at everything, I believe that it was a shameful display of unethical conduct, not only on the part of the attorney, but all involved including Rick James that they would do such a thing that obviously be unjust to individuals, prominent people of the society. You wonder when people will be guided by some morality and ethics in this country. How

could someone sit in the hearing of a Tribunal and want to give evidence after they have heard the evidence of everyone else?"

[23] It is beyond argument that the above words have a defamatory meaning. To say that someone is guilty of unethical conduct is to impute conduct that is discreditable and even dishonourable. It is beyond dispute that the words referred to the Claimant among others, as "Rick James" is identified by name. The classic test to be applied here is whether the words complained of "would tend to lower the Claimant in the estimation of right-thinking members of society". It is beyond doubt that the ordinary, reasonable, intelligent citizen of Antigua and Barbuda hearing the above words would understand them as an allegation of unethical conduct and would understand the words to mean that the Claimant in this case was guilty of unethical conduct and that he was not guided by "some morality and ethics". Such a member of the Antiguan and Barbudian society would tend to hold the Claimant in less esteem as a result. As pointed out by Byron JA in **Carasco v Cenac**³, it is irrelevant that the defendant did not intend the words he used to be understood in a defamatory sense.

[24] It is the submission of Learned Counsel for the Claimant that the above statements meant and were also understood to mean that the Claimant is partisan in his dealings. I do not agree. Applying the test of the ordinary, reasonable man, I do not think that such a man would interpret the words as meaning that the Claimant was partisan in his dealings. I am of the view that such an interpretation is unduly strained.

[25] It is my view, therefore, that the words complained of by the Claimant do not bear all the meanings ascribed to them by the Claimant, namely that the Claimant was involved in 'backdoor' dealings; that the Claimant colluded with the Government to thwart the process of the investigation by the tribunal; that the Claimant attempted to undermine the process with respect to the investigation into the conduct of the Electoral Commissioners; that the Claimant is guilty of sharp practices, or that the Claimant is partisan in his dealings. I find that the words only impute unethical conduct to the Claimant, and for this reason, the said words are defamatory.

³ [1995] Court of Appeal OECS, Civ App No.6 of 1994,

[26] Learned Counsel for the Defendant in her closing Submissions states that "the Defendant accepts and acknowledges that he spoke the words above but the said words were an expression of the Defendant's opinion and/or commentary on what he observed in relation to the proceedings, surrounding Rick James's seeking to give evidence despite being in attendance at the Tribunal proceedings each day and hearing evidence given." It is the further submission of Learned Counsel that "the Defendant now submits that in taking into consideration the full context of the statements made and the background related thereto as set out in the Defendant's summation on the Programme Fire & Steel he is entitled to and does rely on the Defence of Fair Comment."

DEFENCE OF FAIR COMMENT

[27] The Defendant in paragraph 4 of his Defence, pleads as follows:-

"The Defendant asserts that the words in their natural and ordinary meaning as contained with the Transcript attached hereto, were words which constituted fair comment on a matter of public interest namely that :-

- 1) There was a Tribunal to investigate into the alleged misconduct of 3 members of the Antigua and Barbuda Electoral Commission.
- 2) The Claimant was present within the proceedings from the commencement of the Tribunal to the end and heard all the evidence.
- 3) The Lawyer for the Government, Mr. Sanjeev Datadin, invited the Claimant to give evidence on behalf of the Government despite his awareness of the Claimant being present throughout the proceedings.
- 4) To this end, Mr. Datadin, presented to the Tribunal a Witness Statement purportedly signed by the Claimant, and sought to have the Claimant sworn, to give evidence before the Tribunal.
- 5) The Claimant, given his experience, should have known that he could not give evidence in the proceedings, as he had being (sic) present when others gave their evidence.
- 6) The Tribunal ruled that the Claimant would not be allowed to give evidence, as such would be prejudicial to the proceedings and the 3 members of the Commission."

[28] Because the law recognizes that every person has the right to the expression of his opinion, it is a defence to an action of libel or slander that the words complained of are fair comment on a matter of public interest. In order to succeed in the defence, the defendant must however prove that the statements made must be (1) recognizable as comment; (2) on a matter of public interest; (3) based on a fact or facts that are truly stated or stated on a privileged occasion; and (4) a comment on such fact or facts within the wide limits which the law allows. (Halsbury's (supra) – page 71, paragraph 136.)

[29] The first hurdle which the Defendant must overcome is that he must establish that the statements are comment. In the view of the Court, the above words “.....but for me, someone looking-on on these hearings and listening what looking at everything I believe that it was a shameful display of unethical conduct not only on the part of the Attorney but all involve including Rick James.....”, are clearly recognizable as comment in the sense of an expression of opinion. The prefatory words “but for me”, are clearly followed by statements that are comment and not fact.

[30] It is undisputed that the above words spoken by the Defendant are on a matter of public interest. The Tribunal dealt with a subject matter which was of national importance. The entire population of Antigua and Barbuda had an interest in the outcome of the hearings of the Tribunal. In the words of Lord Denning MR in **London Artists v Litter**⁴:-

“Whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at what is going on or what may happen to them or to other; then it is a matter of public interest on which everyone is entitled to make fair comment.”

[31] The comment must be based on facts. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. According to Gatley⁵:-

“In order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails.” – per Fletcher Moulton L. J. in *Hunt v Star Newspaper* [1908] 2 KB 309 at 320. Further, the comment must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated.”

⁴ (1969) 2 Q.B. 375

⁵ Gatley on Libel and Slander, 4th Edition, page 350, paragraph 12.14

[32] In the view of the Court, the following are statements of fact and are not comment:-

“.....Notwithstanding that, this brazen attempt by Mr. Datadin, the lawyer for theah.....Government and MR. RICK JAMES ATTEMPTED TO JUSTIFY OR GIVE REASONS WHY HE SHOULD TAKE THE STAND TO GIVE EVIDENCE AND so it did not take long for the tribunal to rule that it would be unfair to everyone especially, Sir Gerald, Nathaniel Paddy James and to some extent my friend Lionel Max Hurst for Rick James to give evidence.....” (my emphasis)

[33] It would appear that the above is the statement of fact on which the following comment referred to in paragraph 22 above is made. Based on the evidence before the Court, the facts as stated in paragraph 32 above are not truly stated. It is true that the Claimant Rick James was present every day at the hearing of the tribunal; his evidence is that he sat there every day and all day, with the exception of “a few intermissions.” It is also true that the members of the Tribunal disallowed his evidence partly on the basis that Rick James was present throughout the proceedings and partly because the persons who were the subject of the investigation had not been served with the document which Rick James was supposed to tender into evidence. It is arguable that the statement in paragraph 32 above, is open to two different interpretations. The first is that Mr. Datadin was the lawyer for Rick James as well as the lawyer for the Government, and that Mr. Datadin was the one who attempted to justify or give reasons why he (Rick James) should take the stand to give evidence. The second interpretation is that Rick James himself attempted to justify or give reasons why he should take the stand to give evidence. Neither interpretation correctly sets out the factual situation. Based on the transcript exhibited before the Court, the members of the Tribunal asked Mr. Datadin why he was seeking to present Rick James as a witness when he was present throughout the entire hearing and had heard all the evidence. The bulk of the exchange was between the Justices and Mr. Datadin.

[34] The relevant part of the exchange at the hearing, is hereby reproduced from the transcript:-

“JUSTICE FORTE: You mean that’s a witness that has heard all the witness, right there?

SIR GERALD: Yes

MR. DATADIN: I don't know, My Lord, but certainly from where I ---

JUSTICE FORTE: But he's sitting in the front seat; he's not in the front seat? What's the gentleman's name? Mr. James? You are Mr. Rick James?

THE WITNESS: I am. George Rick James.

JUSTICE FORTE: Have you been here everyday?

THE WITNESS: I have been here everyday, except for a few intermissions, not very long.

JUSTICE FORTE: So weren't you aware that the public was asked to give statements if they have an interest in the Tribunal for a public enquiry?

THE WITNESS: I was not aware.

JUSTICE FORTE: Why you waited until this last moment after you have heard all the evidence presented?

THE WITNESS: Because I was invited. I received a letter informing me, Mr. Chairman, that it had come to the attention of the Tribunal that I may have information which is relevant to this.

JUSTICE FORTE: When did you receive that letter?

MR. DATADIN: That was indeed sent, Mr Lord.

JUSTICE FORTE: Didn't you give them a time limit?

MR. DATADIN: My Lord, the proceedings had already started.

JUSTICE FORTE: When you sent the letter to him?

MR. DATADIN: Yes, My Lords.

JUSTICE HARRISON: What's the date of your letter?

JUSTICE FORTE: When did you send that letter?

THE WITNESS: The 29th of September.

JUSTICE HARRISON: When did you receive it?

THE WITNESS: I think the next day, the 30th and I responded on the first, following day.

JUSTICE HARRISON: You received it on the 29th of September?

THE WITNESS: No, I think the 30th

JUSTICE HARRISON: Received on the 30th.

THE WITNESS: And I responded on the first.

JUSTICE FORTE: So how is it at that last minute you invited him? I am a bit surprised.

MR. DATADIN: I apologize, My Lords. I did not know the identity of the person. Yesterday was when it became apparent of the identity and presence in ---

JUSTICE FORTE: The contents of statement to put before the Tribunal?

MR. DATADIN: Yes, My Lord. I will have to say yes. If I may explain to -----

JUSTICE JONES: Mr. Datadin, at the time when the decision have already taken --- your decisions has already been taken that certain witness would not -----

MR. DATADIN: My Lord, the only reason if I may indicate of saying yes is not wanting to shut anyone out. But My Lord, in relation to the matters that are raised for my perusal of the statement that is provided, My Lord, there is a -----the matters that have been raised or addressed.

JUSTICE FORTE: Has Sir Gerald or Mr. James already been served the witness statement?

MR. DATADIN: No, they have not been served.

JUSTICE FORTE: So what you want us to do now? They have made decisions that they are not going to answer promptly what is in the letter been said. Do you want to go over the whole matter again?

MR. DATADIN: No, My Lord. At the very beginning we had agreed, My Lord, not to lead adjudications.

Justice Forte: So this is not a witness you intend to lead then?

MR. DATADIN: My Lord----

JUSTICE FORTE: I am a little more concern. At the beginning I thought it was Mr. Rick James sitting in court, presiding all on his own to offer some testimony. But now he's telling us and with proof of a letter that he's invited.

MR. DATADIN: My Lord, he indicated that he had information, so I advised that we write if he says that he's indicated that he has information and we write him, because----

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JUSTICE FORTE: Is it information that you want to place before the Tribunal?

MR. DATADIN: My Lord, it doesn't advance.

JUSTICE FORTE: It doesn't advance. So we can bring an end it now?

MR. DATADIN: My Lord, as long as it's not been said.

JUSTICE HARRISON: Is it anything you new or they find duplications of the evidence already made?

MR. DATADIN: My Lord, there is one letter that is written which was referred to in the evidence of Mr. Symister which I thought was the most relevant of the materials that has been provided.

JUSTICE HARRISON: Letter was written by Mr. Symister?

MR. DATADIN: No, My Lord, in the evidence of Mr. Symister, Mr. Symister did indicate that a letter was written from the Free and Fair Election League.

JUSTICE FORTE: Was this from the Free and Fair Election League?

MR. DATADIN: This is the ----

JUSTICE HARRISON: Written from the Free and Fair Election League.

MR. DATADIN: To Sir Gerald Watt, but Mr. Symester had mentioned that letter in his evidence.

JUSTICE HARRISON: So that letter written by the Free and Fair Election League to Sir Gerald?

MR. DATADIN: Yes, My Lord.

JUSTICE HARRISON: And he would be giving evidence to put in that letter to Sir Gerald?

MR. DATADIN: At the discretion of the Tribunal, My Lord.

JUSTICE HARRISON: That's absolutely self-serving.

JUSTICE FORTE: Why did you put this in for the response of Sir Gerald's reaction?

MR. DATADIN: My Lord, it is only raised with the Tribunal and it is brought to the Tribunal's attention that there is or there has been sent and received, a statement. My Lord, I may be a little more complete, at the time that I control and preparation of these --- of this proceedings to marshaling the evidence, My Lord, I had to bear what it was that was going to be submitted.

JUSTICE FORTE: Mr. Datadin, I think it would be unfair to the Commissioners who are the subject of this enquiry to allow into evidence the content of a statement by a witness who has been sitting in court from the beginning of this and in addition a statement that has not been served on them and I am sure demand time, address it and at a late stage in the enquiry when decisions have been made by then whether we are going to testify or not. In those circumstances of natural justice and fairness demand that we exclude this particular evidence. That is the ruling."

[35] Based on the above, it is evident that the Justices inquired directly of Rick James when he was asked to give evidence. Rick James responded to the question asked by the Justices. It is therefore not factually correct to state that Rick James attempted to justify or give reasons why he should take the stand to give evidence. It is also not factually correct to state that Mr. Datadin, as Rick James's Attorney, attempted to justify or give reasons why Rick James should take the stand to give evidence. No evidence was produced before the Court to establish that Mr. Datadin was Rick James's Attorney.

[36] Because the comment made by the Defendant was based on facts that were not truly stated, the comment cannot be fair. As stated by Collins MR in **Digby v Financial News Ltd.**⁶: "If the defendant makes a misstatement of any of the facts upon which he comments, he at once negatives the possibility of his comment being fair." For all the above reasons, the Defendant's defence of fair comment fails.

[37] I now turn to address the question of damages. The Claimant claims aggravated damages as well as general damages. General damages are awarded to compensate the claimant for the effects of the defamatory statement. General damages serve three functions; to act as a consolation to the claimant for the distress he suffers from the publication of the statement; to repair the harm to his reputation, (including where relevant, his business reputation); and as a vindication of his reputation – (Gatley, (supra) page 265, paragraph 9.2).

[38] The law is also settled that even where the claimant has suffered no injury to his reputation, he will be entitled to compensation for injury to his feelings. This is because damage to the claimant's reputation is the essence of civil proceedings for defamation.

⁶ [1907] 1KB 502, p 508

The law therefore presumes that some damage will flow in the ordinary course of events from the mere invasion of the Claimant's right to his reputation.

[39] In paragraph 6 of his Statement of Claim, the Claimant pleads that:-

"By virtue of the publication by the Defendant, the Claimant has suffered hurt, distress and embarrassment and has been greatly injured in his profession, credit, character and reputation and has been brought into ridicule and contempt."

[40] In his Witness Statement, the Claimant states:-

Paragraph 13 - "The comments were demeaning of me personally and as Secretary of the FFEL....."

Paragraph 15 - "My name is very important to me. I am Secretary of the FFEL specifically because I hold to high moral and ethical standards. And as Secretary of the FFEL, I am recognized by the public as the face of the organization."

[41] There is no evidence that the Claimant has suffered actual pecuniary loss as a result of the defamation.

[42] In assessing general damages in the instant case, I may take into account such factors as the nature of the libel, the circumstances and extent of its publication, the social or professional status of the Claimant, the conduct and demeanour of the Defendant before and during the trial, whether the libel was published deliberately and willfully, or merely by mistake or carelessness, whether the Defendant made an apology.

[43] The Claimant also claims aggravated damages. The law is settled that "aggravated damages" are meant to compensate the claimant for the additional injury, going beyond that which would have flowed from the words alone, caused by the presence of aggravating factors. The aggravating factors may include malice on the part of the defendant, his failure to make an apology, his insolent or arrogant demeanour, or other unacceptable conduct – (Kondilinye – Commonwealth Caribbean Tort Law⁷). It will also be a matter of aggravation if the defendant has persistently and deliberately given publicity to the defamation complained of, or if he has on other occasions disparaged or assailed the plaintiff's reputation; or if in his conduct of the litigation he has shown a spirit

⁷ Third Edition page 292

of determined hostility. A refusal to retract after an apology or request for retraction is made is an aggravating circumstance which may increase the damages awarded.

[44] I have taken into account the above factors. I have considered the fact that the Claimant pleaded that he made two separate requests for an apology from the Defendant but that no apology was forthcoming. I can take the absence of an apology as an aggravating factor. However, while it is true that there was no apology from the Defendant, the documents before the Court disclose that, prior to the trial, an Order was made that the parties attend a mediation session. In my view, the Defendant's agreement to participate in the mediation process negatives a spirit of determined hostility on the part of the Defendant towards the Claimant. Further, having observed the demeanour of the Defendant at the trial, I formed the view that, not only did the Defendant not display any insolence or arrogance, but that he was not actuated by malice towards the Claimant. The law is settled that, whereas malice is not relevant to the issue of liability, the absence of malice may be relevant in assessing damages.

[45] I have taken into account the nature of the defamatory statement. The statement imputes unethical conduct to the Claimant; however, it does not impute criminal conduct or even reprehensible conduct. I have also taken into account the fact that there is no evidence that the Defendant has disparaged or assailed the Claimant's reputation on other occasions. There is no evidence that the Defendant repeated the defamatory statements on any other broadcast.

[46] I have also taken into account the social and professional standing of the Claimant. As Secretary of the Free and Fair Election League Inc. (the FFEL), the Claimant's reputation and character are without doubt important factors. An imputation of unethical conduct would therefore have the potential to damage his image in the eyes of the public and to cause him injury to his feelings. The Claimant, however, has produced no evidence of any damage to his professional reputation. He is however entitled to compensation for injury to his feelings, as distinct from, and even in the absence injury to his reputation – see **Fielding v Variety Incorporated**⁸.

⁸ [1967] 2 Q.B. 841

[47] Taking all the above factors into account, I am of the view that, in the instant case, an award of \$ 7,500.00 is just and reasonable.

[48] As to the Claimant's claim for a public apology from the Defendant, I can do no better than quote from Gatley on the subject:-

"Since defamation is an injury to a person's reputation, it might be thought that the primary remedy would be an order declaring the calumny false or requiring the defendant to undo the injury by a corrective publication, all the more so when proof of loss measurable directly in financial terms is not required by the law and is anyway rarely obtainable. In fact, however, the primary remedy of the common law is not correction but damages and there is no general power either to require the defendant to correct or for the court to declare that the statement was false....."

My Order is as follows:-

ORDER

- 1) Judgment for the Claimant in the amount of \$ 7,500 .00
- 2) Prescribed costs pursuant to Part 65.5 of CPR 2000.
- 3) Interest at 5% per annum from the date of this judgment until full and final payment.


Jennifer A. Remy
High Court Judge