

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0019 of 2019
(Lautoka High Court Civil Action No: HBC 299 of 2005)

BETWEEN : **SURESH PRATAP** *Appellant*

AND : **ATIL CHANDRA GOSAI** *Respondent*

Coram : Almeida Guneratne, JA
Jameel, JA
Gunawansa, JA

Counsel : Mr R Charan for the Appellant
Mr E Maopa for the Respondent

Date of Hearing : 9th September, 2022

Date of Judgment : 30th September, 2022

JUDGMENT

Almeida Guneratne, JA

Brief account of the background facts

[1] This is an appeal against the judgment of the High Court in which the High Court found the Appellant (Defendant) liable for an alleged defamatory (slandorous) statement made

by him against the Respondent (Plaintiff). The judgment is found at pages 5 to 70 of the Copy Record.

[2] The alleged slanderous statement had been uttered at a meeting of the Nadi Town Council in which the Appellant as well as the Respondent were members.

[3] The alleged slanderous (defamatory) statement (as extracted by the learned Judge (vide: page 7 of the Copy Record), I reproduce as follows:-

“he fooled this council. We are not fools here. The fool is sitting there. But at last the property was transferred to his personal name. This property was transferred to his personal name. Whom did he cheat? I think the minister should intervene now and Investigate in this matter straight away. This is a white collar fraud.”

What constitutes a defamatory statement?

[4] Given the relationship between the claimant (Plaintiff – Respondent) and statement maker (Defendant – Appellant), being members of the Nadi Town Council, and where the statement was made (at a meeting of the said Council) I had regard to a frequently applied test in determining as to what constitutes a defamatory statement. viz: *“the words must tend to lower the claimant in the estimation of right-thinking members of society generally.”* **Sim v Stretch** [1936] 52 TLR 669 per Lord Atkin.

[5] Applying that test I am inclined to the view that, the said statement had the effect of disparaging the Plaintiff – Respondent professionally, given the fact that, even the media was present giving coverage to the incident (as noted by the learned Judge in paragraphs 10 and 11 of his judgment).

[6] In fact, what the learned Judge noted in the said paragraphs, brought the impugned statement and conduct of the Appellant well within Section 10 of the Defamation Act of 1971.

[7] At the outset of the hearing before us, this Court drew Mr Charan’s attention to Section 73 of the Constitution (re: parliamentary privilege) and there being no parallel provision in the Local Government Act (1972), whether learned Counsel was pursuing his ground of appeal based on “*qualified knowledge.*” Learned Counsel then withdrew the said ground of appeal.

[8] Consequently, Mr Charan, settling down to his second main ground of appeal viz: fair comment (tied up with the defence of “*truth*”) argued that, the High Court Judgment was liable to be set aside, in as much as, the said statement was made in the “*public interest.*”

The elements necessary to sustain an action for defamation (slander)

[9] The first element is that, the statement must pass the test of it being (*per se*) defamatory. I have already said that it was so. (in paragraphs [4] to [6] above)

[10] The statement must refer to the claimant (Plaintiff - Respondent in the instant case) in regard to which there is no dispute. This is the second element.

[11] The statement should have stood as having been communicated to at least one person other than the claimant. It is not disputed that it was made at the Nadi Town Council meeting (the members being in attendance) and more-over, it reaching the general public as re-capped at paragraph [5] above.

[12] Thus, that third element also stood satisfied.

[13] However, a fundamental question that arose for consideration was, whether there was any other element that needed to be established to sustain the action.

[14] That further element is spoken of by **Winfield and Jolowicz 3** on the Law of Torts with particular reference to “*defamation.*”

[15] That is, the requirement to establish consequential serious harm caused to a claimant as a result of the impugned statement. (See: **Winfield and Jolowicz**, Tort (19th ed.2014, **Sweet & Maxwell**, p.361).

The evidence of the Plaintiff-Respondent to substantiate the requirement of serious harm

[16] The relevant evidence is found at pages 299 to 300 in the Copy Record which I reproduce below for ease of reference.

“Q: Witness when you heard those comments, how do you feel hearing those comments from the Defendants Suresh Pratap?”

A: My Lord, it still hurts me the day it happened, it reminds me of what had happened like what happen to me. I was so embarrassed, I walked out of that meeting and Suresh Pratap said, look at my black shirt, see what I have done. No one was prepared to listen to me. All my friends, my family members, they started questioning. This was most embarrassing for me and my family.

Q: Witness, how these publications affect you personally and financially?

A: My Lord, I was a professional accountant, I was a member of the Fiji Institute of Chartered Accountant, I was a Tax Agent, I was a Part-time Teacher with FNTC, I was member of Holy Temples. I had good standing in my community and overnight it all turned upside down. I have been questioned by my employer and my family started calling me.

DC: My Lord this is hearsay evidence.

A: My Lord I’ve got to explain it, my feelings.

Crt: No, it does not

DC: I will just put this objection in. I hope he still bring in the witnesses who questioned him.

PC: His employer.

DC: Yes

Crt: Yes

PC: His employer

Crt: His employer

DC: Yes, I hope he is bringing the employer who questioned him.

Crt: Yes, let him go ahead with this, I will decide on that.

A: My Lord everywhere I went, it was just that I was a cheat, I was a fraud. It give me very low morale, affected my employment, my wife was a professional High School Teacher, she started questioning because she was embarrassed. I was well known in school board, I was well known in temples and people looking at me like making jokes, like a fraudster. I was a fraudster. I took advantage of a situation as a Councillor. It came to a stage that we had to leave this country my Lord, just because of this. I had my house here, I had my car, I had my plans for business developments, all shattered. I had to leave everything then we have to make a decision that yes, this is being lingering on, we cannot continue with a normal life with my kids, my wife. I left the country and had to start all over again. It was not my choice to go, I never thought about leaving the country, my Lord. I had been developing here, I had acquired property, I had a good job, good family, had to leave everything behind and get away until this was resolved. It had costed me a lot of in monetary terms. I had to engage Solicitors costing me approximately about \$30,000.00 until now. I had to make regular trips, got all the copies of invoices with me my Lord. Travel, accommodation, I had to pay rent when I moved abroad. I could not acquire a property because all my investments was in Fiji that was all extra burden which was put on me and my family.

Q: So witness, in monetary terms, what would you expect if the Court finds in your favour?

A: My Lord the total cost that I foresee that I have lost is about \$400,000.00 to \$500,000.00. I was at a level of promotion whereby I was of a very good position in a company and when I started over again I had to go from the base. I have to acquire my vehicle. I have to pay for my property which this unnecessary cost which I did not have in Fiji. I had to sell my property plans for development which I could not proceed because of uncertainty with my mind, with my family affairs with my parents ability, it was all affecting everything with my family affairs like brothers all questioning me, what happen, why couldn't you prove yourself."

[17] I pause here to reflect on the fact that, the learned High Court Judge accepted that evidence when he found in favour of the Plaintiff - Respondent in his Judgment.

[18] Neither in Mr Charan's submissions (both oral and written) for the nor in the grounds of appeal (at pages 2 to 3 of the Copy Record), could I find anything to controvert the Plaintiff - Respondent's evidence as recounted above.

[19] Thus, the fourth element of "*serious harm*" also stood established.

[20] In that context I am grateful to my brother, (Justice (Dr) Gunawansa) for making available to me a recent decision of the Supreme Court of the UK for my consideration on the criteria regarding the burden of proof falling on a claimant who seeks to sustain a cause of action based on "*slander.*" (vide: **Lechaux v. Independent Print Limited and Another** [2019] UKSC 27.

Defendant – Appellant's defence of fair comment (and Truth)

[21] Mr. Charan's focus was on the issue of the Plaintiff - Respondent, who was part of owner of "*a property,*" was seeking a discount, (which is available to rate payers when acquiring property), when the Plaintiff - Respondent had paved the way for his father to acquire another lot in the said larger property.

[22] Mr. Charan proceeded to argue that, although the Plaintiff-Respondent had not participated at the Council meeting where the said matter of "*the discount*" had featured, (for which initially the Minister's approval had been given though withdrawn later), he had had "*an interest*" at that initial stage.

[23] Thus, he argued that he was justified in making the alleged defamatory statement, at that initial stage. He submitted that it was made in the public interest at the said Council

meeting and stood as satisfying the “*defence of truth*” for which his client could not have been held liable.

[24] At this point I felt it necessary to re-visit the Plaintiff-Respondent’s evidence contained at page 300 bottom going upto page 314 of the Copy Record.

[25] I do not intend to reproduce the same but I shall make my comments on what flows from the essence of that evidence.

[26] There were three investigations which the Plaintiff - Respondent spoke of in his said evidence on the “*discount issue.*”

[27] A bare reading of that evidence (not controverted) shows that, the Plaintiff - Respondent stood absolved from any “*alleged gain or benefit.*”

[28] Even if Mr Charan’s argument that, at that initial stage his utterance was “*justified*” and was made in “*the public interest,*” when the Minister had withdrawn the discount facility he should have offered an apology to the Respondent.

[29] That, in my view, would have helped to restore the Respondent’s public image.

[30] Of course, an apology could not amount to a defence. However, if accepted by a claimant Plaintiff, that could have settled the dust on the matter.

[31] But, the Appellant did not do that. He not only resisted the action but also preferred the present appeal against the Judgment of the High Court.

Determination

[32] For the aforesaid reasons, I hold that, the learned High Court Judge had correctly addressed his mind to the elements necessary to succeede in an action for “*slander*” as

envisaged in Section 10 of the Defamation Act (1971) in the light of judicial precedents and/or authorities he took account of.

Some further issues that needed to be addressed

Plaintiff-Respondent's claim for enhancement of the damages awarded by the High Court

[33] That learned Counsel for the Respondent sought enhancement of damages in his submissions. I am not inclined to entertain and grant the same in the absence of a cross-appeal.

Plaintiff-Respondent's claim for indemnity costs

[34] For the same reason, (which I have stated above in relation to enhancement of damages) I reject this application as well.

The Defendant - Appellant's counter-claim contained in his Amended Statement of Claim

[35] I have dismissed the appeal. Thus, there does not arise a basis for me to consider and determine the said counter-claim.

[36] In any event, I agree with what the learned High Court Judge said in that regard, viz: that, the amended Statement of Claim had to be dismissed for want of proof.

[37] Consequently, I proceed to make my proposed orders in this appeal.

Jameel, JA

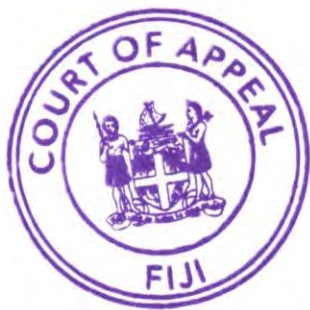
[38] I agree with the conclusions and proposed orders of His Lordship Almeida Guneratne JA.

Gunawansa, JA

[39] I agree with the conclusions reached and the reasons thereto given by Guneratne JA. I also agree with the proposed orders.

Proposed Orders:

- 1) *The Appeal is dismissed and the Judgment of the High Court is affirmed.*
- 2) *The Respondent's (application) for enhancement of the damages awarded by the High Court is rejected.*
- 3) *The counter-claim in the Appellant's Amended Statement of Claim is dismissed.*
- 4) *The Appellant is ordered to pay as costs of this Appeal a sum of \$2,500.00 which shall be in addition to the costs ordered by the High Court within 42 days of notice of this Judgment.*



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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

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Hon. Justice F. Jameel
JUSTICE OF APPEAL

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Hon. Justice A. Gunawansa
JUSTICE OF APPEAL