IN THE HIGH COURT OF FIJI
AT SUVA

ACTION NO: HBC 195 OF 2012

THE STATE -v- **CITIZENS' CONSTITUTIONAL FORUM LIMITED and AKUILA YABAKI**

Respondents

EX PARTE : **THE ATTORNEY-GENERAL OF FIJI**

Applicant

Mr R Green with Ms R Mani for the Applicant
Mr N Williams SC with Mr J Apted and Mr J Cati for the Respondents

SENTENCE

[1] In a judgment delivered on 3 May 2013 the Respondents were found guilty of contempt scandalising the court. On 17 June 2013 the parties appeared before this Court for a mitigation hearing. Prior to the hearing the parties filed affidavits and written submissions for the consideration of the Court. On the day of the hearing Counsel presented further oral submissions.

[2] The background facts were set out in detail in the earlier judgment and since they are relevant to sentencing it is appropriate to summarise them in this decision. Between 13 – 18 November 2011 the Chairman of Law Society Charity, a Mr Nigel Dodds, made a private visit to Fiji. The Law Society Charity is based in the United Kingdom and was established by the Law Society of England and Wales to promote law and justice issues with particular emphasis on legal education and human rights. The Law Society Charity decided to take advantage of the private visit by its Chair to evaluate *"the position there"* and *"to publish a report."* For the purposes of the evaluation and the report the Chair restricted himself to interviewing selected persons on the main island of Viti Levu.

[3] Those persons selected and interviewed by Mr Dodds were identified in general but not by name in the Report dated 12 January 2012 that was subsequently published in the United Kingdom after the visit. The full report was annexed to the affidavit sworn on 16 July 2012 by the Applicant. Those who were not interviewed by Mr Dodds or approached for comment were listed in paragraph 4 of the same affidavit. The list of persons whom Mr Dodds did not approach includes virtually all those persons who perform functions or hold office in positions associated with law and justice in Fiji.

[4] Sometime after the Report was published there appeared on page 8 of the First Respondent's newsletter "*Tutaka*" published in April 2012 an item with the heading *"Fiji: The Rule of Law Lost".* The sub-heading described the item as an *"analysis of the Law Society Charity Report 2012."* A copy of the newsletter including the item on page 8 was also annexed to the same affidavit sworn by the Applicant. The item that appeared on page 8 was written by a Mr Jonathan Turner. No information about Mr Turner or his qualifications and work experience appeared as part of the item on page 8. It would appear that he was at the time an English volunteer legal practitioner attached to the First Respondent.

[5] The words in the item on page 8 that were the subject of the contempt proceedings were set out in the Statement that is required to be filed under Order 52 of the High Court Rules. The Statement alleged that the words:

> "(a) *The Law Society Charity (LSC) in its report, "Fiji: The Rule of Law Lost" provides a stark and extremely worrying summary as to the state of law and justice in Fiji;*
>
> *(b) The report highlights a number of fundamental failings of the current judiciary and legal structure in Fiji, particularly in relation to the independence of the judiciary;*
>
> *(c) That the independence of the judiciary cannot be relied on"*

scandalised the Court and the judiciary as a scurrilous attack on the judiciary and the members of the judiciary by lowering or by posing a real risk of lowering or undermining the authority of the judiciary and the Court.

[6] At all material times the Respondents maintained their pleas of not guilty. The First Respondent is the proprietor and publisher of the quarterly newsletter "*Tutaka*" and the Second Respondent is the editor of that newsletter.

[7] The Respondents were found to be guilty of contempt scandalising the court on the basis that the words as understood by the newsletter's fair minded and reasonable readers would have the effect of raising doubts in their minds that disputes between members of the public and between members of the public and Government would not be resolved by impartial and independent judges. I concluded that as a result the words had the effect of undermining the authority and integrity of the judiciary in Fiji and hence undermining public confidence in the administration of justice.

[8] The task for the Court now is to determine how should its power to punish the Respondents for contempt of court under Order 52 of the High Court Rules be exercised? At the outset I am compelled to indicate that in my judgment this is a case of contempt scandalising the court which should be punished by a penalty that reflects the public interest, acts as a deterrence and appropriately denounces the conduct of the Respondents. I do not consider this to be a case where the mere ordeal of court proceedings and an offer to pay costs with an apology is sufficient. Such an outcome would suggest that the court does not take seriously the role of safeguarding the community from attacks on members of the judiciary and the court which have the effect of undermining confidence in the administration of justice.

[9] In determining what penalty should be imposed on the Respondents by the Court there are a number of factors that are usually considered to be relevant. In **Attorney-General for the State of New South Wales –v- Radio 2UE Sydney Pty Limited and John Laws** (unreported appeal decision of the New South Wales Supreme Court No. 40236 of 1998 delivered 11 March 1998; [1998] NSWSC 29) Powell JA indicated that it was appropriate to consider the objective seriousness of the contempt and the level of culpability (i.e. intentional conduct, reckless conduct, negligent conduct or conduct without any appreciation of consequences).

[10] Apart from seriousness and culpability, other factors that should be considered in this case are (i) any plea of guilty, (ii) any previous convictions for contempt, (iii) any demonstration of remorse and (iv) character and personal circumstances.

[11] In my view this is a serious contempt. This conclusion was stated in the last paragraph of the earlier judgment and the reasons for that conclusion are discussed at length in the judgment. Its seriousness is re-inforced by the Preamble to *"The Bangalore Principles"* which, amongst other things, states that:

> *"Whereas public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society."*

[12] In my judgment that there may not presently be in Fiji a parliamentary system of government does not in any way diminish the importance of maintaining public confidence in the judicial system and in the moral authority and integrity of the judiciary and the courts. By publishing the words "*that the independence of the judiciary cannot be relied on"* the Respondents were representing to readers of the newsletter that members of the public seeking to have their disputes resolved through the courts <u>could not rely on</u>:

(i) members of the judiciary exercising their judicial function independently on the basis of their assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason;

(ii) members of the judiciary being independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate;

(iii) members of the judiciary being free from inappropriate connections with, and influence by, the executive and legislative branches of government and appearing to a reasonable observer to be free therefrom;

(iv) members of the judiciary in performing judicial duties being independent of judicial colleagues in respect of decisions which the judge is obliged to make independently;

(v) members of the judiciary encouraging and upholding safeguards for the discharge of judicial duties in order to

maintain and enhance the institutional and operational independence of the judiciary;

(vi) members of the judiciary exhibiting and promoting high standards of judicial conduct in order to re-inforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

[13] The issues discussed above represent the six applications of the principle of judicial independence which as Value 1 is described in the Bangalore Principles as being a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. The Respondents are telling their readers that members of the public cannot rely on the fundamental guarantee of receiving a fair trial. In my judgment the newsletter item on page 8 at the very least seriously risks undermining public confidence in the judiciary and the courts and hence public confidence in the administration of justice.

[14] The Respondents submit that the seriousness of the contempt is mitigated by the limited circulation of the newsletter. The material before the Court indicated that there were about 2000 copies printed. It is accepted that access to the newsletter is restricted in the sense that distribution is not at large as is the case with a daily national newspaper. I also accept that this is a matter to be considered when determining appropriate penalties.

[15] I do not accept the submission that the purpose of publishing the article was to generate debate about the issues raised by the Dodds Report. It is one matter to publish an article that presents two opposing arguments with the intention of generating debate as to the merits of each side's position. Debate implies the existence of at least two opposing positions. The newsletter article does nothing of the sort. It purports to be an analysis of a report based on limited material obtained from persons selected by its author. In any event the submission does not in any way diminish the serious nature of the contempt.

[16] Turning to culpability which is an issue that by its nature is of more relevance to the Second Respondent. Whilst the existence of the intention to scandalise the court is not a necessary ingredient to establish a finding of guilt, the issue is relevant when considering an appropriate disposition. The Second Respondent has consistently maintained that he did not and does not consider the article in the newsletter published by the First Respondent to constitute contempt scandalising the court. In my judgment he is seriously mistaken and misguided. The Second Respondent is not a legal practitioner by training and before publishing the words *"the independence of the judiciary cannot be relied on"* he did not obtain any legal advice. It is a serious allegation against the judiciary. It does not matter that the article did not make any allegation against a sitting judge. It does however assert that the independence of the judiciary (i.e. the individual judges of the courts) cannot be relied on. I have no hesitation in concluding that those words do have the effect of posing a real risk of undermining the administration of justice.

[17] The Second Respondent appears to rely in part upon the authorship of the article itself and the author of the report as a basis for his conclusion that the article did not constitute contempt scandalising the court. Mr Turner and Mr Dodds may well both be legal practitioners.

[18] Neither the report prepared by Mr Dodds and published in England nor the article written by Mr Turner and published by the Respondents in the newsletter concerned the judiciary in England. In my judgment the issue for the Second Respondent was not whether the authors writing about the judiciary in Fiji considered that the material did or did not amount to contempt scandalising the court but rather whether the publication in Fiji of the allegation in the newsletter when considered objectively constituted contempt scandalising the Court. In my judgment that is a matter upon which the Second Respondent ought to have obtained legal advice based on the developing case law in Fiji. Furthermore, an article written by a volunteer attachment, although a legal practitioner, required extra

vigilance on the part of the Second Respondent as editor. There is authority for the proposition that what may be regarded as tolerable criticism in a developed society may nevertheless be intolerable and contemptuous in a developing state where public confidence in the judiciary is not so well established and where the rule of law is as a result more vulnerable. (See the Privy Council decision in **Ahnee and Others –v- Director of Public Prosecutions** [1999] 2 WLR 1305). Furthermore, the fact that the Respondents received no advice to the contrary from their legal representative concerning their plea of not guilty is not a mitigating factor.

[19] Finally I am not entirely satisfied that the Second Respondent can legitimately claim that his culpability should be limited to that which was urged before me by Counsel for the Respondents. Counsel submitted that the Second Respondent although intending to publish the article as editor had no appreciation of the potential consequences of doing so. However in my judgment the Second Respondent should have realized, before publishing, that the claim that *"the independence of the judiciary in Fiji cannot be relied on"* was unsupported by any material in the summary written by Mr Turner. This is even more so when considered in the context of the various applications of the principle of judicial independence in *"The Bangalore Principles"* to which reference has already been made in this decision. Reliance on events that happened in April 2009 does not constitute support for the assertion that the independence of the judiciary cannot be relied on in November 2011.

[20] As already noted, the principles that are generally applied in sentencing proceedings require the court to consider the issues of genuine remorse and any plea of guilty. In my judgment these two matters can be considered together since a plea of guilty, particularly an early plea of guilty, is regarded as one of the indicators of genuine remorse. When there is a plea of guilty a court will usually grant a reduction in sentence. The amount of the reduction depends on, amongst other matters, the stage in the proceedings at which the plea was given or an indication that there would be a plea of guilty. It is possible that a reduction in sentence

of up to one third may be granted in respect of an early plea of guilty. The rationale underlying the reduction is *"in the nature of a reward for keeping the machinery of justice moving and the cost of administering the criminal justice system down"* (Archbold 2012 para. 5-118).

[21] In the present case at all times up to and including the day of the sentencing hearing the Respondents have maintained their pleas of not guilty. As a result the Respondents cannot claim any credit from the Court on that basis.

[22] That leaves the question of remorse. The manner in which remorse is considered differs from the situation where there is a plea of guilty. The issue of what reduction should be granted for a plea of guilty is usually considered at the end of the sentencing process after the court has considered the aggravating and mitigating factors and having arrived at an appropriate sentence. Genuine remorse or contrition is usually regarded as a mitigating factor to be considered at the same time as other mitigating factors. However in a case where there has been a plea of not guilty it is difficult to entertain the notion of genuine remorse as a mitigating factor. To put it bluntly, a plea of not guilty is usually inconsistent with remorse or contrition.

[23] However, it is appropriate to determine first whether the Respondents have at any time expressed remorse or contrition. After the finding of guilt the Second Respondent in his affidavit sworn on 24 May 2013 has sincerely apologized to the Court and to the judiciary for the publication of the article in the newsletter (para.18). The Second Respondent has accepted full responsibility for the publication of the article and has authorized his Counsel to tender a formal and unreserved apology for the publication (para.19). The apology which was tendered and which the Second Respondent offered to publish was set out on page 16 of the Respondents' Mitigation Submission filed on 11 June 2013.

[24] The issue is to what extent should the Court regard such expressions of remorse as genuine and how much weight should the Court attach to such

expressions of remorse as a mitigating factor in view of the consistently maintained plea by both Respondents of not guilty. It is apparent from the abundant affidavit material that the plea of not guilty entered and maintained by the Respondents was on the basis that the article in the newsletter did not amount to contempt scandalising the court. There is also expressed by and on behalf of the Second Respondent the claim that the article was written by an English volunteer lawyer who was attached to the First Respondent at the time and purported to be an analysis of a Report published in England.

[25] It may be possible on occasions to identify genuine remorse, even when expressed very late in the day following a plea of not guilty and to give some weight to that genuine remorse as a mitigating factor. However, I am not satisfied that this is such a case.

[26] Although the proceedings were not completed when the sentencing hearing commenced, Counsel for the Respondents informed the Court during the course of his oral submissions that the Respondents had already filed a notice of appeal in the Court of Appeal against the findings of guilt. The basis of that decision can be found in the affidavit of Cynara Teresa Mary MacKenzie sworn on 24 May 2013 at paragraph 12:

> *"One of the issues CCF is considering in making this decision is (again) the development of the law of contempt and the appropriate balance between commentary on the court system and the need to appropriately protect the Fiji court system."*

[27] The issue in these proceedings was in essence whether certain words appearing in the article and especially the words *"that the independence of the judiciary cannot be relied on"* constitute contempt scandalising the court. The article purported to be a summary of a report dated January 2012. It purported to be an analysis of a report setting out the position as at November 2011. The only material in the article that related to the independence of the judiciary (in its various applications under the Bangalore Principles) was a reference to the April 2009 revocation of the

Constitution and the removal of all those appointed under that Constitution including the judges.

[28] Neither the article in question nor these contempt proceedings had anything to do with what the deponent has referred to as *"the appropriate balance between commentary on the court system and the need to appropriately protect the Fiji Court system."*

[29] I have concluded that in respect of mitigation, the remorse expressed by the Second Respondent must necessarily be regarded as less than genuine and of little weight. Similarly the apology must necessarily be considered in the same manner.

[30] One obvious mitigating factor that counts in favour of the Respondents is the fact that there are no previous convictions for contempt. In written submissions filed on behalf of the Respondents it is stated that neither Respondent has any prior criminal conviction of any kind. It can fairly be said that the First Respondent as an entity has a good reputation and that the Second Respondent is of good character. These conclusions are re-inforced by the affidavit material filed on behalf of the Respondents in support of mitigation.

[31] Having considered the aggravating and mitigating factors it is now necessary to consider the personal circumstances of each Respondent and then determine an appropriate disposition in each case.

[32] I propose to consider first the position of the Second Respondent, Akuila Yabaki, as editor of the newsletter. The personal circumstances of the Second Respondent are set out in his affidavits filed on 6 September 2012 and 24 May 2013. The Second Respondent is aged 71 years old and is married with four adult children. Although their ages were not disclosed in any material before the Court, Counsel informed the Court from the Bar Table that their ages range from 32 to 43 years old. Following an early career as a teacher, the Second Respondent took up the study of theology and was ordained as a Minister in the Methodist Church in 1972. He then

obtained a Bachelor of Arts degree from the University of the South Pacific in 1974 during the course of his appointment as part time Chaplain. He subsequently held a number of appointments within the Methodist Church both in Fiji and overseas. He took up the position of Executive Director of the First Respondent in May 1999 and is now its Chief Executive Officer. It would appear that this is a full time position and his current status as an ordained minister in the Methodist Church is not disclosed. The Second Respondent's salary is $68,000.00 gross (but not including FNPF contributions) as Chief Executive Officer and that represents his only source of income. With his wife he jointly owns shares in Amalgamated Telecommunications Holdings worth about $10,000.00 and he has taken out a BSP Life Insurance Policy. The Second Respondent and his wife jointly own the family home at Colo-i-Suva. Since taking up the full time position as Chief Executive Officer of the First Respondent, the Second Respondent has received a number of awards and recognition from local and regional entities.

[33] The First Respondent was established after the first 1987 coup under the name *"Back to Early May Movement"* by a group of concerned citizens. The current name was adopted in 1991 and in 1996 the First Respondent was registered under the Charitable Trusts Act Cap 67. The First Respondent made extensive submissions to the Commission charged with drafting the 1997 Constitution. That draft was reviewed by the then Parliament and after considerable debate and critical amendments was passed and subsequently proclaimed in July 1997 to come into effect in July 1998.

[34] Following the enactment of the Constitution the First Respondent took up an educational role involving constitutional and democratic issues. It increased its advocacy activities significantly following the 2000 civilian coup. In 2003 the status of the First Respondent as a charitable trust was revoked and as a result it is now registered as a company limited by guarantee.

[35] In the affidavit sworn by Ms MacKenzie (supra) on 24 May 2013 at paragraph 15 the First Respondent is described as a donor-funded organization and its current principal donors are listed in the same paragraph. Its donors include the Department for International Development (DFID) of the United Kingdom and AusAid. The funding provided is usually "*tied*" although requests for additional funding for unforeseen expenditures must be made separately. The audited accounts for the year ending 31 December 2012 are attached to Ms MacKenzie's affidavit. It is sufficient to note that total income for the year was $1,318,870 of which the principal source was grants amounting to $930,828. Total expenses for the year were $1,465,771 of which the principal item was salaries, wages, FNPF and training levy of $443,734. Although showing a loss, when accumulated funds of $367,793 were taken into account accumulated funds at the end of the financial year amounted to $220,892. Of donor income, the two largest contributors were AusAid with $231,288 and a source described as Conciliation Resources of $412,093. Conciliation Resources is a registered charity in England and Wales whose funding sources, activities and involvement with the Respondents were outlined in the affidavit sworn on 23 May 2013 by its founder and Executive Director, a Mr Andrew Douglas Carl.

[36] Both parties filed written submissions on the issue of appropriate penalties. Both Counsel presented further oral submissions on penalty during the course of the sentencing hearing.

[37] In the written submissions filed on behalf of the Respondents, the relevant case law on sentencing in both this jurisdiction and in overseas jurisdictions is discussed in some detail in paragraphs 21 to 31. In his oral submissions before the Court Counsel submitted that the Singapore decision in **Attorney-General –v- Hertzberg Daniel and Others** [2008] SG HC 218 was relevant in the sense that Singapore was a small Island State in which the decisions of the courts indicated jealous protection of the judiciary. Counsel for the Respondents urged the Court to consider, in view of the case law and the circumstances of the contempt that "*the*

published findings and an order for costs should be adequate to vindicate the public interest."

[38] The written submissions filed by the Applicant also discussed at length the case law in Fiji on sentencing for contempt scandalising the court. The submissions then apply the facts of the present case to the principles that have evolved from the case law. The Applicant urged the Court to impose a substantial fine on the First Respondent and a custodial sentence of six months on the Second Respondent.

[39] As I have already stated any penalty imposed by the Court for contempt scandalizing the court must reflect the public interest in the administration of justice, act as deterrence and appropriately denounce the conduct of the Respondents. This is not a case where the prosecution itself, the ordeal of the court proceedings, the published findings of the Court and an order for costs are sufficient to (i) vindicate the public interest, (2) deter other publications from making similar allegations and (3) appropriately denounce the contempt. I take particular note of the observations of Kirby P (as he then was) in **Director of Public Prosecutions –v- John Fairfax and Sons Ltd** (1987) 8 NSWLR 732 at page 741:

> *"Woven through the language of the courts in their approach to penalty in such cases are references both to the intent and "culpability" of the contemnor and the need, objectively, to ensure, whatever the intent, that such conduct is emphatically denounced and effectively deterred."*

[40] So far as guidance for determining appropriate penalties from previous decisions is concerned, especially those from overseas jurisdictions, I take note of the comments made by the Court of Appeal in **Parmanandam –v- Attorney-General** (1972) 18 FLR 90 at page 99:

> *"It is difficult to draw very much from sentences imposed in other cases as no set of facts completely parallels another and the gravity of contempt must be estimated in its own context."*

[41] In my view the most appropriate guidance comes from the recent decisions of the Courts in Fiji since 2008 involving contempt scandalising the court by publication. Both parties have made reference to those decisions in their written submissions.

[42] Since these proceedings were commenced under Order 52 of the High Court Rules it is appropriate to consider any guidance as to penalty that might by provided by Order 52. It is abundantly clear that under Order 52 a person found guilty of contempt scandalizing the court is liable to be convicted and sentenced to a term of imprisonment (See **Parmanandam –v- The Attorney-General** (supra)).

[43] However under Order 52 Rule 6 the Court may order that the execution of the order for committal shall be suspended for such time and on such conditions as may be specified. There is authority for the proposition that the inherent jurisdiction of the court to punish contempt of court is not affected by statute law dealing generally with imprisonment for crime. (See **Lee v Walker** [1985] QB 191). However if the Court is minded to exercise its discretion to suspend a committal, the suspended sentence must be for a fixed term and the period for which the order is suspended should also be fixed.

[44] Another sentencing option is provided by Order 52 Rule 8 which provides that the Court may, when a person has been found guilty of contempt of court, order the person to pay a fine or to give security for his good behavior. The wording of the Rule indicates that these penalties are in addition to the power to commit.

[45] In my judgment the contempt in the present case falls below the seriousness of the contempt involved in the 2008 decision of the High Court in **Attorney-General of Fiji –v- Fiji Times Ltd and Others** (unreported No.124 of 2008 delivered 22 January 2009). The reasons for this are the limited distribution of the newsletter and the less vitriolic language that constituted the contempt. However it must be remembered that the penalties imposed by the learned Judge in that decision were

premised on an early guilty plea of the Respondents. In addition the penalty that should be imposed in the present case should be less severe than the penalty imposed by the Court in **State v Fiji Times Limited and Others** (unreported No.343 of 2011 delivered 20 February 2013) on the basis that there was in that case a grave aggravating factor and on the basis that the newspaper had already been found guilty of the same form of contempt on a previous occasion.

[46] However this is nevertheless a case where the contempt is sufficiently serious to warrant the imposition of significant penalties. So far as the Second Respondent is concerned, taking into account all the matters relating to culpability I consider that a custodial sentence of three months is appropriate. A term of imprisonment is appropriate in view of the serious nature of the contempt and its potential effect on the administration of justice and the rule of law in Fiji. However I take into account the age of the Second Respondent and his hitherto good character together with the recognition he has received as the Chief Executive of a well known non-government organization. As a result I am prepared to order that such sentence should be wholly but conditionally suspended for 12 months. In so far as the First Respondent is concerned I consider that a fine is the appropriate penalty and I order that the Second Respondent pay a fine of $20,000.00 within 28 days.

[47] As for costs, the Court has received correspondence dated 24 June 2013 signed by the legal practitioners acting for the parties that costs have been agreed in the sum of $5,000.00 with each Respondent to pay $2,500.00 each.

[48] As a result the orders of the Court are:

1. *The First Respondent (Citizens Constitutional Forum Limited) is convicted and fined FJD $20,000.00 to be paid within 28 days from the date of this decision.*

2. *The First Respondent is order to pay costs to the Applicant in the agreed sum of $2,500.00 within 28 days from the date of this decision.*

3. *The Second Respondent (Akuila Yabaki) is convicted and is sentenced to a term of three (3) months imprisonment to be wholly suspended for a period of 12 months upon the condition that Second Respondent pay a fine in the sum of $2,000.00 within 28 days.*

4. *The Second Respondent is ordered to pay costs to the Applicant in the agreed sum of $2,500.00 within 28 days from the date of this decision.*

5. *The Respondents are ordered to arrange for an apology directed to the Judiciary of Fiji to be drafted and submitted within 28 days to the Court for approval and once approval has been advised to be published in the next edition of the First Respondent's newsletter.*

6. *The fine is to be paid to the High Court (Civil) Registry in Suva.*

7. *The costs are to be paid to the Office of the Attorney-General in Suva.*

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W D CALANCHINI
JUDGE

9 August 2013
At Suva