IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 51 of 2016

BETWEEN : **ROBERT EDWARD LOWRES** OF Lot 141, Coral Bay Drive, Naisoso Island in Fiji.

Plaintiff

AND : **MALCOLM ANDREW HERBERT** of Napier, New Zealand.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Ms. R. Lal for the Plaintiff
Mr. A. Narayan (Junior) for the Defendant

Date of Ruling: 28.02.2019

RULING

(Defamation, Absolute Privilege and Striking out)

01. Before me is the summons filed by the defendant pursuant to Order 18 (1) (a), (b) and (d) of the High Court Rules and the inherent jurisdiction of this court. The defendant seeks an order that the plaintiff's action against the defendant be struck out and dismissed on the following grounds;

    a. The plaintiff's statement of claim against the defendant discloses no reasonable cause of action;
    b. It is scandalous, frivolous and vexatious and / or;
    c. It is otherwise an abuse of the process of this court.

02. The summons is supported by an affidavit sworn by the defendant himself and was filed on 01.03.2017 with the leave of the court. Though the plaintiff was granted time to file his affidavit in opposition, however, he did not file any such affidavit. On the next date, both counsels moved to dispose this summons by way of written submission. Accordingly, they filed their respective legal submissions, and thereafter briefly made an oral submission on the authorities they relied on.

03. The facts of the case, albeit brief, are that, the plaintiff is the director of Relcop Fiji Limited (hereinafter referred to as RFL) and the defendant is the director of Plumtree Nisoso Holding Limited (hereinafter referred to as PNHL). PNHL entered into a sale and purchase agreement with RFL to purchase the Naisoso Development at a price of $ 50,000,000.00 from RFL. RFL terminated the sale and purchase agreement and therefore the sale was not materialized. The PNHL sued RFL for an order for specific performance and in the meantime made an ex parte application seeking some injunctive reliefs. However, the said ex parte application was later made inter parte. Both the plaintiff and the defendant in their capacity as the directors of both companies sworn and filed affidavits in that interlocutory application for injunction. The said action is Civil Action No. 369 of 2015 and pending for determination by the High Court in Suva.

04. Whilst the said action filed by PNHL against RFL is pending, the plaintiff instituted this action in this court by writ of summons filed on 30.03.2016 against the defendant and alleged that the defendant, through his two affidavits sworn on 30.11.2014 and on 08.01.2016 respectively, and filed in that action in Suva High Court on behalf of PNHL, published the defamatory statements against the plaintiff. In other words, the affidavits filed by the defendant in that case, allegedly contain defamatory statements. The plaintiff then filed the amended writ on 17.08.2016 and the defendant filed his defence which was replied by the plaintiff. The defendant, in his defence took up the defence of absolute privilege as the both affidavits were filed in the court proceedings for injunctive orders. Therefore, the defendant claimed that, the plaintiff statement of claim discloses no reasonable cause of action and or frivolous and vexatious. The defendant then filed the instant summons as discussed above on the same grounds he took up in his defence.

05. At the hearing of the summons, Mr. Narayan (Junior) argued that, the defamation as a cause of action is a creation of common law and the absolute privilege is the common law defence to defamation. It covers everything that was said in the course of proceedings by judges, parties, counsels and witnesses. In support of his argument, Mr. Narayan cited, inter alia, decisions of English Court of Appeal in **Iqbal v Dean Manson Solicitors & Ors** (No.2) [2013] EWCA Civ 149 and **Singh v Moorlands Primary School & Anor** [2013] EWCA Civ 909. Citing the long title and especially the section 19 of the Defamation Act Cap 34 of Fiji, Mr. Narayan further argued that, the said Act is not a complete code on defamation, but it supplemented the common law on defamation. He therefore submitted that the common law defences are not excluded, but the section 13 of the said Act supplements the fair and accurate reporting of courts proceedings. He also cited the decision in **Singh v Samusamuvodre** [2008] FJHC 381; HBC0194.2001L (19 December 2008) and submitted that, the court recognized and applied the defence of absolute privilege available for judges, counsels and witenesses in common law for defamation. Conversely, Ms. Lal, citing the section 13 of the Defamation Act Cap 34 submitted that, the absolute privilege is limited to newspaper report of court proceedings and it is a stringent statutory defence with no discretion to be applied outside of these circumstances as mentioned in section 13. In support of her argument she cited the decision in **Hennings v Craig De La Mare** [2015] FJHC 700; HBC45.2014 decided on 30 September 2015 where the court has concluded that, the absolute privilege is limited to section 13 of the Act in Fiji. The issue to be determined by this court is whether common law defence of absolute privilege which embraces

everything that was said in the course of proceedings by judges, parties, counsels and witnesses has been abolished by section 13 of the Defamation Act Cap 34 or not. In other word whether the section 13 of the Act limits the absolute privilege to newspaper report of court proceedings only or it supplements it.

06. The cause of action for defamation, whether it is for libel which is generally written or slander which is generally oral, is based on the notion that all persons, whether the upper-classes or living homeless, are capable of having valuable reputation and dignity and their reputation needs to be protected. It is not limited to private character of an individual, but covers all disparagements of his or her reputation in trade, business, profession or office. Hence, the question when there is an allegation of any defamatory statement is whether the impugned statement degraded or lowered the claimant in the estimation of right-thinking members of the society. It was the ecclesiastical courts that originally exercised the jurisdiction over the defamation until the sixteenth century when the common law courts started to exercise jurisdiction where the temporal damages could be established. The common law gradually developed this area with certain defences, of which some were abolished by the statutes and some were incorporated into them, for an example, the 'Reynolds defence' upheld by House of Lords in **Reynolds v Times Newspapers Ltd** [2001] 2 AC 127 and later affirmed by the House of Lord in **Jameel v Wall Street Journal Europe** [2006] UKHL 44 was abolished by section 4(6) Defamation Act 2013, being replaced with the statutory defence of publication on a matter of public interest.

07. The law of defamation, whilst protecting the reputation of individuals, recognizes the vital interest in freedom of speech and public interest. Thus, it strikes balance between the competing interests of freedom of speech and reputation through the defences, which allow someone in certain instances to speak and write without restraint, at the expense of another's goodwill and character. In those instances, making of those statements is not liable for defamation, even though those statements being malicious and untrue. These are called privileged occasions. In fact, the privilege attaches to the occasions and not to the comments. What a member of parliament says on the floor of the House is privileged, but repetition of same words outside is not. A report of judicial or parliamentary proceedings may be privileged, but if the substance of the matter be cast into another form, the publication is subject to ordinary law. The object of the privilege is so, that the public can obtain a fair report of what is said and decided in Parliament and in courts of law; it is not to confer a licence on anyone to handle the subject-matter thereafter in whatever way he or she wishes: **Dingle v. Associated Newspapers Limited and Others** [1961] 2 QB 162 at 188. Furthermore, for the proper and effective administration of justice, the freedom of speech without fear of consequences is considered indispensable. As a result, there is an absolute privilege to the statements made in the course of proceedings before a court of justice, whether by judge, or counsel, or witnesses. The ground of the rule is public policy and it is applicable to all kinds of courts of justice: **Winter Garden Society Ltd v. Parkinson** [1892] 1 QB 431, 442. On the other hand, the public authorities and governmental bodies are not entitled to sue in defamation. The reason being, as House of Lords explained in **Derbyshire County Council v. Times Newspaper Limited** [1993] AC 534 at 547 that, the democratically elected governmental body, or indeed any governmental body should be open

to uninhibited public criticism, and the threat of civil action for defamation must inevitably have an inhibiting effect on freedom of speech.

08. Accordingly, the absolute privilege covers the parliamentary proceedings to protect the integrity of the legislature's democratic process: **Makudi v. Triesman** [2014] 2 WLR 1228, executive matters: [1895] 2 QB 189, **M Issacs & Sons Limited v. Cook** [1925] 2 QB 391, judicial proceedings, reports of judicial proceedings and solicitor - client communications. The absolute privilege granted for judicial proceedings is that, no action of libel or slander lies whether against judges, counsel, witnesses or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. This is a well-established rule in early times in common law by numberless decisions. The English Court of Appeal affirmed this in its recent judgment in **Sudhna Singh v. Governing Body Of Morlands Primary School and Reding Borough Council** [2013] EWCA Civ 909 and held at paragraph 21 that:

> "It was established in early times that no action in defamation could be brought against a witness for anything he said in evidence before a court or tribunal. The same applied to what was said by the parties, the advocates or, indeed, the judge. The earliest case we were shown was **Cutler v Dixon** (1585) 4 Co Rep 14b in which the Court of King's Bench held that no action on the case would lie in relation to articles of the peace exhibited to justices. An "action on the case" was, of course, an action in tort"

09. In **Dawkins v Lord Rokeby** [1873] LR 8 QB 255 some of the earlier authorities were conveniently summarized by Kelly, C.B. The Chief Baron said at page 263:

> "The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. The principle which pervades and governs the numberless decisions to that effect is established by the case of Flyod v. Barker and many earlier authorities ..... down to the time Lord Coke; and which are to be found collected in Yates v Lansing and Revis v. Smith. These two decisions, Yates v. Lensing and Revis v. Smith are themselves direct authorities that no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without reasonable or probable cause, in the ordinary cause of any proceeding in a court of justice."

10. It is the public policy that renders the protection to the witnesses necessary for the administration of justice as House of Lords held in **Watson v. M'Ewan** [1905] A.C. 480. The Earl of Halsbury L.C. said in that case at page 487 that:

> "It is very obvious that the public policy which renders the protections of witness necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice namely, the preliminary examination of witnesses to find out what they can prove."

11. There are some recent cases too which recognize this common law defence of absolute privilege available to judges, counsel, witnesses or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law. Among them two English Court of Appeal judgments in **Mashood Iqbal v Dean Manson Solicitors & Others** (No.2) [2013] EWCA Civ 149 and **Sudhna Singh v. Governing Body Of Morlands Primary School and Reding Borough Council** (supra) are worth to be mentioned. Both cases analyze the earlier cases whilst explaining the limitations and inroads of this defence.

12. The courts have on several occasions explained the underlying policy behind this defence recognized by the common law. The well-known paragraph of Lord Justice Fry in **Munster v Lamb** (1883) 11 QB 588, has been first identified by several subsequent cases to be setting the policy behind this rule. Fry LJ said at page 607:

> "Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexations of defending actions"

13. In the same way, Lord Wilberforce summarized the policy in **Roy v Prior** [1971] AC 470, and said at page 480 that:

> "The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid

> a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover, the trial process contains in itself, in the subjections to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence."

14. Lord Hoffman, having cited the well-known paragraph of Lord Justice Fry as mentioned in paragraph 13 above, described the underlying policy in **Taylor v Serious Fraud Office** [1999] 2 AC 177 in following way at page 208:

> "The immunity from suit, on the other hand is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say. It is generated by the circumstances in which the statement was made and it is not concerned with its use for any purpose other than as a cause of action. In this respect, however, the immunity is absolute and cannot be removed by the court or affected by subsequent publication of the statement."

15. All the cases, which explain the underlying policy and the principle including above cited authorities, indicate that, there are two strands of policy underlying the rule. The first is that those engaged in litigation should be able to speak freely without fear of civil liability. The second is a wish to avoid a multiplicity of actions where one court would have to examine whether evidence given before another court was true or not: **Sudhna Singh v. Governing Body Of Morlands Primary School and Reding Borough Council** (supra). Though it is a well-established defence as discussed above, some deceitful attempts were made to bring the action circumventing the above defence. However, the English and even Australian courts rejected those claims while reiterating the same principle.

16. In **Watson v M'Ewan** (supra) the action was not based on the evidence that the witness gave, but on what he had told the lawyer who took his proof of evidence. The House of Lords, extended the protection, and equally applied the rule to statements made out of court for the purpose of making his proof of evidence. In **Marrinan v Vibert** [1963] 1 QB 528 the action was filed claiming damages caused by conspiracy to give allegedly false evidence in the earlier proceedings. The original court dismissed the action stating that the claim disclosed no cause of action. On appeal to the Court of Appeal Sellers LJ dismissed the appeal and said at 535:

> "It has been sought in this case to draw a difference between the action of libel and slander, the action of defamation, and that which is set up in this case, one of conspiracy. I can see no difference in the principles of the matter at all. Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their

evidence before the court and in the preparation of the evidence which it is to be so given."

17. The same attempt was made in Australia in **Cabassi v Vila** (1940) 64 CLR 130 to base a claim on the disguise of conspiracy to give false evidence, but proved abortive as the High Court of Australia having referred to a large number of English cases rejected the same. This was an appeal to the High Court of Australia from the Supreme Court of Queensland. In that case Starke J said at page 141:

> "But it does not matter whether the action is framed as an action for defamation or as an action analogous to an action for malicious prosecution or for deceit or, as in this instance, for combining or conspiring together for the purpose of injuring another: the rule of law is that no action lies witnesses in respect of evidence prepared *Watson v M'Ewan*, given, adduced or procured by them in the course of legal proceedings. The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice."

18. In **Taylor v Serious Fraud Office** (supra) the immunity was extended to the investigators, and Lord Hoffmann said it is necessary for the administration of justice that investigators should be able to exchange information, theories and hypotheses among themselves and to put them to other persons assisting in the inquiry without fear of being sued, if such statements are disclosed in the court of the proceedings. Lord Hoffmann then agreed with the test proposed by Drake J in **Evans v. London Hospital Medical College (University of London)** [1981]1 W.L.R. 184, in which Drake J held at page 192 that:

> "the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated."

19. However, Lord Hoffmann emphasized in **Taylor v Serious Fraud Office** (supra) that this immunity does not apply to action for malicious prosecution. His Lordship held at page 215:

> "...On the other hand, the immunity does not apply to actions for malicious prosecution where the cause of action consists in abusing legal process by maliciously and without reasonable cause setting the law in motion against the plaintiff. It does not matter that an essential step in setting the law in motion was a statement made by the defendant to a prosecuting authority or even the court: see Roy v Prior [1971] A.C. 470."

20. In that **Roy v Prior** [1971] A.C. 470 cited by Lord Hoffmann and mentioned above, Lord Morris of Borth-y-Gest differentiated the actions based on the evidence given in court and the action for malicious proceeding without a reasonable cause. The court affirmed that the former warrants the immunity, but the latter not. In that case, the plaintiff sued the defendant for the malicious arrest secured through the abuse of judicial process. His Lordship said, at page 477:

> "What the plaintiff alleges is that the defendant, acting both maliciously and without reasonable cause, procured and brought about his arrest. The plaintiff is not suing the defendant on or in respect of the evidence which the defendant gave in court. The plaintiff is suing the defendant because he alleges that the defendant procured his arrest by means of judicial process which the defendant instituted both maliciously and without reasonable cause. ... The gist of the complaint, where malicious arrest is asserted, is not that some evidence is given (Though if evidence is given falsely it may be contended that malice is indicated) but that an arrest has been secured as a result of some malicious proceeding for which there was no reasonable cause.
>
> ...
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> It must often happen that a defendant who is sued for damages for malicious prosecution will have given evidence in the criminal prosecution of which the plaintiff complains. The essence of the complaint in such a case is that criminal proceedings have been instituted not only without reasonable and probable cause but also maliciously. So also in actions based upon alleged abuses of the process of the court it will often have happened that the court will have been induced to act by reason of some false evidence given by someone. In such cases the actions are not brought on or in respect of any evidence given but in respect of malicious abuse of process (see **Elsee v Smith** (1822) 2 Chit. 304)."

21. Though the courts continuously affirmed the long-established principle of absolute privilege to the witnesses in respect of evidence whether viva voce or written, they (courts) never hesitated to strike a balance between two conflicting the principles, i.e. the principle that a wrong should not be without a remedy, and the principle that those involved in the judicial process should be immune from civil suits for what they say in the course of the proceedings.

22. The House of Lords in **Darker v chief Constable of West Midlands** [2001] 1 AC 435 drew distinction between the act itself and the evidence that may be given about the act or its consequences. The House of Lords said the distinction rests upon the fact that acts

which are calculated to create or procure false evidence or to destroy evidence have an independent existence from, and are extraneous to the evidence that may be given as to the consequences of those acts. It unlikely that those who have fabricated or destroyed evidence would wish to enter the witness box for the purpose of admitting to their acts of fabrication or destruction. Their acts were done with a view to the giving of evidence not about the acts themselves but about their consequences. The position is different where the allegation relates to the content of the evidence or the content of statements made with a view to giving evidence, and not to the doing of an act such as the creation or the fabrication of evidence. Accordingly a police officer who gave evidence that he had found a quantity of drugs in premises in the possession of an accused would be immune from suit even if the evidence was perjured, but a police officer who had planted the drugs in those premises, which were said in evidence to have been found there, would not be immune from suit in respect of the act of planting the drugs there (Lord Hope of Craighead said, at page 449).

23. The sentiments expressed by their Lordships in **Darker v Chief Constable of West Midlands** (supra) reflect the above mentioned 'balancing exercise' that the courts ought to do. Lord Hope of Craighead said, at page 446:

> "The question that has been raised relates to the further extent of the immunity. Where are the boundaries to be drawn? It arises because there is another factor that must always be balanced against the public interest in matters relating to the administration of justice. It is the principle that a wrong ought not to be without a remedy. The immunity is derogation from a person's right of access to the court which requires to be justified."

24. In the same manner Lord Cooke of Thorndon supported the above proposition and said at page 453:

> "Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in **Rees v Sinclair** [1974] 1NZLR 180, 187, "The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice..."

25. In the meantime Lord Clyde emphasized that, immunity should only be allowed with reluctance as it runs counter to the policy that no wrong should be without remedy said at pages 456 and 457:

It is temptingly easy to talk of the application of immunities from civil liability in general terms. But since the immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy, it should be only allowed with reluctance, and should not readily be extended. It should only be allowed where it is necessary to do so."

26. In the same manner, the immunity from liability for negligence in **Rondel v Worsley** [1969] 1 AC 191 for barristers and solicitors conducting and preparing for court proceedings has now been abolished by **Arthur JS Hall v Simons** [2000] 3 WLR 543;[2002] 1 AC 615; [2000] 3 All ER 673. The further development of law in this regard is the majority decision of Supreme Court in **Jones v. Kaney** [2011] UKSC 13. Whilst affirming the immunity for defamation, the Supreme Court held that, the expert witness should no longer enjoy immunity from suit for negligence in relation to an expert report prepared for the purpose of litigation. The above analysis indicates the principle of absolute privilege available to witnesses from defamation in respect of evidence in proceedings, and the approach of the English courts in striking the balance between two conflicting interests. Two recent cases namely, **Sudhna Singh v. Governing Body Of Morlands Primary School and Reding Borough Council** (supra) and **Crawford v Jenkins** [2014] EWCA Civ 1035 (24 July 2014) have extensively discussed how the courts struck the balance between the above conflicting interests and in the first case, Lord Justice Lewison summarized principle and stated at paragraph 66 that:

(i) The core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court;

(ii) The core immunity also comprises statements of case and other documents place before the court;

(iii) That immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked;

(iv) Whether something is necessary is to be decided by reference to what is practically necessary;

(v) Where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity;

(vi) In such cases the principle that a wrong should not be without a remedy prevails.

27. The courts also expressed their views on the test applicable to the evidence when determining the privilege, and I will discuss that test later in this ruling to avoid repetition.

28. Presently in United Kingdom, the new law on defamation which is The Defamation Act 2013 applies to causes of action occurring after its commencement on 1 January 2014. This Act was brought to amend the law on defamation. In fact, this Act has considerably changed a number of defamation procedures and also repealed some common law defences, namely, justification has been abolished by section 2 (4), fair comment has

However, except those that are expressly repealed by this Act, other common law defences remain intact, subject however to the limitations imposed by the courts from time to time for the interest of justice and striking balance between two conflicting interests as discussed above. The reason being that, (a) this Act expressly excludes those three common law defences, and (b) it did not codify the law on defamation, but intends to amend it, as provided in its long title.

29. The imperial laws which include the common law, the rules of equity and the statute of general application which were in force in England at the date when Fiji obtained a local legislature on 02.01.1875 shall be in force within Fiji by operation of section 22 of the High Court Act (see: section 25 of the Magistrate's Court Act as well), subject however to the section 25 of the same Act. Undoubtedly, the common law on defamation is applicable in Fiji and numberless cases have been decided and determined in Fiji accordingly. The section 25 however restricts the imperials laws and provides that, they are applicable subject to any existing or future Acts of the Parliament of Fiji. In Fiji, the Defamation Act No. 14 of 1971, Cap 34 (**The Act**) is in force since 23.14.1971. The Act makes certain provisions in relation to the action for defamation and the defences therewith.

30. The question therefore is whether the Act has replaced the common law on defamation or supplemented the law in force in Fiji at the time the Act was brought, and especially whether the section 13 of the Act limited the scope of the absolute privilege recognized and developed by the common law to only newspaper report of courts proceedings. In fact, the main argument in this case is also related to this question as mentioned above. The section 13 reads as follows:

Absolute privilege of newspaper report of proceedings in court

> **13.** A fair and accurate report in any newspaper or broadcast of proceedings publicly heard before any court or other judicial proceeding shall, if published contemporaneously with such proceedings, be absolutely privileged:
>
> Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter.

31. At a glance it will be understood that, absolute privilege is limited to newspaper report of proceedings in court, as this is the only one section which speaks about the absolute privilege in the Act. Generally any section or provision of any Act should not be interpreted in isolation of other provisions of that Act and especially the section like section 13 of the Act, which seems to be, at a glance, limiting the centuries old common law defence of absolute privilege which has been safeguarded and developed by the common law courts from sixteenth century to date.

32. Apart from the three main rules of interpretation of statutes, i.e. literal, golden and mischief rules, the courts have accepted some other intrinsic and extrinsic aids too in ascertaining the intention of the legislature. Intrinsic assistance is derived from the particular statute itself, which is the object of interpretation. The courts use the entire provisions of the particular statue to understand the meaning of a particular part of it. In this process, the title either long or short, other provisions, heading and sub-heading of a particular Act may be referred to for guidance. Lord Simon of Glaisdale in **The Black-Clawson** [1975] AC 591 said at page 647:

> "The statutory objective is primarily to be collected from the provisions of the statute itself. In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity—it is the plainest of all the guides to the general objectives of a statute." (Emphasis added)

33. Accordingly, the long title of the Act too may be referred to in this case as well. The long title of the Act reads as follows:

> "An Act to Amend the Law Respecting Defamatory Words and Libel"

34. It is evident from the above long title of the Act that, the purpose of the Act was to ***amend*** the law in force before the enactment of the Act and obviously it is the common law on defamation as per the section 22 of the High Court Act. Hence the consequential question is whether the Act completely repealed the then existing common law on defamation or supplemented it. The answer for this question is found in section 19 of the Act, which reads under sub-heading 'Clarification' as follows:

Clarification

19. For the purpose of avoiding doubt it is hereby declared that the provisions of this Act, except where the context otherwise requires, shall not replace any law for the time being in force, but shall supplement it.

35. The legislature in its wisdom thought that, there would a doubt in relation to the then existing law when the Act was passed to amend that law. Therefore, in order to avoid such doubt and to clarify it, the legislature had brought this section 19. This section in its unambiguous language provides that, unless context otherwise requires, the Act shall not replace any law for the time being in force, but supplemented the same. On perusal of the entire provisions of the Act it reveals that, nowhere in the Act the context requires the replacement of any law for the time being in force.

36. Sometimes it may be argued that, if the ***Expressio unius est exclusio alterius*** which means "the express mention of one thing excludes all others" is applied in interpreting section 13, it will be inferred that, the Act intended to exclude other instances for which the defence of absolute privilege is applicable. This maxim is not applicable in this context, for several reasons. Firstly, the context does not require the replacement of the any law for the time being in force and section 19 is unambiguously provides that the Act supplemented the law in force for the time being. Secondly, the use of Parliamentary debate as the extrinsic aid to interpret this section more clearly ascertains the intention of the legislature when passing the Act in relation to the law for the time being in force. The House of Lords in a landmark judgement **Pepper (Inspector of Taxes) v Hart** [1992] UKHL 3 established the principle that the *Hansard* could be used to ascertain the intention of the legislature. Likewise, Lord Denning in **Davis v Johnson** [1979] AC 264 said that asserting that the courts could not use *Hansard* was similar to saying that the judges "should grope about in the dark for the meaning of an Act without switching on the light".

37. The following is what transpired in the Parliamentary debate on 24.02.1971 when the Act was placed before the House for the second reading:

> Parliamentary Debate
> House of Representative
> Session of 1971
> Part I
>
> 24th Feb., 1971 Defamation Bill, 1970 Page 149
>
> **HON. ATTORNEY GENERAL**: ".....The Bill Sir, goes a long way to codify the law and in particular to offer guidelines to those who may

innocently or otherwise get tangled in the net of defamation. However, Sir, the Bill is not and could not be all embracing and this, Sir, is made clear in clause 20 which is referred to in paragraph 24 of the Objects and Reasons. With your permission I will read that paragraph.

> *"Clause 20 seeks to make it clear that the normal common law rules relating to defamation are not superseded, unless the Act states otherwise, but are supplemented."*

HON. DR. W.L. VERRIER – Mr. Speaker, Sir, where is the clause? I have not a clause 20.

HON. ATTORNEY-GENERAL. – Clause 19. I beg the honourable member's pardon. (Emphasis added)

The above speech of the then Attorney General makes it clear that, though the Act intended to cover the entire area of defamation law, practically it was not possible and therefore, the section 19 was included to express the intention of the Legislature that, the Act did not supersede any law for the time being in force, but supplemented the same. Thirdly, if the restrictive interpretation that, the absolute privilege is only applicable to newspaper report of proceedings in court as mentioned in section 13 of the Act is allowed, it will lead to absurdity, because the result would be that, newspaper reporters of courts proceeding will enjoy the absolute privilege for what they report, but the judges, lawyers and witnesses will lose the same privilege which they enjoyed for centuries. Therefore, I am fortified in my view that, the Act did not replace or repeal any law for the time being in force and the absolute privileged provided in section 13 of the Act is supplementary to other instances of absolute privilege recognized by the common law. It follows that, the common law defence of absolute privilege to the statements made in the course of proceedings before a court of justice, whether by judge, or counsel, or witnesses is still available in Fiji as it is applied in UK now and all the cases decided in UK in this regard are still applicable in Fiji. However, one should be cautious when following cases decided after introduction of new Act in UK in relation to those three common law defences which were abolished by the new Act, as those defences such as justification and fair comment (see: sections 15 and 16 of the Act), are still available in Fiji as per the provisions of the Act.

38. The counsel for the plaintiff as mentioned above, totally relied on the decision of this court in **Hennings v Craig De La Mare** (supra) and specially cited the following paragraph:

> "A cursory glance at the **Defamation Act** reveals that, there is only one provision that extends to "**Absolute privilege**" and that is Section 13. Section 13 only extends absolute privilege to a fair and accurate report in a

newspaper about proceedings publicly heard before any court or other judicial proceedings if the report is produced contemporaneously with the Court proceedings.

In the result, I venture to say beyond per-adventure that the doctrine of **Absolute privilege** has no application even by any stretch of imagination to the instant case. Thus, I am constrained to answer the third and fourth questions posed at paragraph two in affirmative and negatively respectively."

39. However, I wish not to follow the same in this case for three reasons. Firstly, I reiterate the reasons I discussed above for my conclusion that, the Act supplemented the common law and did not repeal the same. Secondly, absolute privilege for judges, counsels, parties and witness for what they say in the court proceedings was recognized in Fiji in **Singh v Samusamuvodre** [2008] FJHC 381; HBC0194.2001L (19 December 2008) despite the section 13 of Act. Thirdly, the above decision is any event a persuasive authority to this court.

40. The last question in the instant case is whether the statements, made by the defendant in the affidavits filed in the connected matter, qualify the 'test' laid by the courts, to enjoy the defence of absolute privilege? Since the counsel for the plaintiff, only argued that the defendant was not entitled for absolute privilege, she did not raise any concern on the 'test' applicable to for a statement to qualify for this defence. As such this became an uncontested issue. However, for completeness, I discuss the same as stated above.

41. Since the courts were very much concerned about striking balance between two conflicting interests as stated above, they did not just allow all the statements of the witnesses to enjoy the absolute privilege, but set the test for the same. Lord Justice Clarke having analyzing number of authorities summarized the applicable test in **Smeaton v Butcher** [2000] EMLR 985 and stated at paragraph 26 that:

> "(1) A statement by a witness or prospective witness, whether made to a solicitor for the purposes of the preparation of a statement, proof of evidence or affidavit, or made in a statement, proof of evidence or affidavit, is absolutely privileged unless it has no reference at all to the subject-matter of the proceedings.
>
> (2) In deciding whether the statement has any reference to the subject-matter of the proceedings any doubt should be resolved in favour of the witness."

42. Bret MR in **Munster v. Lamb** (supra) stated the rule as follows:

"...with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the Court...whether what they say is relevant or irrelevant, whether what they say is malicious or not – are exempt from liability to any action in respect of what they state, whether the statement has been made in words, that is on viva voce examination, or whether it has been made upon affidavit."

43. There are number of cases which speak about the applicable test for any statement of the witness to qualify for absolute privilege, and all arrive at the decision that, whether what the witnesses say is relevant or irrelevant, whether what they say is malicious or not – are exempt from liability to any action if they speaking with *reference* to the matter which is before the Court. Accordingly, the test is *not one of relevance*, but *reference* to the proceedings in question.

44. The plaintiff stated in his statement of claim that, the following are the defamatory statements made by the defendant in his affidavit:

PARTICULARS OF DEFAMATORY MATERIAL

[a] Affidavit in Support of Malcolm Andrew Herbert sworn on 30th November 2015 and filed 1st December 2015 at paragraphs 34 and 35:

34. I understand that Mr Lowres has transferred over four million dollars at Recorp's monies to Australia over the past 18 months.

35. I understand that Mr Lowres has recently applied for permission from FIRCA and the Reserve Bank to transfer further monies to Australia, after applying for funding from the Fiji local banks.

[b] Affidavit in Reply of Malcolm Andrew Herbert sworn and filed 8th January 2016 at paragraph 29:

29. In reply to paragraph 32 of the said Affidavit I say that the funds have being remitted out of Fiji to Australia is of serious concern given that the 1st Defendant is insolvent and cannot pay its debts as they fall due. An interim liquidator needs to be appointed with urgency given that 2nd Defendant's conduct to protect the unsecured creditor's interest in 1st Defendant with freezing orders on all 1st Defendant's Bank accounts in Fiji and Australia given the large sums of moneys being transferred to Relcorp 23 Pty Ltd in Australia as preferential payments. Annexed and marked "Q" is the details of the remittances made by the 1st Defendant.

[c] Affidavit in Reply of Malcolm Andrew Herbert sworn and filed 8th January 2016 at annexures Q where the Defendant exhibited the following confidential Reserve Bank Exchange Control approvals:

[i] 12th December 2014 $400,000 (Four Hundred Thousand) Relcorp Fiji Limited to Relcorp No 23 Pty Limited:

[ii] 12th December 2014 $300,000 (Three Hundred Thousand) Relcorp Fiji Limited to Relcorp No 23 Pty Limited:

[iii] 12 December 2014 $100,000 (One Hundred Thousand) Relcorp Fiji Limited to Relcorp No 23 Pty Limited:

[iv] 23rd March 2015 $750,000 [Seven Hundred and Fifty Thousand) Relcorp Fiji Limited to Relcorp No 23 Pty Limited:

[v] 23rd March 2015 $750,000 [Seven Hundred and Fifty Thousand) Relcorp Fiji Limited to Relcorp No 23 Pty Limited:

[vi] 23rd March 2015 $500,000 [Five Hundred Thousand) Relcorp Fiji Limited to Relcorp No 23 Pty Limited:

45. The alleged statements of the defendant were admittedly made in the two affidavits filed by him in his action for the purpose of obtaining the injunctive reliefs from the court in Suva. As the counsel for the defendant stated, in an application for injunction, the party who seeks it must satisfy the guidelines laid down in the landmark judgment of Lord Diplock in **American Cyanamid case** [1975] AC 396. Accordingly, if the damages in the measure recoverable would an adequate remedy and the defendant would be in a financial position to pay them, no injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. The defendants alleged averments in relation to the financial positions of the plaintiff and the company (RFL) in that case are not only have direct reference to that application for injunction, but also material ingredient for the court to decide the application for injunction either way. The truthfulness or the falsity or the reliability of those averments, which is in any event not relevant to enjoy the absolute privilege for defamation, is the matter for the court to decide when deciding application for injunction. In any event, this has never been disputed by the plaintiff in this case as mentioned above.

46. The above analysis irresistibly compels me to come to a conclusion that, the defendant in this case is entitled to the defence of absolute privilege from any suit for defamation for what he has averred in those two affidavits filed in the case pending in Suva High Court and accordingly, there is no actionable wrong committed by the defendant to sue him for

defamation. Now I turn to discuss the law on striking out under Order 18 rule 18 of the High Court Rules.

47. The law on striking out the pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

> *18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) It is scandalous, frivolous or vexatious; or*
>
> *(c) It may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) It is otherwise an abuse of the process of the court;*
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1)(a).*
>
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading* (emphasis added)

48. At a glance, this rule gives two basic messages and both are salutary for the interest of justice, and encourages the access to justice which should not be denied by the glib use of summery procedure of pre-emptory striking out. Firstly, the power given under this rule is *permissive* which is indicated in the word *"may"* used at the beginning of this rule as opposed to *mandatory*. It is a *"may do"* provision contrary to *"must do"* provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not ***necessarily*** be struck out as the court can, still, order for amendment. In **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No 3) [1970] Ch. 506, it was held that the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea. **Marsack J.A.** giving concurring judgment of the Court of Appeal in **Attorney General v. Halka** [1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972) held that:

"Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

49. The first ground of the said rule is the absence of reasonable cause of action or defence as the case may be. No evidence is admissible for this ground for the obvious reason that, the court can come to a conclusion of absence of a reasonable cause of action or defence merely on the pleadings itself, without any extraneous evidence. His Lordship the Chief Justice A.H.C.T. Gates (as His Lordship then was) in **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005) held that:

"To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498".

50. Citing several authorities, Halsbury's Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

"A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered" Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.

51. Given the discretionary power the court possesses to strike out under this rule, it cannot strike out an action for the reasons it is weak or the plaintiff is unlikely to succeed, rather it should obviously be unsustainable. His Lordship the Chief Justice A.H.C.T. Gates in **Razak v. Fiji Sugar Corporation Ltd** (supra) held that:

"The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

52. It was held in **Ratumaiyale v Native Land Trust Board** [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000) that:

"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly

*and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95. The principles applicable were succinctly dealt by Justice Kirby in **London v Commonwealth [No 2]** 70 ALJR 541 at 544 - 545. These are worth repeating in full:*

1. *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided (**General Street Industries Inc v Commissioner for Railways (NSW)** [1964] HCA 69; (1964) 112 CLR 125 at 128f; **Dyson v Attorney-General** [1911] 1 KB 410 at 418).*

2. *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action (**Munnings v Australian Government Solicitor** (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (**Dey v. Victorian Railways Commissioners** [1949] HCA 1; (1949) 78 CLR 62 at 91).*

3. *An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary termination. (**Coe v The Commonwealth** (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-7). Even a weak case is entitled to the time of a court. Experience reaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

4. *Summary relief of the kind provided for by O 26, r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. (**Coe v The Commonwealth**(1979) 53 ALJR 403 at 409). If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

5. *If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings. (**Church of Scientology v Woodward** [1982] HCA 78; (1980) 154 CLR 25 at 79). A question has arisen as to whether O 26 r 18 applies only part of a pleading. (**Northern Land Council v The Commonwealth** (1986) 161*

CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and

6. *The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit".*

53. There is no much cases which deals with the other part of first ground that is the absence of the defence, as the said sub rule states '*It discloses no reasonable cause of action or **defence**, as the case may be'*. The reasons being that, if there is no defence, generally the plaintiffs will seek to enter the summary judgement under Oder 14, rather than seeking relief under Oder 18 rule 18 to strike out the defence. In any event, if there is any such application to strike out any pleading for not disclosing a *defence,* the courts can adopt the meaning given by Sir Roger Ormond in **Alpine Bulk Transport Co. v. Saudi Shipping Co. Inc** (1986) 2 Lioyd's Rep, 221 for the *'defence'* which is *"a real prospect of success"* and " *carry some degree of conviction*". Thus, the court must from a provisional view of the probable outcome of the action.

54. The rule also empowers the court to exercise its discretion to strike out any pleadings or claim if the same is scandalous, frivolous or vexatious. If the pleadings contain the degrading charges which are totally irrelevant or if there are unnecessary details included in the pleading in relation to the charge which is otherwise relevant to the claim, then such pleadings and claim are scandalous. The **White Book** in Volume 1 (1987 Edition) at para 18/19/14 states that:

"Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P. 663)".

55. On the other hand, if the action is filed without serious purpose and having no use, but intended to annoy or harass the other party, it is frivolous and vexatious. Roden J in **Attorney General v Wentworth** (1988) 14 NSWLR 481, said at 491 that:

1. *Proceedings are vexatious if they instituted with the intention of annoying or embarrassing the person against whom they are brought.*

2. *They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*

3. *They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*

56. The fair trial is fundamental to the rule of law and to democracy itself. The right to fair trial applies to both criminal and civil cases, and it is absolute which cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus the courts are vested with the power to strike out any such proceeding or claim which is detrimental to or delays the fair trial. Likewise, the rule of law and the natural justice require that, every person has access to the justice and has fundamental right to have their disputes determined by an independent and impartial court or tribunal. However, this access should be used with the good faith and the motive untainted with malice. If any action is prosecuted with the ulterior purposes or the machinery of the court is used as a mean of vexatious or oppression, it is abuse of process. Likewise the subsequent action after dismissal of previous action too is abuse of process. The courts have inherent power to combat any form of such abuse.

57. Halsbury's Laws of England (4th Ed) Vol. 37 explains the abuse of process in para 434 which reads:

> *"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."*

58. His Lordship the Chief Justice A.H.C.T. Gates in **Razak v Fiji Sugar Corporation Ltd** (supra) held that:

> *"It would be an abuse of process for the plaintiff to bring a second action for the same cause of action after disobedience of peremptory orders had resulted in the dismissal of the first action: Janov v Morris [1981] 3 All ER 780. It is said the process is misused thereby. Re-litigating a question,*

even though the matter is not strictly res judicata has been held to be an abuse of process: Stephenson v Garnett [1898] 1 QB 677 CA. In that case the suitor was the same person and he sought to re-open a matter already decided against him".

59. In the case of **Goldsmith v Sperrings Ltd [1977] 2 All ER 566**, Lord Denning said as follows at 574:

> *"In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer".*

60. As discussed above, the rule provides for the permissive discretion to the courts to strike out the claim or proceedings for the above grounds as opposed to the mandatory power. It should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised. It would always be preferable to allow the amendment instead of striking out, unless the interest of justice requires the striking out.

61. A reasonable cause of action, as per the above analysis, means a cause of action with some chance of success, when only the allegations in the statement of case are considered. In this case, I have come to the conclusion, as discussed above that, the defence of absolute privilege is available for the defendant for what he has deposed in his two affidavits and he cannot be sued for the same. As such there is no actionable wrong. As a result, the plaintiff has no reasonable cause of action against the defendant to sue him for defamation.

62. It seems from statement of claim filed by the plaintiff in this matter that, alleged averments in the affidavit do not mean to defame the plaintiff as he claims. All these averments are relating to some remittance of money by the plaintiff to Australia and some are based on the approvals of Reserve Bank of Fiji, though the plaintiff calls them confidential. Therefore, I do not think that the plaintiff will succeed in his claim even in the absence of absolute privilege. If the plaintiff states that, those Reserve Bank approvals are confidential, he might have a cause of action against the person who caused damages by disclosing such confidential and sensitive information. Hence I am of the view that, this action was brought with the intention of annoying or embarrassing the

defendant and for collateral purpose. Accordingly, it is obviously untenable or manifestly groundless. Thus, I am of the view that, this action is frivolous and vexatious.

63. It obviously seems that, the plaintiff brought this action in order to serve extortion or oppression or to exert pressure on the defendant for the case his company PNHL filed against the RFL where the plaintiff is director, so as to achieve an improper end. As Lord Denning held in **Goldsmith v Sperrings Ltd** (supra) legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. Therefore, I am of the view for the above reasons that, the plaintiff has abused the process of the court in order achieve an improper end.

64. For the reasons adumbrated above, I come to the conclusion that, the defendant has absolute privilege form suit for defamation for what he has deposed in his two affidavits filed in the action pending in the High Court of Suva and there is no actionable wrong for the plaintiff to sue the defendant for defamation. It follows that, the plaintiff's statement of claim discloses no reasonable cause of action against the defendant. Thus this action is frivolous, vexatious and abuse of process and ought to be struck out. Furthermore, the defendant should be reasonably compensated for defending this matter till now.

65. In result;

a. The plaintiff' action is struck out and

b. The plaintiff is ordered to pay a summarily assessed cost of $ 1000 to the defendant within 30 days from today.

HIGH COURT OF FIJI
LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
28.02.2019