

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. HBC 50 of 2018

Riyaz Sayed Khaiyum

First Plaintiff

Fiji Broadcasting Corporation Limited

Second Plaintiff

vs

Niko Nawaikula

Defendant

Counsel : Mr E. Narayan for the plaintiff

: The defendant in person

Date of hearing : 2nd and 3rd March,2020

Date of Judgment : 9th October,2020

Judgment

1. This an action for damages for alleged libel. The first plaintiff is the Chief Executive Officer of the second plaintiff and was Chairman of Airport Terminal Services,(ATS). The second plaintiff, Fiji Broadcasting Corporation Limited,(FBC) is one of the two major radio broadcasters in the country. It operates six radio stations in the local languages and in English with a free-to-air television, FBC TV. The defendant is a Member of Parliament. The statement of claim alleges that the defendant falsely and maliciously posted defamatory material regarding the plaintiffs on its Facebook page titled "*Fiji Labour Party*". The posting in its plain and ordinary meaning is prima facie defamatory, false and made with intent to cause harm to the reputation of the plaintiffs. Their business operations have suffered.The posting continues to be on the defendant's Facebook page and caused consequential reputational damage to the plaintiffs.

2. The defendant, in his statement of defence states that his postings were limited only to his Facebook pages. It was not intended for the public. The comments were made sincerely and directly on the ability of the first plaintiff as executive head of an organization to resolve a dispute within his organisation. He denies that it was made falsely and maliciously. In any event, it was a fair comment and justified under common law and the Defamation Act.

3. The plaintiffs, in their reply state that the posting is not true in substance and in fact. It is not a fair comment and was clearly made by the defendant with malice.

The hearing

4. PW1,(the plaintiff)PW2,(Joel Abraham, CEO, FCCC) and PW3,(Jennis Singh, Director, Human Resources of the second plaintiff) testified. DW1,(the defendant) DW2,(Malcolm Beddoes) and DW3,(Richard Lucas) gave evidence for the defence. The plaintiffs filed their closing submissions on 26th March,2020.

The determination

5. It is an agreed fact that the defendant made the posting on his Facebook page titled “Fiji Labour Party” on 21st December,2017. The defendant contends that his posting was not intended for the public, but only for his page.

6. In *Pritchard v Van Nes*,[2016] BCSC 686 the Supreme Court of British Columbia stated:

In my view the nature of Facebook as a social media platform and its structure mean that anyone posting remarks to a page must appreciate that some degree of dissemination at least, and possibly widespread dissemination, may follow. This is particularly true in the case of the defendant, who had no privacy settings in place and who had more than 2,000 “friends”. The defendant must be taken to have implicitly authorized the republication of her posts. (para 83)

7. The defendant, in cross examination said that his Facebook page is limited to approximately 5000 people. Any person who has a Facebook account can access his page. He agreed that it was not a private posting.

8. In the light of the above evidence, the contention that the impugned posting is limited fails.

9. The question for determination is whether the statements in the posting of 21st December, 2017, are defamatory.

10. The posting reads:

RIYAZ MUST RESIGN AS ATS CHAIRMAN & GET OUT
Labasa 21:12:2017

- i. **Admit it, Riyaz, you are the problem the Jonah In that sinking ATS ship. Resign and get out and save us all the embarrassment.**
- ii. **Just look at the mess you did to FBC, I still cannot understand why FICAC has yet to investigate your dealings with your former associate, turned supplier) on the \$20M debt upgrade on FBC,**
- iii. **I am even at a greater loss trying to understand why FICAC has still not investigated the link between FBC's inability to pay the \$20M debt and the \$17M budget allocation to FBC.**
- iv. **You cannot do no right and the ATS employees know it. Who in this world locks out the owners of a company. Who in this world demands admission of guilt & disciplinary measures as conditions to re employment.**
- v. **You know you don't have it in you Riyaz. Just resign and get out.**
(I have numbered the paragraphs for ease of reference)

11. The posting contains hybrid statements concerning the first plaintiff when he was Chairman of ATS and as CEO of the second plaintiff as well as the second plaintiff .

12. The statement of claim states that the words were understood to mean by way of innuendo as follows:

In 10 i above

That the First Plaintiff is the reason for the strike carried out by the (ATS):

That the First Plaintiff is incompetent and inexperienced in his capacity as Chairman of the ATS and lacks the capacity to make informed decisions;

That the First Plaintiff does not know how to do his job and should resign effective immediately;

That the First Plaintiff is an embarrassment to everyone and does not have the necessary skill set to perform his tasks as the Chairman of ATS.

In 10 iv above:

That the First Plaintiff is incompetent as the Chairman of ATS and does not understand the operations of the shareholding structure of ATS;
That the employees of ATS know that the First Plaintiff cannot carry out his job;
That the First Plaintiff is misusing his powers as the Chairman of ATS;
That the First Plaintiff is a dictator who is laying down absurd conditions for reemployment of the ATS employees.

And in 10 v above:

That the First Plaintiff is incompetent in his capacity as Chairman of ATS;
That the First Plaintiff does not have the quality and ability to be the Chairman of ATS and deal with the strike;
That the First Plaintiff should resign from the position of Chairman;
That the First Plaintiff is incompetent and inexperienced in his capacity as Chairman of the ATS and lacks the capacity to make informed decisions;
That the First Plaintiff is an embarrassment to everyone and does not have the necessary skill set to perform his tasks as the Chairman of ATS.

13. Lord Justice Neill in **Gillick v British Broadcasting Corporation**, October 20, 1995 T.L.R 527 at 528 said that a “ *statement should be taken to be defamatory if it would tend to lower the claimant in the estimation of right-thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally*”.
14. Lord Halsbury in **Nevill v Fine Art and General Insurance Co.**, [1897] AC 68 at pg 73 said “ *..it is not enough to say that by some person or other the words might be understood in a defamatory sense*”.
15. In **Dr Ganesh Chand v Fiji Times Ltd**, (Civil Appeal No, ABU 0035 of 2007 S, 10th March, 2009)

..the court looks at the natural and ordinary meaning of the words said to be defamatory or the meaning conveyed from either the literal meaning of the words or by an inferential meaning or implication from the words. However, words may also bear a secondary meaning (that is, one which is not apparent on the face of the words but which depends either upon knowledge of some special meaning of the words or upon knowledge of facts or matters extrinsic to the words in question). This secondary meaning of the words is the legal innuendo meaning.

16. The first plaintiff,(PW1) in evidence in chief said that at the time he was Chairman of ATS, (from 2015 to 2018) 50% of the workers of ATS decided to walk out of their jobs and hold a meeting to discuss issues. When they decided to return to work, the CEO asked them to stay out until the entire issue was sorted. He was not involved in the decision of the management to lock out the workers and was not pleased with that decision.
17. He tried to amicably resolve the matter, as ATS is the backbone of the country, as Fiji is very much dependent on the tourism sector as its major income. He had a meeting with Union representatives. He told them that these workers should return to work and sign a document stating that they will not walk out again, which was agreed to by the workers present. The next day, the workers did not agree to his condition, which led to a prolonged dispute between the workers and the management. The first plaintiff said that his intention was to ensure that the scenario would not recur.
18. It transpired that the dispute was taken to the Employment Relations Tribunal and resolved.
19. In my judgment, the evidence of the first plaintiff establishes that the statements contained in paragraphs i, ii, iv and v of the posting are true and therefore not defamatory of the first plaintiff.
20. The Govt of Fiji owns 51% of ATS , while its employees own 49%. In my view, issues relating to employees of ATS are a matter of public interest. The first plaintiff was at its helm and his words and deeds are open to public scrutiny and comment.
21. I refer to the passages cited by the Court of Appeal in *Fiji Times Ltd v Vayeshnoi*, (Civil Appeal No. ABU 002/08, 16th July, 2010) from the following judgments:
..Lord Nicholls (in *Reynolds v. Times Newspapers Ltd*, (2001) AC 127) said at pg. 205;
Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a blood hound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, is in the field of political discussion. Any lingering doubts should be resolved in favour of publication. (emphasis added)

As Mr. Justice Eady remarked (in Sara Keays v. Guardian Newspapers Ltd,) it was true that the article was in pungent and offensive terms, but it is recognized that hard-hitting comments may be made on matters of public interest without the author being hobbled by the constraints of conventional good manners.

Diplock, J in Silkin v. Beaverbrook Newspapers Limited,[1958] 2 All E.R 516 began his summing up to the jury with these words:

This is an important case, for we are here concerned with one of the fundamental freedoms – freedom of speech, the right to discuss and criticize the utterances and the actions of public men. Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between the right of the individual, like the plaintiff, whether he is in a public life or not, to his unsullied reputation if he deserves it. That is on the one hand. On the other hand, but equally important, is the right of the public, which means you and me, and the newspaper editor and the man who, but for the bus strike, would be on the Clapham omnibus, to express his views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people. (emphasis added)

22. The judgment of the Court in *Fiji Times Ltd v Vayeshnoi*,(*supra*) concluded:

.. any public figure must expect to be criticized. He or she must expect that not everybody will agree with opinions he offers, or actions he takes

23. In *Sara Keays v. Guardian Newspapers Ltd*, (2003) EWHC 1565 Mr. Justice Eady cited

Lord Porter in *Kemsley v. Foot*,[1952] AC 345 at pg 356 as follows:

The question therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action, and I find my view well expressed in the remarks contained in Odgers on Libel and Slander (6th Ed., 1929), at p. 166. "Sometimes, however," he says, "it is difficult to distinguish an allegation of fact from an "expression of opinion. If often depends on what is stated in "the rest of the article. If the defendant accurately states what "some public man has really done, and then asserts that "such conduct is disgraceful", this is merely the expression of his "opinion, his comment on the plaintiff's conduct". (emphasis added)

24. Next, the plaintiffs states that the words in the posting were understood to mean by way of innuendo:

In 10 ii above

That due to the First Plaintiff's status, FICAC is not investigating his actions and/or inactions and that FICAC has some sort of arrangement with the 1st Plaintiff;

That the 1st Plaintiff is a crook and has had previous bad commercial associations with the Second Plaintiff prior to becoming the CEO;

That the First Plaintiff is incompetent in his role as Chief Executive Officer of the Second Plaintiff;

That the First Plaintiff has poor management and misguided leadership;

That the First Plaintiff is corrupt and is having corrupt dealings for the benefit of the Second Defendant;

That the Plaintiffs have a huge debt which it cannot repay;

In 10 iii above

That due to the First Plaintiff's status, FICAC is not investigating his actions and/or inactions and that FICAC has some sort of arrangement with the 1st Plaintiff;

That the 1st Plaintiff is a crook and has had previous bad commercial associations with the Second Plaintiff prior to becoming the CEO;

That the Plaintiffs are unable to pay its debts;

That the Second Plaintiff has a huge debt which it cannot repay as a result of which its grant was increased;

That the First Plaintiff is wrongfully and deceitfully seeking additional grant and or financial advantage from the Government for the Second Plaintiff;

That the Plaintiffs are involved in corrupt practices due to which they were allocated a \$17M budget;

That the First Plaintiff is guilty of dishonest and dishonorable conduct and practice;

That the Second Defendant has poor management and misguided leadership including history of fraudulent commercial practice;

That due to the First Plaintiff's relationship with the Government, FICAC will not investigate the First Plaintiff

25. The question that arise on the statements "I still cannot understand why FICAC has yet to investigate your dealings with your former associate, turned supplier on the \$20M debt upgrade on FBC" and "I am even at a greater loss trying to understand why FICAC has still not investigated the link between FBC's inability to pay the \$20M debt and the \$17M budget allocation to FBC" is whether a reader would infer the innuendos pleaded.

26. In my view, the statements in paragraphs ii and iii of the posting do no more than beg the question why FICAC has not investigated the matters stated therein. The defendant, as a Member of Parliament was entitled to raise those queries on matters of public interest.

27. In my judgment, the statements in paragraphs ii and iii do not convey a defamatory imputation on the plaintiffs.

28. In the celebrated case of *Lewis v Daily Telegraph Ltd*, 1964 AC 234 an article in the Daily Telegraph headed 'Inquiry on Firm by City Police' reported that the City London Fraud Squad were inquiring into the affairs of Rubber Improvement Ltd. The Chairman of the company claimed that the natural and ordinary meaning of the article was that they were guilty of fraud. The House of Lords held that no ordinary and reasonable reader would conclude guilt merely because the police were investigating the matter.

Lord Reid at pgs 258-260 said :

Here there would be nothing libellous in saying that an inquiry into the appellants' affairs was proceeding: the inquiry might be by a statistician or other expert. The sting is in inferences drawn from the fact that it is the fraud squad which is making the inquiry. What whose inferences should be is ultimately a question for the inquiry, but the trial judge has an important duty to perform....No doubt one of them might say "Oh, if the fraud squad are after these people you can take it "they are guilty." But I would expect the others to turn on him, if he did say that, with such remarks as "Be fair. This "is not a police state. No doubt their affairs are in a mess or "the police would not be interested. But that could be because "Lewis or the cashier has been very stupid or careless. We "really must not jump to conclusions. The police are fair and "know their job and we shall know soon enough if there is "anything in it. Wait till we see if they charge him. I wouldn't "trust him until this is cleared up, but is another thing to "condemn him unheard".

What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression. I can only say that I do not think that he would infer guilt of fraud merely because an inquiry is on foot. And, if that is so, then it is the duty of the trial judge to direct the jury that it is for them to determine the meaning of the paragraph but that they must not hold it to impute guilt of fraud because as a matter of law the paragraph is not capable of having that meaning.

