IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CIVIL PETITION NO. CBV 0016 of 2022
[Court of Appeal No. ABU 104 of 2020]

BETWEEN	:	**NIKO NAWAIKULA**
		Petitioner
AND	:	**RIYAZ SAYED KHAIYUM**
		1st Respondent
		FIJI BROADCASTING CORPORATION LIMITED
		2nd Respondent
Coram	:	**The Hon. Justice Salesi Temo, Acting President of the Supreme Court** **The Hon. Justice William Calanchini, Judge of the Supreme Court** **The Hon. Justice Lowell Goddard, Judge of the Supreme Court**
Counsel	:	**Petitioner in person**
	:	**Mr. D. Sharma and Ms. G. Fatima for the Respondents**
Date of Hearing	:	**05 June 2024**
Date of Judgment	:	**28 June 2024**

JUDGMENT

Temo, AP

1. I entirely agree with Her Ladyship Madam Justice Lowell Goddard's reasoning, conclusions and orders.

Calanchini, J

2. I have had the advantage of reading in draft from the judgment of Goddard J and agree with the reasoning and her conclusions.

Goddard, J

3. On 30 September 2022, the Court of Appeal overturned a decision of the High Court dismissing a claim that a Facebook statement posted by the petitioner on 21 December 2017 was defamatory of the respondents. The Court of Appeal found the Facebook post was defamatory and that it had caused injury to the reputation of the respondents and resulted in a loss of business and revenue for the second respondent. The following consequential orders were made:

> ***Orders:***
>
> 1. *The Judgment of the High Court dated 9 October 2020 is set aside, and the appeal is allowed.*
> 2. *The Appellants are entitled to general and special damages as claimed in the Statement of Claim.*
> 3. *A permanent injunction is granted in terms of paragraph 12(d) of the Statement of Claim.*
> 4. *No order for Indemnity Costs.*
> 5. *The case is remitted to the High Court for assessment of damages.*
> 6. *The Respondent will pay to each of the Appellants separately a sum of $ 5000.00 (amounting to a total of $10,000.00) as costs in this court, and $3,500.00 each (amounting to a sum of $7,000.00) as costs in the court below, on or before 30 November 2022.*

The parties

4. At the material time, the petitioner was a Member of Parliament for SODELPA. The first respondent had been a Board member of Airport Terminal Services (Fiji) Pte Limited (ATS) from 2007 and at the material time was Chairman of the Board. He was also Chief Executive Officer (CEO) of the second respondent, Fiji Broadcasting Corporation Limited (FBC), a position he had held since 2007.

5. ATS is 51% owned by the Government of Fiji and 49% by its employees. It provides the total ground handling services for Nadi International Airport.

6. The Fiji Broadcasting Corporation Limited (FBC) is a limited liability company that is wholly owned by the Government of Fiji.

7. The business operations of ATS and FBC are unrelated and were unrelated at the material time. Neither entity has, nor had, any connection with the other for the purposes of this case. The only common denominator was the position of seniority held by the first respondent in each of those state entities at the time the alleged defamatory statements were posted on the petitioner's Facebook page.

The alleged defamatory Facebook post

8. "***RIYAZ MUST RESIGN AS ATS CHAIRMAN AND 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 S20M 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."***

Background events leading to the post

9. On 16 November 2017, ATS workers attended a meeting during working hours to discuss workplace concerns and were locked out by management. The lockout continued for an extended period until 23 January 2018 and was extremely disruptive to the important tourism sector. On 23 January 2018 the Employment Relations Tribunal resolved the matter by issuing orders that all workers be allowed to return to work and that all pay and entitlements owing to them from the time they were locked out be restored. ATS was given 48 hours to comply with these orders, which it did. During the period of the extended lockout, it was the subject of extensive daily publicity and interest both within Fiji and internationally. At one point during the strike there was a public rally and march undertaken by a reported 2,500 Fiji citizens in support of the locked-out workers.

10. The first respondent in his evidence (which was traversed in detail in the Court of Appeal's judgment) said he was concerned about the management decision to lock the workers out and so he travelled to Nadi at an early stage of the strike to meet with the workers' Union representatives in order to try and help resolve the matter. He said he had not agreed with the decision to lock the employee shareholders out. He told the employee shareholders to return to work and to sign an undertaking that they would not walk out again. The workers present at the meeting initially agreed to this but the next day the majority of workers did not agree and the dispute between the workers and management continued until the Employment Relations Tribunal's decision of 23 January 2018.

11. The background to the alleged indebtedness of FBC to the Government over a period of years during the first respondent's tenure as CEO concerned the nature of budget allocations or grants received by FBC from the Government over that period of time and the manner in which these financial arrangements were structured and managed.

The Statement of Claim

12. On 28 February 2018, the respondents' lawyers issued a Writ of Summons and Statement of Claim in relation to the post, alleging the petitioner had "*falsely and maliciously wrote of and posted or caused to be posted defamatory material regarding [the respondents] on its Facebook page titled "Fiji Labour Party"*.

13. It was alleged the plain and ordinary meaning of the words in the post were prima facie defamatory and false and made with intent to cause harm to the plaintiffs' reputations; that Facebook has a worldwide audience and as a result the respondents had been greatly injured in their credit and reputation and brought into public scandal, odium and contempt; and by way of innuendo, the words were meant and were understood to mean, that the first respondent was:

    (i) incompetent as Chairman of ATS and solely responsible for the strike;
    (ii) incompetent in his capacity as CEO of FBC;

(iii) incompetent and inexperienced in his capacity as Chairman of ATS and lacked the capacity to make informed decisions;

(iv) was an embarrassment to everyone and did not have the necessary skill set to perform his tasks as Chairman of ATS;

(v) that due to his status, FICAC was not investigating his actions and/or inactions and that FICAC had some sort of arrangement with him;

(vi) that the post was designed and/or engineered to *"entice the public"* that the respondents were obtaining financial advantage from the Government for its running and were involved in corrupt practices.

14. As a result, the respondents alleged they were suffering grave reputational damage, when it was clear the strike had been initiated by ATS employees without any involvement of the first respondent – further, that the grant referred to in the post was for services providing airtime to the Fijian Government relating to two radio stations and FBC TV under the Public Service Broadcasting (PSB) contract.

15. It was claimed the first respondent had been greatly injured in his credit, character and reputation by the post and brought into hatred, ridicule and contempt in his office; and the second respondents' business' operations were said to have suffered considerably and were continuing to suffer loss and damage.

16. Relief was sought in the form of general damages; special damages and loss of business revenue and profits for the second respondent [to be quantified prior to trial]; punitive damages; a permanent injunction restraining the further dissemination of the statements *"containing the libel or anything similar defamatory of the [respondents]"*; interest on all sums awarded; and costs on a full indemnity basis

Statement of Defence

17. In his Statement of Defence filed on 10 May 2018, the petitioner admitted the content of the Facebook post but denied he had posted it on the "Fiji Labour Party" Facebook page, pleading that it had been limited to his personal Facebook page and not intended for public

readership and that in any event it was *"a fair comment and justified under common law as well as under the Defamation Act"*.

18. He denied the statement had been made falsely and maliciously or that it was defamatory. Rather, he pleaded that his comments were made sincerely and directly on the issue and therefore on the ability of the first respondent as executive head of an organisation to resolve a dispute within his organisation. He refuted the claim for punitive or special damages based on reckless disregard for the truth and for continuing to leave the post on a Facebook page with a wide readership and he denied responsibility for any publication of the post beyond his personal Facebook page.

Timeline of events

19. Although the claim in defamation was brought solely in relation to the post of 21 December 2017, the respondents also introduced into evidence further posts made by the petitioner, as well as posts made by other persons, including right up until the time of the High Court judgment. Also introduced were posts about newspaper reports of the pending proceeding against the petitioner and of a similar proceeding instituted against the Fiji Labour Party (FLP). These further posts were introduced into evidence in support of the respondents' prayer for a permanent injunction. These documents also served to illustrate and reflect the wide-ranging public interest in the issues raised by the impugned post.

20. A timeline of events leading up to the issue of judgment in the High Court follows.

21. As recorded, on 21 December 2017, the impugned statement was posted on the petitioner's Facebook page. It was contemporaneously reposted by a person or persons unknown on the Labour Party's Facebook page, which has an open readership.

22. On 28 February 2018 the Writ of Summons and Statement of Claim were issued.

23. On 10 May 2018 the Statement of Defence was filed.

24. On 25 May, the first respondent wrote to his legal counsel about a post on the page of a website user Aklesh Vince Singh on 24 May 2015. The post referenced a press release in the Fiji Sun that same day, reporting on the defamation suit that had been filed against the petitioner and it incorporated a response by the petitioner to the defamation action that had been instituted:

> ***From:*** *Riyaz Sayed Khaiyum [rskhaiyum@fbc.com.fj]*
> ***Sent:*** *Friday, 25 May 2018 11:22a.m.*
> ***To:*** *Patel Sharma*
> ***Subject:*** *nawaikula*
>
> *Please note this is the latest post by Niko Nawaikula on a known anti govt FB page "Fiji Exposed Forum"*
>
> *Although he has said in his legal defence that his earlier comments about me were made on his private/personal page only for the consumption of his friends, the latest comment below contradicts this.*
>
> *He's now saying that his defamatory comments about me and FBC were for public consumption and is justified as fair comment.*
>
> *Surely this is a major contradiction.*
>
> *Thanks.*
>
> *Riyaz*
>
> ***Aklesh Vince Singh***
> *13 hrs*
> *2018*
> *#PRESS_RELEASE*
>
> *RIYAZ SAYED-KHAIYUM AND FBC SUE NAWAIKULA FOR DEFAMATION – WHAT ACT OF INTIMIDATION STATEMENT JUSTIFIED AND FAIR COMMENT*
>
> *Today's Fiji Sun of 24/5/2018 is reporting that Riyaz Sayed-Khaiyum and FBC have filed a claim for defamation against Nawaikula. Fiji Sun further reports the defamation claim is in relation to a Facebook post by Nawaikula on December, 21, 2017, at 1.25am titled 'RIYAZ MUST RESIGN AS ATS CHAIRMAN & GET OUT'.*
>
> *Fiji Sun further reported the Claim by Riyaz and FBC that, "Nawaikula published the words out of malevolence or spite towards the plaintiffs. The statement of claim*

further states that Mr. Nawaikula did not confirm the accuracy of the various assertions made in the post, constituting reckless disregard for the truth"

#From: Niko

I wish to confirm that fact that Mr Riyaz Sayed Khaiyum has filed that defamation action against me as reported by Fiji Sun. I wish to add however that this is a very childish and shallow attempt to intimidate me because the claim has no substance.

I standby what I said and add that it is a public issue for public consumption and the public deserve information that is transparent to make those that employ and utilize public funds accountable.

In that regard the comments I made are fair comments and are justified under our laws. No doubt such senseless claim will be vigorously defended under those grounds.

At the same time I call upon the public to exercise their right and freedom of expression to it's full extent and not to be intimidated by defamation and sedition laws as well as by the threat and actual prosecution and civil claims as is the case here.

This is badly needed during these trying times in order to rescue and restore our democracy to its full extent.

Niko Nawaikula
The full extract of the Fiji Sun article is reproduced below;
@@@#######@@@@@####@@!!#
NAWAIKULA, FIJI LABOUR PARTY SUED, FILE DEFENCE. ,

25. On 21 July 2017, the following statement, titled *FBC sues Fiji Labour Party,* was posted on the Fiji Labour Party's Facebook page. It concerned the filing of a writ of action in the High Court against the Fiji Labour Party by the first respondent in his capacity as CEO of FBC and by FBC, in relation to a Facebook posting over a year earlier:

> *"Fiji Labour Party has been sued for defamation by the Fiji Broadcasting Commission and its Chief Executive Riaz Sayed Khaiyum, the brother of Attorney General and Economy Minister Aiyaz Sayed Khaiyum, over a facebook posting over a year ago.*
> *FLP has instructed its lawyers to file a defence to claims made by Riaz and FBC in the lawsuit.*
> *The Court action centres around an FLP posting that questioned a huge jump in State allocation to FBC from $2.9m previously to $11.3m over a one year period after Aiyaz Sayed Khaiyum took over as Finance/Economy Minister.*

FBC has not published its annual reports and audited accounts for several years now. Riaz was appointed CEO of FBC by the military regime in 2009 following its abrogation of the 1997 Constitution."

26. On 24 May 2018, the following article by Jyoti Pratibha, a journalist with the Fiji Sun, was posted on the Fiji Sun's website, referring to the two sets of proceedings in respect of the Facebook post by the petitioner on 21/12/2017 and the Labour Party's post of a year earlier:

By Jyoti Pratibha, SUVA
0 Comments

Fiji Broadcasting Corporation Limited and its chief executive officer Riyaz Sayed-Khaiyum have filed two court proceedings, one against SODELPA Member of Parliament Niko Nawaikula and one against Fiji Labour Party.

In the first matter, Mr Nawaikula is sued for putting up a Facebook post on December, 21, 2017, at 1.25am titled 'RIYAZ MUST RESIGN AS ATS CHAIRMAN & GET OUT'.

In the statement of claim filed in the High Court in Suva, lawyer for FBC and Mr Sayed-Khaiyum, Emmanuel Narayan of Patel Sharma Lawyers said it had been months since the post was made on Facebook and it caused reputational damage to FBC and to Mr Sayed-Khaiyum and that Mr Nawaikula published the words out of malevolence or spite towards the plaintiffs.

The statement of claim further states that Mr Nawaikula did not confirm the accuracy of the various assertions made in the post, constituting reckless disregard for the truth and that he further disseminated the statements as widely as possible by continuing to have the post on his Facebook page.

In his statement of defence, which was filed by Mr Nawaikula's firm Nawaikula Esquire, the Suva lawyer and parliamentarian accepted publishing the post but added that it was only for followers of his page and not the wider public.

In a writ of summons on the second matter, Mr Narayan highlighted the contents of a Facebook post made on the Fiji Labour Party page.

In the Facebook post, the political party claimed that FBC was unable to service its loan of about $21million and that the chief executive officer of FBC had to turn to the Attorney-General "Aiyaz Khaiyum" to "bail him out of this mess and the taxpayers got butchered in the process as an easy way was found to settle the matter …"

The statement of claims filed by Mr Narayan says the post was designed and engineered to cause damage to the plaintiffs.

He further stated that as a result of the post, the plaintiffs were suffering grave reputational damage. He said the chief executive officer of FBC has been greatly injured in his character and reputation and had suffered hatred, ridicule and contempt.

In the statement of defence filed on behalf of FLP by Anand Singh of Singh and Lawyers, the party said FBC's finances was an issue of public concern. Edited by Epineri Vula

Riyaz Sayed-Khaiyum | Chief Executive Officer |
Fiji Broadcasting Corporation | P. O. Box 334, Suva.
TEL: (679) 3314333 |FAX: (679) 3301643
M: (679) 9927683 |
Email: rskhaiyum@gbc.com.fj

27. On 29 May 2018 the petitioner filed his reply to the Statement of Defence.

28. On 31 May, the petitioner posted further on his Facebook page, referring to the tabling in Parliament the previous week of annual reports for FBC for the 6 years 2010 – 2015. The title of his post was "FBC - 2010 $21.6M loss. Kept afloat by Government cash grants of $16M. Useful only for government propaganda - yet supported by all taxpayers".

*"**Niko Nawaikula***

FBC 2010-2015 $21.6M LOSS – KEPT AFLOAT BY GOVT CASH GRANTS OF $16M – USEFUL ONLY FOR GOVT PROPAGANDA – YET SUPPORTED BY ALL TAX PAYERS.
Suva 31:5:2018

I'm not a forensic accountant and I am the subject of a defamation court action by the CEO of FBC, Mr. Riyaz Khaiyum, and FBC itself. With those in mind I will now try to make sense of the 6 Annual Reports (that are for 2010, 2011, 2012, 2013, 2014 & 2015) that were all dumped together at once in Parliament last week. They were tabled as Parliamentary Papers Nos 9, 10, 11, 12, 54 & 13 of 2018 respectively.
My first comment is shame on you Riyaz & your Board for your failure to produce your companies annual reports in time. An annual report must be profuced [sic] immediately for the previous year because it is a status report that captures a snapshot of the company's financial status the previous years and is used to guide future directions. But imagine this is six previous years report all at once.

I wonder why the FBC Chairman, Mr. Sash Singh, and his Board of Directors, Mr. Aren Baoa, Sitiveni Raturala & Vimlesh Sagar, have not dismissed the CEO for failing to produce the Annual Reports.

Speaking of Raturala, can Riyaz please explain why is it that Raturala is both Director and appearing in FBC programs at the same time. Isn't that conflict of interest, being employer and employee at the same time. Isn't he collecting both the Directors and employees fees.

At first glance after going through the 6 Annual Reports, my feeling is that FBC as a company is worthless with a $21M loss in that many years. I wonder why has the government been giving it cash grants worth $16M and conclude it is only so that Gorvis and the Government can use it for propaganda. But mind remember you and me as ordinary taxpayers are paying for such extravagance.

One thing that is clear from the sad affairs of the company is that it is losing every year but at the same time it is also receiving government grants yearly but the grants are not repaid as loans. Consecutive losses are as follows, 2010-$517K, 2011-$1.1M, 2012-$7.1M, 2013-$5.6M, 2014-$3.9M & 2015-$3.6M.

What is amazing is that the government continues to pump grants into the company which it does not repay. Grants for the six years despite losses are as follows; 2010-$2.6M, 2011-$2.5M, 2012-$2.6M, 2013-$2.9M, 2014-$2.9M & 2015-$2.9M.

On top of all these is the fact that the company has a $20M loan currently with FDB that it wants refinanced from FNPF. In the 6 years of 2010-2015 FBC made a total loss of $21.6M. But it was receiving a continuous cash grant from government in the sum of $16.4M. In other words the government was underwriting FBC (total loss $21M) by that sum to keep it afloat.

With all that record now out in the open, we all ask the FBC Chairman, Mr. Singh, why is he keeping Riyaz."

29. On an unspecified date in 2019, the first respondent and the Financial Controller of FBC appeared before the Parliamentary Committee on Economic Affairs. The petitioner was a member of the Committee but did not himself raise any questions about the financial operations of FBC at the hearing. After the hearing the petitioner and first respondent apparently had tea together.

30. On 2 September 2019 a pre-trial conference was held. The issues for determination, as settled, were whether the post was defamatory and whether the defences of fair comment, justification and absence of malice applied.

31. On 2 and 3 March 2020 the trial was heard in the High Court by Brito-Mutunayagam J. Judgment in favour of the petitioner was delivered on 9 October 2020.

32. On 18 April 2023, the action brought against the FLP in the High Court was discontinued on the instructions of the FBC.

The High Court Judgment

33. The High Court Judge found the petitioner's initial contention that the Facebook post was not intended for public consumption but only for his Facebook friends could not succeed, given the degree of possible dissemination from such a widely used social media platform[1]. The petitioner accepted this.

34. The Judge observed that the post contained hybrid statements about the first respondent in his capacities as Chairman of ATS and as CEO of FBC. Referring to the pejorative innuendo in the words, as contended for by the respondents, the Judge drew on the following judicial statements in relation to the issue of defamatory or otherwise.

35. In ***Gillick v British Broadcasting Corporation***, October 20, 1995, T.L.R 527 at 528**:**

> *... 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".*

36. In ***Nevill v Fine Art and General Insurance Co***, [1897] AC 68 at 73:

> *"...it is not enough to say that by some person or other the words might be understood in a defamatory sense".*

37. In ***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*

[1] ***Pritchard v Van Nes,***[2016] BCSC 686

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 fact or matters extrinsic to the words in question). This secondary meaning of the words is the legal innuendo meaning."

38. The Judge then considered the evidence given by the first respondent in relation to (i), (iv) and (v) of the impugned post:

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.

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. It transpired that the dispute was taken to the Employment Relations Tribunal and resolved.

39. Having regard to the public nature of the organisation and to the high public interest in the ongoing strike and its resolution, ultimately resolved by the Employment Relations Tribunal, the Judge found on the evidence that the statements in (i), (iv) and (v) of the impugned post were true and therefore not defamatory of the first respondent, observing:

"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."

40. In reaching his conclusion the Judge referred to and relied on established precedent concerning the balancing of fundamental freedoms, such as the right to receive and impart views on matters of public interest even where that might involve strong criticism of public office holders; and the competing right to enjoy an unsullied reputation if such is deserved[2].

[2] ***Fiji Times Ltd v Vayeshnoi,*** **(**Civil Appeal No. ABU 002/08, 16th July, 2010); ***Sara Keays v. Guardian Newspapers Ltd,*** (2003) EWHC 1565.

41. In relation to paragraphs (ii) and (iii) of the impugned post, the Judge was satisfied a reader would not infer the innuendos contended for by the first respondent and the statements in the paragraphs did not convey a defamatory imputation to the plaintiffs.

> *"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.*

42. In reaching his finding of fact the Judge drew on the oft quoted statements of Lord Justices Reid and Devlin in ***Lewis v Daily Telegraph Ltd***[3], concerning an article in the Daily Telegraph headed 'Inquiry on Firm by City Police,' in which it was reported that the City London Fraud Squad were inquiring into the affairs of Rubber Improvement Ltd. The Chairman of that Company claimed 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:

> *"per Lord Reid at 258-260:*
>
> *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 those 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*

[3] 1964 AC 234

guilt of fraud because as a matter of law the paragraph is not capable of having that meaning.

I must notice an argument to the effect that you can only justify a libel that the plaintiffs have so conducted their affairs as to give rise to suspicion of fraud, or as to give rise to an inquiry whether there has been fraud, by proving that they have acted fraudulently. Then it is said that if that is so there can be no difference between an allegation of suspicious conduct and an allegation of guilt. To my mind, there is a great difference between saying that a man has behaved in a suspicious manner and saying he is guilty of an offence, and I am not convinced that you can only justify the former statement by proving guilt. I can well understand that if you say there is a rumour that X is guilty you can only justify it by proving that he is guilty, because repeating someone else's libelous statement is just as bad as making the statement directly. But I do not think that it is necessary to reach a decision on this matter of justification in order to decide that these paragraphs can mean suspicion but cannot be held to infer guilt.

<u>Lord Devlin at pg 286 said:</u>

If the ordinary sensible man was capable of thinking that wherever there was a police inquiry there was guilt, it would be almost impossible to give accurate information about anything; but in my opinion he is not."

43. The Judge concluded as follows:

> *"In my judgment, the defendant's posting of 21st December 2017, is not defamatory of the plaintiffs. The innuendos alleged cannot be supported."*

44. Having found that none of the statements in the impugned Facebook post were defamatory of the respondents, the Judge declined their prayers for relief, including the prayer for a permanent injunction restraining the petitioner from further posting, circulating, distributing or otherwise causing to be distributed statements containing *libel or anything similar defamatory* about them. The respondents' action in defamation was dismissed in its entirety.

<u>The Court of Appeal judgment</u>

45. In a lengthy and detailed judgment, the Appeal Judge began, as Justice Brito-Mutunayagam had done in the High Court, by acknowledging the need to balance the right to free speech against the right to personal reputation and the achievement of this by means of the ordinary person test. In relation to that test, both Judges referred to and relied upon the leading

statement of Lord Reid in ***Lewis v Daily Telegraph*** (supra) quoted above and to passages in ***Reynolds v Times Newspapers Limited***[4]. The Appeal Judge selected the following passage from ***Reynolds v Times Newspapers Limited*** as a reminder of the competing social values at stake when assessing the balance between freedom of expression and the right to an unsullied reputation:

> *"... to be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved However, reputation, too, has value. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to indicate [sic] one's reputation. When this happens society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that reputation of public figures should not be debased falsely. In the political field in order to make and[sic] informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognized that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputation of others.*
>
> *The liberty to communicate and receive information [is a fundamental importance] ... in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed, and not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true. There is no interest in being misinformed. (ibid. at 238, per Lord Hobhouse)."*

46. The Judge noted that whether a statement is one of fact or comment requires the Court to consider the context in which it was made and whether it has a sufficient basis. A statement cannot exist in a vacuum and where defamation is alleged the burden is on the defendant to prove that the factual basis on which the comment was based is true or is sufficiently true.

[4] [2001] 2 AC 127 at 200

47. The Appeal Judge traversed the numerous particulars of innuendo pleaded by the respondents and carried out a detailed assessment of these in context of the evidence given at trial by the first respondent and his two supporting witnesses. The Judge then made a number of lengthy and detailed findings of fact about the alleged defamatory statements, which in their detail went far beyond any findings of fact made by the High Court Judge. In each instance, the Judge found the statements to be defamatory. Although her findings are lengthy, it is prudent and appropriate to set out in extenso/verbatim the Judge's discussion of the [competing] issues as she perceived them to be as well as the reasoning for her findings.

48. Under the sub-heading, discussion of the grounds of appeal, the Judge introduced her findings as follows:

> *"[67] In paragraph 19 of the judgment, the learned High Court Judge holds that the statements contained in paragraphs (i), (ii), (iv) and (v) of the post are true on the basis of the evidence of the 1st Appellant. This finding allows the Respondent the defence of truth, which is a complete defence to the Appellant's claim. For the reasons I will set out below I am not satisfied that the admitted evidence established this."*

49. The Judge then carried out an extensive analysis of the evidence and made the following findings of fact in relation to each statement in the impugned post:

> *"[68] Paragraph (i) of the post which refers to the strike at ATS and states as follows;*
>
> > *"**(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.**"*
>
> *[69] The evidence was that the 1st Appellant did not cause the strike. In fact, the Respondent himself admitted in evidence that he did not say that 1st Appellant created the strike. He said that because the 1st Appellant could not resolve the strike "amicably", he was incompetent. However, the natural and ordinary meaning and the meaning that is likely to be imputed to the published words by an ordinary person, at the time and in the context in which the strike was on-going, is that, the 1st Appellant was an obstacle, an ill-omen, incapable and ineffective for the job he held, caused the strike and his continuation as Chairman of ATS worsens the problem. He was seen as an embarrassment in that he was not capable of doing the job expected*

of him. The Respondent himself said that that the 1st Appellant did not cause the strike, but that by 'failing' to negotiate and bring about an amicable resolution with the workers, and not ensuring the termination of the strike, rendered him incompetent.

[70] In my view this was defamatory. It cannot be said that a person is unfit to be Chairman or CEO or head of an organization, because he is unable to negotiate an 'amicable' settlement of an industrial dispute with striking workers. The competence of a CEO is not to be judged by whether he is pliant to worker demands which may emanate for a multitude of reasons, some genuine and some not so genuine. The competence of the head or the key figures in an institution is to be judged by the success of the institution, and not by the criteria advocated by the Respondent in evidence.

[71] The learned judge found that the statement in paragraph (v) of the post was "established by the evidence of the 1st Appellant". The relevant portion of the post was:

> *" **iv. You cannot do no right and the ATS employees know it. Who in this world locks out the owners of the company. Who in this world demands admission of guilt & disciplinary measures as conditions to re-employment.**"*

[72] The evidence was that the decision to prevent the workers from coming back to work after they had abandoned their duties, was taken by the CEO of ATS, and not by the 1st Appellant. He tried to negotiate with the workers and he did initially succeed, however on the next day, they went back on their agreement. The evidence was that the 1st Appellant had advised the Board that in his view, the workers should be allowed to come back to work and disciplinary action be taken thereafter. The 1st Appellant testified that it was contrary to the regulations for the workers to have walked off as they did. This was not rebutted. In those circumstances it is not improper for the workers to have been requested to give the undertaking referred to. In any event, that would have been a reflection of their contractual obligations.

[73] Further, there was no evidence that the services of the workers had been 'terminated', and therefore the word 're- employment', was a mischievous addition and did not reflect the truth. There was also no evidence that the workers had been 'charged' in any manner, and had been denied the right to defend themselves, and an admission of guilt was sought to be extracted. That portion of the post had no factual basis that the Respondent could have relied on. The ordinary and natural meaning of the statement in paragraph (v) of the post was therefore based on an untruth and therefore was defamatory. Therefore, with respect, it was not open to the learned judge to have concluded that paragraph (v) was established by the evidence of the

1st Appellant Therefore grounds one and three of the grounds of appeal are allowed.

[74] Grounds 2 and 5 and ground of the grounds of appeal deal with paragraph (ii) of the post. Ground 6 of the grounds of appeal is based on paragraph (iii) of the post. These grounds can be dealt with together. Paragraph (ii) states as follows:

> *"**(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 $ 20 M debt upgrade on FBC.**"*

[75] Paragraph (iii) of the post states as follows:

> *"**(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.**"*

[76] Both these paragraphs are in respect of the FBC and the FICAC issue are thus dealt with together. In regard to the finding of the learned judge that the evidence of the 1st Appellant established the contents of this statement, I fail to see which portion of the evidence reflects this. The Respondent failed to adduce evidence of the supplies made to FBC by a former associate of the 1st Appellant. In fact, the cross-examination of the 1st Appellant by the Respondent concluded abruptly (page 236 of the copy record), after he questioned the 1st Appellant as to whether he knew certain persons by having named them, and beyond that, there was actually no evidence that could have been regarded as being the basis of the truth of this statement/allegation. The Respondent produced no evidence of former associates who had turned suppliers, instead he only stated that the matter had been discussed in Parliament and in public. On the contrary, the 1st Appellant's evidence was that his former associates had not turned into suppliers, no one had made complaints in this regard, he had not been confronted at any time with this allegation, FICAC had not investigated either him Respondent had not at any time complain to the relevant authorities, raised it with the 1st Appellant when he had appeared before the Parliamentary Committee on Economic Affairs of which the Respondent was himself a member. This evidence remained unchallenged and therefore the post was defamatory.

*[77] In Para 28 of the Judgment the learned judge relied on the judgment in **Lewis v Daily Telegraph Ltd**, 1964 AC 234, where House of Lords held that no ordinary and reasonable reader would conclude guilt merely because the police were investigating the matter. In my view, the facts*

*of **Lewis** can be distinguished from those in this case. In Lewis, (supra) an investigation was being conducted at the time, and the court said that the sting is in the inferences drawn from the fact that it is the fraud squad that was is making the inquiry.*

*[78] However, in this appeal the reference to FICAC changes the complexion of the matter. It is not a regular police investigation, as was the case in **Lewis** (supra). In this case, the Respondent goes beyond that and asks the question publicly on a public/international platform, as to why the 1st Appellant is being kept in his job when he is engaged in the alleged corrupt activities. In this case the sting is in the reference to FICAC, and the reasonable imputations that flow from that because in Fiji, FIFAC is the institution dedicated to the investigation and prosecution of corruption. An allegation of corruption is certainly more serious than the allegation in **Lewis** (supra). The allegation of corruption goes beyond that and there is no doubt that it is be more capable of lowering the estimation of the Plaintiff in the eyes of the right- thinking members of society, than an investigation by the police for theft. Accordingly, I am of the view that the references to FICAC in paragraphs (ii) and (iii) of the post, contain an imputation that is defamatory.*

[79] In regard to the allegation of the "mess" at FBC, 1st Appellant give the historical background to the loan from Fiji Development Bank and the management decision taken by the board of FBC in respect of the loan. The 'mess' that the Respondent imputed to the 1st Appellant individually, was not borne out by the evidence. It was clear that at the time of the trial the Chairman of FBC was not the 1st Appellant, but was Mr. Sashi Singh. However, the Respondent chose to target only the 1st Appellant who was the CEO of FBC at the time. He did not make allegations against any member of the board or any other person. It is noteworthy that the Respondent chose to target the 1st Appellant personally and individually in the two different capacities that he held in two different institutions. He made allegations against the 1st Appellant in his capacity as Chairman of ATS, and chose not to say anything or lay blame on anyone else. In regard to the FBC, the Respondent chose to lay the blame on the 1st Appellant although he was not the Chairman but was the CEO. In my view this is not a coincidence. It was a targeted attack, individually and personally at the 1st Appellant, irrespective of the designation he held in two different institutions. Put differently, he was after the 1st Appellant, no matter where he worked, or what he did.

[80] In paragraph 26 of the judgment the learned judge found as follows:

> *26. In my view, the statements in paragraphs ii and iii of the post 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."

[81] In my view, a Member of Parliament who raises matters of public interest must do so after verifying the facts, as a matter of public interest. The interest of the public is in receiving information, and not misinformation. The Respondent did not claim privilege. The post was published on a global platform, it goes beyond the public of this country. Therefore the 'public interest" criteria is not met in this case. Further, the specific inclusion of FICAC in the statement, clearly imputes corruption on the part of the Appellants. If indeed the statement was generated by a genuine public interest, there was no evidence or a reasonable explanation why the Respondent chose not to pursue such 'public interest' with the relevant authority. Instead, the evidence is that the Respondent himself was part of the Parliamentary Committee on Economic Affairs, and he chose not to seek any clarification from the 1st Appellant when he appeared before the said Committee, nor did he formally complain to the relevant authority.

[82] There was also no evidence to prove what "mess" had been created by the 1st Appellant and the reason for FICAC investigating the 20 million upgrade. The 1st Appellant clarified the financial arrangements of the 2nd Appellant, the accounting principles that had been adopted in respect of the annual Financial Statements, the fact that there was a Cabinet decision with regard to payments made to FBC, the distinction between the loan and the fees received for work done by FBC for the Government, the decision to take the loan, the regular repayment of the loan. Significantly, this evidence was not rebutted. On the other hand, the Respondent did not reduce evidence of who the former associate -turned supplier of the 1st Appellant was, or the complaints if any, that had made by him or anybody else to FICAC in this regard. Thus, the truth of the statement made the Respondent was not established by the evidence, and the Respondent was not entitled to rely on the defence of truth and justification.

[83] Therefore, in my view there is no evidentiary basis on which the learned judge could have concluded that 1st Appellant's evidence established the truth of the contents of paragraph (ii) of the post. Accordingly grounds 2, 5 and 6 of the grounds of appeal are allowed.

*[84] Ground 4 of the grounds of appeal in regard to paragraph (v) of the post which stated that: "**You know you don't have it in you Riyaz. Just resign and get out**". I do not see any evidence emanating from the 1st Appellant which establishes that the contents of this paragraph are true. This was what I might call a 'catch-all' phrase. On a consideration of the totality of the evidence, I accept the submission of the Appellants that the Respondent has purposefully intertwined and tangled the facts so much about the ATS*

issue and the FBC issue, and that the post was, from the inception designed to harm the reputation of the Appellants.

[85] The 1st Appellant testified in detail the historical background to the loan that was taken for refurbishment and upgrading, that the decision to take the loan was that of the then board of management, it was not an individual decision of the 1st Appellant, it was a business decision made with a view to making FBC a more commercially viable entity, and the thrust of the evidence was that it was a forward-looking project with the larger interest of the public at its base. It was meant to open up opportunities and bring about a complete overhauling and restructuring of the existing business model. That evidence was not rebutted. Unfortunately, it does not appear to have been considered by the court at all. Instead, the focus appears to have been on the close cross-examination of the 1st Appellant that the Respondent indulged in, where he examined the1st Appellant on the ramifications of the budgetary allocations that came into the 2nd Appellant from the Government. In fact, the 1st Appellant testified that the concerns of the Respondent ought to have been directed against the government which made a decision to allocate funds to the 2nd Appellant, and to this, the Respondent's observation was that the Government would not give money unless an institution "asked" for it, and the fault lay at the hands of the institution that made the request the money. That way, the Respondent sought to foist and keep the blame personally and squarely on the shoulders of the 1st Appellant. Accordingly, in my view, on consideration of the evidence in this regard, there was no basis on which the learned judge could have concluded that the 1st Appellant's evidence established the truth of this statement. Accordingly, ground 4 the grounds of appeal is allowed.

[86] Ground 3 of the grounds of appeal is on paragraph (iv) of the post. This states as follows:

> *"**You cannot do no right and the ATS employees know it. Who in this world locks out the owners of the company. Who in this world demands admission of guilt & disciplinary measures as conditions to re-employment.**"*

[87] As has been set out above, when the post was published, the first Appellant was Chairman of ATS. He attempted to negotiate with the workers and bring them back to work and have them give an undertaking that they would not repeat this conduct, which was in fact contrary to the company's regulations. This has been dealt with by me under the ground of appeal relating to paragraph (i) of the post. In my view the ordinary and natural meaning of this statement would convey the impression that the 1st Appellant was unaware of and insensitive to the operations and shareholding structure or business model of ATS, was insensitive to worker opinion, was unreasonable and conducted himself in a dictatorial manner.

There was no basis on which court could have concluded that the evidence of the 1st Appellant established that the statement was true. Accordingly, the Respondent was not entitled to the defence of truth and justification and the finding of the learned judge on this statement in the post was without basis. Accordingly, ground 3 of the grounds of appeal is allowed.

[88] Ground 7 of the grounds of appeal is in on the failure of the court to properly evaluate the evidence presented before it. In paragraphs 7and 8 of the judgment the court found that the post was accessible to anyone with a Facebook account. There was evidence before the court that the 1st Appellant attempted to settle the strike, the basis of the refurbishment of FBC and revamping of the entire business model of FBC, the reason for the loan, the fact that it was a management decision to take the loan, the fact that the repayment was on schedule, the fact that the FBC had negotiated with FNPF to refinance the loan with FDB, the eventual pull-out by FNPF due to the post, the significant work done and progress made by FBC, the failure of the Respondent to complain to FICAC about the alleged 'deals' the 1st Appellant had, the loss of revenue suffered by FBC. However, the court appears to have been persuaded by the mere suggestions made in cross-examination of the 1st Appellant, devoid of evidence. The natural and ordinary meaning of the statement that FICAC was not investigating the 1st Appellant, was that the 1st Appellant is financially corrupt, had wrongfully and deceitfully sought additional funds from the government, was engaged in corrupt practices, and it was this that resulted in losses being made by FBC, he had made use of his previous connections with his former associates and had had business dealings with then in his capacity as CEO of FBC. The court also had before it the evidence that the fee for the Public Service Broadcast (PSB) for the services providing airtime to the Fijian government relating to the two radio stations and if BCTV under the Public Service Broadcasting (PSB) contract. The Respondent did not produce any evidence to establish the truth of the contents of the statement in the post. I accept the submission of the Appellants that the plain and ordinary meaning was defamatory of the Appellants. Accordingly ground seven of the grounds of appeal is allowed.

[89] Ground 8 of the grounds of appeal is that the learned judge erred in law in not holding that the Respondent's post had caused injury to the reputation of the Appellants, and loss off business and revenue, stress trauma and anxiety through the Plaintiffs and its officers. The evidence of the 1st Appellant showed after the post was published, when he had meetings with regular clients they treated him with hesitation and questioned him on the contents of the post. This was embarrassing and had affected his reputation. Witness Joel Abraham CEO of the Fijian competition and consumer Commission (FCCC) testified that in the second-half of 2018 they did not advertise with FBC as the contents of the Facebook post suggested that

there was procurement fraud by the FBC and its CEO, and that FCCC did not want to be associated with 'trouble'. He adduced the summary of the contracts with FBC for the years 2017 to 2019. It revealed that in 2017, FCCC spent $22,903.80 on advertising with FBC. In the first half of 2018, FCCC spent $48,200.00, but in the second half of 2018 they did not advertise with FBC, and instead they advertised with the Fiji Sun. He also testified that, if FCCC advertised with FBC in 2019, it would have spent in the range of 40,000 to $50,000 with FBC. This evidence of loss of revenue to the 2nd appellant was not considered by the court. The court also did not consider the evidence of the 1st Appellant that after the post was published, he experienced loss to his reputation and he had been lowered in the esteem of persons that he associated with. This evidence was not rebutted by the Respondent either in oral or documentary evidence. Therefore, ground eight of the grounds of appeal allowed."

[90] Ground 9 of the grounds of appeal is that the Respondent is not entitled to rely on the defence of Fair comment. Ground 10 of the grounds of appeal is based on the contents of paragraph 29 of the judgment and that it was not defamatory, and that the innuendos cannot be supported. It is convenient to answer both these grounds together.

50. In considering these two grounds the Appeal Judge referred to section 16 of the Defamation Act and to recognised authorities relating to fair comment, honest belief and good faith and also to the importance of ventilating matters of public interest. The Judge also went on to consider whether malice was evident if there was an absence of honest belief.

*"[94] In the appeal before this court I am not convinced that the respondent acted honestly and in good faith/ As the Court said in **London Artists Ltd v Littler**)[5]…, "He ought not to have been so precipitate. He ought to have made enquiries of the artists". He jumped too quickly to unfounded conclusions. He made an imputation without any basis of fact to support it.*

……

[96] The defence of fair comment will be determined by reference to the defendant's honesty. Thus, the defendant must honestly believe in the contents of his statement. In this case the respondent did not successfully establish on the evidence that he honestly believed in the statement.

[5] ***London Artists Ltd v Littler*** [1968] EWCA Civil 3; [1969] 2 All ER 193; [1969] 2 WLR 409.

[97] In respect of the matter of public interest, the learned [High Court] judge had said:

> *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).*

[98] Whilst it true that matters relating to government employees may sometimes be a matter of public interest, generally, the business model of ATS in this case was somewhat different because the employees owned 49% of shares. They were therefore in a unique type of partnership which actually gave them private rights of ownership. The post was calculated and targeted specifically at the 1st Appellant rather than the dissemination of useful information in the public interest.

*[99] Further, reliance on **Reynolds v. Times Newspapers Ltd** (supra) was inappropriate because that case dealt with application by a journalist in a public newspaper. In in this case, the Respondent published the statement in his individual capacity on the Facebook page under the name of the Fiji Labour Party. The two scenarios are indeed very different. Whilst no court would seek to curtail a fair press, no court ought to permit baseless and unverified expressions of opinion, under the guise of the convenient and attractive umbrella of freedom of expression and public interest.*

*[100] The learned [High Court] judge then relied on Diplock J's much quoted summing up to the jury in **Silkin v. Beaverbrook Newspapers Limited**, [1958] 2 All E.R 516:*

> *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. "

[101] The learned [High Court] judge also relied on the following dicta in the judgment of this Court in ***Fiji Times Ltd v Vayeshnoi*** *(Civil Appeal ABU 0002/18, 18 July 2010):*

> *".. 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".*

[102] In my view every person who holds my[sic] office in a public corporation is not necessarily a "public figure". He may be well known in public, but that does not make him a public figure. In this case, though the 1st Appellant was a key figure in two public corporations that per se did not make him a public figure. Further, the matters alleged were reflective of decisions that could not have been taken by the 1st Appellant in individual capacity. In fact, the Respondent conceded that the 1st Respondent was not the cause of the strike at ATS. The matters relating to financial improprieties at FBC could also not have been attributed solely to the 1st Appellant. As I have found above, the Respondent targeted the 1st Appellant personally in his two different capacities. At ATS, he was Chairman who was faulted for not being able to amicably settle the strike. At FBC, as CEO he was faulted in for alleged financial impropriety. Above all, whether a public figure or not, the criticism has to be based on the truth. Comment will not be considered 'fair', if it is untrue. Therefore, I am unable to agree with the learned Judge's view that the 1st Appellant was a public figure who must be open to have his deeds and words criticized in public.

[103] Although it was in evidence that it was a government decision to allocate funds to the second regiment[sic], the Respondent maintained that he "believed in his heart that it was 'evil and wrong". This does not amount to the honest belief that is required in law. Therefore, it was without basis and therefore necessarily moves into the category of malice.

[104] The test of malice has been set out by Brett LJ in ***Clark v Molyneux*** *[1877] UKLawRpKQB 104; (1877) 3 QBD 237 at 247. If the defendant did not honestly believe that what he said was true, and he was indifferent to the truth or falsity of what he said that could amount to malice. The Respondent continuously maintained that the appellants were engaged in wrong and evil*

activities, and he hoped that his post would affect the Appellants. This was despite his having taken any constructive steps to complain to the relevant authorities investigate his allegations.

[105] Accordingly, if the statement is untrue then the defence of fair comment is not available. I am not satisfied that in this case the Respondent had established that the contents of the statement in the post was true. Therefore, the defence of fair comment is not open to the Respondent, and I hold that in this case, the evidence revealed that the statements were made with malice."

51. In contrast to the extensive review of the respondents' submissions as reflected in the Appeal Judge's findings above, the petitioner's position received only cursory mention before judgment was entered in favour of the respondents and the orders set out in paragraph 1 above were made.

The grounds of the application for special leave to this Court

52. The petitioner advanced five grounds in support of his application for special leave. The first three grounds were based on an overlapping argument that the Court of Appeal had erred in wrongly interpreting the law regarding the meaning of a defamatory statement, when no evidence from an ordinary person had been presented to establish whether the statements in the Facebook post had the tendency to: - harm the first and second respondents' reputation and lower them in the estimation of the community or of right thinking members of society generally; - and/or to deter other parties from associating or dealing with the respondents; - and also be likely to affect them adversely in the estimation of reasonable people.

53. In contrast to ordinary men and women, the petitioner submitted that the witnesses called on behalf of the respondents were all highly credentialled persons: namely, the first respondent in his capacities as Chairman and as CEO of two major State entities; Mr Joel Abraham, the CEO of the Fijian Competition and Consumer Commission (FCCC); and Ms. Janice Singh, the Director of Human Resources at the Fijian Broadcasting Commission (FBC). He contended these witnesses were not ordinary men and women in the mould of the classic definition of community representatives, as per the definition in ***Lewis v Daily Telegraph*** (supra).

54. A fourth ground advanced was error of law by the Appeal Judge in finding the petitioner's statement was not "fair comment" and not "justified" because he had not established the truth of every allegation in his Facebook post before posting it. He referred to the law as requiring a statement such as his to be read as a whole, and that the defence of fair comment and justification should succeed if the statement within it was substantially true. Referring to the truth of his Facebook post, the petitioner submitted:

> *(a) It was true that the 1st Respondent had imposed conditions on the workers at ATS to sign an undertaking before they could return to work.*
> *(b) It was true that the workers refused to sign the undertaking, and this resulted in the prolonged ATS strike. The Petitioner never stated that the 1st Respondent was incompetent on this basis neither did an ordinary person give evidence in the High Court and say that in his or her understanding the 1st Respondent was incompetent.*
> *(c) It was true that due to the worker's refusal to sign the undertaking they were locked out from their workplaces.*
> *(d) It was true that the FBC was in receipt of Government funding from 2010 to 2015 despite been granted a loan from the Fiji Development Bank in 2008 or 2009.*
> *(e) It was true that despite being assisted by funds paid by the Government the FBC suffered losses from 2010 to 2015.*
> *(f) It was true that the FBC had accumulated losses of about $30 million from 2009 to 2017.*

55. Further grounds in support of the petition were error of law in finding the petitioner's statement was not in the public interest; and that the Court of Appeal had erred in law in finding that the reference to FICAC by the Petitioner imputed corruption on the First Respondent's part when no ordinary person gave evidence to prove that such imputation was open.

The ordinary member of society test

56. There is no single definition of what might constitute a defamatory statement, either by way of the plain meaning of words in a statement; or by way of innuendo arising from those words. Each case is to be judged according to legal principles and in the context of contemporary social mores and rapidly evolving modes of communication. In those

contexts, whether or not a statement is defamatory is a matter to be assessed by ordinary members of society.

57. The long-standing test, originally formulated by Lord Atkin in ***Sim v Stretch***[6], remains relevant and in more modern parlance defines as defamatory a statement that injures the reputation of another by exposing them to hatred, contempt or ridicule; or which *tends to lower them in the eyes of reasonable members of society*. The yard stick of the reasonable or ordinary member of society simply connotes a notional law-abiding member of society whose views accord with generally accepted contemporary values.

58. Traditionally, defamation suits were tried by juries comprising representatives of contemporary society. Increasingly, however, defamation suits are tried as judge alone matters and section 11 of the Defamation Act 2013 (UK) now provides for trials in defamation cases to be without a jury unless the court orders otherwise.

59. In either case, whether judge or jury, the trier of fact, represents the reasonable member of society, somewhat akin to the person described by Diplock J in his 1958 summing up to the jury in ***Silkin v Beaverbrook Newspapers Limited***[7].

60. In the petitioner's case, the role of the ordinary person was fulfilled by the High Court Judge at first instance and by the Appeal Judge on appeal. In the Supreme Court it is fulfilled by the presiding judges. Each of those judicial officers represents the ordinary person charged with the objective task of assessing whether the petitioner's Facebook post had the tendency to lower the respondents in the eyes of reasonable members of society. His argument about error of law in failing to adduce evidence from ordinary men or women plucked randomly from the community for the task was misconceived.

The law of defamation

61. The common law principles relating to the law of defamation have been developed over time and continue to evolve alongside legislative requirements.

[6] [1936] 2 All ER 1237,1240.
[7] [1958] 2 All E.R 516

62. Of overarching importance in Fiji is Section 17 of the *Constitution of the Republic of Fiji* which enshrines the fundamental right to freedom of speech, expression, thought, opinion and publication, and includes the freedom to seek, receive and impart information, knowledge and ideas.

63. The other relevant legislative provisions in Fiji law are sections 15 and 16 of the *Defamation Act*.

64. Section 15 deals with Justification and provides:

> *"In an action for defamation in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."*

65. Section 16 provides for a defence of fair comment:

> *"In an action for defamation in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."*

66. Many of the relevant statements of principle developed in case law over time have already been cited and relied on in the judgments of both lower courts in this case and do not require repetition. An update of some interest (although not of direct relevance to this case) is the abolition of what was known as the ***Reynolds*** defence, consequent upon the enactment of the Defamation Act 2013 (UK). However, the partial defence in ***Reynolds*** was applicable only to media but the statements of principle in ***Reynolds*** and other cases relied on in the judgments below, about the important the competing social values at stake in balancing freedom of expression and the right to protection of reputation, continue as of primary relevance.

67. In terms of recent legislative reform, the Defamation Act 2013 (UK) introduced a much higher threshold, requiring proof of actual or probable serious harm to a claimant's reputation

in defamation cases, and in the case of corporations, proof of actual or likely loss. The Act is not a complete code but has replaced the common law defences of justification and fair comment (and the partial defence in ***Reynolds***) with new statutory defences of truth, honest opinion, publication on a matter of interest, and privileged publications.

68. In 2021, most states and territories in Australia moved to a "serious harm" threshold in defamation legislation requiring proof that an impugned publication has caused, or is likely to cause, serious harm to a plaintiff's reputation. In New South Wales legislation (at least), there is a defined category of plaintiff, referred to as an excluded corporation, that has standing to sue for defamation on proof that a publication has caused, or is likely to cause, serious financial loss to the corporation. An interesting aspect however, in the context of the present case, is that a corporation that is a "public body" has no cause of action for defamation in relation to the publication of defamatory material about it.

69. In New Zealand there has been a recent move towards the adoption of a more stringent test in the standard of proof required in defamation cases. This development in judicial thinking was discussed by Young J in the contemporaneous decision of this Court in ***Sharma v Biumaitotoya.***[8] After reviewing recent decisions of the New Zealand Courts and other common law authorities, Young J considered that a substantial harm threshold would provide a plausible and appropriate provisional measure of defamatory impact for the law of Fiji for present purposes, observing:

> *"Whether a substantial harm threshold, a lower harm threshold or no threshold should finally be adopted is for a future case based on a review of current practice in Fiji, analysis of the approaches taken in jurisdictions other than just England and Wales and New Zealand and careful consideration of the significance of the ways in which freedom of expression is protected by s 17 of the Constitution of Fiji."*

70. In line with the approach taken by Young J in ***Sharma v Biumaitotoya*** (supra) I will adopt the same provisional standard as an appropriate measure for determining whether there has been substantial harm in this case, should actual harm be proved.

[8] [2022] FJCA 169; ABU0039.2019 (25 November 2022).

Discussion

71. As the Judges did in the Courts below, I will analyse and assess the impugned statement, its meaning and foundation, in the context of the overarching constitutional right to freedom of expression and with regard to the provisions of ss 15 and 16 of the Defamation Act and the common law.

72. The common law over time has provided much guidance on how to assess a statement as 'fair comment' or as the defence is now known, 'honest opinion': (***Joseph v Spiller***[9] Supreme Court of England and Wales endorsing Lord Nicholls analysis of the elements of fair comment in ***Albert Cheng v Tse Wai Chun Paul***[10]***).***

73. The component elements of fair comment or 'honest opinion' are:

    1] that it is an expression of opinion as opposed to an allegation of fact;
    2] it is expressed on a factual reference point that is sufficiently indicated in the statement itself, or otherwise is generally well known or notorious;
    3] it is based on materially true facts known to the author at the time of publication;
    4] the author genuinely believed the meaning expressed at the time of publication.

74. In the subject case, the statement that is sued upon questioned in extremely critical terms the operation of two major public entities in which the first respondent, a high-profile public figure, held senior leadership positions: as chairman of the board of ATS and as CEO of FBC. The statements in the post, as the heading indicates, were primarily directed at the quality and integrity of his leadership as Chairman of ATS during the industrial crisis, which started in November 2017 and lasted until late January 2018. It was an industrial crisis of major proportions that was affecting the Fijian economy and had been squarely in the public domain on a daily basis for a month by the time the statement was posted. It continued to be of high interest in the public domain for some time afterwards. As a situation of national crisis, it was notorious.

[9] [2011] 1 All ER, 947
[10] [2000] 3 HKCFAR 339

75. The context and timing of the post was midway through this ongoing and highly-publicised crisis. The lockout had begun on 16 November 2017; the petitioner posted the impugned statement on 21 December 2017; and the lockout did not end until the orders of the Employment Relations Tribunal were issued on 23 January 2018, directing ATS to reinstate the employee shareholders and reimburse their lost pay.

(a) <u>Overview and title of the post</u>

76. The title and main thrust of the statements in the post were primarily directed to and concerned with the strike. The title of the post proclaimed:

> ***"RIYAZ MUST RESIGN AS ATS CHAIRMAN AND GET OUT"***
> ***Labasa 21:12:2017***

77. The title as worded is an expression of opinion and is not a statement of fact. It is an expression of the petitioner's personal view about the first respondent's style of chairmanship of ATS and his failed attempt to intervene in and end the lockout situation.

78. The focus on the lockout and how the first respondent handled it as Chairman is further clear in paragraphs (i), (iv) and (v) of the post, which were directed at the first respondent's leadership role at ATS and his handling of the lockout.

79. The statements in (ii) and (iii) which are midway through the post appear almost as gratuitous additions (albeit they <u>may</u> inflict a 'sting' which possibility will shortly be discussed) to the main thrust of the post, which is clearly directed to the first respondent's handling of the lockout of the ATS employee shareholders.

(b) <u>The further paragraphs in the post</u>

80. As to the nature of each statement in the post, whether it is an expression of opinion or asserted as a statement of fact, the following is my analysis:

> *vi.* ***Admit it, Riyaz, you are the problem the Jonah In that sinking ATS ship. Resign and get out and save us all the embarrassment.***

81. This paragraph is not a statement of fact. It employs hyperbole and uses a metaphor. The assertion that the first petitioner is "the problem" is not a statement of fact but an extension of the expression of opinion in the title of the post, calling on the first respondent to resign from his position at ATS. Telling him he should admit something and must resign is not stating a fact but is expressing an opinion and the forceful manner in which the opinion is expressed does not alter its character. There was also a factual basis for the references to the first respondent being "the problem". While he may not have been responsible for the initial lockout, the factual basis for the hyperbole would appear to be his somewhat misconceived attempt to intervene in the lockout situation and strike a bargain with the employee shareholders, when that may not have been in accordance with their rights, and he was not in a management role. The references to him 'bringing bad luck' to ATS in the context of the failed attempt to end the lockout, and to ATS as a 'sinking ship' in the context of the huge financial impact of the ongoing lockout on ATS, were not statements of fact or malicious untruths. They were extravagant, colourful and hyper critical statements of opinion.

vii. ***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.***

82. This again is a statement of opinion, framed as rhetorical questions and using hypothetical speculation. It is a sweeping statement with a dramatic air but with a factual basis, as although the initial lock out was effected by the Chief Executive of ATS, it was the first respondent who used his position as Chairman of ATS to try and persuade the employee shareholders to return to work but on condition that all who had attended the stop work meeting would have to sign an undertaking. It was that undertaking that is referred to by the petitioner in his Facebook post, and which he characterised, not inaccurately, as the first respondent requiring an admission of wrong conduct from employee shareholders and an agreement that might possibly inhibit their employment rights in the future. While couched in strong rhetoric the statement has a factual foundation.

<u>You know you don't have it in you Riyaz. Just resign and get out</u>

83. Again, this is not a statement of fact. It is an expression of opinion expressed as a wrap-up and sign off to the post, albeit somewhat vehement.

84. Turning to statements (ii) and (iii) in the middle of the post, it is convenient to consider these together, as both concern the first respondent's role as CEO of FBC. I have referred to them as almost gratuitous in their inclusion in the post, as the post is primarily critical of the handling of the ATS lockout, and they appear to have been included as something of a make weight to add emphasis to the petitioner's opinion about the first respondent's conduct of his senior public roles.

> *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 S20M debt upgrade on FBC,***
>
> *viii.* ***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.***

85. The High Court Judge found these paragraphs did no more than beg the question as to why FICAC had not investigated the matters stated in them, and that the petitioner as an MP was entitled to raise such queries as a matter of public interest. With respect I agree with the essence of the High Court Judge's succinct finding.

86. In determining otherwise, the Appeal Judge found the words to have been a targeted attack on the first respondent personally and that the inclusion of a reference to FICAC was defamatory as it imputed corruption on the part of the respondents. The Judge referred to the absence of any evidence adduced by the petitioner about who the "former associate turned supplier" might have been, the absence of any complaint about such a matter, the absence of any evidence about a complaint having been made to FICAC, or a possible investigation by FICAC, and the fact that such allegations were not broached by the petitioner during the Select Committee hearing in 2019.

87. The Appeal Judge also found the High Court Judge's reliance on ***Lewis v Daily Telegraph Ltd*** to have been misconceived. In her opinion the facts in ***Lewis*** were able to be distinguished from the facts in the petitioner's case. She construed ***Lewis*** as concerning a police investigation as opposed to a fraud investigation which could inflict a reputational 'sting'. To quote her reasoning on this matter:

> *"In Lewis, (supra) an investigation was being conducted at the time, and the court said that the sting is in the inferences drawn from the fact that it is the fraud squad that was is making the inquiry.*
>
> *[78] However, in this appeal the reference to FICAC changes the complexion of the matter. It is not a regular police investigation, as was the case in **Lewis** (supra). .....*
>
> *In this case the sting is in the reference to FICAC, and the reasonable imputations that flow from that because in Fiji, FICAC is the institution dedicated to the investigation and prosecution of corruption. An allegation of corruption is certainly more serious than the allegation in **Lewis** (supra)."*

88. This however misconstrued the nature of the investigation into the Lewis companies which was being conducted by the City of London Fraud Squad. This was not a regular police investigation, as the Appeal Judge thought, but an investigation into possible fraud in an era which preceded independent anti-corruption and fraud agencies and when police forces operated their own specialist fraud squads within the force.

89. The company' chairman in ***Lewis*** had asserted that the natural and ordinary meaning of the article published in the Daily Telegraph 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 and that as a matter of law a statement about such an inquiry can mean suspicion but cannot be held to infer guilt, per Lord Reid at 258-260*:*

> *"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 the ordinary man, not avid for scandal, would read into the words … 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.

per Lord Devlin at pg 286:

If the ordinary sensible man was capable of thinking that wherever there was a police inquiry there was guilt, it would be almost impossible to give accurate information about anything; but in my opinion he is not."

90. In line with the guidance in ***Lewis*** the plain meaning of paragraphs (ii) and (iii) in the post require assessment by reference to the natural and ordinary meaning of the words chosen and how these might be construed by the ordinary sensible member of contemporary society. It is also necessary to determine whether there was a foundation of fact underpinning the statements, against which their extravagant language and the imputation of corruption might be assessed.

91. There was a factual foundation for the statements and a known public context. This is, for example, evident in the series of posts introduced into evidence by the respondents, including the 21 July 2017 statement posted on the Fiji Labour Party's Facebook page titled *FBC sues Fiji Labour Party* (set out in full in paragraph [21] above). That post concerned the filing of a writ of action in the High Court against the Fiji Labour Party by the first respondent in his capacity as CEO of FBC and by FBC. Significantly, the statement had been posted by FLP more than a year earlier on its Facebook page, which had an open readership. The post is evidence there were hard questions already circulating in the public domain, at least a year earlier, about FBC's financial stability and structuring. In the post the FLP had adverted to *…a huge jump in State allocation to FBC from $2.9m previously to $11.3m over a one year period after Aiyaz Sayed Khaiyum took over as Finance/Economy Minister.*

92. The FLP post also referred to the fact that FBC had not published its annual reports and audited accounts for several years. It is probably not without significance that, not long after the petitioner's posted his impugned statement of 17 December 2017, FBC tabled 5 years'

worth of annual reports in Parliament. Although the petitioner failed in an attempt to introduce into evidence relevant copies of Hansard and other official reports about such matters, that is of no moment as these are readily available public records.

93. The petitioner's case was that the statements in paragraphs (ii) and (iii) in his post were founded in fact because, in his words:

> *(a) It was true that the FBC was in receipt of Government funding from 2010 to 2015 despite been granted a loan from the Fiji Development Bank in 2008 or 2009.*
> *(b) It was true that despite being assisted by funds paid by the Government the FBC suffered losses from 2010 to 2015.*
> *(c) It was true that the FBC had accumulated losses of about $30 million from 2009 to 2017.*

94. The factual foundation listed by the petitioner above is irrefutable.

95. While there was no evidence at the trial to establish who any *"associate turned supplier"* might have been, that is only one aspect in paragraph (ii) of the impugned post. In contrast and as referred to above, it appears that a good deal of notoriety had already been circulating in the public arena for some time about the financial stability and financial arrangements of FBC by the time of the petitioner's post. Given that, his loose reference to the financial situation as a "mess" could not be characterised as defamatory. FBC was and is a major public entity owned by the Government and therefore by the tax paying public and its operating costs and financial affairs were rightly a matter of public interest. The petitioner was a Member of Parliament and in that capacity could not be criticised for speaking out about a matter of legitimate public interest and concern.

96. It is correct that the statements were personally directed to the first respondent in his different leadership roles in each separate organisation, but that selectivity did not render them malicious per se.

97. On the matter of legitimate public interest, Lord Denning, MR in ***London Artists Ltd v Littler***[11] said there is no hard and fast definition of public interest but:

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

98. Counsel for the respondents, Mr Sharma, in his submissions at the leave hearing before this Court suggested that this case simply concerned a defamation action between three parties. Clearly that is not a correct analysis of the situation. This case concerned matters of wide public interest and involved persons and corporate entities with high public profiles.

Conclusion

99. Applying the test for fair comment or honest opinion, the Court finds that the statements in the petitioner's Facebook post sufficiently meet all aspects of the test to lead to the conclusion that the post was not defamatory. It clearly contained expressions of opinion as opposed to allegations of fact; it was expressed on factual reference points that were sufficiently indicated within the post and were also in the public arena to a notorious extent; it was based on materially true facts that were known to the petitioner at the time he made the post in his capacity as a concerned Member of Parliament; and there is no reason to doubt the petitioner did not genuinely believe in the views he expressed in his post at the time of its publication.

100. Having regard also to section 16 of the Defamation Act, it follows that, although the truth or accuracy of every allegation of fact in the petitioner's post was not established (and that probably applies only to the reference to a *former associate, turned supplier*) his petition succeeds as meeting the test of fair comment, having regard to the facts that he alleged or referred to are proven.

[11] [1969] 2 QB 375

101. It follows that the Court has found the statements in the petitioner's Facebook post of 21/12/2017 were not defamatory of the respondents and the petitioner's application for leave to appeal the judgment of the Court of Appeal is granted pursuant to section 7(3) (b) and (c) of the Supreme Court Act, which sections provide:

> *"(3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant…leave to appeal unless the case raises:*
>
> *(b) a matter of great general or public importance;*
> *(c) a matter that is otherwise of substantial general interest to the administration of civil justice."*

Orders of the Court:

1. *The application for leave to appeal is granted.*
2. *The appeal is granted.*
3. *The respondents are to pay costs of $10,000 to the petitioner.*

The Hon. Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Justice William Calanchini
JUDGE OF THE SUPREME COURT

The Hon. Justice Lowell Goddard
JUDGE OF THE SUPREME COURT

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