IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 117 of 2017

IN THE MATTER of the Companies Act 2015

AND

IN THE MATTER of an application under Section 176 of the Companies Act 2015.

BETWEEN : **VILIAME FINAU, JAI D SINGH, IVA LENOA, MOHAMMED F. LATEEF, MANASA RATUVILI, KEVUELI TUNIDAU** and **BOB TUILAKEPA** all of Nadi as Trustees of **THE ATS EMPLOYEES TRUST**.

PLAINTIFFS

AND : **CIVIL AVIATION AUTHORTIY OF FIJI** an authority incorporated under the Civil Aviation Act with office at Nadi Airport.

1ST DEFENDANT

AND : **THE ATTORNEY GENERAL ON BEHALF OF THE PERMANENT SECRETARY FOR ECONOMY** under the State Proceedings Act.

2ND DEFENDANT

AND : **AIR TERMINAL SERVICES (FIJI) LIMITED** a liability company with registered office at ATS Head Office, Cruickshank Road, PMB, Nadi Airport, Nadi.

3RD DEFENDANT

AND : **ALAN SUCHIN** of Nadi, Company Secretary.

4TH DEFENDANT

Appearances : Ms P. Prasad for the applicant/ 2nd defendant
Mr P. Chauhan for the applicants/ 3rd & 4th defendants
Mr R. Tikoca for the respondent (contemnor)/2nd named plaintiff
Date of Hearing : 03 July 2018
Date of Sentence : 06 July 2018

SENTENCING REMARKS

Introduction

[01] Mr Jai D Singh, you are not here for the present. You are represented by your counsel.

[02] You are to be sentenced for acts of contempt of court, which the applicants have proved beyond reasonable doubt at a hearing before me on 8 May 2018.

[03] You along with other plaintiffs, brought a claim against the defendants seeking a declaration that the Articles of Association of Air Terminal Services (Fiji) Ltd, the third defendant ('ATS') which expressly permitted the removal of the directors of ATS was oppressive and prejudicial to ATS Employees Trust and that your removal (among others) from the board of directors of ATS was illegal, oppressive, null and void. The defendants filed their striking-out application. The striking application was heard on 07 August 2017 and after a few adjournments, the court delivered its ruling on 06 February 2018 striking out your claim on the basis that your claim was both 'bad in law' and 'weak in evidence'.

[04] Before delivering the ruling on the defendants' striking-out application on 06 February 2018, you filed an *ex parte* application on 27 September 2017. In that application, you sought an order on *ex parte* to stop the AGM scheduled to be held on 28 September 2017. The basis for seeking the order was that the holding of the AGM would prejudice the outcome of the pending case where this court had to rule on the defendants' applications for striking-out the action. The court heard and decided upon your *ex parte* application on the same day (27 September 2017) in which it was filed. The court refused the orders you sought in that application on the ground that you came to court late to stop the

meeting, albeit you had received notice of the meeting some 3 weeks ahead of your application.

[05] On 15 June 2017, you filed an *ex parte* application seeking a stay on the decision of the second defendant removing you (among others) from the board of directors. The relief you sought in your *ex parte* application appeared to be one of the substantive relief prayed for in your claim. Courts cannot grant a substantive relief in an *ex parte* application. It was on that basis, the court ordered that your *ex parte* application should be heard *inter partes* with a short returnable date.

[06] In your statement, you say the court should hear any *ex parte* application within 2 weeks. There is no legal requirement that a court shall hear and decide any *ex parte* application within 2 weeks. It is worth noting that any time limit directed to courts would be taken as directory even where the provision of the law used the mandatory term such as "shall". The court has the discretion to grant interim orders in any proceedings. However, no party is entitled to demand the exercise of the court's discretion in his or her favour.

The facts for sentencing

[07] Before the court delivered its ruling on the defendants' striking-out application, you made various statements and interviews regarding the outcome of the case, the Judge who was nominated to hear and decide the case and the entire Fijian judiciary on different occasions. Your statements and interviews include the following:

i. Our expenditure has always been low but because of Riyaz's action and Ministry's muck up, we will be spending like $50,000 in legal fees and these beneficiaries will lose out on their dividend. [...] These beneficiaries will lose out and this is the case we have got in court [...].

ii. It was *ex parte* motion, the parties were all prepared for it. The man who was supposed to be listening to it, the Judge, said oh sorry I can't have *ex parte*. It has to be inter parte[s]. Here we have got a legal question of removal of illegal directors, the board meeting will have to happen, it will affect the Company, he wasn't worried. [...]. You know what is the first thing they did, throw the case out. That's from the Ministry. So the judge

said I cannot throw the case out. So it went for October, then the judge said oh I haven't completed it so it goes to February 23rd [2018]. [...] Ex Parte Motion has to be decided within 2 weeks period of time. Do you think he'll make a decision, I don't think so. [...].

iii. Because remember all the judges are in the hands of one person, the contracts are signed by him.

[08] You made the comments while your case was still pending in court. This is not a one-single incident. You were making comments one after another. Firstly, you made your comments at a meeting when members of the ATS Employees Trust and journalists were in attendance. This was video recorded and published on Facebook. Secondly, you gave an interview commenting on the judge who was hearing your case and the entire Fijian Judiciary. Your statements were calculated to undermine the judiciary. Your statements were widely circulated.

The Law

[09] In Fiji, unlike in the UK, there is no specific law providing a maximum sentence for contempt of court. Common law assistance may be sought in this regards. In the UK, the maximum sentence for contempt of court is two years of immediate imprisonment (see section 15 of the UK Contempt of Court Act 1981). Lesser punishment can be imposed.

[10] In *Fiji Times Ltd v Attorney General of Fiji* [2017] FJSC 13; CBV005.2015 (21 April 2017), the Supreme Court of Fiji stated that: *"there is no Statute Law in Fiji dealing with contempt"* [scandalising the Court] *"and it is the Common Law principles that apply"*.

[11] I can impose a suspended sentence of imprisonment or a fine, or I can make costs order and make no further order or I can make a combination of these orders. I do not think that I can make some of the orders which a criminal court could make, such as community orders.

[12] Hon. Justice Calanchini (as he then was), in *State v Fiji Times Ltd, ex parte Attorney General* [2013] FJHC 59; HBC343.2011 (20 February 2013), this case was approved by the Supreme Court in *Fiji Times Ltd v Attorney General of Fiji* [2017] FJSC 13;

CBV0005.2015 (21 April 2017), on the governing principle applicable to determination of penalty for contempt of scandalising the court said this at paras 11, 12, 13, 28 & 29:

"[11]. The task for the Court now is to determine how should its power to punish the Respondents for contempt of court under Order 52 of the High Court Rules be exercised? In my judgment this is a case of contempt of court which should be punished by a penalty that reflects the public interest, acts as a deterrence and appropriately denounces the conduct of the Respondents. This is not a case where the mere ordeal of court proceedings and an offer to pay costs with an apology is sufficient. Such an approach would send suggest that the court does not take seriously the role of safeguarding the community from scurrilous attacks on its judiciary amounting to contempt scandalizing the court.

[12]. In determining what penalty should be imposed on each of the Respondents there are a number of factors that have been identified in the authorities that are usually considered to be relevant. In **Attorney General for the State of New South Wales – v- Radio 2UE Sydney Pty Limited and John Laws** (unreported appeal decision of the New South Wales Supreme Court No. 40236 of 1998 delivered 11 March 1998; [1998] NSWSC 29) Powell J A observed:

> *"In determining what, if any, is the penalty appropriate to be imposed on a person found guilty of a contempt of court, it is proper for the Court to have regard to such matters as the objective seriousness of the contempt found established, the culpability as for example, whether the relevant statement was made, or the relevant act was done deliberately, with intent to interfere with the administration of justice, or recklessly, or as the result of gross negligence, or, although intended, without any appreciation of the potential consequences of the act or statement – of the person found to have been guilty of the contempt and any other subjective factors."*

[13]. Apart from seriousness and culpability, other factors that should be considered in the present case are (i) any early plea of guilty, (ii) any previous convictions, (iii) any demonstration of remorse and (iv) the personal circumstances of the Respondents.

[28]. At the outset, it is noted that at all times up to hearing of the Applicant's Motion the Respondents all maintained pleas of not guilty. As a result the Respondents cannot claim any indulgence from the court on that basis.

[29]. That leaves the question of remorse. After the finding of guilt the Respondents have, in the various mitigation affidavits, expressed remorse for the contempt. To what extent should the court regard such expressions of remorse as genuine and how much weight should the court attach to such expressions of remorse? In my view usually a plea of not guilty is inconsistent with a submission of genuine remorse or contrition. During the course of the present proceedings it became apparent that the plea of not guilty entered by all three Respondents was on the basis that the article did not amount to contempt scandalizing the court. Then the Second and Third Respondents appeared to be claiming that even if the article was contemptuous, they could not be held responsible and that no culpability should be attached to either of them. If the only basis for pleading not guilty had been that the article was not contemptuous then it might have been open to submit that the Respondents regretted the publication and were remorseful on the basis that it had been considered not to be contemptuous. On the basis of the affidavit material before the court it may have been possible for the court to conclude that there was a suggestion of genuine remorse. However when the Second and Third Respondents as a basis of their not guilty pleas claimed not to be responsible and denied culpability, any plea in mitigation that involved a claim of genuine remorse must necessarily be regarded as less worthy of credit."

[13] Sir Thomas Bingham MR, delivering the English Court of Appeal decision in *Villiers v Villiers* [1994] 1 WLR 493, said this at page 498C:

> *"It emerges quit clearly from [cases on this subject] that the court does have the power expressed in the rules of the Supreme Court to suspend sentences for contempt; and that in exercising that power the court is not constrained by the limitations which are imposed on the imposition of suspended sentences on the commission of criminal offences.* ***In other words, limitations as to the imposition of young offenders and first offenders do not apply.*** *..."*
> (Emphasis supplied)

The offending

[14] The seriousness of the offending is the primary consideration in sentencing. I need to consider the harm caused and culpability on your part. In doing so, I will have regard to aggravating and mitigating factors.

[15] Another consideration is whether the offending crosses the custody threshold. In this context, the overall purpose of contempt proceedings in this instance is to ensure public confidence in the judiciary as a whole.

[16] It is important to note that you have committed multiple acts of contempt of (scandalising) court. I also note that your contemptuous statements were spread like wildfire in Fiji and beyond via Facebook.

Aggravating factors

[17] There are a number of aggravating factors. These include (1) a number of repeated statements scandalising the entire judiciary of Fiji and judicial officer who was hearing your case while the case was still pending. (2) in making the statement to the media and giving an interview to FBC News you clearly intended wider publicity of your statements. (3) You have taken no steps to purge your contempt. You had maintained not guilty throughout the hearing on the committal proceedings right up to when you were found guilty. (4) You have not shown remorse for what you had done. Your statements have in fact severe impact on the judiciary of Fiji in undermining public confidence in the administration of justice in Fiji, a small developing country.

Mitigating factors

[18] You did not file an affidavit explaining in detail your personal background, the background to the offending and reasons why it might be harsh to impose a sentence of immediate imprisonment. However, your counsel on your behalf submits that: you are an exemplary engineer and because of your work ethics and a clean record from the authorities, you were chosen to be one of the Trustees for ATSET and later became the Chairperson and Director for ATSET. Your appointment as Trustee, Chairperson and Director reflects on how far you have come in safeguarding the best interest of all the employees of ATS. Your appointment meant that you had to leave overseas and work in Fiji. Now you have been found guilty for contempt of court, all your hard work, especially in your role as Trustee and Chairperson, will inevitably be revoked. Finally, your counsel submits, given the suffering you have already experienced, that the court should make an order to discharge you subject to the condition that you enter into a bond without surety [to] be of good behaviour for a period of 12 months.

[19] You have a clean record. You have no previous conviction. I give appropriate weight to that.

The sentence

[20] In order to determine your penalty for the contempt, I have taken all the factors into consideration. For the present purpose, the sentence must: (a) reflect public interest; (b) act as deterrence, and (c) appropriately denounce the contemnor.

[21] You had committed serious contempt of scandalising the court and the entire Fijian judiciary for which you have no remorse.

[22] I have given appropriate weight to your previous good conduct. There is no evidence that you have any adverse medical conditions.

[23] In Fiji, the sentencing range for contempt of scandalising the court appears to be between 3 and 6 months' imprisonment. In *Vijay Paramanandam v Attorney General* (1972) 18 FLR 90 (23 June 1972), the High Court imposed a sentence of 6 months' imprisonment for contempt of scandalising the court, but on appeal, the Court of Appeal reduced the sentence to 3 months.

[24] In your case, having considered all those factors the sentence I would impose is one of 3 months' imprisonment. This is the possible sentence I can impose, having regard to the seriousness of the offence. For this purpose, I convict you as charged for contempt of scandalising the court. I have the power to suspend the sentence. It would have led me to suspend the sentence, if you had pleaded guilty and if there were not the aggravating features I have stated. The offending here is so serious. It crosses the custody threshold. A custodial sentence is inevitable in your case. The harm done to the judiciary is particularly serious because it was a deliberate, flagrant, persistent and inexcusable statement scandalising the entire Fijian Judiciary with a full understanding of what you were doing. AS Sir Thomas Bingham MR (above) said the limitations as to the imposition of first offenders do not apply [in sentencing for contempt of court].

[25] There is a claim for costs of these proceedings. I have already ordered costs against you in my judgment on the committal proceedings when I ordered you to pay the sum of $9,000.00 to the applicants. That is a very large sum. I do not intend to make further costs order against you in these proceedings.

[26] Mr Jai D Singh, with regret, I convict you as charged for contempt of scandalising the court and the sentence will be one of immediate imprisonment

of a period of three (3) months. Your sentence will become effective from the date of your arrest. I issue a Bench Warrant for your arrest.

6/7/18

.....

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

06 July 2018

Solicitors:

For the applicant/second defendant: Office of the Attorney General
For the applicants/3rd & 4th defendants: M/s R. Patel Lawyers, Barristers & Solicitors
For the contemnor/2nd named plaintiff: M/s Vuataki Law