

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 83 of 2019

BETWEEN: **AIYAZ SAYED-KHAIYUM** of Suvavou House, Victoria Parade, Suva, the Attorney General,
Minister for Economy, Civil Service and Communications of Fiji.

PLAINTIFF

AND: **RATU ISOA DELAMISI TIKOCA** C/-SODELPA Office, Dension Road, Suva.

DEFENDANT

BEFORE: Hon. Mr. Justice Vishwa Datt Sharma

COUNSEL: Mr. Devanesh Sharma - for the Plaintiff
 No appearance - for the Defendant

DATE OF JUDGMENT: 25th February, 2021 @ 9.30 am

JUDGMENT
[Assessment of Damages]

INTRODUCTION

1. The Plaintiff filed a Writ of Summons coupled with a Statement of Claim on 21st of March, 2019 against the Defendant and sought for the following reliefs:
 - a) **Damages for libel and slander;**
 - b) **Punitive, Exemplary and Aggravated damages;**
 - c) **An Order that the Defendant within 7 days render in writing a public retraction and apology in prominent print to the Plaintiff to be published in a daily newspaper circulating in Fiji;**
 - d) **Pre-judgment and post-judgment on any award of damages;**
 - e) **Costs of this action on a substantial-indemnity basis plus taxes; and**
 - f) **Such further and other relief as this Court may deem just.**
2. On 15th April, 2019, leave was granted to the Plaintiff to serve the Writ of Summons and all other documents by way of an advertisement in the local newspaper "Fiji Sun" upon the grounds contained in the affidavit of Lemeki Sevutia.
3. However, on 16th May, 2019 the Defendant was served personally at his Residence at Lot 3, Oneata place, Samabula, Suva. An Affidavit of Service confirming service of the document on the Defendant was filed into court on 19th of January, 2019.
4. The Defendant failed to file any Acknowledge of Service and the Statement of Defence as was required of him to be filed in terms of the High Court Rules 1988.
5. On 5th November, 2019, a search for an Acknowledgment of Service and the Statement of Defence was filed by the Plaintiff which revealed the absence of any Acknowledgment of Service and the Statement of Defence filed by the Defendant within the court file record.
6. On 7th of November, 2019, this court granted the order for an Interlocutory Judgment be entered against the Defendant. It was adjudged that the Defendant to pay the Plaintiff Damages to be assessed for Defamation together with a sum of \$320.00 costs of this action.
7. Subsequent to the Plaintiff obtaining the court order in terms of the **Interlocutory Judgment against the Defendant**, the Plaintiff filed the **Summons for Assessment for Damages and other relief on 16th July, 2020.**
8. The application was made pursuant to **Order 19 r.3, Order 37, Order 38 r.2 (1) and Order 10 r.2 (b) of the High Court Rules 1988.** The Plaintiff relied on the affidavit deposed by the Plaintiff Aiyaz Sayed-Khaiyum filed in support of the Summons.
9. On 11th September, 2020, the Defendant was served with the following documents at his residence at Lot 3, Oneata Place, Samabula, Suva -

- a) Interlocutory Judgment;
 - b) Summons for Assessment for Damages;
 - c) Affidavit in Support, and
 - d) Letter.
10. Counsel Mr. Nair .D and Mr. Sharma .N represented the Defendant on the returnable and the adjournment dates on the summons for Assessments of Damages but later withdrew their representations.
11. The Court ordered that a Notice of Adjourned Hearing to be served on the Defendant. The same was accordingly served onto the Defendant requiring the Defendant's attendance on 30th November, 2020. The court record will confirm that again the Defendant failed to appear either in person or by counsel to defend the proceedings filed by the Plaintiff.
12. The Plaintiff's summons seeking for the **Assessment of Damages and other relief** proceeded to Hearing on 17th December, 2020 in the absence of the Defendant. The Plaintiff's counsel furnished court with a Written Submissions for courts consideration and determination accordingly.

FACTUAL BACKGROUND

13. In about late January or mid February 2018, the Defendant intentionally or recklessly slandered the Plaintiff in an interview with a Sydney Community Radio Station where he spoke in the iTaukei Language and made statements without due regard to the truth or veracity of its contents.
14. The said interview was uploaded on a Facebook Page titled "**Fiji Exposed Forum**" by one Aklesh Vince Singh. The video was also transcribed by the Aklesh Vince Singh.
15. The Defendant's interview contained the following statements:

Translation:

- a) *Khaiyum and his community has been searching for a unique race to fulfill this agenda.*
- b) *Last year contractual arrangements have been implemented for civil servants from three months to five years. The most being five years. Within five years the amount of civil servants being replaced will amount to 2550 people.*
- c) *These people are the ones that stand in the way of Khaiyum having more power and in him completing tasks that he's set out to do.*
- d) *Once these civil servants have been replaced, they will not have any jobs to support themselves yet that's where these Freebies come in and are utilized to pacify the population.*

- e) *This is the devious scheme that Khaiyum is masterminding without Bainimarama having a clue whatsoever. This is why they've discontinued the letters to the editor lest the public be made aware.*
- f) *Last year AG ordered the military to arrest people who walked out and were locked out in Nadi (ATS). While the military was on their way there an order was given from the camp for personnel to return.*
- g) *At the moment PM's relations with the military are giving AG pause, yet AG is just waiting for the right moment to strengthen ties with the military to remove PM out of the picture. He's not going to do it right now but instead wait to win the elections to bring in those 2, 550 civil servants of his choosing within the 5 yr time frame of contracts expiring.*
- h) *This enables him to have full control of the commercial sector and government services/ civil servants positions that will give him the ability to completely utilise his 'sunset clause'.*
- i) *Without Saneem and AG then the outcome of this election will be transparent and positive.*
- j) *Whoever wins will do so without conniving and saving their own interests with lies and devices to the general public as AG is only interest in taking the land of the iTaukei people and implemented his sunset clause."*

DETERMINATION

16. **Prima Facie**, the statements made in the Defendant's interview with a **Sydney community Radio Station** and subsequently uploaded on a **Facebook page titled 'Fiji Exposed Forum'** tantamount to **Defamatory** in nature, unless and until the Defendant proves the truth of the allegation made in the Defendant's statements therein.
17. However, the Defendant upon the service of the substantive Writ of Summons coupled with the Affidavits deposed by the Plaintiff failed to face up the court either in person and/or by representation to prove the truth of the allegations in the Defendants statements which was categorically denied by the Plaintiff. Further, the Defendant did not come up to the court to challenge the English translation version on the statements made.
18. The Defendants failure to do so resulted in the court entering an **Interlocutory Judgment** in terms of the Plaintiff's substantive statement of claim filed herein against the Defendant **'Adjudging the Defendant to pay the Plaintiff the Damages to be assessed for Defamation and a sum of \$320.60 costs** of this action on 7th November, 2019.
19. Thus, the application by the Plaintiff seeking for **Assessment of Damages and other relief** therein against the Defendant.

Damages in Libel and Slander

20. Libel and slander are types of Defamatory statements.
21. It is important to bear in mind the subtle but important distinction between the basis for an award of damages in a claim for **libel**, where the **words complained of are published in a permanent form**, and in a claim based on **slander**, where the **words are spoken or in some other transient form**. In the current case, the words or the statements made was **published in the Facebook page titled 'Fiji Exposed Forum'** and the words spoken in the interview appeared on the **Sydney community Radio Station**.
22. **Damages** are the principal **remedy for libel and slander**. In addition to damages, the court may also order an injunction **restraining the defendant from further publication of the defamation**. Even though an action in defamation is really an action to repair damage caused to the plaintiff's reputation, the court does not have the power to order the defendant to publish an apology.
23. There are **two types of damages** that may be awarded by the court. These are **general damages** and **exemplary damages**. There is a subset of general damages which is called **aggravated damages** and which is sometimes viewed as a third and distinct type of damages. A possible explanation for this distinction is that in certain cases the court has awarded **aggravated damages as a separate head of compensation from general damages**. Aggravated damages are essentially damages taking into account the aggravating factors ie factors which aggravate the damage that has been caused and which justify a higher amount of general damages being awarded.
24. The purpose of **general damages** is to **compensate the plaintiff for the effects of the defamatory statement**. Unlike damages recoverable for personal injury or property damage, general damages in defamation claims serve different functions. Such damages are intended to **console the Plaintiff for the hurt and distress that has been caused by the defamation**. It is also intended to **redress** (insofar as a monetary award is able to) the **harm** that has been caused to his **reputation and as a vindication of his reputation**.
25. In **Defamation**, general damages are 'at large'. By this, it is meant that the damages cannot be assessed by means of any mechanical, arithmetic or objective formula or method. The court assesses damages after hearing all the evidence.
26. The **liable** or **slander** of the words spoken by the Defendant (since Interlocutory Judgment was already entered by the court against the Defendant on 7th November, 2019) in their plain ordinary meaning was understood to mean:
 - a) That the Plaintiff was engaging in devious schemes, criminal and illegal acts;
 - b) That the Plaintiff was engaged in discrimination and racism.
 - c) That the Plaintiff was abusing his powers as a Minister and ordering the military and police to arrest striking ATS employees.
 - d) The Plaintiff was engaged in illegal activities to influence the outcome of the 2018 General Elections.

27. The allegations made in the statements are very **serious** in nature. The allegation of this nature does not give anyone or the Defendant in particular any licence or freedom to make these allegations unless they are true in nature and justifiable on very strong grounds.
28. The Defendant's statements caused substantial damage to the Plaintiff's reputation in his capacity as a **member of the Parliament, Minister for Economy and the Attorney General of Fiji** accordingly.

Damages - General [On compensatory basis]

29. The words published by the Defendant were calculated to **disparage the Plaintiff in his profession** and bring the Plaintiff into **contempt, hatred, ridicule and to injure his character**.
30. **Interlocutory judgment** was entered against the Defendant for **uttering the words in a radio broadcast and published in the Facebook page titled 'Fiji Exposed Forum'** which were alleged to be **slandorous and libelous**.
31. Reference is made to the case of **Reyond v Times Newspaer Ltd and Others'** (1999) 4 All.ER 609, Lord Nicholas of Birkenhead said at p.622 which reflects the effect of slanderous words uttered;

"Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate 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 the reputation of public figures should not be debased falsely. In the political field, in order to make an 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 reputations of others". (Underline mine)

32. The Defendant's statements were specifically designed to **impugn the Plaintiff's character and reputation** and bring him into **public ridicule**.
33. The offending words and statements made by the Defendant have subjected the **Plaintiff to public hatred, ridicule and contempt bearing in mind that the Plaintiff is a member of Parliament, a Minister and the Attorney General**. The recent case Authority of the High Court in **Atil Chandra Gosai v Suresh Pratap - Lautoka High Court Civil Action No, HBC 299 of 2005 [TAB 1] refers.**
34. As stated by **Duncan and Neil on Defamation** (1978 Edition) at page 130 for **compensatory damages**, the 'basic rule of common law is that in civil action, damages are awarded as compensation for injury, not as punishment for wrongdoing'. (18.03). The authors go onto state:

The purpose of an award of compensatory damages is to restore the plaintiff, as far as money can do so, to the position he would have been in if the tort had not been committed. This principle of *restitutio in integrum* was stated by Lord Blackburn in *Livingstone v Rawyards Coal Co* as follows:

'Where any injury is to be compensated by damages, in setting the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which would put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.' (underline mine)

35. The nature of Damages and the purposes for which it is awarded has been well expressed by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* [1967] 117 CLR at 150:

"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as vindication of the Plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measureable in money."

"That is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of truth of the matters complained of, or the malice of the Defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libeled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being "at large" (underline mine)

36. The factors that should be considered in awarding **General damages on compensatory basis** apart from the **seriousness of the libel** can be found in *Neil* (supra) at 18.09. They are (a) **special damages**; (b) **injury to the plaintiff's feelings including aggravating factors**; (c) **extent of the publication**; and (d) **mitigating factors**.'

37. The factors that are relevant in considering the measure of damages in defamation cases can be found in the **Singapore Court of Appeal** case of **Tang Liang Hong v Lee Kuan Yew & Anor and other appeals** [1998] 1 SLR 97 (CA) (also reported in *Commonwealth Law Bulletin* - January and April 1998 at 195) said:

"First, a defamation action was fundamentally an action to vindicate a person's reputation on a matter as to which he had been falsely defamed, and the damages awarded had to be regarded as the demonstrative mark of that vindication. Thus, the amount of damages awarded in defamation actions was only given in relation to circumstances of the past and present but it must be sufficient to vindicate he plaintiff's reputation in the relevant respect in the future. Damages and the size of the award, were the only means which ordinarily were available to attract the public or private attention involved in the vindication of the plaintiff's position; Dingle v Associated Newspaper Ltd & Ors [1964] AC 371, Broome v Casell and Co. Ltd [1972]

AC 1027 and John Fairfax & Sons Ltd v Carson (1991) 24 NSWLR 259 followed. The defamation award also had to reflect the aggravated caused to the plaintiff by the defendant's subsequent conduct or any mitigation, in addition to the need to vindicate the plaintiff's good name; Sutcliffe v Pressdram Ltd [1991] 1 QB 153, Rantzen v Mirror Group Newspapers (1986) Ltd & Ors [1994] QB 670 and Carson v John Fairfax and Sons Ltd (1993) HCA 31, (1993) 178 CLR 44 followed."

38. As for damages a greater amount can be awarded where "the publication of a libel was irresponsible. No effort was made to check the report's accuracy and the plaintiff's name was included" (Kiam v Neill and Another, TLR 26.7.96 p.33 C.A.)

The Court of Appeal in Kiam (supra) went on to say further:

"The libel jury could properly take into account the prominence of the plaintiff's reputation when deciding what figure was required to vindicate it. They were also entitled to take account of the fact that it struck at the core of his life's achievement and that, according to the unchallenged evidence, it has a prolonged and significant effect on him personally".

39. In Air Fiji Ltd v Shandil, High Court of Fiji Civil Action No, 380 of 1999, the Court awarded general damages of \$80, 000 and special damages of \$120, 000 with respect to a media broadcast after there had been a fatal air crash.
40. Damages in Defamation are awarded generally to **compensate the Plaintiff for the injury done to his or her reputation**.
41. In the current case, **no public apology** was tendered by the Defendant. There are **no mitigating factors**. The words complained of were uttered with a **deliberate and calculated view to tarnish the reputation of the Plaintiff**. There was **no opportunity to vindicate the Plaintiff's reputation** and the **Damages was forever**.
42. The **Defamatory material was addressed to listeners to a popular radio station** and would have definitely come to the notice of a very large number of listeners. The Defendant was a **prominent person**. He was a **member of the Parliament and a Minister**. This as an **aggravating factor** and it should lead to a very substantial award.

*".....a publication in a national newspaper or by means of a television or radio **may lead to a very substantial award** because the defamatory material is likely to come to the notice of a very large number of people" - Duncan an Neil on Defamation, 1978 Edition, at 18, 14).*

43. Bearing in mind the **reasons as set out hereinabove** coupled with the **principles and annunciated in the case authorities cited**, the **act of the Defendant** clearly must be considered very **serious, irresponsible and uncalled for**. Further, I have also taken into consideration the **factors** such as; Injury to the Plaintiff's feelings, the absence of apology by the Defendant, the malice of the Defendant, The broadcast was designed to cause widespread damage to the Plaintiff, The words were then transcribed in the English Language and the said transcript was then circulated on a prominent social media platform, ie. Facebook, A great deal of embarrassment caused to the

Plaintiff, and that the community needs to be protected from people like the Defendant and any award made against him should serve as a deterrent against such type of behavior.

44. Accordingly, the Defendant must be ordered to pay the Plaintiff a sum of **\$80, 000** as **General Damages** on a Compensatory basis.
45. The Plaintiff also sought for **Exemplary Damages-**

Lord Devlin has dealt with the circumstances in which Exemplary Damages are awarded quite extensively in the case of House of Lords in Rookes v Barnards and Others 1964 AC 1129 at 1221-1231.

His Lordship said at p.1131;

"that exemplary damages could be awarded in cases (i) of oppressive, arbitrary or unconstitutional acts by government servants; (ii) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; (iii) where expressly authorized by statute (post, pp. 1226-1227); that in case in which exemplary damages were appropriate a jury should be directed that only if the sum which they had in mind to award as compensation (which might of course be aggravated by the Defendant's behavior to the plaintiff) was inadequate to punish and deter him, could it award some larger sum (post, p.1228); that the facts disclosed in the summing up showed no case for exceptional damages and possibly none for aggravated damages (post, pp. 1232, 1233); however, the plaintiff could, without any departure from the compensatory principle, invite the jury to look at all the surrounding circumstances and award a round sum based on the pecuniary loss proved (post, pp.1221, 1233)."

Further down at p. 1221

"Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term in is to compensate. The object of exemplary damages is to punish and deter..."

46. The Fiji Court of Appeal said as follows in James Arthur Rennie Borrion & Mago Islands Estate Limited v Fiji Broadcasting Commission & Newspapers of Fiji Limited (Civ. Appeal No. 40/81 FCA at p5):

"Exemplary damages are damages which are awarded to punish a defendant and vindicate the strength of the law. In considering whether exemplary damages should be awarded the Court should ask itself whether the sum it proposes to award as compensatory damages, which may include an element of aggravated damages is adequate in all the circumstances for compensating a plaintiff and also for punishing or deterring a defendant. Only if it is inadequate for the latter purpose should the Court consider awarding exemplary damages".

47. Hence, **Exemplary and Punitive Damages** are awarded to punish the Defendant for his outrageous conduct, to mark the Court's disapproval of such conduct and to deter him from repeating it.

48. The Plaintiff further sought for **indemnity costs**-

Order 62, rule 37 of the High Court Rules, 1988 empower Courts to award indemnity costs **at its discretion**.

49. For the sake of completeness, Order 62, rule 37 is reproduced below.

Amount of Indemnity costs (O.62, r.37)

37. - (1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.

50. The substantive current proceeding was initiated in 2019.

51. The **substantive matter** in fact did not proceed to a trial in terms of a **formal examination of evidence** by the Presiding Judge.

52. The **interlocutory Judgment** was entered against the Defendant on his failure to the **non-compliance of the procedural Act** wherein the Defendant was required upon service of the documents including the Substantive Writ of Summons with a Statement of Claim to file and serve and an Acknowledgement of Service and a Statement of Defence.

53. The conduct of the Defendant had been high handed, insolent and vindictive. He had in fact exhibited a contemptuous disregard of the Plaintiff's rights and status.

54. Therefore, any costs to be awarded should be reasonable in the circumstances.

55. Accordingly, I order that the Defendant to pay the Plaintiff a sum of **\$5000 as summarily assessed as costs**.

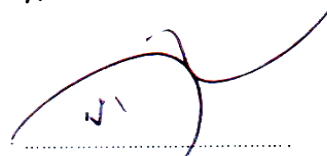
56. In summary, this court has decided that the Defendant pays the Plaintiff a sum of **\$80, 000 as total damages** together with a sum of **\$5,000 as summarily assessed costs**. The amount awarded herein is sufficient both in terms of **compensatory and punitive damages and costs** accordingly.

ORDERS

1. The Defendant is hereby ordered to pay the Plaintiff a sum of **\$80, 000 as compensatory and punitive damages** within a time frame of 30 days from the date of this Judgment.
2. The Defendant is also ordered to render in writing a public retraction and apology in prominent print to the Plaintiff to be published in a daily News Paper circulating in Fiji within 14 days' from the date of this judgment, including the Fiji Times, Fiji Sun and Nai Lalakai, in both English and iTaukei Languages.

3. The Plaintiff is entitled to 6% interest on the sum of compensatory and punitive Damages awarded from 21st March, 2019 to the date of this Judgment.
4. The Defendant is also ordered to pay the Plaintiff a sum of \$5000 as summarily assessed costs of this action within 30 day's time frame from the date of this Judgment.

Dated at Suva this 25th Day of February, 2021.



Vishwa Datt Sharma
Judge

cc: R Patel Lawyers, Suva.
Ratu Isoa Delamisi Tikoca, Suva

