

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No HBC 179 of 2020**

BETWEEN

**DERRICK ARMSTRONG** of MQ49 USP Campus Laucala, Suva.

Acting Vice-Chancellor, University of South Pacific.

PLAINTIFF

AND

**MORGAN TUIMALEALI'IFANO** of Suva.

Consultant.

DEFENDANT

Counsel	-	Mr. S. Nandan for Plaintiff Mr. F. Haniff for Defendant
Date of Hearing	-	08 <sup>th</sup> May 2023
Ruling delivered	-	11 <sup>th</sup> August 2023

## RULING

- [1] The Defendant filed this Summons pursuant to Order 33 Rule 3 & 4 of the **High Court Rules 1988** and the inherent jurisdiction of the Court seeking following issues to be determined as preliminary issue before the trial.
- I. Whether the Defendant was the publisher for the purpose of a libel cause of action of the post and/ or the words alleged in paragraphs 3 and 4 of the Statement of Claim;
  - II. Costs;
  - III. Such other relief the Court deems fit.
- [2] Order 33 Rule 3 & 4 state as follows;
- Rule 3 - 'The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated'.
- Rule 4 - (1) In every action begun by writ, an order made on the summons for directions shall determine the place and mode of the trial; and any such order may be varied by a subsequent order of the Court made at or before the trial.
- (2) In any such action different questions or issues may be ordered to be tried at different places or by different modes of trial and one or more questions or issues may be ordered to be tried before the others.
- [3] In the affidavit deposed by the Defendant, states that the Plaintiff filed Writ of Summons on 19.06.2020 where he alleged at paragraph 3 and 4 of his Statement of Claim that the Defendant made a defamatory statement against the Plaintiff on social media platform, Facebook.

- [4] Paragraph 3 of the Statement of Claim reads as 'the Defendant at all material times was the author of the post and / or publication on Facebook which contained defamatory statements concerning the Plaintiff and caused the same to be published on the social media platform Facebook'.
- [5] Paragraph 4 reads as 'in the said post and / or publication were the following words: "Thompson, Johannsson, Khan, Fay, Krishna Raghuaia, whose side are you on? The VCP exposes the plundering by Rajesh Chandra and Derek Armstrong and their cronies inside USP of student's fees and poor people's taxes, and you go after him? Is USP a corporate cash cow for senior managers or a university for a struggling region"'.
- [6] The Defendant states that in his Statement of Defence, he has denied that he was the publisher of the alleged defamatory statements. Further he states that alleged defamatory statement was a comment made under a news link posted by Ganesh Chand on the 'Pacific Researchers n Academics' Facebook Group page.
- [7] The Defendant further states that he is not the administrator or a moderator of the said Facebook page. His name does not appear on the list of the administrators of the 'Pacific Researchers n Academics' Facebook Group page.
- [8] The Defendant's argument is that a comment made on a Facebook Group page is deemed to be published by the Administrators and/or the moderators of the Facebook Group page and not the individual person who posted or commented on the page.
- [9] The Court notes from the Affidavit of the Defendant that there is no specific admission on the making of the comment. There is no requirement to make any admissions at this stage. The burden is on the Plaintiff to establish their case during the trial.
- [10] Mr. Haniff assisted Court with legal authorities where the Courts of Australia and New Zealand have held that those who operate public Facebook pages are deemed publishers of the comments and posting made on the public Facebook page by third party Facebook users.
- [11] **Voller v. Nationwide News Pty Ltd; Voller v. Fairfax Media Publications Pty Ltd; Voller v. Australian News Channel Pty Ltd** [2019] NSWSC 766 is one such legal authority Defendant relied upon. The question which the Court had to determine in this case was whether the defendant in each of the proceedings was a publisher. The case was later appealed to the High Court of Australia and in **Fairfax Media Publications Pty Ltd v. Voller; Nationwide News Pty Ltd v. Voller; Australian News Channel Pty Ltd v. Voller**

[2021] HCA 27 the High Court held that each appellant becomes a publisher of each comment posted on its public Facebook page by a Facebook user.

- [12] The second case provided by the learned counsel was **Wishart v. Murray** [2013] NZHC 540. The discussion had been on the liability of the Facebook page administrator where several third party users made defamatory comments. Whether those who host such Facebook pages become passive instruments or mere conduits of the content posted on their Facebook page.
- [13] The Defendant also relied on the Supreme Court of British Columbia case **Pritchard v. Van Nes** [2016] BCSC 686 where the Court held that the owner of a public Facebook page is deemed publisher of third party comments of other users on the page.
- [14] At the hearing Mr. Nandan argued that his claim against the Defendant is that he was the author of a post contained defamatory statement and caused the same to be published on Facebook. Learned counsel emphasized the difference between the words 'published' and 'caused the post to be published'.
- [15] In the Supreme Court case of **Fiji Electricity Authority v. Punjas Flour Ltd** [2022] FJSC 37; CBV0013.2019 Hon. Justice Jayawardena discussed the scope and the applicability of Order 33. His Lordship stated *"The word "may" used in the said Order shows that an order to try a preliminary issue cannot be obtained as of right. Further, the word "may" has conferred power on the court either to allow or refuse such an application. Further, by the use of the words "or otherwise" legislature made provision for any party to make an application to obtain an order to try the issues before the trial. Thus, the said Order casts a duty on the court to judicially evaluate such an application and make an appropriate Order by using judicial discretion. Hence, in order to use judicial discretion to evaluate such an application. It is necessary to have materials before court"*.
- [16] His Lordship further stated *"the courts will not try issues before the trial which are complicated and mixed with law and facts"*.

A similar view was expressed in **Salim v. iTaukel Land Trust Board** where it was held:

*"The issue is mixed law and fact and needs the hearing of the witnesses in this matter by the court. This type of case is not justified to deal in terms of Order 33 of the High Court Rules of 1988, as the matter is not complicated and will not serve any purpose except the delay and cost by proceeding this path. It is the court that needs to decide there is no need to proceed with Order 33 of the High Court Rules of 1988.*

Further, in **Tilling and Another v. Whiteman** [1979] UKHL 10; 1979 1 All ER 737 Lord Wilberforce (p738-739) it was held;

*“I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional.”*

- [17] The Defendant’s Summons seeking Court’s determination on whether the Defendant was the publisher for the purpose of a cause of action based on libel.
- [18] Written submissions and the case law provided by Mr. Haniff’s largely discusses the liability of a host or an administrator of a public group page within the meaning of a publisher. The scope of the claim before me is different. It needs consideration on the liability of a person making comments on a third party public Facebook page. Both learned counsel submitted that on this point, there are no persuasive earlier decisions available in Fiji.
- [19] In my view the issue before me is somewhat complex and undoubtedly mixed with facts and law. It would not be appropriate for the Court to make a determination purely on affidavit evidence.
- [20] Accordingly the Court makes following orders.

### ORDERS

1. Originating Summons filed on 01<sup>st</sup> June 2022 hereby dismissed.
2. Defendant to pay \$1000 (one thousand dollars) as cost to the Plaintiff within 14 days of this ruling.

  
Yohan Liyanage  
JUDGE



At Suva on 11<sup>th</sup> August 2023