

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0037 of 2012
(High Court Civil Action No. HBC 336 of 2005)

BETWEEN : SANJIT PATEL

Appellant

AND : ATIL CHANDRA GOSAI

Respondent

Coram : Chandra JA
Lecamwasam JA
Mutunayagam JA

Counsel : Mr. D. S. Naidu and Ms. T. Draunidalo for the Appellant
Mr. V. M. Mishra for the Respondent

Date of Hearing : 6 February 2014

Date of Judgment : 24 March 2014

JUDGMENT

Chandra JA

[1] This is an appeal against the judgment of the High Court at Lautoka which awarded damages to the Respondent in an action brought by him for defamation against the Appellant.

- [2] The Appellant was the Mayor of the Nadi Town City Council and the Respondent was a Councillor in the said Council at the relevant time.
- [3] The Respondent instituted action claiming damages from the Appellant alleging that the Appellant had defamed him.
- [4] In his statement of claim the Respondent alleged that on or about 28th September 2005 the Appellant had allowed and permitted the presence of Fiji TV during a meeting of Nadi Town Council when Councillor Suresh Pratap made defamatory statements in the Council meeting, chaired by the Appellant as Mayor, and that the text of the statement including a statement made by the Appellant was broadcast on Fiji Television. Immediately after the said statement the Appellant had made another statement which had also been broadcast on Fiji Television wherein allegations were made against the Respondent regarding non - disclosure of his interests in a land for which the Council had granted a discount of 50% on the payment of arrears of rates. The Appellant had on or about 13th October 2005 written a letter to the Town Clerk of Nadi Town Council regarding the non - disclosure of the Respondent's personal interest on the said land to the Task Force Committee nor to the Full Council when the application for the discount on rates was being discussed.
- [5] The Appellant in his statement of defence took up the defences of Justification, Fair Comment and Qualified Privilege.
- [6] After trial the learned trial judge by her judgment dated 1st May 2012 awarded the respondent \$70,000.00 as damages and \$6,000.00 as costs.
- [7] The Appellant in his notice of appeal set out the following grounds of appeal:
- "a. That the learned Trial Judge erred in fact and in law in ruling that the Appellant published defamatory statements about the Respondent at a Nadi Town Council meeting on 28 September 2005.*

- b. *That the learned Trial Judge erred in law and in fact in holding that the statements uttered and/or published by the Appellant on the 28th of September 2005 or thereabout was in anyway defamatory of the Respondent and if defamatory that it attracted monetary damages.*
- c. *That the learned Trial Judge erred in fact and in law in ruling that the Appellant did not know that the Respondent was a part owner of Certificate of Title No.7081 at Martintar, Nadi, Fiji.*
- d. *That the learned Trial Judge erred in fact and in law in ruling that the Appellant was actuated by malice in making defamatory statements about the Respondent at a Nadi Town Council meeting on 28 September 2005.*
- e. *That the learned Trial Judge erred in fact and in law in ruling that the Appellant did not honestly believe that the Respondent was not a part owner of Certificate of Title No. 7081 at Martintar, Nadi, Fiji.*
- f. *That the learned Trial Judge erred in fact and in law in ruling that the defence of 'Justification' was not open to the Appellant.*
- g. *That the learned Trial Judge erred in fact and in law in ruling that the defence of 'fair Comment' was not open to the Appellant.*
- h. *That the learned Trial Judge erred in fact and in law in ruling that the defence of 'Qualified Privilege' was not open to the Appellant.*
- i. *That the learned Trial Judge erred in fact and in law in awarding damages to the Respondent for the statements published about the respondent at a Nadi Town Council meeting on 28 September, 2005.*
- j. *That the learned Trial Judge erred in fact and in law in awarding damages in the sum of \$70,000.00 (Seventy Thousand Dollars) to the Respondent for the statements published about the Respondent at a Nadi Town Council meeting on 28 September 2005."*

- [8] The grounds of appeal set out above by the Appellant are on the basis of statements published about the Respondent at a Nadi Town Council meeting on 28 September 2005 only and not in relation to the other statements made by the Appellant regarding the Respondent after that date which were also the subject matter of the action filed by the Respondent against the Appellant.
- [9] The written submissions filed by the Appellant and the oral submissions made before Court did not focus on the different statements specifically but in general and emphasis was placed on the fact that the statements made by the Appellant were on the basis of non-disclosure of the interests of the Respondent regarding the land in question for which a discount had been given regarding arrears of rates.
- [10] For the purpose of dealing with the appeal comprehensively it would be relevant to set out the statements that were in question before Court as set out in the statement of claim of the Respondent and in evidence.
- [11] A statement was made by Councillor Suresh Pratap on 28 September 2005 at the Nadi Council Meeting which was presided over by the Appellant and in the presence of the Town Clerk other councillors, Fiji TV Reporters, photographers and others. This was not an agenda item. It was broadcast on Fiji Television, the transcript of which was as follows:

“There are poor rate payers who can’t afford to pay \$300.00 rate. From \$76000.00 rate he joined his personal interest. He manoeuvred the council. I don’t know how he made it. The rate was dropped to \$38000.00, he fooled this council. We are not fools here. The fool is sitting there. But at last the property was transferred to his personal name. This property was transferred in his personal name. Whom did he cheat? I think the minister should intervene now and investigate this matter straight away. This is a white collar fraud”.

[12] The Respondent had wanted the Mayor to stop Councillor Suresh Pratap from making allegations about him but the Appellant who was the Mayor had not stopped him and had told him that he also would be given an opportunity to speak which had not been done. The Appellant as Mayor had stated at the said meeting that the said allegations would be investigated.

[13] In the Television broadcast that followed the Appellant had stated in the broadcast the transcript of which was as follows:

“Based on the concern raised by Councillor Pratap, and the evidence he is showing now, if that is the case because I full know very well that the discount was approved because of the dispute in the family not because of one person’s property and if there’s grounds on that an investigation will be called in”.

[14] A resolution had been passed at the Council meeting giving authority to the Appellant to investigate the matter, if the Appellant was of the view that the matter should be investigated. The Appellant had given a statement to the following effect:

“You would recall that a Taskforce Committee was formed in 2003 to collect the arrears of town rates. One of the committee members was Cr Atil Gosai.

Cr Atil Gosai’s father, Mr. Jagdish Gosai being 1/6 owner of the above property wrote to the Council seeking 50% discount on the arrears. One of the reasons given was the family dispute. Cr Pratap is claiming that the above land was transferred on Cr Atil Gosai’s personal name immediately after the discounted rate arrears was paid and that Cr Atil Gosai knew very well that the land was to be transferred on his name from the time the application for discount was made by Mr. Jagdish Gosai but failed to advise the Council about his intentions. Cr Pratap believes that Cr Atil Gosai by not advising the Council about his intentions has cheated the Council and its rate payers of \$37,924.09.

I have personally sighted the copies of the transfer documents signed by two members of the Gosai family transferring their shares in favour of Cr Atil Gosai."

[15] Thereafter by letter of 13 October 2005 the Appellant wrote a letter to the Town Clerk where he had stated:

"It is very clear from the above that Cr Atil Gosai did not declare the whole truth that is his personal interest on the said land to the Taskforce Committee nor to the Full Council when the application for the discount was being discussed."

[16] At the Pre – Trial Conference the statements referred to above were agreed upon and recorded as Agreed Facts as the statements on which the allegation of defamation was based which were also referred to in the judgment of the learned Trial Judge and therefore the reference in the grounds of appeal to the statements on 28 September 2005 alone is incorrect.

[17] As the derogatory statements were admitted by the Appellant he was relying on the defences of justification, fair comment and qualified privilege. The application of these defences would be on the basis that the derogatory statements are admitted, so there is no issue as to the making of the statements.

[18] The crucial issue before Court was as to whether the statements which were derogatory were true in relation to the evidence placed before Court by the parties. The Respondent gave evidence himself and also led the evidence of a former Mayor, Mr. Balram and the Town Clerk, Mr. Robin Ali. The appellant gave evidence on his behalf and led evidence of the Rates Officer, Suresh Chand.

[19] The statements alleged dishonesty on the part of the Respondent regarding a reduction of arrears of rates in respect of a land where the Respondent had a share. In May 2003, the Nadi Town Council had given an offer to rate payers

regarding arrears of rent that they would be given a 30% discount if they paid before 31 December 2003. Any discounts above 30% had to be referred to the Minister for approval.

[20] A Task Force Committee (TFC) had been established on 21 May 2003 to consider the applications for discounts where the Appellant served as the Chairman and the Respondent was a member.

[21] The Respondent's father Mr. Jagdish Chandra Gosai, by letter dated 4 August 2003 had made an application requesting a 50% discount wherein he had disclosed 1/6 ownership in the property. His application had been approved on 17 September 2003 by the TFC, unanimously by the Council and subsequently the Minister of Local Government had approved it by letter dated 4 November 2003. On being notified by the Town Clerk on 13 November 2003, the payments had been made on 17 November 2003 on behalf of the Respondent's father. The Respondent had not been present when the TFC and the Council had considered his father's application.

[22] At the meeting of the Finance and Planning Committee of the Council held on 27 November 2003, a motion had been moved to investigate the grant of the specific discount to the Respondent's father. The investigation had been carried out by Councillor Morelli and a report had been submitted on 4 December 2003 which was to the effect that the discount was proper.

[23] The Minister of Local Government had informed the Council that the 50% discount to the Respondent's father was approved by the Minister under Section 73 of the Local Government Act and that the case was closed. This decision had been tabled at the Finance and Planning Committee meeting held on 7 September 2005 which was prior to the day (28 September 2005) when Councillor Suresh Pratap made a statement attacking the Respondent which were followed up by the Appellant with further statements and investigations.

- [24] From the foregoing it is apparent that the issue regarding the discount given on the request of the Respondent's father was initiated by the Appellant when he acted as the Chairman of the task Force Committee and thereafter recommended to the Minister. At the meeting of the Task Force Committee, the Respondent had been asked not to participate in the meeting by the Appellant himself. It is the same recommendation that the Appellant had referred for investigation after Councillor Suresh Pratap had made allegations against the Respondent at the Council Meeting of the 28th September 2005 which ultimately resulted in the said decision of granting the discount remaining the same.
- [25] The learned Trial Judge having considered the evidence regarding the granting of the discount concluded that she was unable to accept that the Appellant was unaware of the fact that the Respondent was a part owner of the property in question. A consideration of the evidence with oral and documentary regarding the matter relating to the discount shows that there was no error committed by the learned Trial Judge in arriving at such conclusion and that the statements made by the Appellant were defamatory.
- [26] The learned Trial Judge has considered the question of malice on the part of the Appellant in making the derogatory statements. The judge has considered the fact that the Respondent had voted against him when the Appellant vied for Mayorship which he lost by one vote, and his subsequent conduct, holding out a threat to the Respondent, his demeanour in Court when he gave evidence and arrived at the conclusion that the Appellant had acted with malice.
- [27] As has been stated above, the ownership and therefore the interests in the land of the Respondent was a crucial matter in the case. The Appellant's evidence on that issue was also very unsatisfactory as at one point in his evidence he had stated that ownership did not matter when considering discounts and later under cross – examination had stated it mattered as the Respondent was a Councillor. On that score the learned Trial Judge had stated that the Appellant was disbelieved on the question of his being aware of the Respondent's interests in

the land especially in view of the fact that there was an admission by the Appellant in his evidence that the recommendation for 50% discount was not only for the property in question but also in respect of properties which were not owned by Councillors. In any event the fact that the Respondent was 1/3rd owner in 1994 was a matter that was known or should have been known by the Council especially when a matter like a special discount was being recommended to be given, as it had the roll of the owners of the properties. The subsequent purchase of shares by the Respondent regarding the property had no bearing regarding the discount that had been given as the discount would apply to the entire land. It is on this basis that the learned trial Judge had arrived at the conclusion that statements made by the Appellant against the Respondent were defamatory.

[28] The statements that were made by the Respondent were subsequent to the statement made by Councillor Pratap at the Council meeting of the 28th September 2005. The Appellant had permitted the said Councillor to make allegations against the Respondent regarding the discount given to the property where he had an interest when he was fully aware of the position regarding the granting of such discount specially as he was the Chairman of the Task Force Committee which originally recommended it, he was aware that it had been gone into again by the Council and a report had been made where it was maintained that the granting of the discount was proper.

[29] The Respondent permitting the Councillor to make the allegations against the Respondent and his subsequent conduct in making statements regarding same had the effect of endorsing what Councillor Pratap had stated. Though there was no repetition of the exact statement of the Councillor, the Appellant's subsequent

statements had the effect of endorsing the same as Lord Hodson stated in Lewis
-v- Daily Telegraph Ltd 1964 AC 234 at 275 stated :

"..... if one repeats a rumor one adds one's own authority to it and implies that it is well founded, that is to say, that it is true."

[30] In the written submissions filed on behalf of the Appellant it was stated that the learned Judge had failed to set out that the Appellant did not know (at all relevant times) that the Respondent was going to become 100% beneficiary of the 50% discount on rates of arrears and that the Respondent knew (at all relevant times) that he was going to become 100% beneficiary of the 50% discount on rates of arrears upon payment of the arrears. This it was submitted went to heart of whether or not the Appellant defamed the Respondent and if he did, whether the Appellant had lawful excuse or defences to do the same.

[31] The case before the High Court did not deal with a possible 100% ownership of the property by the Respondent at any stage. The most that the Respondent would benefit ultimately would be 2/3rd of the property in question even if the transfer of shares of the property to him in 2003 are taken into account, which had not been registered as a Caveat was in place. The Caveat had been removed after the arrears of rates had been paid in November 2003 on the granting of the discount on the application of the Respondent's father. The submission on behalf of the Appellant is that the learned trial Judge has not in her judgment stated about this matter. The amount of the share was not what mattered but the interest of the Respondent not being disclosed regarding the property in question. As stated above the learned trial Judge considered this position and arrived at the conclusion that the Respondent had declared his interests in the said property to the Council and it was a fact known to the

Council when the discount was recommended. Therefore this submission of the Appellant has no merit.

[32] Having arrived at the conclusion that the statement made by the Appellant were defamatory, the learned trial Judge considered the defences taken up by the Appellant. In the written submissions and the oral submissions made on behalf of the Appellant, it was sought to establish that the defences taken up in the High Court were available to him.

The Defence of Justification

[33] The general principle regarding the defence of justification is that it is a complete defence to an action for defamation to prove that the words complained of are true. The law presumes that defamatory words are false. What a claimant has to prove is that defamatory statements have been published of him by the defendant. There is no issue on that in the present case. It is for the Appellant to prove that the statements are true.

[34] The learned trial Judge considered this defence and held that the defence of justification was not available to the Appellant.

The Defence of Fair Comment

[35] It is a defence to an action for defamation for the defendant to prove that the words complained of were published by him as fair comment on matters of public interest. The defence can be defeated by proof that the defendant was actuated by malice.

[36] In Abbas Ali –v- Thompson Civil Appeal No.ABU 0029 of 2010 the Court of Appeal reiterated the five requirements laid down in Albert Cheng –v- Tsey Wai Chun Paul (2000) HKCFA 35 as follows:

- “1. The comment must be on a matter of public interest.*
- 2. The comment must be recognizable as comment as distinct from an imputation of fact.*
- 3. The Comments must be based on facts which are true or protected by privilege.*
- 4. The comment must be explicitly indicated at least in general terms, what the facts of which the comments are being made.*
- 5. The comments must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his view. It must be germane to the subject matter criticized.”*

[37] The Court of Appeal in Fiji Times Ltd –v- Vayeshnoi ABU 002/08 citing the decisions in Reynolds –v- Times Newspapers Ltd and Others (2001)2 AC 127 and Branson –v- Bower [2002] QB 737 concluded that the only requirements for establishing this defence was that a defendant should have expressed the opinions honestly and he should have done so upon facts accurately stated.

[38] The learned trial Judge dealt with the law relating to the defence of Fair Comment as applied in England and in Fiji exhaustively and held that the statements of the Appellant cannot be justified as fair comment. The learned Judge considered the evidence relating to the fact that the Appellant knew the entire episode regarding the granting of the discount on the request made by the Respondent’s father which was in fact initiated by him when he was the Chairman of the Task Force Committee and was subjected to further scrutiny even after the Minister had approved same and knowing the position of the

Respondent regarding it allowed Councillor Pratap to continue making allegations about the Respondent and thereafter made statements and started an investigation again as if it were a matter which had surfaced from Councillor Pratap's statement.

[39] Considering the background facts, the conduct of the Appellant as Mayor at the time Councillor Pratap made the statements and the statements made by him, the honesty of the Appellant in making such statements was very much in doubt. If he was not honest about making such statements then the defence of fair comment cannot be availed of by him.

[40] Further, the learned trial judge held that considering the evidence in the case, the Appellant was actuated by malice which has been referred to earlier in this judgment. The existence of malice is also detrimental to the Appellant's reliance on the defence of fair comment. In those circumstances the Appellant is not entitled to the defence of fair comment and the learned trial Judge was correct in concluding so.

The Defence of Qualified Privilege

[41] The Appellant has submitted that the learned trial Judge had misapplied the principles relating to the defence of qualified privilege which were laid down in Abbas Ali -v- Thompson (supra) and refers to the two limbs of the dictum that has been cited by the learned Judge in her judgment. The dictum cited is as follows:

"The occasions of qualified privilege could broadly be classified into two, First is where the maker of the statement has a duty (whether legal, social or moral) to make the statement and the recipient has a corresponding interest to receive it. Second is where the maker of the statement is acting in pursuance of an interest of his and the recipient has such a

corresponding interest or duty in relation to the statement. The facts of this case fall into the second category."

(Emphasis added)

[42] Referring to the two limbs in the above dictum, the Appellant has submitted that the learned Judge has wrongly applied the second limb to the case at hand whereas what is stated at the end of the dictum (the emphasised portion) is taken from the case of Abbas Ali itself and not as applying to the present case. It is quite clear from the rest of the judgment that the learned trial Judge did not apply the second limb to the present case and therefore the submission made by the Appellant in that respect is incorrect.

[43] The learned Judge went on to cite a dictum of Lord Diplock in Horrocks -v- Lows 1974 1 All ER 662 at 669 which were as follows:

"The motive with which a person published defamatory matter can only be inferred from what he did or said or knew".

".....what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally thought tautologously termed, "honest belief."

[44] Having cited the above dicta the learned trial Judge held that the the defence of qualified privilege was not available to him as he had not satisfied the criteria for its application.

[45] The Appellant was seeking to justify the statements made by him on the basis of qualified privilege stating that they were matters of public interest. However, as stated by Lord Diplock the underlying factor in qualified privilege is the honest belief in the statements made. As has been shown above in this judgment there has been a strong finding regarding the Appellant being disbelieved and also that

he was actuated by malice. In such circumstances it cannot be accepted that the Appellant had an honest belief in the statements made by him and therefore he fails on the defence of qualified privilege as well.

Damages

[46] Grounds 9 and 10 of the notice of appeal refer to the question of damages, both grounds are the same except that in ground 9 the figure awarded is not mentioned. The learned trial Judge dealing with the question of damages to be awarded to the Respondent concluded that the statements made by the Appellant were defamatory and couched in malice and were made to mislead the public at the upcoming elections with an attempt to expose the Respondent to hatred, contempt and ridicule.

[47] In granting the sum of \$70,000.00 as damages the learned trial Judge stated:

"[86] The plaintiff is a councillor of the Nadi town and a professional accountant. He is a person of high social standing in the society. The image of the politician and the perception among the constituents are essential tools for a politician. To be branded as a corrupt politician, abusing his office for his private gain would not auger well for a political life. There is also the direct implication of abuse of office and dishonesty and fraud in respect of public money of ratepayers.

[87] The Plaintiff says he was seriously injured in his character, credit and reputation and had been brought into public scandal, odium and contempt. He had also stated that his reputation as a Teacher, Accountant and as a Hindu Temple Official and as a reliable and decent person was gravely affected and destroyed. The embarrassment had prompted him to migrate and that no apology was made by the Appellant."

[48] There has been no attempt by the Appellant to challenge the credentials of the Respondent or his claims regarding the damage to his reputation and therefore what was stated by the learned trial Judge in paragraphs [86] and [87] were relevant in assessing the damages that were granted.

[49] “In actions for defamation the main relief which a claimant can obtain from court apart from an injunction in appropriate circumstances to prevent repetition of the libel or slander, is an award of damages. ... The general rule is that in actions for defamation, as in other actions for tort, the damages are to be assessed on a compensatory basis”.

(Duncan and Neill on Defamation (3rd Edition) at p.265.

[50] Dealing with the purpose of compensatory damages with reference to actions for defamation, it is stated by Duncan and Neill at p.266 that the assessment of damages will include a substantial subjective element as reputation is not convertible by the use of any yardstick into a sum of money. They submit that awards of damages in defamation actions are, as a matter of practice, now beginning to approximate to a conventional scale.

[51] In Fiji, there has been no such attempt to reach a conventional scale and it would be necessary to consider decisions on actions for defamation to consider the scale of damages that could be granted in appropriate cases. The learned Judge has reflected that considering the judicial thinking on the award of damages that a sum of \$70,000.00 was awarded as damages. The cases that have been referred to in the judgment are Sushila Devi Prasad –v- Ram Kelawan & Ors. Lautoka High Court Civil Action No.HBC 325 of 2003 which dealt with a school teacher who claimed damages in an action for defamation and was granted \$30,000.00 as damages. In Sakiusa Rabuka and Volau Rabuka –v- Fiji Daily Post Company Limited & Ors, Suva High Court Action No. 511 of 2000, a sum of \$40,000.00 was granted by the High Court to the Permanent Secretary for Justice in respect of an article about his wife, which on appeal was affirmed by the Court of Appeal. Mohammed Hassan –v- Fiji Times and Herald Limited where a sum of \$5000.00 had been awarded as damages to a Prison Officer. In Fiji Air Ltd –v- Shandil, High Court of Fiji Civil Action No.380 of 1999, the High Court of Fiji had awarded \$80,000.00 as general damages and \$120,000.00 as special Damages which was in respect of defamation of a corporate entity.

[52] The case of Fiji Times Ltd -v- Vayeshnoi [2010] FJCA 35 which involved a Minister is a case which can be used for comparison purposes in respect of the grant of damages in an action for defamation. The learned Judge referred to this case when dealing with the defence of Fair Comment but did not consider it in dealing with the question of damages. There the Court of Appeal increased the sum of \$30,000.00 granted by the High Court as damages to \$50,000.00. This case is more comparable to the present case as in the case of a Minister, a Councillor of a Town Council is also engaged in politics and the defamatory statements made about him were in relation to matters related to the Town Council. Although it may have been relevant to make Councillors and the public aware of matters relating to the conduct of a particular councillor in respect of a matter which dealt with discounts being granted for arrears of rates, in this case, it was made use of by the Appellant to defame the Respondent actuated by malice and without any honest belief in the truth of the statements as has been discussed earlier in this judgment.

[53] As the statements made about the Respondent related to the affairs of the Council as a politician and not relating to his professional life as such, although it may have had an implied bearing on his reputation as a professional and a respected person in society it would be appropriate to award him a sum of \$50,000.00 as damages in keeping with the judicial thinking in making the award in Vayeshnoi's case.

[54] In the result, the award of damages of \$70,000.00 is reduced to \$50,000.00 and subject to this variation the appeal is dismissed with costs fixed at \$ 5000.00.

Lecamwasam JA

[55] I agree with the reasons and the conclusions of Chandra JA.

Mutunayagam JA

[56] I also agree with the reasons and the conclusions of Chandra JA.

Hon. Justice S Chandra
JUSTICE OF APPEAL

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL

Hon. Justice A B Mutunayagam
JUSTICE OF APPEAL