IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 104 OF 2020
[High Court at Lautoka Case No. HBC 50 of 2018]

BETWEEN : **RIYAZ SAYED KHAIYUM**
1st Appellant

: **FIJI BROADCASTING CORPORATION LIMITED**
2nd Appellant

AND : **NIKO NAWAIKULA**
Respondent

Coram : **Almeida Guneratne, JA**
: **Lecamwasam, JA**
: **Jameel, JA**

Counsel : **Mr. D. Sharma with Ms. G. Fatima for the Appellant**
: **Mr. S. R. Valenitabua for the Respondent**

Date of Hearing : **5th September, 2022**

Date of Judgment : **30th September, 2022**

JUDGMENT

Almeida Guneratne, JA

[1] I agree with the judgment of Her Ladyship, Justice Jameel.

Lecamwasam, JA

[2] I agree with the orders proposed by Jameel JA.

Jameel, JA

[3] This is an appeal from the judgment of the High Court dated 9 October 2020 dismissing with costs, summarily assessed at $2000.00, the action of the Appellants for damages for libel against the Respondent.

Introduction

[4] The 1st Appellant is the Chief Executive Officer (***CEO)*** of the Fijian Broadcasting Corporation (***FBC***), which is the 2nd Appellant. When the Statement of Claim was filed, he was the Chairman of Air Terminal Services. (***ATS***).

[5] The 2nd Appellant is a limited liability company, operates several radio stations and a TV station, and has a wide listenership.

[6] The Respondent is a Member of Parliament. On 21st December 2017 the Respondent posted the following post on the Facebook page titled "Fiji Labour Party".

"***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.***

[7] This post was brought to the attention of the 1st Appellant, who intimated its contents to the Board of FBC, which approved the institution of action on its behalf. The Appellants allege that the false and malicious post on the Facebook page of the Respondent has caused serious damage to them by injuring their reputation and business, which continues to suffer losses as a result of the post.

[8] The Respondent admitted making the post, but denied that it was false and maliciously made, and relied on the defence of fair comment, justification and absence of malice under the Common Law and the Defamation Act 1971.

[9] The Pre-Trial Conference Minutes recorded that the issues for determination were whether the post was defamatory, and whether the defence of malice, fair comment and justification applied. 1st Appellant and two witnesses give evidence on behalf of the Appellants, and the Respondent and two witnesses testified on behalf of the Respondent. The learned High Court judge dismissed the Appellants' claim with costs.

[10] Since the Respondent has admitted that he published the statement, and in view of the particulars of defamation and innuendos alleged by the Appellant, it would be appropriate the first summarize the principles applicable to the defences taken by the Respondent, so that the facts of the case can be considered in that background.

[11] The need to balance the right to personal reputation against the right of free speech has been the cornerstone of the development of the law relating to defamation. In **Jones v Skelton,** [1963] 1 WLR 1362 at 1373, Lord Morris pointed out that the search for simplicity in this branch of the law, has proved to be elusive. There have been many judicial attempts to define what could be classified as a defamatory statement. Halsbury's would be a good starting point, and a defamatory statement is defined as one:

"Which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt, or ridicule, or to convey an imputation on him disparaging or injurious to him in his office."

[12] Gatley on Libel and Slander ("***Gatley"***) states that the most comprehensive definition is possibly the one adopted by the American Law Institute in the Second Restatement of Torts, at para 559.

"*The statement is defamatory if it tends to harm the reputation of another so as to lower him or her in the estimation of the community or to deter parties from associating or dealing with him or her."*

[13] According to Duncan and Neill on Defamation and other Media and Communications Claims, (5th ed. 2020), perhaps the most versatile and widely used definition was the one formulated by the Court of Appeal in **Berkoff v Burchill** [1996] 4 All ER 1008 at 1018:

" 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."

The Ordinary Man

[14] Lord Reid's classic description **Lewis v Daily Telegraph Ltd** [1964] AC 234 at 258–260; [1963] 2 All ER 151 at 154 as follows, has been used as fair guideline in determining the meaning of the defamatory words.

"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs … What the ordinary man would infer without special

knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the Plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning … Generally the controversy is whether the words are capable of having a libelous meaning at all, and undoubtedly it is the judge's duty to rule on that." (Emphasis added).

[15] Determining whether a statement is defamatory, requires the balancing of the competing interests; the right to individual reputation, freedom of expression and the right, and need to disseminate information in the public interest. This has been aptly described in judgment of Lord Nicholls in **Reynolds v. Times Newspapers Limited** [2001] one AC 127 at 200. His Lordship said:

" … 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 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 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).

[16] It has been held defamatory to write of a person that he has been guilty of oppressive conduct, **Woodard v Dowsing** (1829) 2 Man. & Ry.74. Cf. **Arthur v Clitherow**, The Times, June 29, 1963. (cited in Gatley, para. 2.19).

[17] It is defamatory to impute to a person in any office that he is corrupt (**Broadcasting Corporation of New Zealand v Crush** [1988] N.Z.L.R.234; dishonest or to impute fraudulent conduct or other misconduct (**Sachs v Werkerspers Bpk**, 1952 (2) whether the office be public or private, or whether it be one of profit on our trust.

[18] It is defamatory to impute that a person is unfit for his profession or calling going to want of ability, (**May v Greater Kansas City Dental Society**,863 SW2 d, 94(Mo, 1993); learning or some other necessary qualification, or that he has been guilty of any dishonest or disreputable conduct , (any other misconduct or inefficiency therein).

The defences relied on by the Respondent

The statute law: The Defamation Act 1971

[19] Section 15 sets out the defence of justification, and provides that:

> *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.*

Section 16 sets out the defence of Fair comment, and provides that:

> *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.*

[20] Truth is an absolute defence. The defence of justification protects statements of fact, and the defence of fair comment, protects statements of opinion. The burden lies on the defendant to prove the correctness of his defence. The law presumes a defamatory statement to be false, and the defendant can only rebut the presumption by pleading and proving that his statement was true.

[21] Whether a statement is one of fact, or is a comment requires the court to consider the context in which it was made, and determine whether the comment has a sufficient factual basis. It cannot exist in a vacuum. The burden lies on the defendant to prove that the factual basis on which the comment is based, is true or sufficiently true.

Fair Comment

[22] In order to succeed in the defence of Fair comment the defendant must establish that the following elements exist: the statement is a comment and not a fact, that there is a sufficient factual basis, it must be based on facts which are true, the comment must be one which a fair-minded man could honestly hold, (this is an objective test), and the subject matter of the comment must be a matter of public interest. For fair comment to succeed, the comment must explicitly or implicitly indicate at least in general terms the facts on which the comment is based. The comment must be one which could have been made by an honest person however prejudiced he might be. If the defendant is successful in proving these elements, the defence will succeed, unless the Plaintiff proves that the comment was maliciously published. Malice will be established or indicated if it is clear that the defendant did not believe in the opinion he was expressing, and had an improper

motive for expressing it, but nevertheless, in reckless disregard made the statement. The burden of proving malice lies on the Plaintiff.

The Pleadings

Statement of Claim

[23] By Statement of Claim filed on 28 February 2018, the 1st Appellant pleaded that he is the Chief executive officer of the 2nd Appellant and is also the Chairman of the Airport Terminal Services (ATS).

[24] The 2nd Plaintiff was at all material times a limited liability company and a body corporate, it operated six radio stations two in each of the major local languages and in English, with a first -free to air television, FBC TV. Two of the stations are public service broadcast stations which are governed under contract with the government which allows it to buy air-time on those stations, and to contribute to its operations and costs. The other four stations licensed under the commercial category and are funded through advertisements. And that the Appellant is also one of the two major broadcasters in Fiji with a wide listenership.

[25] On or about 21st December 2017 the Respondent falsely and maliciously posted defamatory material on the the Facebook page titled Fiji Labour Party (**"the post**"). The Appellants pleaded the following:

> ***" Particulars of Defamatory Material***
> ***Facebook postdated 21st December 2017 at 1.25 a.m.***
> ***RIYAZ MUST RESIGN AS ATS CHAIRMAN & 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.

[26] The Appellants pleaded that the said words in their natural and ordinary meaning were meant and were understood to mean the following:

Particulars

*"**Admit it Riyaz, you are the problem, the Jonah in that sinking ATS ship. Resign and get out and save us all the embarrassment":***

(i) that the First Plaintiff is the reason for the strike carried out by the Air Terminal Services.
(ii) that the first Plaintiff is incompetent and inexperienced in his capacity as Chairman of the ATS and lacks the capacity to make informed decisions.
(iii) that the First Plaintiff does not know how to do his job and should resign effective immediately;
(iv) that the First Plaintiff is an embarrassment to everyone and does not have the necessary skill set to perform the tasks as the Chairman of ATS.

(b) "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 $ 20M debt upgrade on FBC"

(i) that due to the First Plaintiff's status, FICAC is not investigating his actions and/or inactions and that FICAC has some sort of arrangement with the First Plaintiff.
(ii) that the First Plaintiff is a crook and has had previous bad commercial associations with the Second Plaintiff prior to becoming the CEO,
(iii) that the First Plaintiff is incompetent in his role as Chief Executive Officer of the Second Plaintiff.
(v) the First Plaintiff has poor management and misguided leadership.

(vi) *that the First Plaintiff is corrupt and is having corrupt dealings for the benefit of the second defendant.*

(c) ***"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."***

(i) *that due to the First Plaintiff's status FICAC is not investigating his actions and/or in and that FICAC has some sort of arrangement with the First Plaintiff,*

(ii) *that the First Plaintiff is a crook and has had previous bad commercial associations with the Second Plaintiff prior to becoming the CEO.*

(iii) *that the Plaintiffs are unable to pay its debts;*

(iv) *that the Second Plaintiff has a huge debt which it cannot repay as a result of which it's grant was increased;*

(v) *that the First Plaintiff is wrongfully and deceitfully seeking additional grant and or financial advantage from the government for the Second Plaintiff;*

(vi) *that the First Plaintiffs are involved in corrupt practices due to which they were allocated a 17 million budget.*

(vii) *that the First Plaintiff is guilty of dishonest and dishonourable conduct and practice,*

(viii) *That the Second Defendant has poor management and misguided leadership including history of fraudulent commercial practice,*

(ix) *that due to the First Plaintiff's relationship with the government, FICAC will not investigate the First Plaintiff.*

(d) *"**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**"*

(i) *That the First is incompetent as the Chairman of ATS and does not understand the operations of the shareholding structure of ATS.*

(ii) *that the employees of ATS know that the First Plaintiff cannot carry out his job.*

(iii) *that the First Plaintiff is misusing his powers as the Chairman of ATS.*

(iv) *that the First Plaintiff is a dictator who is laying down absurd conditions for re-employment of the ATS employees.*

(e) ***You know you don't have it in you Riyaz. Just resign and get out***

(i) *that the First Plaintiff is incompetent in his capacity as Chairman of ATS;*

(ii) that the First Plaintiff does not have the quality and ability to be the Chairman of ATS and deal with the strike;
(iii) that the First Plaintiff should resign from the position of Chairman;
(iv) that the First Plaintiff is incompetent and inexperienced in his capacity as Chairman of the ATS and lacks the capacity to make informed decisions;
(v) that the1st Plaintiff is an embarrassment to everyone and does not have the necessary skill set to perform his tasks as the Chairman of ATS;

INNUENDO

[27] The Appellants pleaded further, the particulars that the said words were meant and understood to mean by way of innuendo contained in the entire post of the 1st Respondent.

[28] The Appellants pleaded that the post was published on Facebook, which is a social media platform with a worldwide audience, and that as a result the Plaintiffs' credit and reputation have been injured, and they have been brought into public scandal, odium and contempt. In respect of innuendo, they pleaded the following particulars:

" *(i) the post is designed to misleadingly indicate that the first Plaintiff is incompetent in his capacity as chairman and is the sole reason for the ATS strike.*
(ii) the post also indicates that the first Plaintiff is also incompetent in his capacity as CEO of the second Plaintiff.
(iii) that the first Plaintiff is incompetent and inexperienced in his capacity as chairman of the ATS and lacks the capacity to make informed decisions.
(iv) That the first Plaintiff easy an embarrassment to everyone and does not have the necessary skill set to perform his tasks as chairman of ATS.
(vi) that due to the first Plaintiffs status, FICAC it's not investigating his actions and/or inactions and that FICAC just some sort of arrangement with the first Plaintiff.
(vii) that the first Plaintiff is a crook and has had previous bad commercial associations with the second Plaintiff prior to becoming the CEO.
(vii) then due to the first plane tips relationship with the government, FICAC we did not investigate the first Plaintiff,
(viii) the post is further designed and or engineered to cause damage to the plane tips so as to entice the public that the Plaintiffs are obtaining financial

advantage from the government for its running and is involved in corrupt practices,

(ix) as a result of the post the Plaintiffs are sour favoring grave reputational damage when it is clear that the strike was initiated by employees without the involvement of the first Plaintiff.

(x) furthermore the grant being referred to in the post is a PSB fee(fee) for services in relation to providing your time to the Fijian government relating to 2 radio stations end FV under there public service broadcasting (PSB) Contract.

(xi) *the fee is for the non-commercial programs that are produced and broadcast as well As for the maintenance and operations of the services provided by the second Plaintiff which are purely non-commercial in nature and focuses on cultural religious educational and disaster management programs.*

(xii) the Plaintiffs carry immense community service responsibility which is reflected in the content of the network and the defendants baseless allegations in the post has greatly harmed the reputation of the Plaintiff which is continuing.

(xiii) the first Plaintiff has been greatly injured in his credit character and reputation and he said office and occupation and has been brought into hatred ridicule and contempt.

[29] They pleaded that as a result of the post the 1st Plaintiff had suffered loss of reputation, and the 2nd Plaintiff's business operations have suffered considerably. The Plaintiffs continue to suffer losses and damage, and that there had been injury to reputation, loss of business and revenue as well as stress, trauma and anxiety for the Plaintiffs and its officers.

[30] The Plaintiffs complained further that it had been almost two months since the said post was published it continued to remain on the Respondent's Facebook page, and had caused consequential reputational damage to the Plaintiffs listenership and viewership. They pleaded that the Respondent had published these words out of malevolence or spite towards the Plaintiffs.

[31] The Plaintiffs claimed that the Respondent did not confirm the accuracy of the various assertions made in the post, either adequately or at all, before publishing the post, thereby

constituting reckless disregard for the truth, and that he had disseminated the statements in the post as widely as possible and continued to have it on its Facebook page which had a wide audience.

[32] The Appellants therefore claimed general damages, special damages and loss of business revenue, punitive damages, a permanent injunction restraining the Respondent from further posts, circulating distributing or otherwise causing to be posted the said or similar statements containing the libel or anything similarly defamatory of the Plaintiffs, as well as interest and indemnity costs.

The Statement of Defence

[33] The Respondent admitted having published the post but pleaded that it was limited to only his Facebook pages, and denied that it was false or made maliciously, and that the content was not intended for the public, but only for the followers of his pages; and that in any event it was fair comment and justified under the Common Law, as well as under the Defamation Act 1971.

[34] The Respondent denied that the plain and ordinary meaning of the words in the post are defamatory and false, or made with intent to cause harm to the Plaintiffs' reputation and stated that the "*the comments were made sincerely and directly on the issue and therefore the ability of the First Plaintiff as executive head of an organization to resolve a dispute within his organization"*, (vide paragraph 6 of the statement of defence). The Respondent also denied that he had not confirmed the accuracy of the assertions in his post. In other words, he pleaded that contents of the statement were true. (*Vide* paragraph 11(a) of the Statement of Defence).

[35] In the Appellants' Reply to the Statement of Defence, they stated that the post was done on a public page of the Fiji Labour Party which can be seen by a wide audience, it was not limited to the Respondent's Facebook page as claimed by the Respondent but could be viewed by anyone, the Respondent continued to keep the post on the said Facebook

page, the contents of the post were not true in substance and in fact, it was not fair comment but had been done with malice without confirming the accuracy of the various assertions made in the post either adequately or at all, before publishing the said post, and the words therefore constituted reckless disregard for the truth, and had been made with the clear intention of hurting the Plaintiff's reputation.

The Proceedings before the High Court

[36] The 1st Appellant Riyaz Sayed Khaiyum, testified that he had been in the journalism industry for almost 30 years. Between 1994 in 2004 he worked for Fiji Television, between 2004 and late 2007 he worked in New Zealand as a Senior Producer and Writer and Director of a program for Television New Zealand. In 2007, he was appointed as the CEO of FBC. He inherited a government institution that was in bad shape and had been making losses for many years prior to that. The FBC building was almost being condemned, worker morale was low and, there were breakdowns with transmission. When he was first appointed to FBC, the then Board gave him the task take over after the technical operations of the six radio stations and in specific to improve FBC's radio operations. In 2019, the Fiji Broadcasting Corporation was renamed the Fijian Broadcasting Corporation. FBC is a government owned commercial company with a public service arm. Four of its radio stations are commercial, and two are Public Service radio stations. The aim of FBC was to disseminate information through the radio stations as widely and as efficiently as possible throughout Fiji, to educate, entertain and inform the Fijian public of local and global news including, sports news and weather updates. The commercial radio stations were financially dependent on advertising. FBC had decided to expand its business and made a concerted effort to commence Fiji's nationwide television service. Although there were television services before FBC, the reach was not as extensive as FBC. The service expanded over the years and now FBC has three channels. At the time the 1st Appellant testified, FBC had four commercial radio stations, two public service channels and three television channels, an events arm, and a news media arm. The Digital Media and Events Department was responsible for organizing events around Fiji. These are for commercial purposes and, for campaigns in respect of

Corporate Social Responsibility such as Anti-Litter Campaigns and Nation Building Campaigns. Over the years, FBC had made a concerted effort to hire more personnel, and to work on its digital arm to keep up with the fast-changing world of social media and news in general, which meant expanding the 2nd Appellant's business.

[37] In regard to the 21.5 million loan and the 17.5 million budget allocation referred to in the post, the 1st Appellant testified that it was factually incorrect. The $17 million was in respect of a broadcasting contract between the government and FBC, for funding public service broadcasting for education, information, and cultural entertainment and disaster management programs. This involved the production and broadcasting programs of national interest, educational programs, health programs weather updates and disaster management programs, all of which fall under the ambit of public service broadcasting. In regard to the contents of the post, the correct sum was $14 million, and not 17 Million as claimed by the Respondent, that was paid to FBC for services provided annually by FBC to the Government. FBC provides approximately services worth $30 million annually and was paid just over $40 million. He stated that the budget allocation from the government to FBC had no connection or link whatsoever with the loan taken by FBC, FBC had not defaulted in its loan repayments, and repayment had always been on schedule.

[38] As set out above, The 1st Appellant testified that when he joined FBC it was in bad shape and needed to be made viable as an institution. In that background, he was given the task by the Board to ascertain and put in place a program to make the institution viable.

[39] In or around 2008 or 2009, the Board, chaired at the time by Daniel Whippy, decided that in order to continue and remain as a viable national broadcaster it had to invest. A major refurbishment and new operations for a national television service, were also needed. The only lending institution that was willing to lend was the Fiji Development Bank which gave a loan of $21.5 million. The loan was repayable at 12% interest. That was the background of the loan. This involved the production and broadcasting of programs of

national interest, educational programs, health programs with the updates and disaster management programs, all of which, fall under the ambit of public service broadcasting.

[40] The loan was used to completely renovate and refurbish the FBC building, and improve the other services which had a greater reach than the service existing at time, and ensured that they put in place the best radio and television service in the country. At the time of the trial, Sashi Singh was the Chairman of FBC.

[41] In respect of the Respondent's statement relating the ATS issue, the 1st Appellant testified that he was appointed to the Board of ATS in 2012, was appointed Chairman in 2015 and held that post until his term expired in 2018. When he was the Chairman of ATS, at one point, about 50% of the workers walked off their jobs and did not return to work. The then CEO of ATS had decided to keep out until the issue was resolved. When the 1st Appellant was informed of this, he was not in agreement with the stance taken by the CEO and had intimated to the Board that the workers ought to be allowed to come back to work, and that disciplinary action be taken thereafter. In a bid to resolve the matter, he went to Nadi, but when he reached Nadi, the situation had evolved into a major industrial dispute, and workers who had attended the union meeting without following the regulations of the company and notifying the management before leaving work were standing outside the premises in protest. The 1st Appellant had attempted to resolve the issue and spoke to the union representatives outside the premises, requested to them to return to work, and requested that those who had abandoned the workplace in contravention of the existing regulations of the company, give a written undertaking that they would not repeat this conduct. When the 1st Appellant discussed this matter with the union representatives, they initially agreed to his request. However, the next day they retracted on their undertaking. The 1st Appellant's intention was to have the workers return to work as soon as possible because it affected the services at the International Airport, and had major repercussions, ATS being at the helm of the country's gateway, with tourism being a major income earner for Fiji.

[42] The 1st Appellant testified that the statement contained in the post of the Respondent is false because he was not involved in 'locking out' the workers and it was a misconception because the Respondent did not understand the unique business model of ATS, in which the workers too were shareholders of the company. The Respondent's statement also imputed that the 1st Appellant was incompetent in general and could not solve a problem relating to ATS, as well as to FBC, and that he was corrupt in respect of contracts entered into by FBC. The 1st Appellant stated that he got to know about the Facebook post when a known person sent him a screenshot of it. He then discussed it with the board of FBC, which then decided to take legal action. He testified that the Respondent had posted the defamatory statement on the Fiji Labour Party's Facebook page, which is a global platform accessible to anyone with a Facebook account, it was an open page, meaning that anybody had access to it. He was certain that thousands of Fijians had read the post and felt very dejected as he had been in the media industry for almost 30 years, and the Respondent's post containing accusations and allegations had cast him in bad light, in the industry and in his profession. In addition, the 1st Appellant's family had also been affected and questioned him about the post, members of his staff had been talking about the accusations contained in the post, and he felt very embarrassed particularly because he was the head of the institution and was expected to lead by example and show direction. The Respondent's post could be read by all, and the 1st Appellant had no means of addressing it without embarrassment to himself, and therefore had to seek legal redress.

[43] In regard to the loss suffered by the 2nd Appellant, the 1st Appellant testified that in 2018 the 2nd Appellant received less revenue from its regular clients, and he felt strongly that this was because of the contents of the defamatory post, which resulted in certain individuals not wanting to even associate themselves with either him as an individual, or the 2nd Appellant as a company, because it was allegedly involved in corrupt practices. The defamatory post did affect the revenue of the company. The 1st Appellant had a hands -on approach and he himself attended sales and marketing meetings. But after the post, he did notice some hesitation and discomfort on the part of clients when they met him, and some even raised the issue of the post. He therefore felt that the post had definitely affected both his reputation as well as the reputation and revenue of the 2nd Appellant.

[44] In regard to the deliberate reference to the PSB fee, the 1st Appellant stated that it was paid to the FBC under the PSB contract with the government. In early 2016, in order to comply with the International Accounting Standards (IAS), the fee paid by the government for services provided by FBC had for accounting purposes to be recorded under the heading of 'revenue'. This was documented and covered in the media and generally well known. However, despite this, the 1st Respondent continued to describe it as a 'grant,' and the 1st Respondent felt that this was done to give the impression to the public that money was being freely and indiscriminately given to the 2nd Appellant.

[45] The 1st Appellant testified further that after the loan was approved by FDB, the FBC wanted to negotiate better rates, and eventually approached the FNPF and after much negotiation, FNPF agreed to re-finance the FDB loan at a very good rate. However, because of the allegations of corruption contained in the post being discussed in the public domain through the social media, at the last minute, the FNPF backed out, and did not refinance the loan. This again was a loss to the 2nd Appellant as it was deprived of a financial benefit that it would have received, if not for the publication of the post.

[46] The 1st Appellant stated that the Respondent had not approached him, the 2nd Appellant any authority, the Ministry or FICAC in regard to the statements published in the Facebook post. The Respondent was a member of the Parliamentary Committee on Economic Affairs before which, the 1st Appellant had appeared in 2019, together with the Financial Controller of FBC. The members of the Committee raised several questions about the 2nd Appellant's operations, revenue and losses etc., but the Respondent did not raise any questions at all. The Committee was satisfied with the answers given, and neither the members, nor the Respondent raised any issues about any wrongdoing on the part of the Appellants, or any issues of corruption or underhand dealings as published by the Respondent in the Facebook post, and the subsequent posts.

[47] Whilst the trial was in progress, the 1st Respondent had made another statement in the Fiji Exposed Forum. Since the Appellants had sought a permanent injunction restraining the

defendant from further post circulating and distributing posts of the said statement or anything similarly defamatory of defamatory of the Appellants, the Appellants sought to lead this statement in evidence.

[48] This statement was not laid in evidence as part of the claim of defamation, however it was used to establish in court that the Respondent continued to make personal attacks against the 1st Appellant in which, he called upon the public to exercise their right and freedom of expression to its full extent and "*not be intimidated by defamation and sedition laws."* The 1st Appellant testified that he believed that the Respondent was urging and encouraging the public to make comments similar to those that he had made against the 1st Appellant in his Facebook page post was continuing the same dishonest narrative against him.

[49] The Respondent cross-examined the 1st Appellant closely and repeatedly on the ATS matter, particularly in regard to the fact that the workers retracted on their undertaking. The 1st Respondent tried to establish that the failure of the 1st Appellant to end the strike was the inability of the 1st Appellant "*to resolve the problem amicably*". The relevant evidence was as follows:

Mr. Nawaikula: But did you resolve that? Did you resolve the dispute amicably"
Mr. Khaiyum: I tried to resolve it.
Mr. Nawaikula: You tried to?
Mr. Khaiyum: Yes
Mr. Nawaikula: Did you?
Mr. Khaiyum: It did not happen
Mr. Nawaikula: It did not happen. So isn't it correct to say that you did nothing?
Mr. Khaiyum: No you were saying that I am the problem.
Mr. Nawaikula: Yes you are the problem.
Mr. Khaiyum: Your Honour, that is not the problem. I tried to resolve it. I do not see myself as the problem.

Mr. Nawaikula: *But you agree even though you say you are not responsible for the day-to-day operations, you did agree you did impose conditions on them like signing an undertaking that they will not do this again did you or did you not?*

Mr. Khaiyum: *Yes I have stated earlier your Honour.*

Mr. Nawaikula: *Yes you did.*

Mr. Khaiyum: *I did because I did not want a repeat of the same circumstances again.*

Mr. Nawaikula: *OK but did that resolve it?*

Mr. Khaiyum: *They did later, they could sign it but they did not at a later stage.*

Mr. Nawaikula: *So did they go back to work as a consequential(sic)?*

Mr. Khaiyum: *They did not.*

Mr. Nawaikula; *They did not so do you agree therefore that your attempt did not work, did not resolve it amicably?*

Mr. Khaiyum: *I made an attempt and it was not accepted by the union at a later stage even though they had indicated that they will accept the conditions.*

Mr.Nawaikula: *OK are you still the Chairman of the ATS?*

Mr. Khaiyum: *No, I am not:*

Mr. Nawaikula: *When did you finish from there?*

Mr. Khaiyum: *In 2018*

Mr. Nawaikula: *Isn't that a sign that you are not worthy?*

Mr. Khaiyum: *No it is not.*

Mr. Nawaikula: *Well I put it to you that's a sign that you are not worthy?*

Mr. Khaiyum: *Your Honour, it is not because of that, my term came to an end I was not told to leave in between my contract, my term came to an end.*

Mr. Nawaikula: *I put it to you that your contract was not renewed because you cannot resolve an issue as small such as that?*

Mr. Khaiyum: *It was not a small issue first of all, your Honour and the lapse of my appointment came quite sometime after this incident.*

Mr. Nawaikula: *In what that you are demanding them will you demanding them to admit their guilt? Could you just clarify that, you wanted them to sign something before they go in, what was that?*

Mr. Khaiyum: *I had explained this earlier but I will do it again, your Honour. I just wanted them to say that they had made a mistake and that they should not have walked off their jobs. And they should have told management as per company regulations and that they will not walk off their jobs again to attend the meetings without first informing the management as per the rules of ATS. That's all I wanted them to say and that is all I put forward to the union at the meeting outside the gate.*

Mr. Nawaikula: *And that was explained to them?*

Mr. Khaiyum: *Yes it was*

Mr. Nawaikula: *And what happened?*

Mr. Khaiyum: *And they said yes it sounds fair, You think it will be OK But I don't remember whether it was the same evening or the next day that they decided that they were not going to do that.*

Mr. Nawaikula: *But you agree with me that you are doing this even though you said previously that you are not responsible for the day operations of the company?*

Mr. Khaiyum: *I had to as Chairman. I do not run the operation of the company, but because by the time I got to Nadi there was a situation where I thought management had made a mistake by not allowing the workers to come back in after they had walked out. And I was trying to save the situation and get everyone back to work. And that was one of the proposals that I had for the union in order to get everyone back to work.*

Mr. Nawaikula: *I put it to you that the workers who are the majority shareholders disagreed entirely with you with the payment of 3 million to airports to Fiji Airways for the damaged airplane"?*

Mr. Khaiyum: *Your Honour I don't know why what has to do with the case.*

[50] The cross-examination in regard to the FICAC issue was as follows:

Mr. Nawaikula: *if you look at the statement this is the statement that have (sic) been alleged, "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 associate on the20 million debt. I'm even at a greater loss trying to understand why FICAC has still not investigated the link between the 20 million and the budget allocation." I want to put it to you that you these issues about five and about… performance of FBC has been in the public domain, discussed widely in the Parliament, and in the newspapers, what's your comment in relation to that?

Mr. Khaiyum: I do not understand the question, your Honour.

Mr. Nawaikula: OK I will put it straight to you. Your work at FBC has been because you have been incurring losses after losses after losses despite assistance from government years after years after years?

Mr. Khaiyum: Your Honour, the government does not assist us and I have made that very clear in my evidence before lunch Your Honour, we are paying (sic) a fee for the work that we do for government.

Mr. Nawaikula: *Well I put it to you that fee is wrong and the Auditor General has questioned that, now what do you wish to say to that?*

Mr. Khaiyum: I have not seen anywhere where the Auditor General has questioned our fee. And that is the question that should be asked of the government whether it is right or wrong.

Mr. Nawaikula: And 2011 do you know how much money that government gave to you, calling but you may capital grants service fee, public service fees but coming from the government?

M. Khaiyum: Your Honour it would be good if we refer to it correctly.

Mr. Nawaikula: But coming from government?

Mr. Khaiyum: It's a fee paid to us by the government.

Mr. Nawaikula: Well that fee as I told you is questionable the auditor given queries on it.

Mr. Khaiyum: I do not see any evidence from the Auditor General.

Mr. Nawaikula: *Let me put this to you. in 2018 the Auditor General raise (sic) concern about this money has been taken as revenue. The Auditor General said that should not be the case.*

Mr. Khaiyum: *I have not seen anything in regard to that your Honour. I'm hearing about this for the first time as I had stated earlier in my evidence in 2016 according to the international accounting standards had to record that down in our books as revenue, because that is exactly what it was, it was revenue.*

Mr. Nawaikula: *And for that reason you received a bonus correct?*

Mr. Khaiyum: *Not forgetting a fee.*

[51] Losses were projected for a number of years, it was entering the television industry for the first time and was building up from ground level, and there were depreciation issues to take care of because of new equipment. Further, many of the losses were book losses which had been projected, and therefore it came as no surprise. The witness sought to draw the distinction between projected losses and actual losses. The evidence in this regard was as follows:

Mr. Nawaikula: Whether it's projected or otherwise I am saying they are here losses but they appear

Mr. Khaiyum: *I'm giving the reasons for the losses my Lord. The reason for your losses would not be incompetence or corruption as it has been suggested, but it is because we have started off a new business in a very, very competitive environment and we knew that we were going to make projected losses and this was something my Lord that was clearly explained to Mr. Nawaikula at the Parliamentary Economic Committee last year and he understood all this. And he actually thanked me for giving an explanation, just today that he seems to have a problem with this.*

[52] The Respondent then cross -examined the 1st Appellant on the Annual Reports of the 2nd Appellant. At that point the learned High Court judge questioned the 1st Respondent as to whether he was going to produce the accounts through a witness, and the Respondent stated that he was only going to put questions to the 1st Appellant, based on the Accounts. The relevant evidence in this regard was as follows:

Mr. Nawaikula: You should have been sacked already for all the losses that you incurred from 2010 to 2015 which in total comes to 21 million. What do you wish to say in relation to that?

Mr. Khaiyum: Like I said they were projected losses. it wasn't something that happened because we did not operate FBC properly in a proper manner or due to some under handling (sic) dealings etc. It was projected losses and we knew that it's going to be a loss. On that same token Digicel has been making losses of hundreds of millions of dollars and they had not sacked their CEO and Chairman. So these are all projected losses and they tell their shareholders about losses that are going to happen. We gave evidence that these were projected losses.

Mr. Nawaikula: You are making losses year after year but you are receiving money from government

Mr. Khaiyum: Your Honour, we've making profits from 2016.

Mr. Nawaikula: Well I put it to you that profit is wrong and the Auditor General has made his comment.

Mr. Khaiyum: I do not agree with that your Honour. What surprises me your Honour is that last year during the Parliamentary committee meeting he did not ask me all these questions when he had the perfect opportunity to ask me all these questions, and he did not go to *any institutions to complain about these issues that find so… A certainly a contradiction.*

[53] The Respondent then referred to that part of his statement which states that: *you are the Jonah in the sinking ATS ship, resign and get out"*. The evidence in that regard was as set out below.

Mr. Nawaikula: My Lord the statement says he's the Jonah, so I'm trying to prove that he's a Jonah. And oh Jonah he's the person who causes the problem that's all. You look at the statement in the statement it said 'you are the donor in the sinking ATS ship resign and get out". So I have to convince the court that he is the Jonah. That's well it's coming from.

Mr. Khaiyum: With all due respect, Jonah does not mean that, Jonah means someone who brings about bad luck

[54] The Respondent then cross examined the 1st Appellant on the connection between him and his former colleagues in relation to contracts with FBC. The evidence in this regard was as follows:

Mr. Nawaikula: OK do you know this person Ego Zukiner?

Mr. Khaiyum: Yes I do.

Judge: Who?

Mr. Nawaikula: Ego Zukiner. Do you know Simon Jackson?

Mr. Khaiyum: Yes I do.

Mr. Nawaikula: Do you know Stuart Crow?

Mr. Khaiyum: I don't recall Stuart.

Mr. Nawaikula: Do you know Peter Fraser?

Mr. Khaiyum: I do not recall Peter Fraser.

Mr. Nawaikula: Well I put it to you that these were your friends in Auckland when he was studying there, right. Who later formed the company called that audio video group that dealt with FBC?

Mr. Khaiyum: Your Honour this is bordering under preposterous I never studied in Auckland.

Mr. Nawaikula: OK whatever.

Mr. Khaiyum: Your Honour, you can't say whatever.

Mr. Nawaikula: Well let me put this to you, you know these people who are your friends and they formed the company there they knew later transacted them.

Mr. Khaiyum: *That is absolutely incorrect your Honour.*

Mr. Nawaikula: *Yes you can say that if you don't know you can say that.*

Mr. Khaiyum: *You shouldn't have tell things that are not correct. I've never studied in Auckland your Honour. As I have stated before lunch I worked there for four years I did not study.*

Mr. Nawaikula: *this company certain company in Auckland transacted with FBC or you dealt with correct? what do you wish to say in relation to that?*

Mr. Khaiyum: *Yes I did*

Mr.Nawaikula: *And I wish to put to you that there were many complaints raised about your dealing with this company in the public.*

Judge: *Many complaints raised?*

Mr. Nawaikula: *Many raised about FBC's dealing with this company.*

Mr. Khaiyum: *By whom your Honour?*

Mr. Nawaikula: *Well I can suggest you name Lucas do you know Lucas?*

Judge: *Lucas?*

Mr. Nawaikula: *Yes.*

Mr. Khaiyum: *And what did Mr. Lucas say your Honour?*

Mr. Nawaikula: *Then they just turned the code are you aware of any complaints from any member of the public?*

Mr. Khaiyum: *No but I need to know what the complaint was, Your Honour.*

Mr.Nawaikula: *Now I'll put to him the complaint about this. these are the complaints I'll put to him. my Lord and he can have 15 minutes even if the court can give to them so that he can respond to that.*

Mr. Nayaran: *Objection my Lord that's not discovered documents.*

Mr. Nawaikula: *Well he agreed in relation to these other documents that we deal with them as time comes.*

Judge: *No, now he can raise his objections to it.*

Mr.Nawaikula: *Well I put it to him.*

Judge: *No, no, no you have to first deal with counsel before you deal with witness. You are trying to produce the document which are not disclosed, right?*

Mr. Nawaikula: Yes.

[55] Upon Mr. Nayaran objecting to the documents being tendered in evidence the court disallowed it on the basis that discovery should have been done earlier within the time given in the High Court rules for discovery of documents.

[56] Cross- examination of the 1st Appellant concluded abruptly in the following manner:

Mr.Nawaikula: Well I put it to you that there were complaints made in relation to that deal what do you want to say in relation to that?
Mr. Khaiyum: Complaints by who, your Honour?
Mr. Nawaikula: By members of the public.
Mr. Khaiyum: By which members of the company your Honour?
Mr. Nawaikula: Members of the public as well as it was discussed in Parliament.
Mr. Khaiyum: If matters being discussed in Parliament, your but I don't know any specific complaints by members of the public
Mr. Nawaikula: I have no further questions my Lord.

[57] Mr. Joel Krishna Abraham testified on behalf of the Appellants. He was the CEO of FCCC and, testified that he had with him documents relating to the advertising budgets for 2017 2018 and 2019. He testified that in 2017, FCCC spent $ 22, 903.80 for bus fare review and advocacy. In 2018 they spent $48,200 for radio and television advertisements. Their financial year runs from August of one year to July of the current year. In 2019 they did not spend any money on advertising. One of the reasons they did not advertise with FBC was that a matter was brought to their attention, and they made a business decision to stop advertising with FBC because towards the end of 2019 the witness had received a screenshot of a comment made on Facebook suggesting procurement fraud to the effect that the CEO of FBC was dealing with suppliers he was associated with. The witness made specific reference to the Facebook post which stated; "*why FICAC has not investigated regarding supplier dealings with your former associate turned supplier.* The witness testified that if they had advertised with FBC that year it would have been in the

range of about $40,000.00 to $ 50,000.00. The witness testified that they did consider several reasons, and felt that at that point of time it was not opportune to advertise with FBC and that it could be looked at later. This witness was not cross-examined.

[58] Witness Janice Singh, Director- Human resources of FBC testified on behalf of the Appellants. She had worked in the same capacity for the last 9 1/2 years. On 21st December 2017 she became aware of the Facebook post when she heard staff talking about it in the office, and she had heard that it was not a complimentary post. Upon hearing about it she went to meet the 1st Appellant, who was always popular amongst the staff. She described the 1st Appellant as one of the most inspiring, passionate and humble CEOs that she had worked with. However, after the post had been circulated, she noticed that it had affected him at a deeply personal level and he became quiet and withdrawn. When she went to see him, although when questioned by her as to whether he was feeling alright he said he was, his expression belied his answer. Witness Singh was not cross-examined.

The evidence of the Respondent

[59] The Respondent appeared in person. He testified that he was a Member of Parliament and makes comments on matters of public interest. He admitted having made the statement under challenge. In regard to the ATS issue, he said he expected the 1st Appellant as Chairman to resolve the matter amicably, and because he did not, it was his problem, as Chairman of the company it was his responsibility to solve it amicably. His evidence was as follows:

> "*Well he may not be responsible for the day-to-day running but he himself went to see them and imposed those conditions. He tried his best as he admitted but he did not resolve it. And then you had to go to the tribunal with the tribunal agreeing to the workers. So they went back without any conditions. So basically, I'm saying those were the facts, there was a situation that came under his very responsibility, he did not resolve it.*

And my Lord, therefore I'm entitled to make that comment or any person that saw that situation. Not only me, but any reasonable person would also have made the same comment because he failed, he failed to resolve the matter under his direct responsibility amicably. So that is the background to that, my Lord. Those are the factual backgrounds to the comments I made."

And my Lord, same for FBC. Then I went on, "just look at the mess you did to FBC. I still cannot understand why FICAC", all those my Lord are not just comments from the air, I did not create those. Those have been discussed very widely and on record and the records are the firstly the Annual reports. Annual Reports of FBC, the second document is the Hansard of Parliament where these issues, these issues were discussed over and over again. The third document is the."

[60] The Respondent referred to the Auditor General's Report of 2012. He then stated (copy record 256):

"but the critical one where the auditor criticised that and said' that is contrary to the accounting practice that should be applied to government. You don't recognize government grants in that way it should be treated as other income'. That statement came out clearly in the 2018 Auditor General's Report PG13 where under subheading titled Disclosure of Impact of Non-Compliance I is 20 and it says' To the financial statement stated at based on the cabinet decision in 2012 grants and of special Government from the government of Fiji were treated as capital contribution. So previously they were treated as capital contribution. And in addition to equity rather than being recognized as operating revenue for the company. Effective from March 8th 2016 and based on Cabinet decision 2016, grants are now referred to as Broadcast Service Fee. While the matter was raised as an emphasis for the matter to the attention of the management, there have been no resolutions to clarify on the capital contribution prior to the consultation with the Ministry of Public Enterprise to comply with the full requirement of IAS 20. So my point is that in that then the recommendation the company should disclose in the notes of financial on whether the non-compliance with IAS 20 and implications on financial statements. So my Lord basically the point that I am saying is that these were the background to the statement that I said. I said "just look at the mess you did to FBC' what mess because years after years after years the Plaintiff has been CEO and he has been running the company at a loss. It is almost unlawful to retain a person in a position where it runs losses year after year. And I calculated the losses amounted to $21 million for those periods. At the same time it was receiving

money from the government and I totaled it up to 17 million so are you or any reasonable person could have said that "look at the mess you did to FBC"

So there is the basis of the background to my statement taken from the Annual Reports, commented in Hansard and also at the Auditor General's. Then I went further, I still cannot understand why FICAC is yet to investigate your dealings with your former associates turned supplied on the $20 Million upgrade. That also was discussed in Parliament in a Hansard Report and it's known widely that there were questions raised in relations to the engagement of a certain consulting firm from New Zealand for the spending of that $20million. In Parliament you're entitled to make the government accountable, it should account to the people of that$20 million so we raised these issues and that's why I said "I cannot understand why FICAC has yet to investigate them"

<u>*Cross examination of the Respondent*</u>

[61] Relevant extracts from the evidence of the Respondent are set out below (copy record 261-263):

Mr. Nayaran: *Answer is no, I did not say that. What was the reason for the strike? Was Riyaz the reason for the strike?*

Mr. Nawaikula: *I don't know the reason for this strike.*

Mr. Nayaran: *So the first paragraph says "Admit it Riyaz, you are the problem", obviously Riyaz was not the problem. He was not the cause of the strike, the Jonah in that sinking ATS ship. So you do not know why the strike happened so you cannot blame Jonah or Riyaz for that matter and Jonah was never in the ATS sinking ship, is that right?*

Mr. Nawaikula: *No I disagree with you.*

Judge: *Pardon?*

Mr. Nawaikula: *I disagree. It became a problem because it was prolonged when it became prolonged it becomes a...*

Mr. Nayaran: *That paragraph actually means further means that the First Plaintiff is incompetent and inexperienced as Chairman at ATS?*

Judge: *inexperienced and?*

Mr. Nayaran: *Incompetent*

Mr. Nawaikula: He is incompetent for that reason.

Mr. Nayaran: You are saying that he is incompetent?

Mr. Nawailkula: For that reason.

Mr. Nayaran: For that reason?

Mr. Nawaikula: Which is he failed to resolve it amicably.

Mr. Nayaran: and you also in that paragraph, it clearly means that he is an embarrassment to everybody. I'm saying that he is an embarrassment to everyone in the sense that he does not have the necessary skill set to perform his job as the Chairman of ATS. You agree or disagree?

Mr. Nawaikula: I disagree

Mr. Nayaran: In your post you said resign and get out and save us all the embarrassment. That is what you said.

Mr. Nawaikula: Yes I said that.

Mr. Nayaran: You are clearly saying that he is embarrassing ATS?
Mr. Nawailkula: Embarrassing ATS, everybody because he cannot resolve the problem amicably.

Mr. Nayaran: But you admit that he was not the cause of the strike, is that right?

Mr. Nawaikula: Yes.

Mr. Nayaran: And you do not know what was the reason for the cause of the strike?

Mr.Nawaikula: I do not know the reason for the cause. I don't know the reason why the strike started.

Mr. Nayaran: So you posted something without knowing these two, the main critical facts.

Mr. Nawaikula: I just know, my Lord that as Chairman of that problem, especially its prolonged, and call upon him. [Emphasis added].

[62] In cross-examination the Respondent said that he made the statement about the 1st Appellant because he is incompetent. However, when he was questioned to the effect that the ordinary meaning of his statements was that the 1st Appellant did not understand the operations of ATS, and that the1st Appellant cannot carry out his job, that the 1st Appellant is a dictator who had laid down conditions for re-employment of ATS employees, the Respondent replied in the negative.

[63] When the Respondent was questioned on whether the true and ordinary meaning of the words that because of the 1st Appellant's status, FICAC has not investigated the Apellants, he replied in the negative. When asked whether the ordinary meaning of that particular paragraph means that the 1st Appellant is a crook, has previous bad commercial associations, and that he is incompetent as the CEO of the 2nd Appellant, and that the 1st Respondent was having corrupt dealings with the 2nd Appellant, he replied in the negative. The evidence in this regard was as follows:

Mr. Nayaran: *I want to put it to you that, that particular paragraph means that the First Plaintiff is corrupt and is having corrupt dealings with the Plaintiff the second defendant company.*

Mr. Nawaikula: *I disagree. My statement was limited to looking at the situation objectively where you have a strike out which was prolonging and that called upon him to resolve amicably, he did not. It was there it where the background of that statement.*

Mr. Nayaran: *Yes you are trying to justify your words I get that. but this is what it says. ' I still cannot understand why FICAC has yet to investigate', so you are saying there is some criminal activity involved with the first and second Plaintiff.*"

Mr. Nawaikula: *No I did not say that .I did not mean that.*

Mr. Nayaran: *Now if I can take you to the third paragraph, this is where it gets interesting. Because the third paragraph reads,* ***"I am even at a greater even loss so you are already at a loss now you are at a greater loss' trying to understand why FICAC has still not investigated the link between if BC's inability to pay 20 million in the 17 million budget***

allocation". *So let's go to the top let's break it down. I am at a greater loss trying to understand why FICAC' so my instructions are and I put it to you that again you are saying, you are re-emphasizing that there is a corrupt activity or fraudulent activity between the First Plaintiff and the second Plaintiff Is that right?*

Mr. Nawaikula: *I did not say that*

Mr. Nayaran: *But that is what it means.*

Mr. Nawaikula: *Not to me.*

Mr. Nayaran: *Yes or no*

Mr. Nawaikula: *No*

Judge: *you mentioned FICAC?*

Mr. Nawaikula: *I explained that here you have.*

Judge: *No I'm asking about FICAC. Why did you bring FICAC into this?*

Mr. Nawaikula: *Because there is a reason to believe and the reason to believe is this my Lord. YOU have 21 million there owed. And yet there is 17 million which is being given by government. So there is something wrong there. If you borrow money and you should pay then you asked the government to give you money again. That is where I am coming from.*

[64] On behalf of the respondent witness Malcolm Beddoes testified. He it's not an accountant but gave his opinion based on general knowledge. He conceded that the government had paid fees for the programs done by FBC. His evidence at page 294 of the copy record conceded that FBC performed work for the government and it was fair for the government to pay for these services. The Respondent failed to plead material facts and particulars relied on at the trial, and fail to discover the FBC Annual Reports and the Auditor General's Reports.

The judgment of the High Court

[65] Reproduced below those portions of the High Court judgement that are necessary to be considered to determine the issues raised in grounds of appeal. The learned High Court judge found as follows:

> *20. In my judgment, the evidence of the First Plaintiff establishes that the statements contained in paragraphs i, ii, iv and v of the post are true and therefore not defamatory of the First Plaintiff.*
>
> *21. 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.*
>
> *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.*
> *27. In my judgment, the statements in paragraphs ii and iii do not convey a defamatory imputation on the Plaintiff.*
>
> *28. In the celebrated case of* ***Lewis v Daily Telegraph Ltd,*** *1964 AC 234 an article in the Daily Telegraph headed 'Inquiry on Firm by City Police' reported that the City London Fraud Squad were inquiring into the affairs of Rubber Improvement Ltd. The Chairman of the company claimed that 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.*
>
> *29. In my judgment, the defendant's post of 21st December 2017, is not defamatory of the Plaintiffs. The innuendos alleged cannot be supported."*

[66] Being aggrieved by the judgment of the High Court, the Appellants preferred this appeal on 11 grounds. Grounds 1 to 4 are based on the findings in paragraph 19 of the judgment, grounds 5, 6, 7, 8 and 9 based on the findings in paragraph 26.

The Grounds of appeal

1. ***THAT*** *the Learned Judge erred in fact and in law by finding in Paragraph 19 of the Judgment that the paragraphs (i) is true and not defamatory when in fact paragraph (i) stated "Admit it, Riyaz, you are the problem, the Jonah in that sinking ATS ship. Resign and get out and save us all the embarrassment" which in its ordinary meaning and by way of innuendo meant:*

(i) That the 1st Appellant is the reason for the strike carried out by the Air Terminal Services;
(ii) That the 1st Appellant is incompetent and inexperienced in his capacity as Chairman of the ATS and lacks the capacity to make informed decisions;
(iii) That the 1st Appellant does not know how to do his job and should resign effective immediately;
(iv) That the 1st Appellant is an embarrassment to everyone and does not have the necessary skill set to perform his tasks as the Chairman of ATS; and
(v) The Respondent in his evidence stated that the Appellant was a Jonah who brings about "bad luck or bad omen."

2. ***THAT*** *the Learned Judge erred in fact and in law by finding in paragraph 19 of the Judgment that the paragraphs (ii) is true and not defamatory when in fact paragraph (ii) stated "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 $20M debt upgrade on FBC" which in its ordinary meaning and by way of innuendo meant:*

(i) That due to the 1st Appellant's status, FICAC is not investigating his actions and/or inactions and that FICAC has some sort of arrangement with the 1st Appellant;
(ii) That the 1st Appellant is a crook and has had previous bad commercial associations with the Second Appellant prior to becoming to CEO;
(iii) That the 1st Appellant is incompetent in his role as Chief Executive Officer of the Second Appellant;
(iv) That the 1st Appellant has poor management and misguided leadership;
(v) That the 1st Appellant is corrupt and is having corrupt dealings for the benefit of the Second Respondent and or the investments made by the Appellants; and
(vi) That the Appellants have a huge debt which it cannot repay.

3. ***THAT*** *the Learned Judge erred in fact and in law by finding in Paragraph 19 of the Judgment that the paragraphs (iv) is true and not defamatory when in fact paragraph (iv) stated "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" when in its ordinary meaning and by way of innuendo meant:*

(i) That the 1st Appellant is incompetent as the Chairman of ATS and does not understand the operations of the shareholding structure of ATS;
(ii) That the employees of ATS know that the 1st Appellant cannot carry out his job;
(iii) That the 1st Appellant is misusing his powers as the Chairman of ATS;
(iv) That the 1st Appellant is a dictator who is laying down absurd conditions for re-employment of the ATS employees.

4. ***THAT*** *the Learned Judge erred in fact and in law by finding in Paragraph 19 of the Judgment that the paragraphs (iv) is true and not defamatory when in fact paragraph (v) stated "You know you don't have it in you Riyaz. Just resign and get out" which in its ordinary meaning and by way of innuendo meant:*

(i) That the 1st Appellant is incompetent in his capacity as Chairman of ATS;
(ii) That the 1st Appellant does not have the quality and ability to be the Chairman of ATS and deal with the strike;
(iii) That the 1st Appellant should resign from the position of Chairman;
(iv) That the 1st Appellant is incompetent and inexperienced in his capacity as Chairman of the ATS and lacks the capacity to make informed decisions; and
(v) That the 1st Appellant is an embarrassment to everyone and does not have the necessary skill set to perform his tasks as the Chairman of ATS.

5. ***THAT*** *the Learned Judge erred in law and in fact by finding in Paragraph 26 and 27 of the Judgment that statement in paragraph (ii) do not convey a defamatory imputation on the Appellants when in fact paragraph (ii) stated "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 $20M debt upgrade on FBC" which in its ordinary meaning and by way of innuendo meant:*

(i) *That due to the 1st Appellant's status, FICAC is not investigating his actions and/or inactions and that FICAC has some sort of arrangement with the 1st Appellant;*

(ii) *That the 1st Appellant is a crook and has had previous bad commercial associations with the Second Appellant prior to becoming the CEO;*

(iii) *That the 1st Appellant is incompetent in his role as Chief Executive Officer of the Second Appellant;*

(iv) *That the 1st Appellant has poor management and misguided leadership;*

(v) *That the 1st Appellant is corrupt and is having corrupt dealings for the benefit of the Second Respondent;*

(vi) *That the Appellants have a huge debt which it cannot repay;*

(vii) *That the Respondent being a member of Parliament cannot raise issues of public interest outside of the privileges that are given to a Parliamentarian;*

(viii) *That the Respondent's publication on the Facebook platform did not meet the required criteria of qualified privilege; and*

(ix) *That the Court only took into considerations issues in relation to the ATS issue and not the remarks against the Appellants.*

6. ***THAT*** *the Learned Judge erred in law and in fact by finding in Paragraph 26 and 27 of the Judgment that statement in paragraph (iii) do not convey a defamatory imputation on the Appellants when in fact paragraph (iii) stated "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" which in its ordinary meaning and by way of innuendo meant:*

(i) *That due to the 1st Appellant's status, FICAC is not investigating his actions and/or inactions and that FICAC has some sort of arrangement with the 1st Appellant;*

(ii) *That the 1st Appellant is a crook and has had previous bad commercial associations with the Second Appellant prior to becoming the CEO;*

(iii) *That the Appellants are unable to pay its debts;*

(iv) *That the Second Appellant has a huge debt which it cannot repay as a result of which its grant was increased;*

(v) *That the 1st Appellant is wrongfully and deceitfully seeking additional grant and or financial advantage from the Government for the Second Appellant;*

(vi) *That the Appellants are involved in corrupt practices due to which they were allocated a $17M budget;*

(vii) *That the 1st Appellant is guilty of dishonest and dishonourable conduct and practice;*

(viii) *That the Second Appellant has poor management and misguided leadership including history of fraudulent commercial practice; and*

(ix) *That due to the 1st Appellant's relations with the Government FICAC will not investigate the 1st Appellant,*

7. ***THAT*** *the Learned Judge erred in law and in fact by failing to properly evaluate all the evidence presented before the High Court by the Appellant and thereby erred in holding in the Judgment dated 9th of October 2020 that the article published on 21st December 2017 on Facebook page titled "Fiji Labour Party" was not defamatory including awarding costs against the Appellants in the amount of $2,000.00.*

Particulars

(i) *The said post is in its plain and ordinary meaning are prima facie defamatory and false and was made with the intent to cause harm to the Appellants reputation;*

(ii) *The post was done on the social media platform, Facebook which has a worldwide audience and as a result, the Appellants have been injured in their credit and reputation and have been brought into public scandal, odium and contempt.*

(iii) *The post is designed to misleading indicate that the 1st Appellant is incompetent in his capacity as Chairman as is the sole reason for the ATS strike.*

(iv) *The post also indicates that the 1st Appellant is also incompetent in his capacity as CEO of the Second Appellant;*

(v) *That the 1st Appellant is incompetent and inexperienced in his capacity as Chairman of the ATS and lacks the capacity to make informed decisions;*

(vi) *That the 1st Appellant is an embarrassment to everyone and does not have the necessary skill set to perform his tasks as the Chairman of ATS;*

(vii) *That sue to the 1st Appellant's status, FICAC is not investigating his actions and/or inactions and that FICAC has some sort of arrangement with the 1st Appellant;*

(viii) *That the 1st Appellant is a crook and has had previous bad commercial associations with the Second Appellant prior to becoming the CEO;*

(ix) *That due to the 1st Appellant's relationship with the Government, FICAC will not investigate the 1st Appellant;*

(x) *That post is further designed and/or engineered to cause damage to the Appellants so as to entice the public that the Appellants are obtaining*

financial advantage from the Government for its running and is involved in corrupt practices;

(xi) *As a result of the post, the Appellant are suffering grave reputational damages when it is clear that the strike was initiated by ATS employees without any involvement of the 1st Appellant;*

(xii) *Furthermore, the grant being referred to in the post is a PSB fee ("fee") for service in relation to providing airtime to the Fijian Government relating to 2 radio stations and FBC TV under the Public Service Broadcasting ("PSB") Contract;*

(xiii) *The fee is for the non-commercial programs that are produced and broadcast as well as for the maintenance and operations of the services provided by the Second Appellant which are purely non-commercial in nature and focuses on cultural, religious, educational and disaster management programs;*

(xiv) *The Appellants carry immense community service responsibility which is reflected in the content of the network and the Respondent's baseless allegations in the post has greatly harmed the reputation of the Appellant which is continuing;*

(xv) *The 1st Appellant has been greatly injured in his credit, character, and reputation and in his said office and or occupation and has been brought into hatred, ridicule and contempt; and*

(xvi) *By the publication of the said words, the Appellant's have been greatly injured in his credit and reputation and have been brought into scandal, odium and contempt,*

8. ***THAT*** *the Learned Judge erred in law and in fact by not holding that as a result of the post, the 1st Appellant and the Second Appellant's business operations have suffered considerably;*

Particulars

(i) *Injury to reputation;*

(ii) *Loss of business and revenue;*

(iii) *Stress, trauma and anxiety for the Appellants and its officers;*

(iv) *The post has caused consequential reputational damage to the Appellants in respect of its listenership and viewership. Further the Respondent has published the said words out of malevolence or spite towards the Appellant.*

9. ***THAT*** *the Learned Judge erred in fact and in law by holding that the post was not defamatory and/or that the Respondent was successful on the defence of fair comment when in fact the Respondent did not confirm the accuracy of*

the various assertions made in the post, either adequately or at all, before causing such allegations to be posted; constituting reckless disregard for the truth and/or the Respondent disseminated the statements in the said post as widely as possible by continuing to have the post on its Facebook page which has a wife audience.

10. ***THAT*** *the Learned Judge erred in law and in fact by finding in Paragraph 29 of the Judgment that the post on 21st December 2017 is not defamatory of the Appellants and that the innuendoes cannot be supported when in fact:*

(a) *As per the Defamation Act, for the Respondent's defence of absence of malice to be successful, the Respondent ought to have inserted in a newspaper or broadcast a full and complete apology for the defamation. In cross-examination, he adamantly and relentlessly stated that he did not need to and there was no reason to do so;*

(b) *The Respondent admitted in cross-examination that the 1st Appellant was not the cause of the strike and also concurred to the suggestion that he was not running day to day operations. He was at all material time aware of these facts yet the Respondent imputed the 1st Appellant as the reason behind the strike and the Appellants being involved in illegitimate activities and being under the shield of the Government. This constituted a deliberate and calculated view to bring the Appellants into hatred, ridicule or contempt. This was a gross personal attack by the Respondent on the Appellants character;*

(c) *The defamatory post was made by the Respondent without due or proper inquiry as admitted by him during cross-examination. There was carelessness or recklessness and disregard for the integrity and respect of the Appellants, a disregard of that sort of duty which one man owes to another; and*

(d) *The Respondent admitted in cross-examination that he believed in his heart that the Appellants were evil and wrong, It is to be noted that "honest belief" means not the actual belief in the Respondent's mind but belief founded on reasonable grounds which the Respondent has failed to justify;*

(e) *From the circumstances in which the post was made, an inference of deliberate and calculated view to prejudice or to impute blame to the Appellants can easily be drawn. The conduct of the Respondent was vindictive and malicious.*

(f) *That the "Respondent is not entitled to rely on the defence of fair comment if the comment was made maliciously"; Chand v Bolatiki, The Respondent's post was inspired by malice thus the defence of fair comment fails as the*

Respondent has not adduced any evidence at all to show that his post was based on the truth and the Respondent's post is not a fair comment but rather an attempted imputation of facts.

(g) *In Fiji Fashion Week Ltd v Radrodro [2017] FJHC 9; HBC143.2015 (18 January 2017), the principle requires that "the Respondent pleads justification. The burden of proving justification rested on him." The defence of justification operates in the same way as the defence of fair comment. The presence of malice would nullify the defence of justification hence the Respondent is not entitled to his defence. The defence of justification fails as the Respondent's action has materially and substantially injure the Appellants reputation and connotes a gross disregarded of the truth.*

11. ***THAT*** *the Learned Judge erred in law and in fact by finding in Paragraph 30 of the Judgment that the calm for general damages, special damages, loss of business revenue and profits of the Second Appellant; punitive damages, a permanent injunction restraining the Respondent from further post, circulating, distributing or otherwise causing to be posted the statements containing the libel or anything similar defamatory of the Appellants, interest, and indemnity costs id declined when in fact:*

Particulars

(i) *The Respondent admits the post were done by him on a Facebook page that was accessible by anybody. The posts clearly identify the Appellants and the 1st Appellant's link to the Second Appellant and ATS.*

(ii) *The sources of the Respondent's information through which the Respondent derived and articulated the post are FBC Annual Reports, Hansards and Auditor General's Reports, none of which was adduced by the Respondent during the course of his evidence.*

(iii) *The Respondent relentlessly states that the Appellants are engaged in "evil" and "wrong" activities, that the 1st Appellants is "worthless", that it is his hope the post affects the Appellants which is intended to paint him as a concerned citizen and a Good Samaritan wanting to expose the Appellants for their alleged illicit activities. He has made recurring posts to maintain the same position as his initial position while hiding behind the shield of public activism and maliciously adopting principles of accountability and transparency to justify his actions.*

(iv) *The Respondent has not raised the issues and concerns as per his post with the relevant authorities such as FICAC and the Office of the Minister for Finance or at the relevant platform such as the Parliamentarian Committee of Economic Affairs meeting.*

(v) *The Respondent has adduced no documentary or concrete material to support his post and substantive his allegations against the Appellants so as to verify the sources from where the Respondent has derived such information.*

(vi) *The Respondent has not adduced any evidence to show his post was a fair comment and was justified under common law and under the Defamation Act.*

(vii) *The evidence given by the Chief Executive Officer of Fiji Consumer and Competition Commission (FCCC), Mr. Joel Abraham was reliable, credible and coherent in substantiating the detrimental effects of the Respondent's post on the Appellants image and integrity and the resulting loss of business and revenue caused to the Second Appellant. The evidence was unchallenged and undisputed. If FCCC was to advertise with FBC in 2019, FCCC would have spent around $40,000.00 to $50,000.00, which was losses sustained as a direct result of the Respondent's post of 21st December 2017.*

(viii) *The evidence given by Janice Singh, Director Human Resources of the Second Respondent clearly stated that she has known the CEO for 9 ½ years and has known him to be funny and inspiring person who often created laughter. He became quite, sad and isolated. These are some symptoms of withdrawal during stress which was due to the said post and further staff morale affected and the CEO had to answer to the Board, staff and the public. The 1st Appellant was psychologically and emotionally affected by the Respondent's post as staff members, the Board and the public had begun to question the integrity of the 1st Appellant and the accuracy of the post. The evidence of Ms. Janice Singh was unchallenged and undisputed.*

(ix) *The Appellants has adduced evidence to confirm that the ongoing posts and attacks by the Respondent after the institution of this action to warrant a grant of permanent injunction. The Respondent has continued to post after the initial post hence the Respondent should be stopped from post defamatory articles and/or posts on Facebook and on any media.*

(x) *That as a result of the posts on Facebook, the Appellants reputation has been seriously damaged and its business operations have suffered considerably and continues to suffer and damage.*

(xi) *The Respondent's clear attack and bullying nature by way of using Facebook as a medium to negatively and subtly tell the public not to be associated with the Appellants has caused clear economical damages and losses to the Appellants.*

(xii) The Respondent has acted with malice and in a high-handed manner in post defamatory statements entitling the Appellants to punitive and aggravated damages. The Respondent even refused to apologise and/or retract the posted statements.

12. Such further grounds of appeal as may be appropriate upon receipt of the High Court Record.

13. THAT the Appellants reserve their right to argue and/or file further or revised grounds of appeal.

Discussion of the grounds of appeal

[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.

[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 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. In arriving at his conclusion, the learned judge relied on the following passage in **Lewis** *(supra)*:

> "*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 whose 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 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." ((Emphasis added).

[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 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.

[91] Section 16 of the Defamation Act 1971 provides as follows:

> *"16. 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."*

[92] The Appellants correctly relied on **Joseph and Others v Spiller & Another** [2011] 1 All ER 947 at 951-952. *" at* 198 , [1969] 2 QB 375 *at* 391

> *What are currently the elements of the defence of fair comment?*
>
> *[3] Sitting in the Court of Final Appeal of Hong Kong in* ***Cheng Albert v Tse Wai Chun Paul*** *(2000) 10 BHRC 525 , [2001] EMLR 777 Lord Nicholls of Birkenhead was concerned with the ingredients of malice that can defeat the defence of fair comment. Before considering that question he set out (2000) 10 BHRC 525 at 529, [2001] EMLR 777 (paras 16–21) under the heading*
> ***Fair Comment****: The Objective Limits' what he optimistically described as five 'non-controversial matters', which were 'well established' in relation to the defence of* ***fair comment****:*
> *'First,* ***the comment must be on a matter of public interest****. Public interest is not to be confined within narrow limits today: see Lord Denning in* ***London Artists Ltd v Littler*** [1969] 2 All ER 193 *at* 198 , [1969] 2 QB 375 *at* 391 *].*
> *"Second,* ***the comment must be recognisable as comment, as distinct from an imputation of fact****. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of* ***Myerson v Smith's Weekly*** *(1923) 24 SR (NSW) 20 at 26:*
> *"To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment."*

Third, ***the comment must be based on facts which are true or protected by privilege****: see, for instance,* ***London Artists Ltd v Littler*** [1969] 2 All ER 193 *at* 201 , [1969] 2 QB 375 *at* 395 *. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available****.***

Next, the ***comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made****. The reader or hearer should be in a position to judge for himself how far the comment was well founded.*

Finally, ***the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views****: see Lord Porter in* ***Turner v Metro-Goldwyn-Mayer Pictures Ltd*** [1950] 1 All ER 449 *at* 461 *, commenting on an observation of Lord Esher MR in* ***Merivale v Carson*** (1888) 20 QBD 275 *at* 281 *. It must be germane to the subject matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in* ***Gardiner v Fairfax*** *(1942) 42 SR (NSW) 171 at 174.*

These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence.'

[4] These five propositions relate to elements of the defence of fair comment in respect of which the burden of proof is on the defendant. Cheng's case was primarily concerned with a sixth element—absence of malice. A defendant is not entitled to rely on the defence of fair comment if the comment was made maliciously. The onus of proving malice lies on the claimant."

Public Interest

[93] In **London Artists Ltd v Littler** [1968] EWCA Civil 3; [1969] 2 QB 375; [1969] 2 All ER 193; [1969] 2 WLR 409 . Lord Denning, MR said:

"interest in which everyone, press and all, are entitled to comment freely. "*Three points arise on the defence of fair comment…*

There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the Judge and not for the jury. I would not myself confine it within narrow limits. 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. A good example is South

Hetton Coal Co. v. North Eastern News (1894 1 QB 133). A colliery company, owned most of the cottages in the village. It was held that the sanitary condition of those cottages - or rather their insanitary condition - was a matter of public interest. Lord Esher, Master of the Rolls, said that it was "a matter of public interest that the conduct of the employers should be criticised." There the public were legitimately concerned. Here the public are legitimately interested. Many people are interested in what happens in the theatre. The stars welcome publicity. They want to be put at the top of the bill. Producers wish it too. They like the house to be full. The comings and goings of performers are noticed everywhere. When three top stars and a satellite all give notice to leave at the same time - thus putting a successful play in peril - it is to my mind a matter of public

In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter, *see Cunningham-Howie v. Dimbleby (1951 1 K.B.) at page 364. They are* ***the facts on which the comments are based or from which the inferences are drawn -as distinct from the comments or inferences themselves****. The commentator need not set out in his original article all the basic facts, see Kemsley v. Foot in 1952 Appeal Cases, 345:* ***but he must get them right and be ready to prove them to be true. He must indeed afterwards in legal proceedings, when asked, give particulars of the basic facts****, see Burton v. Board (1929 1 K.B. 301); but he need not give particulars of the comments or the inferences to be drawn from those facts.* ***If in his original article he sets out basic facts which are themselves defamatory of the Plaintiff, then he must prove them to be true: a****nd this is the case just as much after section 6 of the Defamation Act, 1952, as it was before. It was so held by the New Zealand Court of Appeal in Truth v. Avery (N.Z.F.R. 274), which was accepted by this Court in Broadway Approvals Ltd. v. Odhams Press Ltd. (1965 1 W.L.R. 805).* ***It is indeed the whole difference between a plea of fair comment and a plea of justification. In fair comment he need only prove the basic facts to be true. In justification he must prove also that the comments and inferences are true also.***"(Emphasis added).

[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** (*supra)*…, "*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.

[95] These principles were reiterated in **Fiji Times v Vayeshnoi [2010] FJCA 35; ABU002.2008 (16 July 2010)** this court held that:

27.0 *In* ***Branson v. Bower*** *the Judge held that the touchstone for fair comment on a matter of public interest was always honesty and should not be watered down by considering issues such as fairness or moderation even if the words complained of could be characterized as attributing corrupt or dishonourable motives to the claimant; and that, accordingly, the only requirements for establishing a defence of fair comment were that the defendant had expressed his opinion honestly or has done so upon facts accurately stated.*"

25.0 The clear conclusion to be drawn from the judgments of Lord Nicholls and Lord Cooke is that although the constitutional structures vary, the pervading ideals are the same. Freedom of speech on the one hand and personal reputation on the other have the same importance in all democracies. The whole purpose of defamation law is to enable a Plaintiff to clear his or her name.

[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.

[97] In respect of the matter of public interest, they learned judge 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 judge then relied on Diplock J's much quoted summing up to the jury J *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 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 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, 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) 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.

The Respondent's position

The Respondent admitted having made the claim, and the summary of his defence has set out in his written submissions in this court was that;

(a) the statements of the post were not defamatory because the claim of the 1st Appellant was not supported by evidence because:

(i) the Appellants did not call an ordinary person, man or woman to testify in court what the statements in the post meant to him and this ordinary person ought to have been person who was on the Facebook page of the Respondent.

(ii) even if the statements were defamatory the Respondent had shown through the evidence of the first appearance own oral testimony and the evidence of the Respondent the statements were true, fair comment, justified, without malice, amounted to fair criticism in the public interest.

[106] For the reasons set out above, and on a consideration of the oral and written submissions filed on behalf of the parties, I am satisfied that the Appellant's have established that the respondent's Facebook post published on 21st December is defamatory of the Appellants, and caused injury to their reputation and resulted in loss of business and revenue for the 2nd Appellant.

[107] The appeal is accordingly allowed with costs.

<u>Orders of the Court are:</u>

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.*

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....

Hon. Justice Farzana Jameel
JUSTICE OF APPEAL