

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

CIVIL APPEAL NO. ABU 0039 OF 2019
[High Court at Lautoka Civil Action No: 147 of 2012]

BETWEEN : **ISIRELI BIUMAITOTOYA** *Appellant*

AND : **UMA DUTT SHARMA** *Respondent*

Coram : **Dr. Almeida Guneratne, P**
E. Basnayake, JA
S. Lecamwasam, JA

Counsel : **Mr A.J. Singh and Ms P.D. Prasad for the Appellant**
: **Mr V. Sharma for the Respondent**

Date of Hearing : **10th November, 2022**

Date of Judgment : **25th November, 2022**

JUDGMENT

Almeida Guneratne, P

[1] I shall begin by making a brief recount of the background that had led to resulted in the alleged libel (defamatory “*publication*” (posting)).

[2] The Appellant (defendant in the High Court) was a tenant of the Respondent, his landlord (plaintiff in the High Court) of a premises in which the Appellant was having a dental clinic.

- [3] Owing to a history of discontentment (through a short period), that had arisen between them (on which much forensic labour was spent in this case which in my view was irrelevant), the Appellant sent “*a posting*” (via email) to 144 dental personalities.
- [4] After trial, the learned High Court Judge held that the alleged posting constituted defamation and awarded damages to the Respondent.
- [5] It is against that judgment of the High Court that this appeal has been preferred.
- [6] Before I embarked on my task to ascertain and determine as to whether the High Court judgment bears scrutiny, I looked at (a) the Statement of Claim of the Respondent, (b) the Statement of Defence of the Appellant, (c) the evidence led at the trial, (d) the written submissions tendered on behalf of both parties and (e) the oral submissions made by respective Counsel at the hearing before this Court.

Discussion

- [7] The initial element in regard to “*an alleged libel (defamation)*” is “*the publication of it*” in the instant case, the distribution/circulation of it.
- [8] That requirement stood established.
- [9] However, was the said “*alleged libel*” satisfy the requirements of grounding a cause of action for “*libel?*”
- [10] I shall at this point refer to the alleged defamatory words (the impugned posting).

The impugned posting (reproduced by the Judge at pages 38 to 40 of the Copy Record)

“*Subject: SHORTLANE MEDICAL CENTER*”

“*Totally different here folks*”

“As you have said I have been vacated by my landlord Dr Uma D Sharma from Shortlane Medical Center, Namaka. This is after 12 years in that location.”

- a) *“I hear a group of Dr’s including Dr Tui Taoi from LaToya are planning to move in there.”*
“I have moved to a better location, however, I want everyone interested that there is a LEGAL ACTION by me against Dr Uma coming up in 3 weeks at Nadi Court. I will be suing for DAMAGES.”

“Those moving in there may find themselves inconvenienced by this Legal Suit.”

- b) *“Dr Uma’s wife is also for Filing for Divorce”*
In its natural meaning, the abovementioned words meant and were understood to mean that the Plaintiff is in the process of dissolution of marriage, abusive, intolerant, manipulative, personal life in disarray, not a family oriented person.
- c) *“So the property may go into receivership, causing future problems to tenants.”*
- d) *“Also Dr Uma is a landlord from hell, his interference into the rented premises and into your business, refusing to do repairs, refusing to renew the Legal Lease Agreement after the 1st 5 years, so that he can chase you away anytime and, and every agreement he will say that to your face.*

“This is what he did to me. He is landlord that will involve you and expect you to do silly things like spying on his wife for lovers ETC. I have been through that rubbish.”

What was the applicable test to determine whether the words contained in the “posting” were defamatory?

[11] I shall first take the common law position.

The Common Law Position

[12] In the year 1936, Lord Atkin in the case of **Sim v Stretch** [1936] 52 TLR 669 had held that *“the words must tend to lower the claimant in the estimation of right-thinking members of society generally.”* (cited with approval by this Court in **Suresh Pratap v Atil Chandra Gosai**, ABU0019 of 2019, 30th September, 2022.

[13] That Atkinian definition has survived for over eight decades (see: **Sube v. News Groups Newspaper Ltd** [2018] EWHC 1234 (Q.B). Foreshadowed by some earlier decisions as well, in Sube's case, it was said, exemplifying the said Atkinian test, that the question whether a statement is defamatory must be judged by reference to the standards of society generally, rather than a section of it.

Application of the said test to the facts of the instant case

[14] To begin with, the impugned statement was distributed and circulated among 144 (dental), doctors and therefore confined to a close professional community.

[15] Out of the said 144 dental personalities, the plaintiff (respondent) called 2 such personal to give evidence which evidence is seen at page 32 of the Copy Record.

[16] Taken cumulatively the evidence of the said two witnesses, all what they said was that they felt “*disgusted*” (Mr. Raju – the 1st witness) and “*was upset and felt rotten about it*” (re: Rajendra Bali – the 2nd witness).

[17] The theme which those witnesses pursued was an admonition on the Appellant’s conduct in sending the posting via email. Neither of them spoke one word on whether, on account of the said posting (that), in their minds, the reputation of the Respondent had been lowered in their estimation.

[18] From this evidence it is plain as a pikestaff that, it is the Appellant who had been lowered in the estimation of the said two witnesses and not the Respondent. There was no evidence for the High Court to hold that the Respondent’s reputation had been affected.

[19] In fact, when asked by Court, Mr Sharma for the Respondent’s response was that, the evidence of the two witnesses referred to above showed that, the Respondent was “*ridiculed.*”

- [20] While agreeing with Mr Sharma (for the Respondent) on that score and disagreeing with Mr Singh (for the Appellant) that the impugned words were a mere hyperbole, nevertheless, the words did not constitute defamatory content in as much as the consequential criterion of (a) the Respondent's reputation and/or (b) he had suffered financial loss were not established being the criteria this Court took into consideration in the cases of **Suresh Pratap v. Gosai** (supra) and **Riyaz Sayed Khaiyum and FBC Limited v. Niko Nawaikula**, (ABU 104/2020), 30th September, 2022.
- [21] While I feel I have adequately dealt with the "*reputation criterion*," this Court might have been still persuaded to affirm the judgment of the High Court if "*financial loss*" had been proved.
- [22] In that regard we did look at what the Respondent had averred at paragraph [22] of his Statement of Claim (page 21 of the Copy Record). Therein, the Respondent has addressed that aspect when he averred that on account of the libelous statement, the premises that had been given to the Appellant still remains vacant.
- [23] Mr. Sharma in his submissions referred to the evidence given on behalf of the Respondent in that regard at pages 254 to 258 of the Copy Record, which he submitted was not challenged by the Appellant in cross-examination.
- [24] However, on a perusal of that evidence I could not find a decisive nexus between what had been averred by his client at paragraph [22] of his Statement of Claim and the evidence found at pages 254 to 258 of the Copy Record.
- [25] On the contrary, Mr. Singh for the Appellant referred this Court to a document at page 131 of the Copy Record which showed that, the premises which had been given to the Appellant had remained vacant after the Appellant had vacated it because the Respondent had been sanguine of effecting repairs to the same.

[26] Whatever time lines or reasons which Mr. Sharma drew between the time the Appellant had remained on the premises and vacated, that explanation given by Mr. Singh struck me as acceptable on a balance.

Determination

[27] I feel I have explained the background as it presented itself.

[28] This was not some irresponsible media gunslinger firing rhetorical shots to discredit someone. The Appellant was airing his discontent and treatment he had received as a tenant.

[29] On the evidence as recapped above, I could not see how his reputation in society in general (or even within the particular medical community) had got affected. Moreover, even where any person (doctor, dentist or otherwise) had refused to take the apartments the Respondent had for rent (including which had been rented out to the Appellant earlier); and, *inter alia*, loss of hospitality from friends in which regard I took cognizance of the factors this Court had taken into consideration in the case of **Shiu Ram v. Carpenters Fiji Limited** [ABU 129/2017, 28 February, 2020].

[30] In that case, the Court though holding that, *prima facie* defamatory words had been uttered, refused to award substantial damages while awarding nominal damages. In contrast, in the present case, the fundamental requirement of a defamatory statement was not made out in this Court's view, therefore sufficient to reverse the judgment of the High Court, in as much as, the essential ingredients to sustain an action for defamation had not been made out.

[31] Consequently, this Court holds that any question of the Appellant "*pleading justification*" could not have arisen.

Some final reflections

[32] Before parting with this judgment I wish to say that, we have determined this appeal on common law principles. The Defamation Act of Fiji (1971) (as amended by Act No: 31 of 2016), this Court found to have no bearing on what has been said before in this judgment. Modelled as it were on the 1952 Defamation Act of England, though there are differences between the 1971 Fijian Act and the current English Act of 2013, (particularly in regard to Section 1(1) thereof, bringing in concept of “*serious harm*” to the reputation of the claimant to sustain an action for defamation) whereas, the 1971 Fijian Act contains no definition of defamation (save as to say in the interpretation section that defamation includes libel and slander). Interpreting Section 1(1), the English Supreme Court has held that, the effect of that section was that “*a statement which would previously have been regarded as defamatory because of its inherent tendency to cause some harm to reputation was not to be so regarded unless it had caused or was likely to cause harm which was serious.*” (vide: **Lachaux v. Independent Print Ltd** (and another connected case) 2019 UKSC 27.

[33] This Court took note of the thinking in the **Lachaux** case (supra) in **Suresh Pratap v. Atil Chandra Gosai** (supra).

[34] In summary, it may be said that,

- (a) The case law in England prior to 2013 under Common Law principles and the Fijian case law referred to in this judgment encompassed the concept of “*serious harm*” on consideration of “*harm to reputation*” and consequentially “*financial harm*” (as an incidence of harm to reputation);
- (b) Thus, the concept of “*serious harm*” in the English Act of 2013 reflects a statutory incorporation of the antecedent common law regime.
- (c) Accordingly the relevance of citing English case law precedents before and after 2013 in the jurisprudence of Fiji.

The essential balance between a defendant's right to freedom of expression and a claimant's right to reputation

- [35] In **Jameel v. Dow Jones & Co. Inc.** [2005] EWCA (iv 75) the English Court of Appeal, recognizing the obligation created by the Human Rights Act 1998 to maintain a proper balance between a defendant's right to freedom of expression and a claimant's right to reputation, held that, in cases where it was apparent that the publication had in fact caused little or no damage to the claimant's reputation, the action could be struck out as an abuse of process on the basis that the publication did not constitute a real substantial tort. (see further in this context **Duncan and Neill on Defamation...**, (Fifth Edition) Lexis Nexis (2020).
- [36] The Human Rights and Anti-Discrimination Commission Act No. 11 of 2009 of Fiji recognizes and creates obligations similar to the English Act of 1998. The interpretation of human rights and prohibited grounds of discrimination contained in Section 2 (among other provisions therein) read with Section 17(1) of the Constitution of Fiji show the striking of a balance between a defendant's right to freedom of expression and a claimant's right to reputation in an alleged defamation suit.
- [37] The evidence of the two witnesses referred to earlier in this judgment in regard to an alleged adverse impact on the Respondent's reputation taken together with the alleged monetary loss left me with no doubt that, the "*posting in question*" had in fact caused no damage.
- [38] Having said that, for the reasons contained in my judgment I proceed to make my proposed orders as follows, that:
- (a) The Appeal be allowed;
 - (b) Parties to bear their own costs.

Basnayake, JA

[39] I agree with the reasoning and conclusions arrived at by Almeida Guneratne, P.

Lecamwasam, JA

[40] I agree with the reasons given, orders and conclusion arrived at by Almeida Guneratne, P.

Orders of Court

- 1) *The Appeal is allowed and the impugned Judgment of the High Court is set aside.*
- 2) *The parties are to bear their own costs.*



Handwritten signature of Almeida Guneratne in blue ink.

.....
Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Handwritten signature of E. Basnayake in blue ink.

.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Handwritten signature of S. Lecamwasam in blue ink.

.....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL