

In the High Court of Fiji  
At Labasa  
Civil Jurisdiction  
HBC Civil Action No. 10 of 2014

BETWEEN:  
Manoj Kissun Zikar  
Plaintiff

And

Avinesh Chand  
Defendant

COUNSEL: Mr M.N.Sahu Khan for the plaintiff  
Mr A.Sen for the defendant

Date of hearing: 11<sup>th</sup> November, 2016

Dates of Judgment: 22<sup>nd</sup> November, 2016

### Judgment

1. This is an action for damages for slander. The plaintiff, in his statement of claim states that the defendant, in “*or about 2012*”, maliciously made a false and slanderous allegation against him to the General Manager, Mr Sean Calvo and the Chief Executive Officer of Chi Management, Ms Pilar Morisa and residents of Taveuni with the intent to damage his character, good fame and reputation. The particulars of “*malicious, unfounded and baseless allegations*” set out read:

- i. *That the Plaintiff negotiated a contract with the Defendant on behalf of Garden Island Resort asking the Defendant to provide a quotation well and truly above what the Defendant had quoted so that the Plaintiff could obtain a benefit from the excess amount (said dealing).*
- ii. *The Plaintiff received \$14,000.00 from the Defendant from the said dealing.*
- iii. *The Plaintiff was involved in fraudulent financial dealings.*

The statement of claim contains an innuendo that the words in their natural and ordinary meaning meant and were understood to mean that the plaintiff is “*a dishonest person*”, “*a fraud*”, “*an untrustworthy person*”, “*to be kept away from*”, “*a thief*”, “*not to be employed because of his dishonesty*” and “*does not have any integrity*”.

2. The defendant, in his statement of defence “*emphatically*” denies making any allegations against the plaintiff to injure his integrity, reputation or character. He states that he never had any control over the plaintiff’s employment and denies he has incurred any loss and damages. The plaintiff has failed to state the “*words capable of rendering damages*” and in the premises, the plaintiff is not entitled to maintain this action.

***The hearing***

***The plaintiff***

3. PW1,(the plaintiff) in evidence in chief said that he was the Financial Controller for Garden Island Resort in Taveuni from 1<sup>st</sup> June,2012, until 27<sup>th</sup> November,2012.
4. On 27<sup>th</sup> November,2012, he was called to the Boardroom of Garden Island Resort and was told by the General Manager,Mr Sean Calvo that the defendant,(a contractor who carried out electric repairs for Garden Island Resort) had said that he had commissioned \$14,000 from the defendant.
5. He said that the allegation made by the defendant was false, unfounded and made to destroy his morale,character, image and the reputation he had built up in the tourism industry. It was the main reason for his dismissal. He produced his letter of termination of 27<sup>th</sup> November,2012, which gave two other reasons for his termination.
6. The relevant paragraph of the letter of termination reads as follows:

*We now refer to specific incidences by which you have acted contrary to your employment contract:-*

- a. *In negotiating a contract with the electrician for the electrical works to Adrian’s House, Plantation Villa, Garden Island Automatic Operation Pressure Water Pump, Garden Island Generator, Plantation Villa Generator and Adrian’s House Generator, you demanded the electrician to provide a quotation which was well and truly in excess of what the electrician has quoted. The purpose for inflating the quotation was for you to subsequently obtain the excess funds from the electrician. **Our investigations reveal that you have unlawfully paid a sum of FJD\$14,000.00 to the electrician so that he would be able to pay that money to you.** Subsequently you did receive the sum of FJD\$14,000.00 from the electrician.You have unduly profited yourself much to the detriment and prejudice to the*



*Company. Not only that this conduct of dishonesty cannot be tolerated by the Company.*

- b. *Further your job description also includes preparing the payrolls of the staff including yours. In the process, over a period of time, you have unlawfully and systematically drawn a salary which is contrary to your employment contract. Our calculation have revealed that you over paid yourself by a sum of FJD1,024.51. The details are as follows:-*

*Amount paid 4/6/2012 – 18/11/2012* *\$12,499.92 (a)*

*No. of days worked* *\$168.00*

*Refer to contract: \$25,000 x 168 / 366 days*

*\$11,475.41(b)*

*Amount overpaid:* *\$1,024.51 (a) – (b)*

- c. *Pursuant to Clause 15.1 of your employment contract, you were/are not to “...at anytime during and or after the termination of your employment with the Resort, disclose or make us of any trade secrets or proprietary information of the Resort.” With regret, it has come to the Company’s knowledge that you have knowingly and internationally released confidential documents to a potential contracting party when you were expressing told and advised not to do so, **Once again this is a serious breach of your contract.**(emphasis added)*

7. Mr Shau Khan, counsel for the plaintiff asked PW1 why the defendant had made that allegation against him. He said that the defendant was annoyed that he had advised and persuaded him to finish a job at Plantation Villa, in respect of which he had obtained a 50% advance.
8. PW1 said that he did not receive \$14,000 from the defendant. The allegation destroyed his life, showed him as a dishonest and untrustworthy person, a liar and a person who cannot be employed again. He was shunned and disparaged in his home town in Sigatoka. He could not obtain gainful employment from 27<sup>th</sup> November, 2012, to 25<sup>th</sup> February, 2016.
9. He reported the allegation made by the defendant to the Police. He took legal action for his wrongful dismissal, but was time-barred. He made a report to the Ministry of Labour.
10. On the procedure adopted by Garden Island Resort to award contracts, he said that the Board approves the quotations called for. PW1 said that he does not have a say. Two signatories: the General Manager and he, (PW1) sign the cheques.

11. In cross-examination, PW1 said that he was summoned to the Boardroom of Garden Island Resort and given his letter of termination. The allegations in the letter were put to him. He was unaware if the letter was published.
12. He admitted the defendant was not mentioned in the letter. It was a communication between Garden Island Resort and himself. The dissemination of that document could only be done by either of the two.
13. The defendant was not in the Boardroom when the allegation was made, nor did he meet him thereafter. The defendant had no control over Garden Island Resort and no knowledge of the allegations with respect to his termination.
14. In the light of the transparent process adopted for contracts awarded by Garden Island Resort, he admitted that even if the defendant had made the allegation, it could not possibly be true. Any right minded person would not have believed it.
15. PW1 said that he had made a written response by email to Garden Island Resort to the charges in his letter of termination. His response was not produced. He denied that he would still have been terminated on the second and third charges set out in his letter of termination.
16. Mr Sen, counsel for the defendant put it to him that there was no proof that he had negated the charges in any forum.
17. In re-examination, PW1 reiterated that the Directors and General Manager of Garden Island Resort told him that the defendant made the allegation that he had taken \$14,000 from the defendant. The General Manager, the CEO and the Group Financial Controller Daphne Wong were present in the Boardroom, when the allegation was made. The defendant was in Garden Island Resort, that morning.



DW1(*the defendant*)

18. DW1 in evidence in chief said he did not tell anybody at Garden Island Resort that PW1 had asked him to inflate his quotation, so that he could be paid \$14000. He did not pay him \$14,000. He has no enmity with PW1. PW1 did not ask him if he had made a complaint against him.
19. In cross-examination, it transpired that DW1 carried out works for Plantation Villa of Garden Island Resort on a contract basis.
20. He said that he had built a good reputation in Taveuni in the last six years.
21. Some of the Directors of Garden Island Resort lived overseas. They were expatriates from Hong Kong. DW1 said that he is unaware as to why the Directors made the allegation against PW1.
22. DW1 said that he was not concerned if someone made a false allegation against him, if it was not true.
23. He denied that he made a false allegation to the General Manager, Mr Sean Calvo and the Chief Executive Officer of Chi Management, Ms Pilar Morisa that PW1 wanted a quotation inflated.
24. At the conclusion of the case for the defendant, Mr Sahu Khan and Mr Sen made oral submissions, as directed by Court.

***The determination***

25. The agreed facts issues recorded at the PTC provide that PW1 was the Financial Controller for Garden Island Resort in Taveuni, the defendant operates a business known as "*Avinesh Electrical*" and had business dealings with Garden Island Resort.
26. The preliminary question that arises for determination is whether DW1 made the stated allegation against PW1 to the General Manager, Mr Sean Calvo and the Chief Executive Officer of Chi Management, Ms Pilar Morisa, as contended.

27. Mr Sahu Khan submitted that it has been proved on a balance of probability that DW1 made the slanderous statement in the Boardroom of Garden Island Resort, in the presence of three persons. He said that the requisite of publication was satisfied, as a third party heard the statement.
28. It was further submitted that DW1 was “*directly linked*” to the allegation for three reasons. Firstly, he was admittedly, an electrician who worked for Garden Island Resort. The letter of termination refers to an electrician. Secondly, he was seen at Garden Island Resort on the morning of the day that PW1 was called to the Boardroom. Finally, Mr Sahu Khan said that there was no reason why Directors of Garden Island Resort would make “*wild allegations*”. PW1 was not cross-examined on the basis that the Directors did not make the allegation.
29. Mr Sen, in reply submitted firstly, that the exact words of the alleged statement and the date on which it was made, have not been set out in the statement of claim.
30. Secondly, there is no evidence before Court that DW1 made the allegation. DW1 denies he made any allegation against PW1. He said that he did not cross-examine PW1 on what happened in the Board room, as his client was unaware as to what happened therein.
31. Next, he said that there is no evidence of publication to a third party. The letter of termination was a communication between an employer and employee. It does not state that DW1 made an allegation, but rather that their “*investigations reveal that you have unlawfully paid a sum of FJD\$14,000.00 to the electrician so that he would be able to pay that money to you*”. The letter sets out two other important reasons for his termination,
32. Mr Sen concluded that the case for the plaintiff is premised on the “*assumption*” that DW1 inflated the price of the contract, obtained \$14,000, fraudulently gave it to PW1 and made a slanderous allegation against PW1.



33. In my judgment, the essence of slander (and libel) is the publication of words to a third party. “*There is no doubt that to give a cause of action there must be publication by the defendant*”: per Bray J in *Powell v Gelston*, [1916] 2 K.B.610 at pg 619

34. In *Rabuka v Fiji Daily Post Company Ltd*, [2005] FJHC 174 as referred to by Mr Sahu Khan, Pathik J cited the following passage from the judgment of A.L.Smith M.R. in *Sadgrove v Hole*, (1901) 2 KB 1 at pg 4:

*The plaintiff in order to succeed in the action must prove a publication of and concerning him of the libellous matter, and if he does not satisfy the onus of proof which is on him in this respect, there is no cause of action.*

The judgment of the High Court was upheld in appeal: *Fiji Daily Post Company Ltd v Rabuka*, [2006] FJCA 47.

35. Slander consists in the apprehension of the hearer. It follows that if the defendant denies he made the slanderous statement, as in the present case, the hearer must be called to state that the words were spoken in his or her hearing.

36. *GATLEY ON LIBEL AND SLANDER*, (11<sup>th</sup> Ed, 2008) at para 34.13 states:

*Action for Slander. Where there is no admission by the defendant that he spoke the words complained of or words to like effect, the plaintiff must call evidence of what the defendant said and of who heard him. The witnesses will usually be those who were present, but evidence is admissible of what the witness was told the defendant said by someone who was present. Evidence of the claimant as to what was said, and as to the presence of other people, may be insufficient, as the fact that there were other people around does not of itself entitle anyone to draw the conclusion that those people must have heard what was said. A tape recording of the slander would be admissible. The actual words alleged to have been published must be proved; it is not sufficient for witnesses to state what they conceive to be the substance or effect of the words, or their impression of what was said.*(footnotes omitted, emphasis added)

37. That takes me to the opening submission made by Mr Sen. He quite correctly pointed out that the exact words and the date on which it was alleged to have been said, have not been pleaded.

38. This is well stated in *GATLEY ON LIBEL AND SLANDER*, (9<sup>th</sup> Ed, 1998) at para 32.10 which I quote:

*Setting out words complained of: slander. The general principles governing the pleading of the actual words in libel also apply in slander. Thus, in slander the actual words spoken must also be set out verbatim” in order that the defendant may know the certainty of the charge, and may be able to shape his defence”. It is not sufficient to allege that the slanderer used such and such words, or that effect. (footnotes omitted, emphasis added)*

39. Denning, L.J. (as he then was) in *Collins v Jones*, [1955] 2 All E.R. 145 at pg 146 declared:

*In a libel action it is essential to know the very words which the plaintiff founds his claim. As LORD COLERIDGE, C.J., said in Harris v. Warre, (1879), 4 C.P.D. 125 at p.128:*

*“In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them.... In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends.”*

*Assuming that these letters did contain some statements defamatory of the plaintiff, that is not sufficient to ground a libel action. She must show what the actual words were. A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of those contents he is unaware. He must in his pleading set out the words with reasonable certainty; and to do this he must have the letter before him, or at least have sufficient material from which to state the actual words in it. A suspicion that it is defamatory is not sufficient. He cannot overcome this*



*objection by guessing at the words and putting them in his pleading. The court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one. If he cannot give the particulars, he will not be allowed to go on with the charge.*(emphasis added)

40. In my judgment, the plaintiff's action fails.

41. **Orders**

- (a) The plaintiff's action is dismissed.
- (b) The plaintiff shall pay the defendant a sum of \$1500 as costs summarily assessed.



*A.L.B. Brito - Mutunayagam*

**A.L.B. Brito-Mutunayagam**

**JUDGE**

22<sup>nd</sup> November, 2016

At Suva