

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
CIVIL JURISDICTION

Civil Action No. HBC 117 of 2017

IN THE MATTER of the  
Companies Act 2015

AND

IN THE MATTER of an  
application under Section 176 of  
the Companies Act 2015.

BETWEEN : VILIAME FINAU, JAI D SINGH, IVA LENOA, MOHAMMED F. LATEEF, MANASA RATUVILI, KEVUELI TUNIDAU and BOB TUILAKEPA all of Nadi as Trustees of THE ATS EMPLOYEES TRUST.

PLAINTIFFS

AND : CIVIL AVIATION AUTHORITY OF FIJI an authority incorporated under the Civil Aviation Act with office at Nadi Airport.

1<sup>ST</sup> DEFENDANT

AND : THE ATTORNEY GENERAL ON BEHALF OF THE PERMANENT SECRETARY FOR ECONOMY under the State Proceedings Act.

2<sup>ND</sup> DEFENDANT

AND : AIR TERMINAL SERVICES (FIJI) LIMITED a liability company with registered office at ATS Head Office, Cruickshank Road, PMB, Nadi Airport, Nadi.

3<sup>RD</sup> DEFENDANT

AND : ALAN SUCHIN of Nadi, Company Secretary.

4<sup>TH</sup> DEFENDANT

**Appearances** : Ms B. Narayan with Ms P. Prasad for the applicant/ 2<sup>nd</sup> defendant  
Ms M. Vanua for the applicant/ 3<sup>rd</sup> defendant  
Mr K. Vuataki with Mr R. Tikoca for the respondent/2<sup>nd</sup> named plaintiff  
**Date of Hearing** : 08 May 2018  
**Date of Judgment** : 12 June 2018

## J U D G M E N T

### **Introduction**

[01] This is an application by the second and the third defendants (*'the applicants'*) for the committal of Mr Jai D Singh, the second named plaintiff (*'the respondent'*) for alleged contempt (the scandalising) of court. The applicants have filed two separate applications for the committal of the respondent for the alleged statement and interview made by the respondent concerning the court.

[02] On 31 January 2018, the Attorney General representing the Permanent Secretary for Economy, the second defendant filed an *ex parte* notice for leave to make an application for an order of committal of the respondent together with a statement, affidavit verifying statement and affidavit of Izek A Lal. The *ex parte* application was heard on the same day and leave was granted. The second defendant accordingly filed a notice of motion on 31 January 2018, pursuant to Order 52 Rule 3 of the High Court Rules 1988 ('HCR') seeking the following orders:

- (a) *an Order of Committal against Jai D Singh for Contempt of Court and that the said Jai D Singh be committed to prison;*
- (b) *that Jai D Singh do pay costs of and occasioned by these proceedings on an indemnity basis; and*
- (c) *such other Order(s) as this Honourable Court may deem just.*

[03] On 5 February 2018, Air Terminal Services (Fiji) Limited, the third defendant also filed an *ex parte* application for leave to make an application for the committal of the respondent for alleged contempt of court. Following the granting of leave,

the third defendant filed their application for an order of committal in conjunction with an affidavit of Riyaz Sayed Khaiyum in support.

[04] The respondent has filed an affidavit in opposition on 17 April 2018.

### **The Background of the original claim**

[05] The background facts can be stated quite shortly. The plaintiffs brought an action against the defendants seeking among other things a declaration that the Articles of Association of Air Terminal Services (Fiji) Limited, the third defendant ('ATS'), which expressly permitted the removal of directors of ATS was oppressive and prejudicial to ATS Employees Trust and that the removal of Jai D Singh (among others) from the board of directors of ATS was illegal, oppressive and null and void.

[06] The defendants filed applications pursuant to Order 18 Rule 18 to strike out the claim on the basis that it discloses no reasonable cause of action against the defendants or it is otherwise an abuse of the process of the Court.

[07] The court heard the striking-out applications and after a few adjournments delivered its ruling on 23 February 2018 striking out the claim as it was both 'bad in law' and 'weak on evidence'.

#### *The Comments*

[08] On 19 January 2018, when the matter was still *sub judice*, Jai D Singh who was one of the plaintiffs (second named plaintiff) made certain statements recorded on video which was uploaded on social networking site, Facebook. The statements he made concerned among other things the substantive proceedings that were still *sub judice*. He made the statements in a meeting attended by members of the ATS Employees Trust and by members of the press.

[09] The impugned statements made by Jai D Singh are as follows:

- (a) *"The Man who was supposed to be listening, the Judge, he said 'oh sorry, I can't have ex-parte it has to be inter parte[s]'. Here we have got a legal question*

of removal of illegal directors, a board meeting is going to happen it will affect the company, he wasn't worried."; and

- (b) "So the judge said I can't throw the case out so it went for October, the Judge said sorry I haven't completed it so it goes to February 23<sup>rd</sup>. Ex parte motion, if you people are legal you would know, ex parte motion has to be decided within 2 weeks period of time. Na. Do you think he will make a decision? I don't think so." (Emphasis added.) (Hereinafter referred to 'Facebook Video Comments')

[10] Subsequently, on 18 February 2018, Jai D Singh made statements which were published on FBC News at 7.00pm ('News Segment'). The news segment contained the following comments:

- (a) "All of the judicial department is controlled by one Minister. That's all it is. Nothing more, nothing less. Is it true that Minister controls the Justice Department, Minister of Justice? Is it true or not true?"(Emphasis added.) (Hereinafter referred to as 'News Segment Comments')

[11] Further, on 22 February 2018, Jai D Singh gave an interview to the News Segment ('Interview Recording'). The interview recording contained the following comments:

- (a) "Well firstly the A-G's Department and the Permanent Secretary for Economy, Makereta have decided that I had said something which was in contempt of Court. And they have served me with papers, they have to prove these allegations and as far as I'm concerned I did not say anything that was not a fact, right. So if somebody else draws an innuendo out of that it's their problem but I only stated facts and facts and facts only."
- (b) "So that is why I was very surprised that I was served with the contempt of Court and also my beneficiaries were very surprised when I got that and I think they have been telling everybody else and probably gone to ITF, I'm not very sure of that yet until I find out. But what get me is this, we will be defending fully the contempt of Court charges and not only that, will be suing Fiji Sun online, Riaz Khaiyum and Hare Mani for defamation." (Hereinafter referred to as 'Interview Recording Comments')

## The Legal Framework

[12] Order 52, Rule 1 of the HCR spells out the power of the court to punish for contempt of court. That rule provides:

*"1 (1) The power of the High Court to punish for contempt of court may be exercised by an order of committal.*

*(2) This Order applies to contempt of court-*

*(a) committed in connection with-*

*(i) any proceedings before the Court; or*

*(ii) ...;*

*(b) committed otherwise than in connection with any proceedings.*

*(3) An order of committal may be made by a single Judge.*

*(4) Where by virtue of any enactment the High Court has power to punish or take steps for the punishment of any person charged with having done any thing in relation to a court, tribunal or person which would, if it had been done in relation to the High Court, have been a contempt of that Court, an order of committal may be made by a single Judge."*

## Real Risk Test

[13] The test applied in a contempt of court proceeding is the 'real risk' test. My attention was drawn to the two case authorities, i.e. *Fiji Times Ltd v Attorney General of Fiji* [2017] FJSC 13; CBV0005.2015 (21 April 2017) and *Gallagher v. Durack* (1983) 152 CLR 238 (Australia).

[14] In *Fiji Times Ltd* Chandra J stated (with Kankani J concurring) at para 13:

*"[13] From the above decisions in Fiji, the law as it stood after the decision in Fiji Times (2009) was quite clear regarding contempt as being derived from the Common Law and that the test to be adopted was that of the "real risk" test. What was necessary was to show that there was a real risk that the statements made would undermine the public confidence in the administration of justice and it was sufficient to show that the contemnor had intended to do the acts which are said to constitute the contempt."(Emphasis added.)*

[15] In *Gallagher* (above) at 243 the High Court of Australia stated:

*“The law endeavours to reconcile two principles: one principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that ‘it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of impressing imputations upon courts of justice which, if continued, are likely to impair their authority’...The authority of the law rests on public confidence and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.”(Emphasis added.)*

### **Proceeding in the respondent’s absence**

- [16] The respondent was not present in court personally. However, he was represented by counsel, Mr Vuataki. At the hearing of the application, the respondent did not express a wish to give oral evidence on his own behalf, albeit he was entitled to do so, pursuant to Order 52, Rule 5 of the HCR. He cannot be compelled to give oral evidence.
- [17] The hearing was before me in open court. The proceedings should be in open court unless proceedings relate to infants, patient suffering from mental disorder, a secret process, discovery or invention or where it appears to the court that in the interests of the administration of justice or for reasons of national security, the application should be heard in private (‘HCR O.52, R 5 (1)).
- [18] The respondent opted to give evidence by affidavit, but he was not available for cross-examination. As a matter of discretion, the court may allow cross-examination of the respondent whether he gives oral evidence or gives evidence by affidavit.

### **Service of the committal application**

- [19] An application for an order of committal must be served personally on the person sought to be committed (HCR, O 52, R 3 (3)).
- [20] The second defendant’s application together with all documents was, upon leave being granted, couriered on 7 February 2018, by DHL courier services to Jai D

Singh to his residential address at 188 Nuwarra Road, Moorebank, NSW 2170, Australia. The third defendants' application was served via registered mail post at his residential address in Australia.

- [21] There was no disputation over the service of the applications to the respondent. The respondent has made a public statement where he says that he has been served with papers of committal proceedings and they have to prove the allegation of contempt of court. In that statement, he states that he would be defending fully the contempt charges.

### **Procedural requirements**

- [22] I have considered the procedural requirements for committal application such as the present. The procedural requirements are laid down by HCR, O 52.
- [23] A committal application against any person cannot be made unless leave to make such an application has been granted in accordance with HCR, O 52, R 2(1). The applicants have had leave to apply for an order of committal.
- [24] After the leave has been granted, the application for the order of committal has to be made by motion and, unless the Court granting leave has otherwise directed, there must be at least 8 clean days between the service of the notice of motion and the day named therein for the hearing (HCR, O52, R3 (1)). The applicants in the present case had complied with this requirement. The respondent did not take a point on any procedural requirements issue.
- [25] I am satisfied that, in this case, all the procedural requirements as laid down in HCR, O52, R2 & 3, have been fulfilled.

### *Burden of proof*

- [26] As for as the burden of proof is concerned, any allegation of contempt of court has to be proved beyond reasonable doubt. The Fiji Court of Appeal in *Mahendra Pal Chaudhry v Attorney General of Fiji* (1999) 45 FLR 87 at page 92 (Casey, Barker and Thompson JJA) said:

*"This summary indicates the common law offence of contempt scandalising the Court involves attacks upon the integrity or impartiality of judges or Courts, the mischief aimed at being a real risk of undermining the public confidence in the*

*administration of justice which must be established beyond reasonable doubts.”*  
(Emphasis supplied)

### **The evidence relied upon**

- [27] The second defendant relies upon the affidavit of Izek A. Lal (Izek) sworn on 30 January 2018, the supplementary affidavit of Makereta Alifereti Konrote (Makereta) sworn on 23 February 2018 and the supplementary affidavit of Izek sworn on 27 February 2018.
- [28] The third defendant relies on the affidavit of Riyaz Sayed Khaiyum sworn on 1 February 2018.
- [29] The Respondent (second named plaintiff), Jai D Singh relies on his affidavit in response sworn on 5 April 2018.

### *The Chronological Summary of evidence relied upon Applicant’s evidence*

- [30] Mr Izek in his affidavit evidence sworn on 30 January 2018 states:

“... ”

2. *On 19 January 2018, I accessed the Facebook page on Fiji Exposed Forum which is open to public viewing.*
3. *Upon perusing the said Facebook page, I saw an uploaded video in which JAI D SINGH made certain statements and comments which I verily believe were scandalising with regards to an existing matter before the Court between the Trustees of the ATS Employees Trust and Air Terminal Services (Fiji) Limited. A copy of the Facebook page together with the video posted on the same is annexed hereto and marked as “IL-1”.*
4. *I believe the person making the scandalising statements in the video is JAI D SINGH because he gives his name as such in the introduction of the video.*  
...”

- [31] The summary of affidavit evidence of Mr Riyaz sworn on 1 February 2018 follows:

“... ”



4. *Our Board was alerted to an article that was posted on Facebook on 19<sup>th</sup> January 2018 at 2.19 pm. A snapshot of the Facebook page in which the article appeared is annexed hereto and marked as Annexure "A".*
5. *The article was a video recording of a speech made by Mr Jai D Singh a party named in this case addressing members of the ATS Employees Trust and other attendees in Nadi.*
6. *Members of the press were also present at the said meeting.*
7. *At this meeting, Mr Singh spoke on a number of matters but he also made certain statements relating to Civil Action No. HBC 117 of 2017.*
8. *We have downloaded a copy of the video recording of Mr Singh's speech and this is contained in the Compact Disc that is annexed hereto and marked as Annexure "B".*
9. *Our solicitors have also taken the liberty to transcribe the relevant parts of Mr Singh's speech which I am advised and verily believe to be tantamount to contempt in that Mr Singh's comments were made to scandalise the Court and judicial officer who has carriage of the case and to bring the administration of justice in Fiji into disrepute. A full transcript is annexed hereto and marked as Annexure "C".*
10. *I am advised by our Solicitors and I verily believe that Mr Singh, by his statements, also attempted to influence the Court's pending decision by making comments on a matter that is sub judice.*
11. *The relevant parts of Mr Singh's speech are marked in bold and underlined as follows:*

*We have got three things in the Court now. "We have got 3 things in the Court now.*

*Our expenditure has always been low but because of Riyaz's action because of the Ministry of Economy's action, we'll be spending something like \$50,000 in legal fees to clear everything that has happened and these beneficiaries are gona to lose out on the \$50,000 of their dividend. Whh? Because of one man. Because of the majority[of] directors. [...]*

*These beneficiaries are gona lose out on the \$50,000 of the dividend are the things we have got in Court (inaudible) the removal of directors is illegal. they don't have powers to do that. And the second thing the Court wants to know if you have got conflict of interest you have to prove it to Court that there is a conflict of interest. Number 2, that the transfer of share from CAAF to minister of economy is not valid. It will be given to us first and we will purchase. So that's the second point in Court.*

*The third point in Court the company secretary does not have an authority to remove directors. Letters were written by him. He doesn't have any he is the company secretary with no authority. He is subservient to the Directors. Please know your law. He is subservient to your directors. He's the one that wrote the letters. So it's in the Court house.*

*Page 7...*

*It was Ex Parte motion, Vuataki's our lawyer for that. Ex-parte motion, the man who was supposed to be listening to it, the Judge, he said oh sorry I can't have Ex Parte. It's gotta to be Inter Parte.*

*Here we have got a legal question of removal of Illegal Directors, a Board meeting is going to happen, it will affect the Company, he wasn't worried. So it became inter parte[s].*

*[...]*

*You know what is the first thing they did, throw the case out. That's from the Ministry. Throw the case out. So the Judge said I can't throw the case out. So it went for October. The Judge said I haven't completed it so it goes to February 23<sup>rd</sup>.*

*[...]*

*Ex parte motion. If you are legal you would know Ex Parte Motion has to be decided within 2 weeks period of time. Na. Do you think he'll make a decision, I don't think so.*

*[...]*

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*Because remember all the judges are in the hands of one person, the contracts are signed by him.*

*..."*

[32] Ms Makereta's supplementary affidavit evidence sworn on 23 February 2018, is summarised as follows:

*"...*

3. On 18 February 2018 Izek Ashwin Lal, Manager Executive Support at the Office of the Attorney- General, Suva brought to my attention that Jai D Singh had made statements which were published on FBC News at 7.00pm (hereinafter referred to as 'News Segment') which inter-alia concerned the proceedings in this action and which I have subsequently viewed.

4. The statements made by Jai D Singh contained the following relevant comments:

(a) "All of the judicial department is controlled by one Minister. That's all it is. Nothing more, nothing less. Is it true the Minister controls the Justice Department, Minister of Justice? Is it true or not true?"

(b) "And this [ATSET] bulletin is telling them that united behind me you have one voice to look at what's happening to the chairman of the trust and that's how it is supposed to be seen. Become united within the workforce and for the betterment of ATS itself."

(hereinafter referred to as 'Further Comments')

5. A video copy of the News Segment is annexed to this Affidavit and marked "A".

6. Furthermore, on 22 February 2018, Izek Ashwin Lal, Manager Executive Support at the Office of the Attorney-General, Suva brought to my attention that Jai D Singh made certain statements for the interview in relation to the News Segment (hereinafter referred to as 'Interview Recording'). The Interview Recording contained statements which inter-alia concerned the proceedings in this action, wherein Jai D Singh made inter-alia the following relevant comments:

(a) "Well firstly the A-G's Department and the Permanent Secretary for Economy, Makareta have decided that I had said something which was in contempt of Court. And they have served me with papers, they have to prove these allegations and as far as I'm concerned I did not say anything that was not a fact, right. So if somebody else draws an innuendo out of that it's their problem but I only stated facts and facts and facts only."

(b) "So that is why I was very surprised that I was served with the contempt of Court and also my beneficiaries were very surprised when I got that and I think they have been telling everybody else and probably gone to ITF, I'm not very sure of that yet until I find out. But what gets me is this, we will be defending fully the contempt of Court charges and not only that, we will be suing Fiji Sun online, Riaz Khaiyum and Hare Mani for defamation."

(hereinafter referred to as 'Interview Recording Comments')

7. *A copy of the Interview Recording is annexed to this Affidavit and marked "B" and wherein Jai D Singh confirms being served with contempt of Court papers with a threat to fully defend the contempt of Court charges.*
8. *I am advised by my Counsel and verily believe the advice to be true that the Further Comments and Interview Recording Comments made by Jai D Singh are contemptuous in that:*
  - (i) *the Further Comments and Interview Recording Comments have been deliberately made with the intention to scandalise the Court and all Judicial Officers including the Judicial Officer who is presiding over this matter.*
  - (ii) *it is a scurrilous attack on all members of the judiciary thereby lowering or undermining or posing a real risk of lowering and undermining the reputation of the judiciary and administration of justice in Fiji.*
  - (iii) *it is designed to influence the Court on issues that are sub judice.*

..."

[33] The summary of supplementary affidavit evidence of Izek sworn on 27 February 2018 is as follows:

"...

1. *On 18 February 2018, while watching FBC News at 7.00pm I saw a news segment on Jai D Singh (hereinafter referred to as the 'News Segment'). The News Segment contained statements which inter-alia concerned the proceedings in this action. On 22 February 2018, Fiji Broadcasting Commission provided both the interview recording of Jai D Singh in relation to the News Segment (hereinafter referred to as the 'Interview recording') and also I saw an uploaded video of the News Segment on the website Youtube which is open to public viewing.*
2. *Upon listening to the Interview Recording of Jai D Singh and watching the News Segment video I believe that he made certain statements and comments which were scandalising with regards to an existing matter before the Court between the Trustees of the ATS Employees Trust, Air Terminal Services (Fiji) Limited and others, including the Permanent Secretary for Economy. A copy of the Interview recording is annexed hereto and marked as "A" and a copy of the News Segment is also annexed hereto and marked as "B".*

3. *I believe the person making the scandalising statements in the Interview Recording and News Segment is Jai D Singh.*

*Respondent's evidence*

[34] The respondent's evidence by affidavit in response sworn on 5 April 2018, states in summary:

"...

1. *I am one of the Trustees and the Chairman of the ATS Employees Trust (hereinafter "the Trust") and was one of the named plaintiffs in this action before it was struck out and depose this my affidavit to respond to the allegations of contempt of Court brought against me by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.*

*Abuse of Process*

6. *On the 6<sup>th</sup> day of February 2018 the High Court at Lautoka through his Lordship Justice Ajmeer struck out the proceedings and we appealed to the Court of Appeal via Civil Appeal ABU0010 of 2018.*
7. *I therefore believe that this action is not alive for its title to be used for contempt proceedings against me and I therefore ask that this contempt proceedings against me be struck out for abuse of process.*

*The Statements*

11. *As to Annexures "A" in the Affidavit of Riyaz Sayed Khaiyum sworn on 1<sup>st</sup> day of February, 2018 and "B" and "C" and Annexures and Annexure "IL-1" in the Lal affidavit I say that I did not publish the video on Fiji Exposed Forum nor did I authorize its publication on Facebook.*
12. *I admit making the statements but say that I was justified in making the statements complained of by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and do think that they were fair and honest comments made by me.*
13. *I also do think that such comment[s] was for the betterment of the Judiciary in Fiji and do not pose a real risk of injury to the authority and independence of the courts in Fiji.*

*Ex parte to inter partes*

14. *I honestly believed that His Lordship should have heard our said ex-parte application and even after turning it inter-parties should have set it for hearing.*
15. *Our ex-parte turned inter-parte Motion was not set for hearing and not heard despite it being adjourned by His Lordship and to what I believe were the days as to when the motion was adjourned to.*
16. *I therefore believe that I was justified in saying that no decision would be made on it and his Lordship did not hear us on the matter.*
17. *Our request on an ex parte basis was made on the basis that any Board meeting without two Directors of the Trust would detrimentally affect the company and in his turning or ex parte application inter parte showed that His Lordship was not worried about the situation the 3<sup>rd</sup> Defendant was in without Trust Directors sitting on its Board.*
21. *I honestly did not think that His Lordship the Judge was going to make a decision and our said ex-parte turned inter parte application and His Lordship in fact made no decision on or ex parte application as he struck out the Originating Summons.*
22. *In making such a statement, I was leaving it open to others to make their own opinion as to whether a decision will be made and I did not think that this would prejudice the Courts but that by highlighting it the honourable Court would do better in future and therefore serve the interests of justice.*

*Signing of Contract*

26. *However, when our application ex-parte turned inter-parte was not heard I therefore thought that such executive policy had not changed and thought I was justified in saying what I did.*
27. *The Attorney General was a party to the action and my comment was a fair one in light of a former Judge of the Fiji Court of Appeal making such a statement and would enliven independence of the Judiciary rather than endanger it.*

...”

**The Submissions**

- [35] Ms Narayan, counsel for the second defendant, submits that the comments by Jai D Singh are contemptuous as they have scandalised both the Judge and the Fijian

judiciary because there is a real risk . His statements undermine the public confidence in the administration of justice by alleging bias and partiality and that the court should deal firmly with such attack because Fiji is a small country and its courts are more susceptible to unjustified attacks.

[36] Ms Vanua, counsel for the third defendant argued that not only there was a “real risk” of “undermining public confidence in the system of administration of justice” as opposed to “a remote possibility” but also a “clear and present danger” in that regard in the mind of an ordinary reasonable person.

[37] On the other hand, Mr Vuataki, counsel appearing for the respondent contends that Jai D Singh made the statement complained of in good faith in the petition that he had read. He further contends that the fair minded reasonable person viewing the video would take all the matters into account and not think that there was a real risk of administration of justice in this particular case in Fiji was undermined.

### **The analysis and finding**

[38] Mr Jai D Singh, the respondent is facing an allegation of criminal contempt of scandalising the courts and the judge who was hearing his case while the case was still *sub judice*. He made statements recorded on video and his subsequent interview to the FBC news, which, the applicants allege, amount to contempt of scandalising the court. The statements were made in an Airport Terminal Services Employees Trust (*ATSET*) meeting held on 19 January 2018. The meeting was in attendance of *ATSET* members and members of the press. The video recorded statements went viral on social media, such as Facebook. His TV interview was telecast on the FBC News segment.

[39] The respondent appears to plead not guilty to the allegation of contempt of court.

[40] The respondent did not deny making the statement and giving the interview complained of. However, he has in his affidavit raised a couple of defences, i.e. (1) He was influenced by a petition of Marshal QC, SC which he believed to be true and it was an honest comment stemming out from his reading the said petition, and (2) he made the statement in good faith.

[41] Unlike the UK, there is no substantive law governing any contempt of court in Fiji, except for HCR, O 52, which explains the procedure to be adopted in dealing with an application for an order of committal for contempt of court. In the absence of any substantive law, we need to look at the common law and the principles applied in common law countries such as the UK and Australia in dealing with an application of committal of the contemnor.

[42] In this analysis, I would consider three factors: (a) the identity of the spoken words; (b) the audience; and (c) the nature of the jurisdiction in which the words were published. In order to determine the guilt of the respondent to the allegation, I will apply the 'real risk' test as applied by His Lordship Calanchini J (as he was then) in *The Attorney General v Fiji Times Limited* (High Court HBC 343 of 2011), which was approved by the Supreme Court (*Fiji Times Ltd v Attorney General of Fiji* [2017] FJSC 13; CBV0005.2015 (21 April 2017)).

*(a) Identity of spoken words*

[43] The words spoken by the respondent are contained on the CD. The written transcript of his speech has also been provided.

[44] I will deal with the relevant statements of the respondent in turn.

[45] He made a public statement that: *'It was Ex Parte, the parties all prepared for it. The man who was supposed to be listening to it, the Judge, he said: 'oh sorry I can't have Ex Parte, it has to be inter parte[s]'*. No party is entitled to demand an *ex parte* interlocutory injunction as of right. The court has the discretion to grant *ex parte* relief in an appropriate case. The granting of any *ex parte* relief is entirely depending on facts and circumstances of each case. In this case, the court decided to hear the *ex parte* application *inter partes* having perused the writ of summons, the affidavit, the documents annexed and the relief sought. At an interlocutory stage, the respondent sought an *ex parte* order in the nature of mandatory injunctions, i.e. ask the court to undo certain things that has already been done. At an interlocutory stage, 'the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial that the injunction was rightly granted, and this is a higher standard than required for a prohibitory injunction' (per Megarry J in *Shepherd Homes Ltd v*



*Sandham* [1971] Ch 340 at 35, approved by the Court of Appeal in *Locabail International Finance Ltd v Agro-export* [1986] 1 WLR 657 and *Leisure Data v Bell* [1988] FSR 367).

- [46] The respondent had a right of appeal to the Court of Appeal. He did not appeal the decision to hear his *ex parte* application *inter partes*.
- [47] By the comment that: '*the man who was supposed to be listening to it, the Judge, he said: 'oh sorry I can't have Ex Parte, it has to be inter parte[s]'*', the reasonable prudent audience and/or readers would have taken the view that the court was acting in favour of the defendants or the court was acting disingenuously. The statement cast a doubt upon the court's performance in the discharge of its judicial functions.
- [48] The respondent continued his comments and said: '*here we have got a legal question of removal of illegal Directors, the Board meeting will have to happen, it will affect the Company, he wasn't worried.*' By these comments, the reasonable and prudent audience and/or readers would have felt that the court was not mindful to take a decision or the court would not arrive at an impartial decision.
- [49] In the statement the respondent also said: '*You know what is the first thing they did, throw the case out. That's from the Ministry. Throw the case out. So the Judge said I can't throw the case out. So it went for October. The Judge said I haven't completed it so it goes to February 23<sup>rd</sup>.*' In this case, the court had to consider the voluminous submissions filed and the case authorities relied upon by the parties. All the four defendants had filed separate applications for striking-out the claim. The court has the discretion to reserve the judgment or ruling, if it were not ready for pronouncement. By publicly commenting on the adjournment of the ruling from October to 23 February 2018, the respondent had imputed a doubt in the mind of reasonable and prudent audience that you cannot expect an independent and impartial decision.
- [50] He further commented that: '*... Ex Parte Motion has to be decided within 2 weeks period of time. Na. Do you think he'll make a decision, I don't think so. Because remember all the judges are in the hands of one person, the contracts are signed by him...*' This statement is clearly an attack on the independence of the judiciary in general. Undoubtedly, it would

cast a doubt in the mind of the reasonable and prudent audience that Fiji judiciary is not independent.

*The audience*

- [51] The statements were made in a meeting attended by the members of ATSET as well as members of the media. The TV interview was telecast on FBC News Segment and viewed by its viewers. The statement went viral on social media, the Facebook. The Facebook users also viewed the statements. The statements and the interview had received a wider publicity.

*Nature of the jurisdiction*

- [52] Fiji is a small country. Its geographical size renders its courts more susceptible to any unjustified attacks. In the *Fiji Times Ltd* (above), Chandra J expresses the view on this point that (at para [64]):

*"[64] I would echo the views expressed in Singapore as being relevant to Fiji being a small country like Singapore. In Attorney-General v Dhee Soon Juan [2006] 2 SLR 650 (at paragraph 25) the Supreme Court states that:*

*"Conditions unique to Singapore necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts. To begin with, the geographical size of Singapore renders its courts susceptible to unjustified attacks."*

*Mens Rea*

- [53] *Mens rea (intention)* is not an element of contempt of court charges. In *The Fiji Times Ltd case* (above), the Supreme Court said, at para [47] ... *In any event, it is well established that under the common law, mens rea is not an element of the offence of contempt of Court and that is the position in Fiji.*
- [54] It is seen that the applicants need not prove the element of *mens rea* to establish their allegation of contempt of court. The only intention that needs to be established by the applicant is the intention to publish the statements. The respondent made open public statements in front of the members of ATSET as well as journalists. He also gave TV interview in respect of the pending case and the courts, which were also published on the Facebook. I am satisfied, beyond

reasonable doubt, that the respondent intended publicity of his statements through media including the Facebook.

*The authorisation of publication, not a requirement*

- [55] Authorisation of publication is not an element of the offence of contempt of court. On this, I was referred to *Attorney General for State of Queensland v Lovitt* [2003] QSC 279, where the Court at paras 62, 64 and 65 states:

*"[62]... I am prepared to infer, beyond reasonable doubt, that the respondent knew that such publication was a distinct possibility and that he was indifferent to that occurrence.*

...

*[64] In this case there is no resemblance to that. Here the respondent initiated the criticism and made it to journalists reckless of the outcome and with no basis for believing that all of their news organisations would decline to publish his remarks.*

*[65] Accordingly I am satisfied that the respondent is guilty of contempt of court..."*

*The defence*

- [56] The respondent claims that the statements complained of were made in good faith. The respondent explains in his affidavit that he is being influenced by a petition of Marshal QC, SC which he believed to be true. It was an honest comment stemming from his reading the said petition.
- [57] Mr Vuataki of counsel for the respondent submits that Jai D Singh made the statement complained of in good faith in the petition that he had read. He relies on para [62] of the Supreme Court judgment in the *Fiji Times Ltd* (above). The Supreme Court, at para [62], states:

*'[62] Even if it is argued that the Courts can develop the Common Law and therefore Dhookarika's case should be made use of it in Fiji, that case being Privy Council*

*case is not binding as far as Fiji is concerned and is only of persuasive value. Further, in my view Dhooharika did not set down the proposition that mens rea is an ingredient in the offence of contempt, it only elaborated on the concept of good faith which was extended to mean lack of bad faith, being a possible defence where appropriate. I would rely on the law that was being followed in Fiji until the judgment in the High Court was delivered and refrain from applying the extended interpretation given to Dhooharika.”*

[58] The above observation of the Supreme Court does not assist the respondent in any way.

[59] The defence that the respondent was influenced by the Marshal petition will not help exonerate him. Calanchini J (as he was then), in *The State v Citizens’ Constitutional Forum Limited and Akuila Yabaki* (HC Action No: HBC 195 of 2012, at para [88]) states:

*“[88]”... The decision to publish the offending material rested entirely with the Respondents and once publication actually occurred then contempt by publication has been committed. In my view the fact that others may have published similar material on the same subject matter does not exonerate the Respondents and does not render the contemptuous words fair comment.”*  
(Emphasis supplied)

[60] The claim that the respondent made the statements based on the Marshal petition, which he believed to be true, does not exonerate the respondent and does not render the contemptuous statements fair comments.

[61] As far as the good faith defence, Calanchini J, in the *Citizens’ Constitutional Forum Limited* (above), states (at paras 99 & 100) that:

*“[99] To the claim that the words go no further than mere criticism I am prepared to rely on the remarks of the Supreme Court of India in In Re Arundhati Roy [2002] 3 SCC 343 at 352 to the effect that:*

*“...any criticism of the judicial institution couched in language that apparently appears to be mere criticism, but ultimately results in undermining the dignity of the courts cannot be permitted when found having crossed the limits and has to be punished.”*

[100] *Furthermore, in my view the decision of the Court of Appeal in Vijay Parmanandam v The Attorney General (supra) is authority for the conclusion that when the words go deeper than mere criticism they cannot be regarded as having been made in good faith nor can they constitute fair comment.*"

[62] The statements complained of are not mere criticism. The respondent had crossed the limits of fair comment. His words undermine the integrity and dignity of the courts. In the circumstances, he cannot claim the defence of fair comment.

### **Conclusion**

[63] There is unchallenged evidence before the court that the respondent made open statements, TV interview and they were published on the social media, Facebook. I am satisfied, beyond reasonable doubt, that the applicants have proved the allegations of contempt of scandalising the court. I am also satisfied that the statements made by the respondent when viewed objectively by a fair minded reasonable person would mean that there is a real risk of not having his dispute determined by an independent and impartial member of the judiciary. I find that the respondent's statements scandalise both Judge in particular and the Fijian judiciary in general and that there is a real risk of his statements undermine the public confidence in the administration of justice in Fiji. In my opinion, the statements had exceeded the mere criticism limit. Therefore, it cannot be regarded as having made in good faith nor can they constitute fair comment. I would reject the defence of fair comment. I accordingly find the respondent, Jai D. Singh guilty to the contempt of scandalising the courts, as alleged.

### **Costs**

[64] The applicants, especially the Attorney General was fully justified in bringing the application in the light of the statements made by the respondent and the evidence filed in answer to the application was not so compelling as to require the applicants to desist. The applicants were entitled to pursue the matter. The notice of the application was served to the respondent out of jurisdiction by way of DHL by the second defendant and by way of registered mail by the third defendant. The applicants had to make a number of applications in these

proceedings. They have made a few appearances through counsel for these proceedings, and there was a full hearing on the applications. The applicants had also filed submissions. In all the circumstances, it would be appropriate, fair, just and reasonable to order costs against the respondent. I would summarily assess the costs at \$4,500.00 to each applicant. Accordingly, the respondent will pay \$4,500.00 to each applicant (totalling \$9,000.00) for the costs of these proceedings.

[65] I will now proceed to hear submissions in penalty/mitigation.

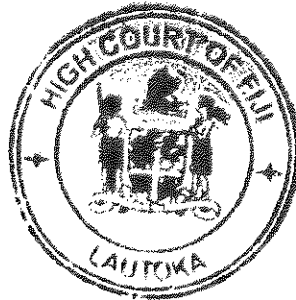
### **The Result**

1. The respondent, Jai D Singh, is found guilty of the offence of contempt of scandalising the courts.
2. The respondent will pay summarily assessed costs of \$4,500.00 to each applicant totalling \$9,000.00.
3. Hearing in penalty/mitigation is adjourned till 10.30 am on 3 July 2018.

*M.H. Mohamed Ajmeer*  
.....  
12/6/18

**M.H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**12 June 2018**

### **Solicitors**

For the applicant/second defendant: Office of the Attorney General

For the applicant/third defendant: M/s R Patel Lawyers, Barristers & Solicitors

For the respondent/second named plaintiff: M/s Vuataki Law