**IN THE HIGH COURT OF FIJI**
**WESTERN DIVISION**
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 147 of 2012**

**BETWEEN** : **ISIRELI BIUMAITOTOYA** of 14 Concave Road, Namaka, Nadi, Medical Practitioner.

**APPLICANT**

**A N D** : **UMA DUTT SHARMA** of Lot 30, ATS Subdivision, Namaka, Nadi, Dental Practitioner and also Trustee for Sharma Family Trust.

**RESPONDENT**

**Appearances** : **Mr. Anil Singh for the applicant**
**(Ms.) Setaita Ravai for the respondent**

**Hearing** : **Wednesday, 07th August, 2019**

**Ruling** : **Friday, 23rd August, 2019**

# RULING

## [A] INTRODUCTION

(1) On 07th May, 2019, this Court entered judgment in favour of the respondent (plaintiff) and ordered the applicant (defendant) to pay $70,000.00 as general damages [on compensatory basis] to the respondent.

(2) The applicant appealed against the judgment to the Fiji Court of Appeal.

(3) This is an application for a stay of execution of the judgment of this Court pending the determination of the appeal by the applicant to the Fiji Court of Appeal.

(4) By writ issued on 29th June, 2012 the respondent, Uma Dutt Sharma, who is a dental practitioner, claimed damages from the applicant, Isireli Biumaitotoya, who is a medical practitioner, for a "libel" contained in an email alleged to have been sent by the applicant which reflected upon the conduct of the respondent.

(5) In the statement of defence, the applicant admitted that he wrote and published the words complained of. The defence was a denial that the words bore the interpretation placed upon them in the statement of claim and they amounted to a defamatory matter.

(6) The relevant facts of this matter have been set out in my judgment of 07th May, 2019.

## [B] THE SUMMONS AND AFFIDAVITS

(1) The summons for the stay of execution was filed on 16th May, 2019 and supported by an affidavit of the applicant sworn on 15th May, 2019.

(2) The application for the stay of execution was vigorously opposed by the respondent. The respondent filed an answering affidavit sworn on 12/06/2019 followed by an affidavit in reply.

## [C] THE JURISDICTION

(1) The right of appeal is not a substantive right but one that is conferred by statute rather than common law.

See; * **Attorney – General v Sillem**

(1864) 2 H & C 581 at 608, 609

***Victoria Stevedoung and General**

**Contracting Co. Pty Ltd v Digham** (1931) HCA 34

(2) There is provision in the High Court Rules, 1988, a jurisdiction given to the High Court to stay execution of its judgments pending an appeal to the Court of Appeal.

(3) Order 45, rule 10 of the High Court Rules, 1988 provides;

***Matters occurring after judgment: stay of execution, etc. (O.45.r10)***
*10. Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.*

## (D) THE PRINCIPLES TO BE APPLIED

(A) The Court of Appeal of Fiji in **Native Land Trust Board v Shanti Lal [CBV 0009.11, January 2010]** had set out the law on stay pending appeal. His Lordship Chief Justice Gates in the said Court of Appeal case stated that a Court considering a stay should take into account the following questions:

(a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory.
(b) Whether the successful party will be injuriously affected by the stay.
(c) The bona fides of the applicants as to the prosecution of the appeal.
(d) The effect on third parties.
(e) The novelty and importance of questions involved.
(f) The public interests in the proceeding.
(g) The overall balance of convenience and the status quo.

(B) The principles laid out by the Court of Appeal in the above case is used and cited in various cases for stay application.

The Fiji Court of Appeal in **"Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd (FCA Civil Appeal No. ABU0011 of 2004S)"** held thus;

*"The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005):"On a stay application the Court's task is carefully to weight all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful."* ***Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA)****, at p.87.*

## [E] DISCUSSION

(1) **The granting of a stay of execution of any judgment pending an appeal is always a matter for the discretion of the Court and can be given either absolutely or for such period and subject to such conditions as the Court thinks fit.**

(2) The applicant contends that the application should be granted because; (reference is made to paragraphs (5) to (8) of the affidavit in support sworn on 15/5/2019).

*(5) I have been advised and I verily believe that I have meritorious grounds of appeal. Annexed hereto and marked with letter* ***"IB-2"*** *are my grounds of appeal.*

*(6) I believe that if stay is not granted, my right of appeal will be rendered nugatory.*

*(7) I believe the successful party will not be injuriously affected by the stay.*

*(8) I believe that third parties will not be affected by the stay.*

(3) The respondents opposition to the application is as follows; (reference is made to paragraphs (04), (05), (06) and (09) of the affidavit in opposition sworn on 12/06/2019).

*(4) THAT in response to paragraph 5, 6, 7 and 8, we can only accept stay on the condition that the Applicant does deposit the amount (as per Judgment and Assessment) into an interest bearing High Court Account. These monies may be released to the party who has success on appeal. Further, we do not agree that the Applicant has any meritorious grounds.*

*(5) THAT in response to paragraph 8, I further say that the Applicant needs to explain what "third" parties that he is referring to and explain the relevance of the said paragraph to the proceedings herein.*

*(6) THAT in response to 9, 10, 11 and 12, this Honourable Court has made a determination on the evidence adduced and the facts presented.*

*(9) THAT the Applicant does not have any chances of successful as based on the evidence provided thus the determination of this Honourable Court.*

**Will the appeal be rendered nugatory? [This is not determinative]**

(4) So far as the first factor in **Natural Waters of Viti Ltd** (supra) is concerned, the applicant deposed "*I believe that if stay is not granted, my right of appeal will be rendered nugatory*" (paragraphs (06) of the affidavit in support sworn by the applicant on 15/05/2019).

(5) The affidavit filed by the applicant does not set out the reason as to why the applicant believes "..... *If stay is not granted, my right of appeal will be rendered nugatory.*"

(6) It was said in ***John Fong v John T Polotini and Another (1974) 20 F.L.R. 15*** at page 18 that the only ground, as a general rule, for a stay of execution, is an affidavit showing that if the appeal were successful then there would be no possibility of getting back any costs or damages which had been paid to the other party.

(7) The relevant factor which this Court must consider is in a matter such as this is whether if the appeal is successful it will turn out to be nugatory because of the respondent's financial inability to repay to the applicant the judgment sum which the Court of Appeal might subsequently direct them to repay. Here, two affidavits are filed by the applicant. He has not adverted to this question. In my view, he should have. There is virtually no evidence in affidavit form to support that the respondent would not be financially capable of returning the judgment money paid to him if the appeal is successful. Thus, I am not satisfied that declining a stay would render the appeal nugatory.

(8) Mr Singh, Counsel for the applicant frankly informed Court that his client is not in a financial situation to pay into this Court by way of security the sum of $70,000.00 being the amount due on the judgment. Therefore, the Court can form a view that the applicant is not in a financial situation to satisfy the judgment sum in the event of the appeal failing. In these circumstances, it would be the respondent who would be affected if a stay is granted.

**The bona-fides of the application**

(9) The judgment was delivered on 07/05/2019. The summons for the stay of execution was issued on 16/05/2019 and the applicant has applied for an urgent hearing of his application for stay of execution.

**The effect on third parties**

(10) There are no third parties involved in the matter.

**The novelty and importance of questions involved**

(11) In my view, there is no novelty in this matter as it involves a question of:

(A) Interpretation of the words complained of and concerning the plaintiff.
(B) Whether the words bore the interpretation placed upon them in the Statement of Claim.
(C) Whether they amounted to a defamatory matter.

It is hard to perceive any novel and important question to be decided in this appeal. As I understand the proposed grounds of appeal, most of them are based on defence of justification and fair comment which are not pleaded in the statement of defence.

**The public interest in the proceeding**

(12) The present case is between two parties and would affect only them. The grounds of appeal lack novelty and importance other than to the respective parties. The grounds do not fit into the category of 'far reaching questions of law' or 'a matter of great general public importance'.

**The balance of convenience**

(13) The test here is a determination of which of the two parties will suffer greater harm from granting or refusal of an interim stay pending a determination of the appeal on merits, balancing of conflicting consideration is required, between the underlying principle that a litigant, is entitled to the fruits of his judgment forthwith and the obvious injustice in refusing a stay where such a refusal will render the appeal nugatory or substantially nugatory.

(14) In **Stephen Patrick Ward v. Yogesh Chandra** CBV 0010 (20-04-2010) it was stated:

> *"[25] In Atul Kumar Ambalal Patel v. Krishna Murti (unreported) Civil Action HBC 022.99L in ruling against the grant of a stay, the High Court stated at pages 2-3;*
>
> > *"Once successful, the litigant should not lightly be deprived of the fruits of his successful litigation: The Annot Lyle (1886) 11P.D. 114 at 116 CA; Monk v. Bartram (1891) 1 AB 346. The Power of the Court to grant a stay is discretionary. The Attorney-General v. Emerson and Others (1890) 24 QB 56; and it is "an unfettered discretion" Winchester Cigarette Machinery Ltd v. Payne and Anor (No.2) (1993) TLR 647 and 648.*
> >
> > *If a stay was not granted by the Court at the time of making the order now appealed against, the applicant must show that special circumstances exist as to why a stay should now be imposed, and the successful litigant in effect held back from his remedy Tuck v Southern Countries Deposit Bank (1889) 2 TLR 400; Barker v. Lavery (1885) 14 QBD 760. In the Winchester Cigarette Case (supra) at 648 Lord Justice Hobhouse put it "The Appellant has to show some special circumstances which took the case out of the ordinary."*
>
> *[26] That summary was cited with approval by this Court in Prem Singh v. Krishna Prasad and Anor. CBV0001.02S ,25th April, 2002.*

(15) **Barker v. Lavery** (1885) 14 QBD 760 was in a property dispute. The defendant against whom a costs order had been made appealed to the House of Lords. He then applied to the Court of Appeal for a stay in respect of the costs order. He offered payments into Court of the full amount and expected a stay to be granted on these terms. The Lord Chancellor, the Earl of Selborne at page 769 asked in argument:

> *"....Are there any circumstances in evidence to show that the plaintiff, if he is defeated in the House of Lords, will be unable to pay back the money levied by execution against the defendant?"*

Then Lord Selborne gave a succinct judgment at page 770:

> *".....the defendant is not entitled to have the application granted as a matter of course. Evidence ought to have been adduced to show, that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords. As to the request for time to make an affidavit about the plaintiff's means, we cannot accede to it; those, who apply for a stay of execution, must come before us prepared with all necessary materials."*

**Atkins v. Great Western Railway** (1885 – 86) 2 Times Law Reports at page 400 was most likely was a personal injury case. A civil jury had awarded the plaintiff 350 pounds against **The Great Western Railway.**

Counsel for the railway company's grounds for a stay were:

> *"that a great deal of prejudice had been imported into the case and that these were the strongest grounds of appeal."*

Lord Esher M.R. dismissed the application, followed **Barker v. Lavery** and dismissed the applications robustly (at page 400):

> *"The Master of the Rolls said that he would not undertake to say that the Court of Appeal would never listen to what happened at the trial in order to see whether they would grant a stay of execution, but, as a general rule, the only ground for such a stay was an affidavit showing that if the damages and costs were paid there was not reasonable probability of getting them back even if the appeal succeeded. He would not say that the Court would not interfere for some other reason, but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so. In **Barker v. Lavery** (14 QBD, 769) the Court enunciated that rule when Lord Selborne, then Lord Chancellor, was present, and he was precisely of the same opinion. The application should be refused."*

(16) I have already formed a view that declining a stay would not render the appeal nugatory. (See, Paragraph (07) above). In paragraph (08) I have stated that it would be the respondent who would be affected if a stay is granted. In the circumstances, the Court finds that the factor of the degree of prejudice to the respondent does count against the applicant's application for stay.

**Grounds of appeal**

(17) The applicant says that he has a good case on appeal. Counsel for the respondent takes issue on this point and says that the applicant has no meritorious grounds and the appeal is designed to delay the respondent in enjoying the fruits of the judgment.

(18) It is not my function to assess the actual merits of the appeal. This Court is required to consider the bona fides of the applicant in the prosecution of the appeal and whether the appeal involves a novel question of some importance. It would be wrong for this Court, on this application, to say anything that indicates any view on to the merits of the appeal, because the judgment is the subject of appeal to the Court of Appeal, and will have to be heard and dealt with. The issue of 'novelty' is not crucial.

In the illuminating judgment of Resident Justice of Appeal, ***William Marshall, in A.G. of Fiji and Ministry of Health v Loraina Dre, Miscellaneous Action No. 13 of 2010,*** decision 17/02/2011, contained the very significant passage following;

*The heading of note 59/13/1 is* ***"When will a stay of execution be granted".***
*I set out only the parts of this note that are relevant to the present discussion.*

*"An appeal does not operate as a stay on the order appealed against, except to the extent that the Court below, or the Court of Appeal (or a single Judge of the Court of Appeal otherwise directs (O.59, r.13(1) 9a); see also World Trade Centre Group Ltd & Another v. Resourceful River Ltd & Another [1993] H.K.L.Y. 847; and Re Schindler Lifts (H.K.) Ltd v. Dickson Construction Co. Ltd [1993] H.K.L.R. 45). It follows that service of notice of appeal and setting down the appeal does not, by itself, have any effect on the right of the successful party to act on the decision in his favour and to enforce the order of the Court below. If an appellant wishes to have a stay of execution, he must make an express application for one (see further Para. 59/13/5 (below)).* ***The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal****: World Trade Centre Group Ltd & Another v. Resourceful River Ltd & Another; Civ. App No. 70 of 1993, May 12, 1993.* ***That hurdle is higher than that of chances of success for considering whether leave to appeal should be granted****. See also Asha Harskishin Premsingh v. Harskishin Isarsingh Premsingh Kishinani M.P. No. 3436 of 2000, November 12, 2000, unreported. Neither the Court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. Unless a stay can be justified by good reasons, one will not be ordered (Star Play Development Ltd v. Bess Fashion Management Co. Ltd, unreported, HCA No. 4726 of 2001, May 28, 2002: and see Wenden Engineering Service Co. Ltd v. Lee Shing Yue Constructions Co. Ltd, unreported, HCCT No. 90 of 1999, July 17, 2002, [2002] H.K.E.C. 1059). The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled", pending an appeal (The Annot Lyle (1886) 11 P.114 at 116, CA; Monk v. Bartram [1891] 1 Q.B.346]....*

*.....Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court, that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (Atkins v. Great Western Ry Co. (1886) 2 T.L.R. 400, following Barker v. Lavery (1885) 14 Q.B.D. 760, CA; this rule applies equally to Admiralty cases, see: The Annot Lyle, above, at 116). ....."*

(Emphasis added)

**The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal. That hurdle is higher than that of chances of success for considering whether leave to appeal should be granted.**

(19) The grounds of appeal upon which the applicant relied on are;

(1) *The Learned Replacement Judge erred in law and in fact in his findings of defamation against the Appellant as, the words used were everyday English phraseology meaning up market and difficult, which was uttered in exercise of free speech without any malice pursuant to the Constitution of Republic of Fiji and it was sent to a closed private group of colleagues of the Appellant without any intention to defame.*

(2) *The Learned Judge's findings of malice is contrary to the evidence adduced before the Trial Judge wherein the evidence of the Respondent was thoroughly discredited and therefore unreliable and the evidence was not sufficient to prove defamation.*

(3) *The finding of general damages is contrary to the evidence. The Respondent was a retired dentist who suffered no economic loss or loss of any dental patients in the dental profession and further the phraseologies were uttered in regards to the Respondent being a landlord and further the phraseology referred to the Respondent as a Trustee of a premises which the Appellant occupied and therefore any loss by the utterance of the phraseologies would have been to the Trust and not to the Respondent in a personal capacity and the Learned Judge omitted to consider this important points of law in regards to standing.*

(4) *The Learned Judge writing the judgment erred in awarding $70,000.00 when he knew or ought to have known from the facts of this case that anything more than nominal damages was excessive and erroneous. The Learned Judge was mistaken in law when he was unable to differentiate between exemplary/punitive damages and general and therefore there is no legal basis for the awards he made in the substantial amount.*

(5) *The Learned Judge when making an assessment for damages failed to consider the principles of the Fijian Court of Appeal decision in the case of Newspaper of Fiji Ltd v Ah Koy [1989] and therefore fell into appealable error by ordering an excessive award in damages.*

(6) *The Trial Judge who heard the case must have observed that the evidence of the Respondent was not credible, not reliable and prone to embellishment and exaggeration as the Respondent was thoroughly discredited in cross-examination therefore rendering the trail as a nullity and in breach of the Constitution of Republic of Fiji and the notion of fairness and justice.*

(7) *The Learned Judge fell into error as he was not the Judge who heard the evidence therefore he was not able to make any assessment on credibility and weight of the evidence and erroneously proceeded to write the judgment when clearly it was a de novo case, be with the consent of the parties but nevertheless , he ought to have known that he could not make a proper assessment of the evidence and therefore he denied the Appellant procedural fairness and a fair trial as required by law and as such he fell into appealable error.*

(8) *The Learned Judge in his assessment of the evidence failed to note that the Respondent was a litigious person who had numerous cases including DVRO in family matters and as such his finding of defamation and malice was totally contrary to the evidence which unfolded in cross-examination of the Respondent and his two witnesses. The Learned Judge failed to consider that the Respondent was harassing the Appellant and disrupting his quiet possession of the premises occupied by him by blocking a door which the National Fire Authority had to un block and by giving an adjacent space to a friend who operated a fish market causing stench and disturbance to the Appellant's patience.*

(9) *The Learned Judge failed in his assessment of the evidence of the two witnesses as those witnesses were not independent but friends of the Respondent and whose evidence was of little weight thus falling into an appealable error.*

(10) *The Learned Judge when writing the judgment placed too much emphasis on the statement of defence and thereby failing to comprehend that it was the duty of the Respondent to establish defamation and loss as a consequence and he fell into appealable error by reversing the onus of proof.*

(20) The main contention of the applicant in his proposed grounds of appeal is that the evidence of the respondent was not sufficient to prove libel. Counsel for the applicant argues that I failed to consider that a landlord from hell is a 'metaphor' and the words alleged were plain English words.

(21) In the statement of defence, the applicant admitted that he wrote and published the words complained of. **The question as to whether words which are complained of are capable of conveying a defamatory meaning is a question of law. This question is one for the trial judge to determine.**

The action arises out of the publication by the applicant of an electronic mail written by him and sent to electronic mail addresses of 144 medical practitioners through the applicant's electronic mail address.

It was a hard hitting criticism of respondent's conduct. The sting of the electronic mail is;

a) *"I hear a group of Dr's including Dr Tui Taoi from LaToya are planning to move in there."*

b) *"Dr Uma's wife is also for Filing for Divorce"*

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."*

In **Chand v Bolatiki** [2019] FJHC 574; HBC 32.2014 (5 June 2019), Justice Deepthi Amaratunga referred to the case of **Lewis v Daily Telegraph Ltd** [1964] A.C. 234 at 258 – 260 in which the Court stated the following:-

*"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 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 art of their natural and ordinary meaning.....Generally the controversy is whether the words are capable of having a libellous meaning at all, and undoubtedly it is the judge's duty to rule on that.***

(Emphasis added)

(22) I came to the conclusion that the words complained of and concerning the respondent are capable of bearing the meaning pleaded in paragraph 12 of the statement of claim and as a result the words complained of and concerning the respondent would lower him in the estimation of right-thinking members of medical community in Fiji and the words cause him to be regarded with feelings of hatred, contempt, ridicule and dislike. There is no doubt that the words in the e-mail are libellous and the medical community in Fiji would think less of the respondent as a result of the e-mail.

(23) It was next submitted that the Court's finding of malice is contrary to the evidence led before the trial.

(24) As I understand the applicant's pleadings, the applicant has not put forward (A) the plea of justification (B) the plea of privileged occasion (C) the plea of fair comment on a matter of public interest. If the applicant relies upon the plea of justification, the plea of privileged occasion or the plea of fair comment on a

matter of public interest, he must plead that matter specifically. The applicant has not done so. The applicant during the trial unsuccessfully contended to rely upon the defence of justification as an answer to the action without pleading that matter specifically. The chief defence taken at the trial was justification; that is to say, the truth. The applicant cannot claim the protection of justification because the applicant in his statement of defence has not specifically pleaded the defence of justification in an answer to the libel. Therefore, I dismissed the chief defence taken at the trial by the applicant. I need not pronounce a finding as to the defence of justification (the truth).

The foundation of an action of defamation is malice. If words are used which are defamatory and untrue the law implies malice. The word malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse. In law if a man writes or says what is not true and what is libellous or slanderous of another, it is presumed to be malicious; but when the occasion is privileged then we require something more, we require what the law calls 'express malice'. The phrase 'express malice' means; it does not mean that hatred and charitableness which are usually associated with the word malice. Malice in law means this – a wrongful act done intentionally without just cause or excuse that is what malice means.

Since the applicant has not specifically pleaded the defence of justification;

(A) The respondent is not required to prove that the words in the electronic mail are false. The law presumes that the defamatory words are false. **See; Duncan and Neill on Defamation, Para 26.08.** Therefore, I held that the defamatory words contained in the applicant's email are false.

(B) The respondent is not required to prove the actual harm to his reputation. There is a realistic threat that the statements in the e-mail, in its full context, would reduce a reasonable person's opinion (in the medical community of Fiji) of the respondent and posed a realistic threat to his reputation in the medical community.

The foundation of an action of defamation is malice. If the words are used which are defamatory and untrue the law implies malice. That presumption is rebutted if the occasion when the words were used is privileged. The privilege destroys the presumption. See; **Reynolds v Times Newspapers Ltd and Others (1999) 4 All .E.R. 609 at page 649.**

**I reached the conclusion that the words contained in the electronic mail are libellous and false. Since the applicant has not specifically pleaded the defence of privileged occasion the law presumes that the words contained in the electronic mail are malicious. In the result, I held that the words contained in the electronic mail which reflected upon the character and conduct of the respondent have been written and published by the applicant falsely and maliciously and the words are libellous.**

(25) It was submitted that my award of punitive damages under the head of general damages was erroneous.

With respect, I do not accept that. One point should be emphasized. The sum I awarded as general damages on compensatory basis only includes an **element** of punitive damages.

Exemplary damages are damages which are awarded to punish a defendant and vindicate the strength of the law. In considering whether exemplary damages should be awarded the Court should ask itself whether the sum it proposes to award as compensatory damages, which may include an element of aggravated damages is adequate in all the circumstances for compensating a plaintiff and also for punishing or deterring a defendant. Only if it is inadequate for the latter purpose should the Court consider awarding exemplary damages[1].

The sum I awarded as general damages on compensatory basis includes an element of exemplary/punitive damages and it is adequate to (1) punish the applicant for this outrageous conduct (2) to mark the court's disapproval of such conduct (3) to deter him from repeating it.

Therefore, I declined to award exemplary/punitive damages. I considered that my award in general damages on compensatory basis reflect the serious nature of the libel and compensate the respondent for the mental torment and distress he must have suffered.

(26) It is also contended that I have not heard the case or observed the witnesses and therefore I could not judge the credibility of the witnesses.

It should be firmly stated that both parties did not consent for de nova trial and they agreed to adopt the evidence and to obtain judgment based on the evidence given before J. Sapuvida. Counsel for the applicant and the respondent made application that judgment be delivered on the transcript of Justice Sapuvida's notes of evidence. The applicant cannot approbate and reprobate.

---

[1] James Arthur Rennie Brown & Mago Islands Estate Ltd v Fiji Broadcasting Commission & Newspapers of Fiji Ltd (Civ. Appeal No. 40/81 FCA at p5)

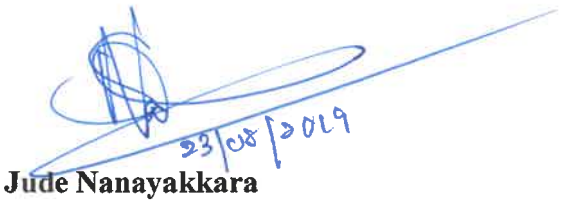
(27) In the applicant's submission the applicant argued that the respondent sued in a dual capacity but he did not have standing on both capacities. With respect, I disagree. The respondent had right to sue in both capacity because libel has an effect on not only his personal capacity but also on his character and his capacity as the trustee of the rented building which belonged to the trust.

Applicant presented a number of grounds. As I understand, most of his grounds of appeal are based on defence of justification and fair comment which are not pleaded in the statement of defence. In my view, the applicant has not presented strong grounds of appeal.

In this case, for the reasons I have given, I am not satisfied that the execution of this judgment should be stayed. In the circumstances, the application is refused.

**ORDERS**

1. The application for stay execution of the judgment is refused.
2. I make no order as to costs.


**Jude Nanayakkara**
**[Judge]**

**At Lautoka,**
**Friday, 23rd August, 2019**