IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Case No: HBC 59 of 2018

BETWEEN: **JOSAIA VOREQE BAINIMARAMA** of New Wing, Government Buildings, Suva, Prime Minister of the Republic of Fiji.

FIRST APPLICANT

A N D: **AIYAZ SAYED-KHAIYUM** of Suvavou House, Victoria Parade, Suva, Minister of Economy and Attorney- General of Fiji.

SECOND APPLICANT

A N D: **AMAN RAVINDRA – SINGH** of Tukani Street, Lautoka, Fiji, Barrister and Solicitor.

RESPONDANT

Appearance : Ms. Gul Fatima for the Applicants
Respondent appeared in person

Sentence Hearing : Tuesday, 9th August 2022 at 10.30 a.m
Sentence : Tuesday, 16th August 2022 at 2.30 p.m

SENTENCE

(A) INTRODUCTION

[1]. In a ruling delivered on 28.07.2022, the respondent was found guilty of contempt of court.

[2]. The hearing in the applicants' application for committal for contempt of court was concluded on 13.06.2022 and the court's decision was delivered on 28.07.2022. The court found the respondent guilty of contempt of court. The mitigation and sentence hearing was scheduled for 01.08.2022.

[3]. However, before the mitigation and sentencing hearing, the respondent filed an application for permanent stay of the proceedings. On 01.08.2022 the respondent did not appear in court but by his instructions to counsel who appeared on his behalf insisted that the application for permanent stay be dealt with. The hearing of the application for permanent stay was scheduled for 03.08.2022.

[4]. At the hearing of the application for permanent stay, both parties made oral submissions to court and were directed to file written submissions by Friday, 05.08.2022.

[5]. My Judgment on the respondent's application for stay was pronounced on 09.08.2022. I refused the application for permanent stay.

[6]. On 09.08.2022, counsel for the applicants, Ms Fatima, in making sentencing submissions urged the court that a custodial sentence be imposed on the respondent in the higher scale as he continued and persisted posting libelllous posts on his Facebook using 'Violent Voreqe' and 'korrupt khaiym' after Justice Seneviratne adjudged they were defamatory. She said the respondent had also delayed in complying with the orders of the court.

[7]. The respondent took the stand to give evidence and said that the opinion of Justice Seneviratne was not a court order, and no injunction or gag order was made stopping him from referring to the applicants as 'Violent Voreqe' and 'korrupt khaiyum'. Further, he said that he removed original defamatory post as ordered by the court, published a public retraction and apology on his social media and in the print media.

[8]. At the end of sentencing submissions, I reserved the sentence and directed the parties to file written sentencing submissions by mid-day 11/08/2022. As directed by the court, both parties filed sentencing submissions for which I am grateful.

[9]. This is my sentence for contempt of court.

(B) BACKGROUND

[10]. **The background facts were set out in detail in my decision dated 28.07.2022 and since they are relevant to sentencing it is appropriate to reproduce it below.**

[11]. On 09.09.2020, the applicants sought leave under Order 52, Rule 2 to institute committal proceedings for contempt of court against the respondent for disobedience to Justice Seneviratne's judgment orders dated 24.7.2020. The application was made ex-parte.

[12]. The application for leave was supported by an affidavit and a statement which sets out the grounds for committal.

[13]. Leave was granted on 12.10.2020.

[14]. A motion pursuant to Order 52, Rule 3(1) of the High Court Rules, 1988 was filed on 15.10.2020 where the hearing of the committal was set down for 25.10.2020 within the 14 day timeline.

[15]. On 25.10.2020, the court extended the hearing date because personal service could not be effected on the respondent.

[16]. The court allowed the applicants time to serve the respondent. Since the applicants could not serve the respondent, an application was made on 05.11.2020 to effect service through substituted service. This was allowed under Order 10, Rule 2 of the High Court Rules, 1988.

[17]. On 09.11.2020, the court granted leave to serve the documents by way of substituted service.

[18]. The service was effected by way of substituted service on 20.11.2020. The respondent did not enter an appearance on 01.12.2020. The court adjourned the committal hearings for 16.03.2021.

[19]. On 16.03.2021, the respondent entered an appearance and raised a preliminary objection. On 01.04.2021, the court delivered the ruling and the court overruled the preliminary objection. The respondent did not enter an appearance on 01.04.2021 and 06.05.2021.

[20]. The respondent again entered an appearance on 28.10.2021. The respondent sought 28 days to file Affidavit in Opposition. The court granted 28 days for the respondent to file Affidavit in Opposition to the committal application. The hearing was again adjourned for 18.01.2022. The respondent did not file an affidavit in opposition to the committal application. The respondent again defaulted appearance on 18.01.2022 and the hearing was adjourned for 25.02.2022 and eventually to 13.06.2022.

[21]. On 13.06.2022, the respondent took his plea. He pleaded not guilty to the alleged contempt. The court gave him the right to reply to the charge. The respondent chose not to give oral evidence under oath explaining his position to the alleged contempt.

[22]. The committal hearing for contempt of court was decided only in accordance with the evidence and arguments properly and openly put before the court. At the committal hearings for contempt of court, the respondent was before the court and had every opportunity of presenting his case on facts. The respondent did not go into the witness box to explain his position to the alleged contempt. It was open to the respondent to cross-examine the applicants as to the affidavit evidence. He chose not to cross-examine. The respondent did not file an affidavit in opposition to the applicants' affidavits despite he was given 28 days. All those tools were available to the respondent. As such in the absence of defence, the court accepted the veracity of the matters to which the applicants have **deposed** as to the respondent's culpability.[1]

[23]. In the committal proceedings the applicants' evidence before me is all on affidavits:

- The affidavit of the second applicant sworn on 28.08.2020 and filed on 09.09.2020.

- The supplementary affidavit of the second applicant sworn on 07.10.2021 and filed on 08.10.2021.

[24]. The statement filed by the applicants on 09.09.2020 pursuant to Order 52, Rule 2(2) of the High Court Rules, 1988 sets out the grounds for committal as follows:

> *"**For failure to obey a court order sealed on 28th July 2020 and served on 01st August 2020** whereby the respondent was ordered to publish an immediate apology and also pay a sum of $120,000.00 as damages within 30 days from 28th July, 2020."*
>
> [Emphasis added]

[25]. On 28.07.2020, Suva High Court Registry sealed Orders delivered in his Lordship J Seneviratne's judgment and on 01.08.2020, applicants' solicitors' bailiff served the respondent with the sealed orders. The affidavit of service of the bailiff is annexure marked "D" referred to in the affidavit of the second applicant sworn on 27.08.2020.

[1] HKSAR v Lee Ming Tee, unreported Hon Kong Court of Final Appeal; Hklii: (2003)HKCFA 54. See also, Jai Prakash Narayan v Savita Chandra, Civil Appeal No:- 37 of 1985, date of Judgment 08.11.1985.

[26]. The rationale of the Judgment of J. Seneviratne dated 24.07.2020 which is the point that determined Judgment and Judgment orders is paragraph (7) of the Judgment which is binding in nature. It is reproduced below with paragraph (6) for the sake of clarity.

(6). *I will below reproduce the entire text of the article posted on the Face Book by the defendant:*

> *Regime Dirty Politics.*
>
> *I am sickened at the recent series of temples around Fiji. I cannot help but wonder how in an election year in the past three months at least 6 temples have been desecrated. Someone surely wants all the attention.*
>
> *These criminals were well organised and I am even assumed that they went out of their way to buy red paint which was later used when they committed these crimes.*
> *Even during the worst days of racial, religious and ethnic tensions in 1987 and 2000, we never had six temples desecrated within a period of three months.*
>
> *These series of desecrations appear to be part of a grand plan and not some random acts of stupidity and misled thoughts as we have seen in the past.*
> *Notice how Korrupt Kaiyum & Commissioner of Police conveniently appear at temple open forums and promise safety and security. These promises are further propped by the regime's number 1 print propaganda machine the Fiji Sun which runs the headlines: "We Will Keep You Safe" & "We Won't Tolerate These Acts".*
>
> *The plan all along has been to:*
>
> *Phase 1: desecrate these temples,*
> *Phase 2: create a climate of fear with the community,*
> *Phase 3: show up and promise security.*
> *Stop the desecration of temples in Fiji for cheap political gains. These sick and despicable crimes were organised by* ***Korrupt Kaiyum, Violent Voreqe*** *& their henchman.*

[Emphasis added]

(7). These allegations are very serious in nature. One does not make allegations of this nature unless they are true and have very strong grounds to justify them. The 1st plaintiff is the Prime Minister of Fiji who were elected to that post by the people of Fiji. The people would not have voted for him if they did not have confidence and trust in him that he would discharge his duties honestly and efficiently. The people who read the above article would certainly have lost faith in the 1st plaintiff because he is referred to in the said article as ***Violent Voreg****e. The 2nd plaintiff who is the Minister of Economy and the Attorney General, was also elected by the people of Fiji to be a member of the Parliament. Without any reasonable ground he has been referred to as* ***Korrupt Kaiyum. People have various political affiliations but one must not defame the character of another for his own political gain. This is what exactly has happened in this case****. No court will have sympathy towards people who violate the rights of others in the guise of exercising their rights guaranteed by the Constitution.*

[Emphasis added]

[27]. The ratio of paragraph (7) of the judgment is that the words 'violent voreqe' and 'korruptkaiyum' are defamatory and are injurious to the rights of the applicants. The court then turned to the question of quantum of damages to be awarded.

Continuation of the conduct - The disturbing feature of the matter

[28]. **After Seneviratne J. delivered the Judgment and after the commencement of Committal Proceedings**, the respondent **continued** to post the following posts on his Facebook and used the hashtags #violen tvoreqe and #korrupt kaiym when referring to the applicants **despite having a judgment in place which clearly condemned and adjudged that the words 'violent voreqe' and 'korrupt kaiym' are defamatory.** (Reference is made to paragraph (11) to (48) of the **unchallenged affidavit evidence** of the second applicant sworn on 07.10.2021).

11. *The following thirty-one (31) posts are annexed hereto and marked as follows:*

i. Post dated 13th October 2020 - Annexure 2

ii.	*Post dated 16th October 2020*	-	*Annexure 3*
iii.	*Post dated 21st October 2020*	-	*Annexure 4*
iv.	*Post dated 1st November 2020*	-	*Annexure 5*
v.	*Post dated 25th November 2020*	-	*Annexure 6*
vi.	*Post dated 19th December 2020*	-	*Annexure 7*
vii.	*Post dated 21st December 2020*	-	*Annexure 8*
viii.	*Post dated 4th February 2021*	-	*Annexure 9*
ix.	*Post dated 5th February 2021*	-	*Annexure 10*
x.	*Post dated 6th February 2021*	-	*Annexure 11*
xi.	*Post dated 11th February 2021*	-	*Annexure 12*
xii.	*Post dated 15th February 2021*	-	*Annexure 13*
xiii.	*Post dated 20th February 2021*	-	*Annexure 14*
xiv.	*Post dated 3rd March 2021*	-	*Annexure 15*
xv.	*Post dated 20th April 2021*	-	*Annexure 16*
xvi.	*Post dated 6th May 2021*	-	*Annexure 17*
xvii.	*Post dated 26th May 2021*	-	*Annexure 18*
xviii.	*Post dated 4th June 2021*	-	*Annexure 19*
xix.	*Post dated 10th June 2021*	-	*Annexure 20*
xx.	*Post dated 12th June 2021*	-	*Annexure 21*
xxi.	*Post dated 14th June 2021*	-	*Annexure 22*
xxii.	*Post dated 4th July 2021*	-	*Annexure 23*
xxiii.	*Post dated 11th July 2021*	-	*Annexure 24*
xxiv.	*Post dated 30th July 2021*	-	*Annexure 25*

xxv.	*Post dated 5th August 2021*	-	*Annexure 26*
xxvi.	*Post dated 19th August 2021*	-	*Annexure 27*
xxvii.	*Post dated 9th September 2021*	-	*Annexure 28*
xxviii.	*Post dated 15th September 2021*	-	*Annexure 29*
xxix.	*Post dated 16th September 2021*	-	*Annexure 30*
xxx.	*Post dated 24th September 2021*	-	*Annexure 31.*

12. *The posts contain a barrage of serious and malicious allegations against the First Applicant and myself. To this day, not a single iota of evidence has been provided by the Respondent to prove his allegations.*

13. *In the post marked **Annexure 2**, the Respondent refers to Fiji's 50th anniversary of independence and alleges that the First Applicant and I, referred to as **#Violent Voreqe** and **#Korrupt Kaiyum**, have led Fiji to bankruptcy and ruin. He refers to us as idiots and questions what we celebrated on 10th of October 2020, i.e., Fiji Day.*

14. *In the post marked **Annexure 3**, the Respondent refers to a decision made by Fiji Airways with respect to the employment of its workers and alleges that the First Applicant has lied. The Respondent states in his post **"U know u live in a dictatorship when PM lies to public — Fiji Airways workers were terminated by the board and not —- #Korrupt Kaiyum".***

15. *In the post marked **Annexure 4**, the Respondent refers to the occasion on which the First Applicant was awarded Fiji's 50th Anniversary of Independence Commemorative Medal by his Excellency the President of Fiji for eminent achievement and merit of the highest degree to Civil Service, diplomacy and Government. The Respondent states in his post, **"In Fiji coup leaders are glorified and presented with medals. [...] Fiji PM #Violent Voreqe below receives his medal from the President. Citation should have read:- For committing treason, sedition, murder, torture and other serious criminal offences"**.*

16. *In the post marked **Annexure 5**, the Respondent refers to the 11pm to 4am nation-wide curfew and states **"#Korrupt Kaiyum says curfew will not be lifted any time soon" This curfew provides security & protection to these corrupt few!"**.*

17. *In the post marked **Annexure 6**, the Respondent refers to the nation-wide curfew and again refers to the Applicants as corrupt. He states in his post **"Life in a Dictatorship: The national curfew allows the corrupt regime, #Korrupt Kaiyum & #Violent Voreqe to sleep peacefully!"***

18. *In the post marked **Annexure 7**, the Respondent refers to Tropical Cyclone Yasa and alleges that the First Applicant is providing empty words to victims of the natural disaster. He states in his post **"#Violent Voreqe: Victims of TC Yasa do not need your empty words — the victims need food and water now. #TalkIs Cheap #Cyclone Relief Now".***

19. *In the post marked **Annexure 8**, the Respondent again refers to Tropical Cyclone Yasa and includes a photograph of the First Applicant sitting in a briefing session with a Member of Parliament. In the post, the Respondent states, "[...] **Look at the photo below - There are at least ten (10) bottles of bottled water in front of PM #Violent Voreqe. Something is surely not right when the PM gets to enjoy so many bottles of water with his sidekick, this is happening while at the same time thousands of our people who are victims of Cyclone Yasa are thirsty and desperately waiting for food and water supplies".***

20. *The Respondent ends the post with a number of hashtags, some of which are as follows:*

- ***#Talk Is Cheap***
- ***#Stupidy Has No Limit***
- ***#idioticleadership***
- ***#The Most Corrupt Fiji Government In Our History***

21. *In the post marked **Annexure 9**, the Respondent states **"The deportation of Professor Ahluwalia and his wife by #Korrupt Kaiyum and #Violent Voreqe is equivalent to the act of Nazi's and their Gestapo".***

22. *In the post marked **Annexure 10**, which the Respondent has titled **"Regime Human Rights Violations - illegal Deportation"**, he states **"The only reason Professor Pal Ahluwalia and his wife were illegal declared prohibited immigrants and deported from Fiji by #Korrupt Kaiyum and #Violent Voreqe was due to the Professor exposing massive financial abuse, financial***

mismanagement and corruption at the University of the South Pacific"*. The Respondent goes on to state* ***"Understand one fact - the moment of speaks the truth in Fiji, you will be targeted and the dictators #Korrupt Kaiyum and #Violent Voreqe will go to great lengths to silence you. Your silence is the fuel to everything that is wrong in Fiji. You silence is the oxygen for this Korrupt & Brutal government".***

23. *In the post marked* ***Annexure 11****, the Respondent states that he would like to deport the Applicants. Again, he refers to us as* ***#Korrupt Kaiyum*** ***and #Violent Voreqe****.*

24. *In the post marked* ***Annexure 12****, which the Respondent has titled* ***"Sad Day for the Criminal Justice System"****, the Respondent refers to the amendments to the Criminal Procedure Act and makes a number of allegations against the Second Applicant. Some of these allegations read,* ***"Without proper consultation and without engaging real stakeholders, #Korrupt Kaiyum continues making irrational, incompetent and pathetic decisions which continues to expose his stupidity at the highest levels"****.*

25. *The Respondent also makes allegations regarding my experience as a barrister and alleges that* ***"#Korrupt Kaiyum has no clue about, what is involved and what is entailed in a High Court criminal trial in the presence of assessors"****.*

26. *In the post marked* ***Annexure 13****, the Respondent states* ***"This is Hilarious. #Korrupt Kaiyum walks around with 20 bodyguards and yet is scared of one Facebook post! #Coup Free Fiji"****. The Respondent published this post after a Facebook user was charged with one count of causing harm by posting electronic communication. In the said post, the Facebook user has allegedly called for my killing and has stated that I will be killed.*

27. *In the post marked* ***Annexure 14****, the Respondent states that* ***"#Korrupt Kaiyum & #Violent Voreqe's biggest achievement - leading the most Korrupt government in Fiji's history! #I Am A Witness".***

28. *In the post marked* ***Annexure 15****, the Respondent states* ***"Suddenly #Korrupt Kaiyum says "we have the capacity to pay for COVID- 19 vaccines" - THAT IS ONE BIG FAT LIE".***

29. *In the post marked **Annexure 16**, the Respondent again uses the, hashtags **#Violent Voreqe** and **#KorruptKaiyum** and states **"Just like that #Violent Voreqe and #Korrupt Kaiyum's bubble burst!**".*

30. *In the post marked **Annexure 17**, the Respondent titles his post "**Fiji Government is Broke & Financially Crippled"** and states therein "[...] **Photo below moments after the agreement for direct budget "[...] Photo below moments after the agreement for direct budget, support was signed by the Australian High Commissioner and Fiji's dictator and Minister for Everything including Minister for Mismanaging the Economy #Korrupt Kaiyum (Showing signs of temporary relief)"**. The Respondent also included the following it hashtags:*

"#Coup Free Fiji
#Fiji Government Broke
#Fiji Government Financially Crippled
#Fiji Government Stop the Torture
#Fiji Government Stop Human Rights Violations
#Fiji Government Where is the Mission Millions
#Most Corrupt Fiji Government in History"

31. *In the post marked **Annexure 18**, the Respondent states "**Fiji government failures continue under #Korrupt Kaiyum & Party - We cannot afford Covid19 vaccine so we wait for handouts!**"*

32. *In the post marked **Annexure 19**, the Respondent states "**I would like to see the two dictators' #Violent Voreqe & #KorruptKaiyum survive on $50 each over 7 weeks! #Our People Are Hungry'.***

33. *In the post marked **Annexure 20**, the Respondent states **"#Korrupt Kaiyum wiping rotten eggs from his face! Illegally deported Professor Ahluwalia again appointed USP VC. #Trust Wins Over Evil"***

34. *In the post marked **Annexure 21**, the Respondent titles this post it "**Peoples Power**"and states therein **"[...] While Our People Continue to Starve During Lockdown #Korrupt Kaiyum & #Violent Voreqe continue to pay $38 Million per month for empty Fiji Airways planes parked at Nadi Airport**". The Respondent also included the following hashtags:*

"#Our People Are Starving
#Regime Lies On a Daily Basis
#Where Are Food Rations
#Millions Spent On Empty Planes While People Starve
#Life in Dictatorship
#Broke Government Only Care for Themselves
#i am a witness"

35. *In the post marked* ***Annexure 22****, the Respondent again titles this post* ***"Peoples Power"*** *and repeats the content in his earlier post, i.e.* ***[...| While Our People Continue to Starve During Lockdown #Korrupt Kaiyum & #Violent Voreqe continue to pay $38 Million per month for empty Fiji Airways planes parked at Nadi Airport".*** *The Respondent also adds the same hashtags as his earlier post:*
"#Our People Are Starving
#Regime Lies On a DailyBasis
#Where Are Food Rations
#Millions Spent On Empty Planes While People Starve
#Life in Dictatorship
#Broke Government Only Care for Themselves
#i am a witness"

36. *In the post marked* ***Annexure 23****, the Respondent states "Calls for* ***#IKorrupt Kaiyum to resign. I oppose that. I say let him continue to ruin Fiji. #Criminals Run Fiji #Coup Free Fiji"****.*

37. *In the post marked* ***Annexure 24****, the Respondent states "****This forced vaccination by #Korrupt Kaiyum & #Violent Voreqe is unconstitutional & illegal - #Say No To Forced Vaccination'****. The Respondent has also in his capacity as a lawyer, represented certain parties and filed an application for leave to apply for Judicial Review in respect of the statutory provisions of the Health and Safety at Workplace (Amendment) Regulations of 2021.*

38. *In the post marked* ***Annexure 25****, the Respondent states* ***"While the nation is on its knees devastated by Covid19 - #Korrupt Kaiyum & #Violent Voreqe focus on Land Bill No. 17. #Coup Free Fiji".***

39. *In the post marked* ***Annexure 26****, the Respondent states* ***"Question: What were you thinking by supporting CRIMINALS #Korrupt Kaiyum & #Violent Voreqe to run Fiji's government? #Criminals Run Fiji"****.*

40. *In the post marked* ***Annexure 27****, the Respondent titles this post* ***"Korrupt Khaiyum and his Mafia at Work"****. The post reads in part* ***"#Korrupt Kaiyum says he will not release money as grants to USP [....] and "My questions to #Korrupt Khaiyum [...]"****. The Respondent ends this post with the following hashtags:*

"#Criminals Run Fiji
#Fiji Mafia
#Coup Free Fiji"

41. *In the post marked* ***Annexure 28****, the Respondent titles this post* ***"Terrorists Celebrate in Fiji'****. The post reads in part* ***"#Violent Voregе appears very confused on the day [Un-Constitutional Day] appointed to celebrate their terrorist achievements with #Korrupt Kaiyum".*** *The Respondent ends this post with the following hashtags:*

"#Coup Free Fii
#Terrorists Run Fiji
#Criminals Run Fiji
#Fiji Mafia Control Fiji
 # L am a Witness

42. *In the post marked Annexure 29, the Respondent states "****Only in Dictatorship - Fiji Bureau of Statistics CEO terminated by****: #Korrupt Kaiyum for exceeding scope of data collection - Seriously!"***

43. *In the post marked* ***Annexure 30****, the Respondent states* ***"#Korrupt Kaiyum just added Chief Executive - Bureau of Statistics to his long list of self-appointed titles. #Life in a Dictatorship****"*

44. *In the post marked* ***Annexure 31****, the Respondent states "****Life in a Dictatorship U know you live in a dictatorship when all laws are made & passed by one man #Korrupt Kaiyum. #Coup Free Fiji!"***

45. *I believe that the above posts show a continued and deliberate defiance of his Lordship's Orders and the decision of the High Court of Fiji. The allegations made by the Respondent have caused further damage to our reputations not only in our Capacities as Prime Minister, Attorney General and Members of Parliament, but also in our personal capacities.*

46. The Respondent is a Legal Practitioner, a practicing Barrister and Solicitor in the Fijian Courts. I believe that as a Legal Practitioner, the Respondent would know the consequences of blatantly breaching Court Orders and further, know the consequences of aggravating a matters by making further defamatory postings.

*47. The initial defamatory article contained the words **"Korrupt Kaiyum"** and **"Violent Voreqe"** and the Court has adjudicated on these terms as being defamatory toward the Applicants.*

48. The Respondent's continued usage of these terms and further a baseless and serious allegations against the Applicants shows his complete and utter disregard of the Orders of the Court. Such conduct is malicious and contumelious. I also request the Court to note the inciteful language and all other hashtags used by the Respondent.

(C) SENTENCING

The sentencing principles

[29]. The task for the court now is to determine how should its powers to punish the respondent contemnor for contempt of court under Order 52 of the High Court Rules, 1988 be exercised? Contempt, whether civil or criminal, share a common characteristic. It is as Lord Diplock said in **A.G v Leveller Magazine Ltd**[2] that they involve an interference with the due administration of justice either in a particular case or more general as a continuing process. The power to punish for contempt is not for personal vindication of the Judges; the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for the public good alone[3]. In cases of contempt the dominant purpose is vindication of the authority of the court and promotion of the public welfare by protection of the majesty of the law from attack.

[30]. Contempt are neither wholly civil nor altogether criminal. And it may not always be easy to classify a particular act as belonging to either one of these two classes. It may, partake of the characteristics of both[4]. The object of proceedings for contempt

[2] (1979) AC. 440 at 449
[3] R v Dunbabin Ex-parte Williams (1935) 53 CLR 434
[4] Bessettee v Conkey 194 U.S 324

would be coercive in its character, and proceeding is in the interest of the public welfare and in vindication of the authority of the court, and that this feature dominates the proceeding and fixes its character as punitive rather than remedial. An offence of contempt is punishable with a fine or imprisonment, and unlike a criminal offence, it is not subject to any limits on the duration of imprisonment or the amount of fine.

[31]. In determining what penalty should be imposed on the respondent contemnor by the court there are a number of factors that are usually considered to be relevant. In **Attorney-General for the State of New South Wales v Radio 2UE Sydney Pty Ltd and John Laws**[5] Powell JA indicated that it was appropriate to consider the **objective seriousness of the contempt and the level of culpability** (i.e, intentional conduct, reckless conduct, negligent conduct or conduct without any appreciation of consequences.)

[32]. Apart from seriousness and culpability, other factors that should be considered in the case are

i). any plea of guilty,
ii). any previous convictions for contempt,
iii). any demonstrations of remorse and,
iv). Character and personal circumstances.

[33]. In deciding whether an act of contempt is serious enough to warrant imprisonment, two factors are determinative: first, the likely interference with the due administration of justice and second, the culpability of the offender[6]. Sentences of imprisonment tend to be more common in cases which involve a blatant refusal to adhere to an order of the court[7]. The considerations of public policy underlying the contempt jurisdiction generally are the protection of the administration of justice and the maintenance of the courts authority. There lies at the heart of both civil and criminal contempt the need for society both to protect its citizen's rights and to maintain the rule of law[8].

[5] unreported appeal decision of the New South Wales Supreme Court No:- 40236 of 1998, delivered on 11th March 1998; (1998) NSWSC 29
[6] R v Thomson Newspaper Ltd (1968) 1 ALL ER 268 at 269
[7] OCM Opportunity Fund II, LP v Burhan Uray (2005) 3 SLR 60
Lim Meng Chai v Heng Chok Keng (2001) SGHC 33
[8] Arlidge, Eady & Smith on Contempt, Fifth Edition, p.158

[34]. Those who commit contempt must be denounced, and that deterrence is an important consideration. However, as with all sentencing exercises the objective seriousness of the relevant conduct and the defendant's personal culpability for the conduct must be assessed. In accordance with ordinary sentencing principles a defendant's means and any personal aggravating or mitigating factors will be taken into account[9].

[35]. For the purposes of punishment, various classes of contempt have been identified in the cases. They include **technical, wilful** and **contumacious contempt**. For **technical contempt**, the court will usually accept an apology from the contemnor. It may order that the contemnor pay the costs of the proceedings brought to uphold the authority of the courts of law. An illustration of a technical contempt may be found in '**Ainsworth v Hanrahan**[10]. That was a case where counsel, in the course of cross-examination of a party, without leave of the relevant court, used answers given by the party to interrogatories administered in other proceedings. No penalty was imposed.

[36]. A similar approach is sometimes taken to contempt which are more than **technical** and which, although wilful, are not found to have been deliberate. An illustration of this class of contempt may be found in '**Attorney-General for New South Wales v Dean[11].** In that case a police officer participated in a police media conference and identified a suspect in a murder investigation in such a way as to interfere in the suspect's right to have a fair trial according to law. The court found an absence of a specific intent to interfere in the administration of justice. But this was neither an answer nor a defence to the charge. Nor was ignorance of the law of contempt an excuse. The court, nevertheless, contended itself with a declaration that the police officer had been guilty of contempt. It ordered him to pay the costs of the proceedings.

[37]. The most serious class of contempt, from the point of view of sanction, is **contumacious contempt**. Not every intentional disobedience involved a conscious defiance of the authority of the court which is the essence of this class of contempt[12]. This class of contempt is reserved to cases where the behaviour of the contemnor has been shown to be aimed at the integrity of the courts and designed to degrade the administration of justice, as distinguished from a simple interference

[9] Solicitor – General v Krieger (2014) NZHC 172, Solicitor-General v Alice (2007) 2 NZLR 783
[10](1991) 25 NSWLR 155
[11](1990) 20, NSWLR 650
[12]Australian Consolidated Press Ltd v Morgan [1965] HCA 21; (1965) 112 CLR 483 at 500

with property rights manifested by a court order[13]. In cases where such a measure of willfulness is established, the court may proceed to punish the convicted contemnor by the imposition of a custodial sentence or a fine or both.

The following case authorities have dealt with contempt of court in Fiji

[38]. I gratefully quote from the Judgment in **Re Chaudhry**[14], in relation to material facts and sentence passed in following cases.

a). Vijaya Paramanandam v Attorney-General[15]
b). Chaudhry v Attorney General [16]
c). In Re Application by the Attorney General of Fiji[17]
d). Nicholas v The Attorney-General of Fiji[18]
e). Fiji Times Ltd v Attorney General of Fiji[19]
f). Viliame Finau & Ors v Civil Aviation Authority of Fiji & Ors[20]

Name of Case	Facts	Penalty
Parmanandam case	The material constituting the contempt was contained in a lengthy speech made at a political meeting, part of which was subsequently published in a pamphlet alleging: "*the NFP platform[is] to clean the judiciary once and for all",* magistrates were being appointed as Judges which called into question whether they may be *"sacrificing a principle or a rule, or a particular rule of law, for the sake of expediency or for the sake of promotion",* questioning the appointment of an Australian as Chief Justice with his position being paid by the Australian government and how this reflected upon Fiji's independence, questioning appointments to the Court of Appeal when *"their future appointments in sessions depend entirely upon" the Chief Justice,* and that "*TWO SUVA LAWYERS*	Six months imprisonment reduced to three months by Court of Appeal.

[13] Root v MacDonald 157 NE684
[14] (2019) FJHC 488
[15] (1972) 18 FLR 90 (23 June 1972) ('Paramanandam case');
[16] [1999] FJHC 28; [1999] 45 FLR 87 (4 May 1999) ('Chaudhry case');
[17] [2009] Civil Action No.124 of 2008 (22 January 2009) ('The Fiji Times case (2009)');
[18] (2013) C.A. No. 364 of 2011 [8 February 2013] ('Nicholas case');
[19] [2017] FJSC 13; CBV0005.2015 (21 April 2017) ('The Fiji Times case (2017)');
[20] Lautoka High Court Civil Action No. HBC 117 of 2017 (6 July 2018) ('ATS case').

	WERE CONDEMNED IN ABSENTIA IN A COURT OF LAW" by the Chief Justice which the Court of Appeal found *"was a clear imputation that the Chief Justice had disregarded basic and elementary principles of justice"* and was imputation that was false. Contemnor apologises to both Supreme Court and Court of Appeal.	
Chaudhry case	The material constituting the contempt was published in a pamphlet which repeated suggestions that some judges and magistrates were corrupt. This was published in the Daily Post on 14 July 1997 under the heading "Judiciary Corrupt" and was as follows: "*There has been public suspicion since the coups that many in our judicial system are corrupt. In several cases well known lawyers have been identified as receiving agents for magistrates and judges. A number of lawyers are known to arrange for them to appear before their preferred magistrates or judges."*	Court costs to be paid within 7 days fixed at FJ$500
The Fiji Times cas (2009)	On 22 October 2008, the following letter to the Editor was published on page 6 of *The Fiji Times* as follows: *"Court ruling* *A DARK day in the annals of Fiji's judiciary and legal history was brought about by* ***the totally biased, corrupt and self preserving judgment handed down by Anthony Gates, John Byrnes [sic] and Devendra Pathik [sic] in the Qarase vs Bainimarama case.*** *I do not know Mr Qarase nor am I a member of the SDL but I know when an unjustice [sic] has been committed and I believe that the injustice i this case must be condemned by all law abiding citizens ...* ***The judiciary was tainted from the day*** *Justice Daniel Fatiaki was forcefully removed and* ***Anthony Gates unashamedly usurped his position****.* ***Gates' efforts to legalise the immunity is laughable given the immunity was designed to***	Parties pleaded guilty. The editor-in-chief of the Fiji Times was sentenced to a term of imprisonment of three months which was suspended upon him entering into a good behaviour bond for 12 months. The publisher was discharged without conviction upon entering into a good behaviour bond for 12 months. Fiji Times Limited was ordered to pay a fine of FJ$100,000.00. Fiji Times Limited was ordered to enter into a $50,000 bond for 2 years on behalf of its Chairman.

	protect him also. *Thank you Mr Qarase and keep up the good figh against oppression, tyranny and injustice.* ***VILI NAVUKITU*** ***Queensland, Australia***" The contemnors pleaded guilty.	
Nicholas case	The contemnor was quoted in an article that appeared in the website of the Sunday Star Time on 6 November 2011 containing the following th words: *'You should be aware that with no judiciary ther his case has been reviewed by one Australian Judge. It is not a court per se.'"* Contemnor pleaded guilty to the offence of contempt of court.	Fined $15,000 and $3500 costs. Ordered to arrange for an apology directed to the judiciary of Fiji.
The Fiji Times cas (2017)	On Monday 7 November 2011, an article entitle "FIFA Probes Doc" was published on page 30 of the Fiji Times. The impugned article contained the words and statement: *'You should be aware that with no judiciary ther his case has been reviewed by one Australian Judge. It is not a court per se.'"*	Fiji Times Limited was fined FJ$300,000.00. The Second Respondent (Brian O'Flaherty) was ordered to pay a fine of FJ$10,000.00. (Reduced to $7,500.00 by Court of Appeal). The Third Respondent (Fred Wesley) was sentenced to a term of six months imprisonment.
Viliame case	The contemnor had brought a claim against the defendants seeking a declaration that the Article of Association of Air Terminal Services (Fiji) Ltd which permitted the removal of directors as oppressive and prejudicial and that the contemnors removal as a director was illegal, oppressive, null and void. The Defendants filed a strike out application. Before the court delivered its judgment on the strike out application, the contemnor filed an ex parte application to stop an AGM. The application was heard and dismissed on the day it was filed. The contemno then went ahead and made various statements and interviews regarding the outcome of the case, the judge who was nominated to hear the case and the entire Fijian judiciary. The video wa made publicly accessible on the social networkin site Facebook.	Costs in the sum of $9000.00 to the Applicants and convicted as charged for contempt of scandalizing the court and sentenced to immediate imprisonment of a period of three (3) months.

[39]. In Re Chaudhry (supra) the respondent's Facebook posts were intended to convey that the Hon. Chief Justice and the entire Fijian Judiciary is corrupt, pliant and bias towards the Fijian Government. The respondent was found guilty for contempt of courts and he was sentenced to fifteen (15) months imprisonment.

Deliberate, conscious and contumacious disobedience to court orders

[40]. It must be remembered that the respondent's contempt arose from the respondent's act of disobedience to adhere to the Judgment orders of the court dated 24.07.2020 and sealed on 28.07.2020 which are in the following terms:

1. *The defendant is ordered to pay the plaintiffs $120,000.00 as damages ($60,000.00 to each plaintiff) within 30 days from the date of this judgment.*

2. *The defendant is ordered to render in writing a public retraction and apology to the plaintiffs in prominent print which is to be published on his Face Book page and in all local daily newspapers.*

3. *The defendant is ordered to remove the subject article from his Face Book page immediately.*

4. *The plaintiffs are entitled to 6% interest on the sum awarded from 07th March 2018 to the date of the judgment.*
5. *The defendant is also ordered to pay the plaintiffs $8,000.00 as costs (summarily assessed) of this action within 30 days from the date of the judgment.*

[41]. A disobedience of court orders is a civil contempt but it can become a criminal contempt (after it has been proved beyond reasonable doubt) for the purpose of punishment if the contempt involves deliberate defiance or is contumacious in nature.

[42]. The respondent did not challenge by way of an appeal process the obligations imposed by or owed to court as per judgment orders dated 24.07.2020 and sealed on 28.07.2020. The Judgment orders required the respondent to do certain things

within the time specified in the Judgment. The respondent is bound by the Judgment and its orders and the Judgment can be enforced by committal of the person bound by the Judgment.

[43]. The respondent pleaded not guilty to the charge of contempt brought against him. No **admissible evidence** was put forward by the respondent **at the committal hearing** to establish that he has fully or partially complied with the orders of J. Seneviratne's Judgment dated 24.07.2020. The respondent contemnor did not go into the witness box to explain the meaning of his conduct. The respondent chose not to file an affidavit in opposition explaining his conduct despite he was given 28 days to file the same. **At the commencement of the committal hearing, during the course of the committal hearing and right throughout the committal hearing there was nothing on the record to point any difficulty the respondent is facing in complying with the orders of the court.** I note that he did not even seek time from the court to ensure compliance with the orders after he was served with the motion pursuant to Order 52, Rule 3(1). Right throughout he maintained his plea of not guilty but never raised a defence by way of admissible evidence to the charge of contempt brought against him.

[44]. The respondent made no excuse whatsoever for non-compliance. No defence was raised by way of affidavit evidence or sworn testimony. He maintained the plea of not **guilty** right throughout. No sensible excuse has been offered by way of affidavit evidence or sworn testimony for non - compliance. This act of disobedience can neither be justified nor excused and his failure to confirm to lawful orders of the court in the absence of defence or excuse shows his wilful, perverse, intentional and deliberate disregard to the obligations imposed on him by the court or owed to the court by the Judgment orders dated 24.07.2020. Hence, casual, accidental or unintentional disregard to the obligations imposed by the court or owed to the court are excluded. The respondent's wilful, perverse, intentional and deliberate disregard to the obligations imposed on him by the court or owed to the court by the Judgment orders dated 24.07.2020 is a far cry from a piece of breath- taking insouciance. The evidence of the case demonstrated not only that he acted in wholesale disregard of his obligations under the orders of the court. His wholesale flagrant, repeated and persistent disregard of his obligations under the orders of the court, coupled with an awareness of the consequence can properly be regarded as 'contumelious' conduct.

[45]. I conclude that the conduct of the respondent contemnor was contumacious and would warrant punishment for criminal contempt rather than civil contempt. As I

said earlier, a civil contempt (disobedience of orders) can become a criminal contempt for the purpose of punishment if the contempt involves deliberate defiance or is contumacious in nature. In civil contempt the sole purpose is to achieve enforcement.

Contumacious conduct is conduct that is deliberately defiant[21]. **Pluhowsky v Registrar of Court of Appeal (NSW)** [22] Kirby J. used the language of ' *deliberate defiance*'. The word contumacious means what has been termed ' *a perverse and obstinate resistance to authority*'[23].

[46]. The penal notice on the sealed order served on the respondent clearly states that; "*If you within – named defendant, Aman Ravindra – Singh disobey this order by the time therein limited, you will be liable for process of execution for the purpose of compelling you to obey the same."* This satisfies me that the respondent was well aware of the consequence of the disobedience.

[47]. The seriousness of breaches of court orders was discussed by Merkel J in **Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union**[24].

> *"The rule of law in a democratic society does not permit any member of that society, of matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes (Patrick Stevedores Operations (No 2) Pty Ltd v Maritime Union of Australia (1998) 153 ALR 641 at [1] per Hayne J), it also requires that parties comply with the orders made by the courts in determining those disputes.*
>
> *If the individual respondents believed that the orders of Whitlam J were wrongly made, then it was open to them to appeal, or apply for leave to appeal, against those orders."*

[48]. Mens Rea (intention) is not an element of contempt of court charges. The supreme court in the **Fiji Times Ltd v A.G**[25] said at para 47 that …. "*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."*

[21] Amieu v Mudginberri Stations PTE Limited, (1986) HCA 46.
[22] (1999) 198 CLR 435
[23] Commissioner for Fair Trading v Voulon (2006) WASC 261
[24] [2000]FCA 629 at [79]-[80] (Merkel J).
[25] 2017 FJHC 13 at para 47

[49]. Fiji is a democratic state constitutionally based on the rule of law. In order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its orders and to protect the administration of justice against contempt which are calculated to undermine it.

Remarks

[50]. The initial defamatory article contained the words "Korrupt kaiyum" and "Violent voreqe". **Justice Seneviratne has adjudged on these terms as being defamatory towards the applicants and injurious to the rights of the applicants. Instead of abstaining from the usage of these defamatory terms which are injurious to the rights of the applicants, the respondent continued usage of these libellous terms on 31 Facebook posts despite being fully aware of the order of J. Seneviratne and contempt proceedings.** [*See paragraph 28 above]*. It is quite apparent to me from the unchallenged affidavit evidence of the applicants that the respondent **repeated and persisted** in positing posts on his Facebook referring to the applicants, after J. Senevirante's orders were served on him and after committal proceedings were served on him. The conduct of the respondent is in disobedience of a finding, ratio and the judgment made by the court on behalf of the applicants. This shows that there was a flouting of the authority of the court and willful affront of its power and a conduct disclosing a purpose to flout the court and its findings ratio and the judgment and subversive of the administration of justice. His continuous usage of the said defamatory terms on 31 Facebook posts despite being fully aware of the Judgment of J. Seneviratne, shows his hostility to the court as the means afforded by government for the administration of justice, contumacy towards the court and towards its Judgments and this disobedience is in such a character and in such a manner as to indicate a contempt of court rather than a disregard of the rights of the adverse party. No discussion is required to demonstrate the substantive injury compensable in damages caused to the applicants from the wrongful conduct of the respondent. The personal injury to the adverse party in whose favour the court has made the finding gives a remedial character to the contempt proceedings. The punishment is to secure to the adverse party the right which the court has awarded them.

[51]. At the sentence hearing respondent took the stand to give evidence and said that the opinion of a judge was not a court order and no injunction or gag order was made restraining him from referring to the applicants as such.

[52]. It must be remembered that the rationale of the Judgment of Justice Seneviratne dated 24.07.2020 which is the point that determined Judgment and Judgment orders is paragraph (7). The ratio of paragraph (7) of the judgment is that words 'Violent Voreqe' and 'korrupt kaiym' are defamatory and injurious to the rights of the applicants. The court then turned to the question of damages. Viewed in that light, the respondent being a practicing Barrister and Solicitors in Fiji why wait for a restraining order? The respondent was not contrite nor did he make any attempt to withdraw the offending 31 Facebook posts. Instead, he repeatedly maintained that he has a legitimate right to refer to the applicants as such which overrode the courts ratio and finding in the Judgment to the contrary. This involves a flagrant challenge to the authority of the court. This is the conduct of an officer of the court leading up to the present proceedings. However, I note that the respondent has not been charged for that.

[53]. **AGGRAVATING FACTORS**

- The seriousness of the criminal contempt proved.
- The respondent's culpability was high.
- There has been no genuine expression of contrition by the respondent for his conduct, nor any indication that he will desist in the future, nor even that he considers that he has done anything wrong, as opposed to mere regret that what he did was found to constitute contempt of court- he is sorry he has been prosecuted and convicted; but there is no evidence he in any way resiles from his conduct.
- The respondent contemnor is a practicing Barrister and Solicitor in Fiji.
- The respondent never displayed any remorse for his actions. I reiterate that the respondent in sentencing inquiry took the stand to give evidence and said that he has a legitimate constitutional right to continue referring to the applicants as 'Violent Voreqe ' and 'Korrupt kaiyum' as there is no injunction order or gag order restraining him from referring to the applicants as such. Justice Seneviratne in the

course of his Judgment has referred to the said words and **has condemned and adjudged as defamatory and held that the above words [baseless attacks on the integrity of the applicants] are injurious to the integrity of the applicants. The court found that the respondent has infringed the rights of applicants. The respondent was squarely on notice as to how seriously the court took his behavior.** Viewed in that light, this court is entitled to conclude that the respondent's sarcastic statement overrides the court's ratio and finding in the judgment. He not only persisted but escalated the conduct. The respondent's conduct should be characterized as attempting to find a weakness or loophole in the Judgment orders and seeking to exploit that. A conspicuous aspect of the respondent's conduct is that it was carefully planned. In the circumstances of this case, deterrence looms large in relation to both the aspect dealing with contumacious disobedience to Judgment orders and in relation to what might be conveniently described as defiance of court's authority. The rule of law requires that those whose rights are infringed should seek the aid of the court, and respect for the legal process can suffer if those who need protection fail to get it. The respondent's statement is a clear and present danger to judicial administration and if permitted, could shake the confidence of the litigants and the public in the decisions of the court and weaken the spirit of obedience to the law. His vigilante sentiment cannot be tolerated if the rule of law, and the role of the courts, is to have a meaningful part to play in maintaining civil society.

- The respondent has displayed an absolute and utter disdain for the judiciary, its function and its decisions.

- This case deals with a legal practitioner whose actions have a far reaching impact on the administration of justice and the image of the judiciary.

- This case deals with a respondent who has not, on any occasion, expressed to the court that he will not act in this manner again.

- The nature of the jurisdiction. It is permissible to take into account that on a small Island such as Fiji the Administration of Justice is more vulnerable. See;

  - **Feldman, Civil Liberties & Human Rights in England & Wales[26]**

[26] [1993] pp 746 - 747

- **Barendt, Freedom of speech[27]**

- The observations of the Privy Council in **Ahnee and Others v DPP**[28] support the proposition that the contempt should be considered in the context of the recent constitutional history of Fiji which renders the administration of justice in Fiji, as a developing small island state, more vulnerable than in developed nations.

Breach of Trust

- The respondent is a practicing Barrister and Solicitor in Fiji. Also he is a former Prosecutor of the D.P.P. As a consequence, the respondent was well aware that he was reposed with trust and responsibility to maintain the honour and dignity of his profession as an essential agent of the administration of justice. The respondent has committed the highest breach of trust in the eyes of the administration of justice.

Plea of not guilty

- The principles that are generally applied in sentencing proceedings require the Court to consider the issues of genuine remorse and any plea of guilty. An early plea of guilty is regarded as one of the indicators of genuine remorse. In the present case, at all times up to and including the day of the sentencing hearing the respondent has maintained his plea of not guilty. As a result, the respondent cannot claim any credit from the Court on that basis. That leaves the question of remorse. In a case where there has been a plea of not guilty it is difficult to entertain the notion of genuine remorse as a mitigating factor. To put it bluntly, a plea of not guilty is usually inconsistent with remorse and contrition.

MITIGATING FACTORS

- **Previous character of the respondent**

[54]. One obvious mitigating factor that counts in favour of the respondent is the fact that there are no previous convictions for contempt. It is stated that the respondent has no prior criminal conviction of any kind. It can fairly be stated that the respondent has a good character. When the contemnor is a first time offender there is a general

[27] [1985] pp.218 - 219
[28] (1999) 2 WLR 1305

desire to keep offenders, and especially first-time offenders, out of prison[29]. **This consideration, though relevant, is of much less weight and pales in the case of contumacious contemnor**.

- **Steps taken to purge contempt**

[55]. **Order 1** was due on **23 August 2020 [30 days from date of Judgment]**.

[56]. On 27 July 2022 [11 months and 4 days from when the sum was due, and 9 months and 15 days from when the Leave was granted to institute committal proceedings], the Respondent emailed the Applicants' Lawyers and notified them that he had paid $120,000.00 to the Official Receiver.

[57]. The applicants have instituted Bankruptcy proceedings against the respondent in Lautoka Magistrates Court and the receiving order was made on 06.07.2022. This spurred the Respondent to pay the amount of $120,000.00 with the Official Receiver.

[58]. The above are the circumstances leading up to the payment. In mitigation, the respondent said that he did not have the money earlier. He said he took a loan and liquidated some assets to raise the funds. I cannot accept this. He should have sought time from the court to make the payment when the motion for committal was served on him instead after a number of interlocutory proceedings on preliminary matters and a full hearing. The full hearing was delayed on many occasions by reason of the particular challenges presented by the respondent. He is expecting leniency from the court when everything else has failed. **There is a stark contrast between purging the contempt at the earliest possible opportunity, and purging the contempt at the end of long litigation when everything else has failed.** With respect, the absence of bona fide of the respondent is obvious from the timing of the payment. Consequently, purging the contempt by belated compliance with order number One carries very little weight. Besides, this matter does not involve civil contempt where the sole purpose is to achieve enforcement to vindicate the rights of the applicants. As I said earlier, this matter involved criminal contempt where the primary purpose of exercising the power is to vindicate the authority of the court.

[59]. In respect of Order 2, the Respondent attempted to render in writing a public retraction and apology to the Applicants in the Fiji Times. This was published on 7 July 2022 – after the Hearing in these proceedings had completed and the parties awaited Decision of this Court. A copy of the apology and retraction is enclosed in Tab 1.

[29] Templeton Insurance v Thomas (2013) EWCA Civ35 at 27, R V Kefford (2002) Cr. App. R (S) 106 and R v Seed and Stark (2007), 2 Cr. App. R (S) 69

[60]. This apology and retraction is unacceptable. It does not refer to the date of the Judgment. It does not specify what the respondent is apologizing for. It does not make reference to the proceedings commenced by the applicants. Consequently, it carries a very little weight.

[61]. The Orders of the Judgment pertaining to a defamatory article that was written by the respondent was published on his Facebook post. As was pointed out, is it not fair that the Respondent refer to this in his apology and retraction?

[62]. In **Young v Registrar**[30], the Court of Appeal declined to exercise their discharge power in respect of the convicted appellant as the apology was not considered to be genuine. Rather, Powell JA described it (at 292G) as "**no more than an empty collection of words**".

[63]. I conclude that the apology and retraction published in the Fiji Times is not genuine and does not assist the respondent in purging his contempt.

[64]. In respect of **Order 3**, the Respondent was required to publish the apology and retraction to the Applicants on his Facebook page. To date, this has not been done.

[65]. **Order 4** required payment of interest on the damages awarded to the Applicants. To date, this has not been paid.

[66]. **Order 5** required the Respondent to pay costs to the Applicants within 30 days from the date of the Judgment. To date, this has not been done.

- **Personal Circumstances**

[67]. I have no affidavit evidence concerning the respondent's **personal circumstances**. There is no affidavit material filed on behalf of the respondent in support of mitigation.

Appropriate Sentence

General Principles

[68]. In **Registrar of the Court of Appeal v Maniam (No 2)**, [31]Kirby P said (at 314):

[30] (1993) 32 NSWLR 262
[31] (1992) 26 NSWLR 309

"A conviction of contempt of court is a conviction of an offence, criminal in nature. Punishment of the convicted contemnor must therefore take into account the considerations normally applicable to the punishment of crime and apt to uphold the purpose of this jurisdiction, viz, the undisturbed and orderly administration of justice in the courts according to law. Thus, in determining the punishment which is apt to the circumstances which have led to a conviction of contempt, it is appropriate to bear in mind the purposes of punishing the contemnor; deterring the contemnor and others in the future from committing like contempts; and denouncing the conduct concerned in an approximately emphatic way: see Director of Public Prosecutions v John Fairfax & Sons Ltd (1987) 8 NSWLR 732 at 741."

[69]. Further, his Honour elaborated (at 315):

"The most serious class of contempt, from the point of view of sanction, is contumacious contempt. Not every intentional disobedience involves a conscious defiance of the authority of the Court which is the essence of this class of contempt: see Australian Consolidated Press Ltd v Morgan (1965) 112 CLR 483 at 500. This class of contempt is reserved to cases where the behaviour of the contemnor has been shown to be aimed at the integrity of the courts and designed to degrade the administration of justice, as distinguished from a simple interference with property rights manifested by a court order: cf Root v MacDonald 157 NE 684 (1927) at 688; 54 Am LR 1422 (1927) at 1429. In cases where such a measure of willfulness is established, the court may proceed to punish the convicted contemnor by the imposition of a custodial sentence or a fine or both."

[70]. Similar considerations are also applied by the Federal Court in **Kazal v Thunder Studios Inc (California)**:[32] These considerations are:

(a) the seriousness of the contempt proved;

(b) the contemnor's culpability;

(c) the reasons or motive for the contempt;

[32] (2017) 256 FCR 90; [2017] FCAFC 111 at [101] (Besanko, Wigney and Bromwich JJ).

(d) whether the contemnor has received or tried to receive a benefit from the contempt;

(e) whether there has been any expression of genuine contrition by the contemnor;

(f) the character and antecedents of the contemnor;

(g) the contemnor's personal circumstances;
(h) personal and general deterrence; and

(i) the need for denunciation of contemptuous conduct.

[71]. Since these proceedings were commenced under Order 52 of the High Court Rules it is appropriate to consider any guidance as to penalty that might be provided by Order 52. It is abundantly clear that under Order 52 a person found guilty of contempt of the Court is liable to be convicted and sentenced to a term of imprisonment[33].

[72]. The seriousness of breaches of court orders was discussed by Merkel J in **Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union[34]** ; "*The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes (Patrick Stevedores Operation (No 2) Pty Ltd v Maritime Union of Australia (1998) 153 ALR 641 at [1] per Hayne J), it also requires that parties comply with the orders made by the courts in determining those disputes. If the individual respondents believed that the orders of Whitlam J were wrongly made, then it was open to them to appeal, or apply for leave to appeal, against those orders instead, they breached them. The fact that the breaches are by union leaders holding important offices in a federation of national trade unions makes them more, rather than less, serious: see Gallagher v Durack (1983) 152 CLR 238 at 244."*

[73]. This court is seeking to **achieve the followings** in imposition of punishment for criminal contempt involved in this case which is in the form of wilful, deliberate, perverse and contumacious disobedience to judgment orders of Justice Seneviratne dated 24.07.2020;

[33] Paramanondam v A.G (1972) 18 FLR 90 at p.99
[34] (2000) FCA 629 at 79-80

- Denunciation (to drive home the point that such behavior is unacceptable)
- Specific deterrence (to prevent a recurrence of such behavior)
- General deterrence (to signal to others that such behaviour will be dealt with severely)

[74]. As stated by this court earlier, the sole purpose of civil contempt is to achieve the enforcement. I made a clear finding earlier in this decision that the contempt involved in this matter is criminal in nature because there was wilful, perverse, deliberate and contumacious disobedience to Judgment orders dated 24.07.2020 and hence the primary purpose of exercising the power changed from vindication of rights of the applicants to vindication of the authority of the court. In 2018, the New South Wales Court of Appeal in **Dowling v Prothonotary of the Supreme Court**[35] in particular, Basten JA, with whom Meagher JA agreed, held that sentencing legislature have no application to proceedings for civil and criminal contempt. The most significant impact of the Downing decision relates to structure and content of the orders that can be made in respect of criminal contempt; non parole orders can no longer be made, aggregate sentences can no longer be set; and alternatives to custodial imprisonment such as intensive community corrections orders are no longer available to criminal contempt. Therefore, the statutory considerations contained in the Fiji sentencing legislature does not apply when imposing a punishment to the respondent for criminal contempt.

[75]. An offence of contempt is a common law offence. This means that the maximum penalty for contempt is at large subject only to the restriction in the Bill of Rights restriction upon cruel punishment[36].

[76]. I have reached a conclusion that nothing but a sentence of imprisonment should be imposed on the respondent **chiefly** because of the gravity of the criminal contempt – A wilful, deliberate, perverse and contumacious disobedience to the Judgment orders of Justice Seneviratne dated 24.07.2020. The rule of law requires that those whose rights are infringed should seek the aid of the court, and respect for the legal process can suffer if those who need protection fail to get it. That is why deliberate, perverse, wilful and contumacious disobedience to orders of the court has always earned severe punishment.

[77]. The following matters which are referred below are **additional considerations**;

[35] (2018) 99 NSWLR 229
[36] Wood v Galea (1997) 92 A Crim R 287 at 290 and Smith v The Queen (1991) 25 NSWLR 1 at 13-18

- The breach of trust.

- The respondent will not personally suffer or be deterred by a fine.

- There has been no genuine expression of contrition by the respondent for his conduct, nor any indication that he will desist in the future, nor even that he considers that he has done anything wrong, as opposed to mere regret that what he did was found to constitute contempt of court – he is sorry he has been prosecuted and convicted; but there is no evidence he in any way resiles from his conduct.

- There remains no indication that the respondent personally sees anything wrong with his conduct and need for specific deterrence looms large.

- **The respondent never displayed any remorse for his actions**. As I have said, the respondent in sentencing inquiry took the stand to give evidence and said that he has a legitimate constitutional right to continue referring to the applicants as 'Violent Voreqe' and 'Korrupt kaiyum' as there is no injunction order or gag order restraining him from referring to the applicants as such. Justice Seneviratne in the course of his Judgment has referred to the said words and **has condemned and adjudged as defamatory and held that the above words (the baseless attacks on the integrity of the applicants) are injurious to the integrity of the applicants. The court found that the applicants' rights are infringed by the respondent. The respondent was squarely on notice as to how seriously the court took is behavior.** Viewed in that light, this court is entitled to conclude that the respondent's sarcastic statement overrides the court's ratio and finding in the judgment. He not only persisted but escalated the conduct. The rule of law requires that those whose rights are infringed should seek the aid of the court, and respect for the legal process can suffer if those who need protection fail to get it. The respondent's statement is a clear and present danger to judicial administration and if permitted, could shake the confidence of the litigants and the public in the decisions of the court and weaken the spirit of obedience to the law. Therefore, the court's authority is at stake and it is necessary in order to vindicate and protect the court's authority to imprison the respondent.

- To deter the respondent from engaging in like conducts in future, denounce the conduct future and to serve a warning to others who chose to go down

the respondent's path. [General and specific deterrence] The sentence will deter the respondent and others minded to emulate him because the sentence is a clarion call that such behavior will not be tolerated.

[78]. And also there is a strong need to ;

- Denunciate the respondent's conduct.
- To specially deter legal practitioners from engaging in such conduct.
- To generally deter future litigants from engaging in similar conduct and
- To protect the rule of law, the integrity of the judiciary and its pronouncements and the administration of justice.

[79]. Due to the reasons given above, I sentence the respondent to a term of **Ten [10] months imprisonment.**

[The counsel for the applicants submitted that the circumstances warranted a custodial sentence and they made submissions seeking a higher scale custodial sentence. The quasi – prosecutorial role of counsel for the applicants imposes fundamental limits on going further on sentence than assisting court to avoid a sentencing error. That may include submissions as to the type of disposition that is appropriate, such as to whether a custodial sentence was called for and perhaps whether it should include actual incarceration. But it entails refraining from advocating for any particular duration or range of sentence to be imposed.[37]]

[80]. The power of Courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory. If a party can make himself a judge of the validity of Orders which have been issued, and by his own act of disobedience set them aside, then are the Court's impotent, and what the Constitution now fittingly calls the "judicial power" would be a mockery. This power has been uniformly held to be necessary to the protection of the Court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of rights of suitors[38].

[37] Barbaro v The Queen , (2014) 253 CLR 58 at 29-33
[38] Bessette v Conkey; 194 U.S 324, 333

FINE

[81]. The Court has inherent jurisdiction to impose fines for contempt having regard to its seriousness. **Neurom Ltd v Trans, H.C. Auckland** CP 623/SW 01, 14/05/2002. The Courts in Fiji have imposed fines of $20,000[39], $25,000[40] and $50,000[41] for civil contempt.

[82]. In **Taylor Bros Limited v Taylors Group Limited**[42], the New Zealand Court of Appeal held that the Court can apportion the payment of fine to both the Crown and the plaintiff.

> *The jurisdiction regarding a fine must and does extend to ordering that part of it be paid to a complainant who has set the Court proceedings in motion..... Perhaps there is no fundamental objection in principle to accepting even that the Court could order the whole fine to be paid to the complainant. We think, however, that this would be to go too far. The contempt jurisdiction exists in the public interest as a sanction to ensure that Orders of the Court are complied with. An element of amends to the public institution should always be present in a fine.*

[83]. The New Zealand High Court in '**Blomfield v Slater**'[43] ordered that a portion of the fine imposed for contempt be paid to the complainant.

ORDER

The respondent is sentenced to a term of **Ten (10) months immediate imprisonment** for contempt of court.

HIGH COURT OF FIJI SUVA

16/08/2022.

Jude Nanayakkara

JUDGE

High Court - Suva
Tuesday, 16th August 2022

[39] Paradise Transport Ltd v Land Transport Authority (2018) FJHC 844
[40] In the matter of Credit Corporation Fiji Ltd v Sisters Aircool & Electrical Services Limited (2012) FJHC 1496
[41] Rajendra Chaudhary, Civil Action No. HBC 313 of 2018
[42] (1991) (1) NZLR 91 (CA)
[43] (2015) NZHC 2239