IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

Civil Petition No. CBV0002 of 2020
[From Civil Appeal No. ABU0004 of 2018 and High Court of Fiji Action No. HBC 337 of 2014]

BETWEEN	:	**ALIZ PACIFIC**
		1st Petitioner
	:	**DR. NUR BANO ALI**
		2nd Petitioner
AND	:	**AUDITOR GENERAL OF FIJI**
		1st Respondent
	:	**ATTORNEY GENERAL OF FIJI**
		2nd Respondent

Coram	:	**Hon. Mr. Justice Kamal Kumar, President of the Supreme Court** **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court** **Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court**
Counsel	:	**Mr. D. Sharma for the 1st and 2nd Petitioner**
	:	**Mr. P.I. Knight for the 1st Respondent**
	:	**Ms. S. Kapoor for the 2nd Respondent**
Date of Hearing	:	**17 October 2022**
Date of Judgment	:	**28 October 2022**

JUDGMENT

Kumar, P

[1] I had the advantage of reading the detailed reasons and findings of Marsoof, J.

[2] I concur with the reasons and orders proposed by Marsoof, J.

Marsoof, J

Introduction

[3] This application seeking leave to appeal against a decision of the Court of Appeal had its origins in a defamation suit involving an audit report the publication of which was alleged to have hurt the good name and reputation of a consultative firm and its Managing Partner, a reputed Chartered Accountant.

[4] It raises questions relating to transparency and tender process and the ambit of certain constitutional, legislative and regulatory provisions relating to public finance on the one hand and the freedom of expression, publication, justification, fair comment and qualified privilege on the other.

[5] Circumstances relating to the case also travers two constitutional regimes and two finance regulations in the backdrop of the restructuring of a co-operative dairy company into two separate companies with one functioning as the supplier of milk and cream and the other functioning as the processor and marketeer for greater efficiency and profitability.

The High Court proceedings

[6] The 1st Petitioner, Aliz Pacific, and its Managing Partner, Dr. Nur Bano Ali, who is the 2nd Petitioner, sought relief by way of writ of summons dated 28th November 2014 against the 1st Respondent, the Auditor General of Fiji, and the 2nd Respondent, the Attorney General of Fiji, on the basis that the contents of the 1st Respondent's Audit Report for 2010 injured the character and reputation of the Petitioners, brought them into hatred, ridicule and contempt and they have suffered damages as a result.

[7] In the Statement of Claim attached to the writ of summons, the Petitioners *inter alia* sought against the 1st Respondent Auditor General (hereinafter referred to as "the 1st Respondent"), an injunction, a declaration that the Auditor General has defamed the Petitioners, an order that the 1st Respondent make a public apology, general and special damages, interest and costs.

[8] The words that the Petitioners claim are defamatory of them as contained in Volume 2 of the 2010 Audit Report (Paragraph 1.13 of the Agreed Facts), relating to the Ministry of Industry and Trade are as follows:

> "(a) Ministry of Industry and Trade
> Engagements of Consultants – Aliz Pacific
> *Tenders were not called* for the restructure of the Rewa Co-operative Dairy Company Limited (RCDC) *casting doubt on the transparency of the process in awarding the consultancy contract to Aliz Pacific.* In 2010, Government paid $562,500.00 to Aliz Pacific in consultancy fees, with additional fees paid in 2011.
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> The procurement authorities delegated by the Permanent Secretaries and the Government Tender Board when procuring goods, services or works are as follows:
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> Responsible Authority Procurement Limits
> Permanent Secretary $30,000.00 and less
> Government Tender Board $30,001.00 and more
> *A tender must be called for the procurement of goods, services or works valued at $30,001.00 and more."*(*emphasis added*)

[9] The Petitioners also allege that in Volume 4 of the said Audit Report, the 1st Respondent observes as follows:

> *"Government Procurement procedures pertaining to the acquisition of services above $30,000.00 were breached and the transparency of the process in which Aliz Pacific was awarded the Consultancy Contract for the re-structure of RCDC was questionable. A tender must be called for the procurement of goods, services or works valued at $30,001.00 and more.*
>
> *The Audit also noted that the then RCDC Board was informed by a representative of AP Consultants in a Board Meeting held on 17 May 2010 that Government*

through the Ministry of Industry and Trade had appointed her Consultancy Firm to implement the re-structure of the company."(emphasis added)

[10] The Petitioners claim that the 1st Respondent's statements and words in the said Audit Report were in fact defamatory and libellous, and the contents of the said Audit Report having been posted in the 1st Respondent's website had been widely circulated and reported in the media and have been used to malign and defame the Petitioners. The Petitioners also claim that the contents of the statements, in their natural and ordinary meaning, mean or were understood to mean:-

(i) That the Plaintiffs had acted with dishonesty and deceit in acting as the Lead Consultants in the Restructure of RCDC;
(ii) That their appointment as Lead Consultants was improperly done;
(iii) They lacked personal integrity;
(iv) That they were paid consultancy fees that was improperly procured by Government of Fiji;
(v) They had engaged in improper practices in being awarded a tender for consultancy services without complying with Government Tender Procedures;
(vi) The Plaintiffs had exerted undue influence to obtain a Consultancy Contract to Restructure RCDC.

[11] The 1st Respondent in his Defence, admitted the relevant statements, the fact that the statements were made in reference to the Petitioners and to its publication. The 1st Respondent denied that the statements were defamatory or libelous. The 1st Respondent stated that the contents of those statements are true in substance and in fact and insofar as they consist of expressions of opinion, they are fair comments made without malice on the said facts, which are a matter of public interest.

[12] The 1st Respondent has pleaded in paragraph 21(b) of his Defence that the facts and matters relied on in support of the allegation that the words set out in paragraph 21(a) above and the facts upon which the comments are based, are true as follows:

"(i) Tenders were not called by Government for the re-structure of RCDC prior to Government entering into the Memorandum of Agreement dated 9 July 2010.
(ii) The Government did pay Aliz Pacific $562,500.00 in 2010 in consulting fees pursuant to the terms of the said Memorandum of Agreement.

(iii) Finance Instruction 2010 – Section 1 does provide that tenders must be called for the procurement of goods, services or works valued at $30,000.01 and more.

(iv) By letter dated 9 March 2011 from RCDC to the 1st Respondent, RCDC advised that in the RCDC Board Meeting held on 17 May 2010, the 2nd Petitioner advised the Board that the Government of Fiji through the Ministry of Industry and Trade had appointed her consulting firm to be the consultant of the restructure of RCDC."

The 1st Respondent also pleaded that the publication of the 2010 Audit Report was an occasion of qualified privilege.

[13] The Petitioners filed their Reply to the 1st Respondent's Defence joining issue with certain paragraphs of the Statement of Claim. They also stated that the alleged defamation arose from the fact of publishing the Report in the 1st Respondent's website after submitting his Report to the Speaker as required by section 167 (7) of the Fiji Constitution of 1997.

[14] The 2nd Respondent Attorney General, who was joined as Defendant pursuant to the State Proceedings Act since the claim is against a statutory authority, did not file any Defence. At the commencement of the trial, Counsel for the 2nd Respondent submitted that since no orders or relief have been sought against the Attorney General, she will not be making any submissions or calling witnesses and her presence be excused for the duration of the trial.

[15] At the trial before the High Court the 2nd Petitioner Nur Bano Ali and Sunil Deo Sharma, a Chartered Accountant and Partner in the 1st Petitioner firm testified on behalf of the Petitioners, and Hirdahy Lakhan, a former Director of the Board of the Rewa Dairy Co-operative Company Limited (RCDC) and Finau Seru Nagera, a Director of Audit at the Auditor General's Office, testified on behalf of the 1st Respondent.

[16] The learned High Court Judge held in paragraph 15 of his judgement pronounced on 31st January 2018 that the onus is on the Petitioners as the original Plaintiffs to prove on a

balance of probabilities that the statements referred to in the Auditor General's 2010 Audit Report are in their natural and ordinary meaning defamatory of the Petitioners.

[17] The learned High Court Judge also held in paragraph 24 of his judgment that tenders were not called for the restructure of the Rewa Dairy Cooperative Company Limited, and that the RCDC Board was informed by a representative of AP Consultants in a Board Meeting on 17 May 2010 that Government through the Ministry of Industry and Trade had appointed the 1st Petitioner firm to implement the restructure of the company.

[18] In paragraph 25 of his judgment, the learned High Court Judge held that the Government of Fiji paid the 1st Petitioner $562,500.00 including VAT $62,500.00 for the services rendered pursuant to the Memorandum of Agreement (marked P9). In paragraph 26 of his judgment, the learned High Court Judge observed as follows:

> "The next issue to determine is as to whether a tender must be called for the procurement of goods, services or works valued at $30,001 and more. The Audit Report 'P13' has made reference to Section 11 of Finance Instructions 2010. *The fact that a tender must be called for the procurement of goods, services or works valued at $30,001.00 and more is based on the said Finance Instruction 2010."(emphasis added)*

[19] In paragraph 27 of his judgment, the learned High Court Judge stated that he agrees with the 1st Respondent's assertion that "*the said statements were statements of facts and were true in substance and in fact.*" He also held that "the comments in the statement were based on the said statement of facts and can be considered as *fair comments on a matter of public interest.*" He went on to observe in paragraph 29 of his judgment that considering the evidence as a whole, he was of the opinion that "*the Plaintiffs have failed to establish on a balance of probabilities that the statements and words referred to in paragraph 1.13 of the Agreed Facts (and the additional portion referred to in paragraph 17 of my Judgment) are defamatory of the Plaintiffs and that the statements were published maliciously by the First Defendant.*"

[20] Accordingly, the High Court determined that the impugned statements and words are not defamatory of the Petitioners it was not necessary to delve into the other issues arising in the case, and made order dismissing the Petitioners' case without costs.

Appeal to the Court of Appeal

[21] The Petitioners lodged a timely appeal to the Court of Appeal relying on the following grounds of appeal:

> *"Ground (i)*
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> *That the Learned Judge has erred in fact and in law when at paragraph 26 and 27 of the Judgment he held that for this case a tender had to be called for the procurement of goods, services or works valued at $30,001 pursuant to section 11 of the Finance Instructions 2010 without considering the fact that the Finance Instructions 2010 were not in force at the material time and that the Government of Fiji was not a budget sector agency to whom the Finance Instructions 2010 applied.*
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> *Ground (ii)*
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> *That the Learned Judge has erred in fact and in law when at paragraph 28 of the Judgment he held that the statements made by the First Respondent were not published maliciously or with any malicious intent without considering the fact that the First Respondent ignored the advice of the Ministry of Trade and Industry who had informed the First Respondent that a tender was not necessary in the case and also without taking any steps to verify the allegations made in his report with the Plaintiffs so as to give them an opportunity to refute the allegations before the same was published in his Report by the First Respondent.*
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> *Ground (iii)*
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> *That the Learned Judge has erred in fact and in law in failing to uphold the Appellant's submission that the Government of Fiji paid the sum of $562,500.00 to Aliz Pacific to facilitate the Consultancy and that the First Respondent wanted to give the readers of his Report the distinct impression that this amount was paid to Aliz Pacific as their fees when in fact he knew or clearly would have known that this was not so and a portion of the fees were also paid to other entities. Any reasonable reader reading the First Respondent's Report would think that Aliz Pacific got paid $562,500.00 as their fees. In doing so the First Respondent has withheld information in his Report that the fees were apportioned among other professionals. The clear inference here is that that was so because it was his intention to malign the Appellants.*

Ground (iv)

That the Learned Judge has erred in fact and in law in failing to consider and uphold the Appellant's submissions that the Constitution only protected the Auditor General if he complied with the Constitution and submitted his Report in Parliament only to the Speaker and the Ministry of Finance and that nothing in section 152(13) of the Constitution allowed the Auditor General to place the Audit Report in his Website where members of the public can have access to the same Section 152 (13) provides hat the Auditor General must submit a report made by him or her to the Speaker of Parliament and must submit a copy to the Minister responsible for finance.

Ground (v)

That the Learned Judge has erred in fact and in law in failing to consider and uphold the Appellant's submissions that the First Respondent was carrying out a statutory duty to compile his Report for the Parliament of Fiji but any comment that the First Respondent made in the Report had to be on the matters that he was required to give an opinion in pursuant to section 152(2)(a) and (b) of the 2013 Constitution and that the 1st Respondent deliberately failed to comply with section 152(2)(a) and (b) in order to enhance his malicious attack against the Appellants.

Ground (vi)

That the Learned Judge has erred in fact and in law in failing to uphold the Petitioners' submissions and consider the evidence before the Court that the Second Petitioner did not inform the Board of Directors of Rewa Co-operative Dairy Company Limited that her Company had been awarded the Consultancy and that this was done by one Amrita Singh."

[22] After summarising the submissions made on behalf of the Petitioners in paragraphs [16] to [18] and those of the 1st Respondent in paragraphs [19] to [24] of its unanimous judgment dated 29th November 2019, the Court of Appeal proceeded in paragraphs [25] to [34] of its judgment to analyze them and concluded in paragraph [35] of its judgment that the learned High Court Judge rightly dismissed the Petitioners' action.

[23] Having considered the aforesaid grounds of appeal, the Court of Appeal proceeded to dismiss the Petitioners' appeal and awarded costs in a sum of $5000.00 in favour of the 1st Respondent.

Appeal to the Supreme Court

[24] The Petitioners seek leave to appeal against the impugned decision of the Court of Appeal on the following grounds:-

> *"Ground (1)*
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> *The Court of Appeal erred in law by not upholding the principles of law submitted by the Petitioners before the Court of Appeal, viz-*
>
> *(a) That the Government of Fiji was not bound by the tender limitations and procedures relating to procurement of contracts beyond $30,000.00;*
> *(b) The Auditor General was not required under the Constitution of Fiji to publish the 2010 Audit Report on his website;*
> *(c) The Auditor General relied on the wrong law in basing his Audit Opinion on the Finance Instructions 2010 which were not in place at the time the Petitioners were contracted to undertake the Consultancy for the restructure of Rewa Co-operative Dairy Company Limited;*
> *(d) The Auditor General did not fulfil his work and constitutional obligations by confirming whether funds were properly acquitted under section 167 (2) of the Constitution of 1997 which corresponds with section 152 (2) of the Constitution of the Republic of Fiji, 2013; and*
> *(e) That malice on the part of the Auditor General was established by his ignorance of the law, his wrongful opinion on compliance with tender process and transparency, his naming of the Petitioners in the Audit Report and the circulation of the 2010 Audit Report by publication on his website.*
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> *Ground (2)*
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> *The Court of Appeal erred in holding that the issue about the Government not being bound by tender process because it is not a budget sector agency was being raised for the first time in the Court of Appeal when it had already been raised in the High Court as well and overlooked by the Learned High Court Judge."*

[25] In considering the above grounds urged in support of the application for leave to appeal, this Court is mindful of Section 7(3) of the Supreme Court Act 1998, which sets out stringent criteria for the grant of special leave to appeal. It is provided in section 7(3) of the said Act that-

"In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-

(a) a far reaching question of law;
(b) a matter of great general or public importance;
(c) a matter that is otherwise of substantial general interest to the administration of civil justice."

[26] Criteria set out in section 7(3) of the Supreme Court Act have been examined and applied by this Court in decisions such as *Bulu v Housing Authority* [2005] FJSC 1, CBV0011.2004S (8 April 2005), *Praveen's BP Service Station Ltd., v Fiji Gas Ltd.*, CAV0001 OF 2011 (6th April 2011), *Dr. Ganesh Chand v Fiji Times Ltd.*, [2011] FJSC 2; CBV0005.2009 (8th April 2011), *Native Land Trust Board v. Shanti Lal and Several Others* CBV0009 of 2011 (25th April 2012), *Suva City Council v R B Patel Group Ltd* [2014] FJSC 7; CBV0006.2012 (17 April 2014) *Digicel (Fiji) Ltd v Fiji Rugby Union* [2016] FJSC 40; CBV0004.2015 (26 August 2016) *Extreme Business Solution Fiji Ltd v Formscaff Fiji Ltd* [2019] FJSC 9; CBV0009.2018 (26 April 2019) and *Housing Authority v Bulileka Hire Services Ltd* [2022] FJSC 12; CBV0016.2019 (29 April 2022).

[27] It is clear from the abovementioned decisions that special leave to appeal is not granted as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave.

[28] The Petitioners have pleaded in their petition seeking leave to appeal from this Court that the aforesaid grounds of appeal raise far reaching issues of public importance relating to the interpretation of Constitutional, legal and regulatory principles and procedures applicable in the Republic of Fiji for inspecting, auditing and reporting the state of public accounts, the control of public money and public property applicable at times material to this case. They submit that the decisions of the lower courts in this case have resulted in a

serious miscarriage of justice to the Petitioners amounting to a miscarriage in the administration of justice in Fiji as well.

[29] Learned Counsel for the Petitioners stressed at the hearing of this case in this Court that the main complaint of the Petitioners is that the High Court and the Court of Appeal overlooked section 167(2) of the Fiji Constitution of 1997 and key provisions of the Finance Instructions of 2005 which was in operation at the time the material transactions relating to the restructuring of the Rewa Co-operative Dairy Company Limited (RCDC) took place in 2009 and the early part of 2010. Learned Counsel for the Petitioners has highlighted in the course of his submissions before this Court and in his written submissions that the Finance Instructions of 2010 did not apply to the Government of Fiji, or to the RCDC as it was not a budget sector agency as wrongly assumed by the High Court and the Court of Appeal, and in any event, the said Finance Instructions came into force only on 1st December 2010.

[30] The Petitioners have also submitted that the 1st Respondent when sued for defamation, could not have taken shelter under section 167 of the Fiji Constitution of 1997 which neither required nor empowered him to place his 2010 Audit Report on his website, which action is alleged to have caused considerable damage to the good name and reputation of the Petitioners.

[31] Having heard the submissions made on behalf of the Petitioners and the 1st Respondent, I am inclined to grant leave to appeal to the Petitioners on the two grounds set out in paragraph [24] of this judgment. Following the practice usually adopted in the Supreme Court, I shall proceed to consider the said grounds of appeal and arrive at findings.

Analysis of Grounds of Appeal

[32] The Petitioners have raised only two grounds of appeal, and for the purpose of understanding these grounds in their context it is necessary to examine the legal framework in place in the Republic of Fiji for inspecting, auditing and reporting to

Parliament of the state of public accounts, the control of public money and public property and transactions with or concerning public money or public property of the State that was applicable at times material to this case.

[33] It may be useful to briefly focus on some of the material facts relating to the restricting of the Rewa Cooperative Dairy Company Limited (RCDC) in the context of which the dispute between the Petitioners and the 1st Respondent has arisen, with particular focus on the time element. This is crucial for determining the applicable law at the time of the relevant transactions.

[34] A little background will also prove useful. From the Cabinet Memorandum dated 23rd April 2010 (marked P6) it can be discerned that RCDC which was incorporated under the Companies Ordinance in 1913 was subsequently registered under the Co-operative Dairy Companies Act in 1974 (paragraph 2.1) and its shareholders were mainly farmers involved in milk production. RCDC's authorized capital is 6 million dollars, of which the issued capital is 3 million dollars consisting of 3 million shares of $1 each. Of this issued capital the paid up capital is only $1,100,000 (paragraph 2.2).

[35] While therefore it is manifest that that RCDC was a private cooperative enterprise which made a significant contribution to the economy of Fiji and the national production of milk products, it is also apparent that the government had some interest in the said enterprise from the national perspective of the need to develop the dairy industry though it owned less than 1% of the RCDC shareholding which translates into approximately 18,930 shares held through Koronivia Agricultural Station (vide paragraph 2.3 of the Cabinet Memorandum marked P6).

[36] It is also interesting to note that RCDC called for expression of interest by its advertisement published in the Fiji Sun newspaper dated 20th February 2009 (P2) for the appointment of a Consultant to (a) facilitate a strategic seminar workshop and provide a draft strategic report; (b) provide a draft Corporate Governance Policy and (c) provide a draft Risk Management Policy. It has been submitted on behalf of the Petitioners that

there was no legal requirement for RCDC to call for expressions of interest prior to making such an appointment, but it was done by RCDC as a matter of prudence.

[37] It appears from the letter dated 7th September 2009 (P4) that the Petitioners were selected by the RCDC Board to carry out the said work. The study commenced in September 2009 and the strategic seminar workshop was held in October 2009 with various stakeholders including farmers, the RCDC Board, the respective ministries and agencies, such as the Ministry of Finance, PIB, Fiji Development Bank, Department of Co-operatives, Ministry of Agriculture, Ministry of Health and TLTB participating.

[38] These developments led to the RCDC Board Resolution of 20th November 2009 (Board Minutes marked P5 item 17) to proceed with the corporate restructure, to appoint the Audit and Finance Committee to monitor implementation of the re-structuring project and to approve appointment of a working group team comprising of two management staff from RCDC and the Consultant Dr. Ali to drive the re-structure plan and to restructure the RCDC after receiving the approval of the members of RCDC as the Fiji Dairy Co-operative Company Limited and to register a new company Fiji Dairy Company Limited as the processing arm. From the Board Minutes of 20th November 2009 (P5 item 19(d)(2) it also appears that the RCDC Board also resolved to mandate the Audit and Finance Committee to appoint a team or teams of experts to source financing for implementing the strategic plan as per the strategic workshop report.

[39] It appears from paragraph 2.6 of the Cabinet Memorandum dated 23rd April 2010 (marked P6) that the proposal to restructure RCDC was a direct response to Government's vision to achieve self-sufficiency in liquid milk supply for the country by 2014, and it is evident from item (i) of the Cabinet Decision dated 27th April 2010 (P7) that the proposal to restructure RCDC received Cabinet approval. Paragraphs 3.2 to 3.5 of the Cabinet Memorandum dealt with financing issues and in paragraph 3.6 of the said Memorandum it was proposed that an official from the Ministry of Industry and Trade be part of the Restructure Team, which will consist of the Chair of RCDC, the current RCDC financial controller and project manager, the current CEO of RCDC and the

consulting firm of Aliz Pacific. It is manifest from item (ii) and (iii) of the said Cabinet Decision marked P7 that government funding of the restructure in a sum of $500,000.00 (out of the estimated restructure cost $1.4 million) was also approved by the Cabinet of Ministers as outlined in paragraph 3.2 to 3.6 of the Cabinet Memorandum.

[40] It is also important to note that although there was no direct allocation under the Appropriation Act to RCDC, there was a grant made by the Government amounting to $500,000 and although the provisions of the Financial Instructions of 2005 do not apply to RCDC, it has in an abundance of caution entered into a Memorandum of Agreement with the Government which was the donor of the funds. The said Memorandum of Agreement dated 9th July 2010 was marked P9. This Agreement was entered into between the 1st Petitioner Aliz Pacific and the Government of Fiji through the Ministry of Industry and Trade which in its preamble referred to the Cabinet Decision of 27th April 2010 and the fact that Fiji Government had committed $500,000 for the restructure programme by way of *inter alia* using the services of a Consultant.

[41] In Clause 2 of the said Memorandum of Agreement which spells out the consultant's obligations, it is specifically stated that "AP Consultant may hire any additional expertise as they see fit to achieve the implementation of the restructure plan expeditiously. However such additional expertise shall work under the instructions and directive of AP Consultant and any liability, damages or compensation arising from the hiring or performance of the additional expertise shall be borne by AP Consultant (Clause 2.2 of P9)."

[42] It is material to note that under clause 3.0 of the Memorandum of Agreement dealing with the Ministry Obligations, after stating that the Ministry shall appoint a designated official to facilitate the implementation of this project (Clause 3.1), the Memorandum expressly provides in Clause 3.2 that:

"The Ministry agrees to-

(i) *Make payments where necessary provided AP Consultant issues the approved invoices on the usage of funds granted for the restructure plan.*
(ii) *Monitor and determine payments in accordance with reports on the restructure by AP Consultants;*
(iii) *Approve the performance of services by the Consultant; and*
(iv) *Ensure regular communication concerning the accessibility and accountability as required under these terms of Agreement."*

[43] Aspects of confidentiality and Intellectual Property are covered by Clause 6.1 of the Memorandum of Agreement marked P9 which provides that "It is agreed by both parties that all information ascertained or obtained or was part of the relied upon in the course of this Agreement are deemed confidential and must not be disseminated to any other party unless consented to by the Ministry or required to be disclosed in accordance with law."

[44] From the foregoing summary of facts it will be seen that RCDC had appointed the 1st Petitioner as its Consultant for its restructure process as well as a member of the RCDC team to implement the restructure well ahead of 1st December 2010 on which date the Finance Instructions 2010 was made in terms of section 81 of the Financial Management Act 2004.

Analysis of Ground (1)

[45] Following the foregoing background analysis, it is now convenient to consider ground (i) urged by the Petitioners, namely *that the Court of Appeal erred in law by not upholding the principles of law submitted by the Petitioners before that Court of Appeal.* It is significant to note that the 6 grounds of appeal presented to the Court of Appeal by the Petitioners were pleaded on the basis that learned Judge of the High Court was mistaken in reaching the conclusion that the impugned statements were not defamatory because he was allegedly mistaken in accepting the submission that the statement of facts referred to in the impugned statements were true when he should have found those statements were in fact incorrect (see paragraphs 26, 27 & 28 of the judgment of the High Court at page 24 of Volume I of the High Court Record). The Petitioners have invoked the appellate jurisdiction of this Corut to have these matters reviewed.

Ground (1)(a) and (c)

[46] The learned Counsel for the Petitioners has listed 5 principles that he claims the Court of Appeal has failed to uphold, and the first of them is the proposition that *(a) the Government of Fiji was not bound by the tender limitations and procedures relating to procurement of contracts beyond $30,000.00.* The above submission of the learned Counsel of the Petitioners is closely related to another proposition relied upon by him, namely *(c) The Auditor General relied on the wrong law in basing his Audit Opinion on the Finance Instructions 2010 which were not in place at the time the Petitioners were contracted to undertake the Consultancy for the restructure of Rewa Co-operative Dairy Company Limited.*

[47] Although the learned Counsel for the Petitioners has invited the attention of this Court to several passages of judgment of the Court of Appeal, it would suffice to refer to paragraphs [25] and [26] of the impugned judgment in this connection. From the last three sentences of paragraph [25] of the judgment of the Court of Appeal it would be apparent that the court was responding to the submission of the learned Counsel of the Petitioners that Financial Instructions of 2010 cannot apply to the transactions involving the restructure of RCDC for the reason that those Instructions came into force after all those transactions had been entered into. It is in this context that the Court of Appeal observed as follows in the latter part of paragraph [26] of the impugned judgment:-

> "The difference between the two Financial Instructions is that, whilst the 2005 Instructions require tenders to be called on *Government procurements for services* over and above $50,001.00, in the 2010 Financial Instructions *the procurement limit* has been lowered to $30,001. The amount involved in this case is ten times over the 50,000 limit. *Therefore under whatever Instructions the Audit report was made, this contract cannot escape the requirement of having to go through the tender procedure.*" (*emphasis added*)

[48] Learned Counsel for the Petitioner submits that the Court of Appeal failed to uphold principle (a) when the court sought to apply Finance Instructions 2005 and 2010 to the Government sector. To comprehend his submission, it is necessary to refer to the

Financial Management Act 2004, which is described in its long title as "an Act to regulate the financial management system of the State and for related matters". It was in terms of this Act that both the aforesaid Finance Instructions were made, and in fact, even the Fiji Procurement Regulations of 2010, which came into force on 1st August 2010, was made in terms of the same Act. But what is important to note is that whereas the Act had a wider scope and applied to the State and agency sectors, the scope of the Financial Instructions were limited.

[49] It is relevant to note that the Financial Management Act 2004 is divided into several parts. While Part 1 of the Act deals with Interpretation, Part 2 deals with Financial Management generally, Part 3 with the Consolidated Fund and Other Funds, Part 4 with Resource Allocation, Part 5 with Budget Sector Agencies, Part 6 with Off-Budget State Entities, Part 7 deals with Accountability, which is then sub-divided in its application to the State and other sectors mentioned above.

[50] In Part 1 dealing with Interpretations contains definitions of the various terminology used in the Act, and for instance in section 2 of the Act, a 'department' is defined to mean a department of the public service for the management of which a person is responsible under section 110 of the Constitution, whether the department is titled or referred to as a ministry, department or office or in some other way. Similarly, the same section contains definitions of 'government company' and other entities coming within the purview of the Act, but the most interesting are the definitions of 'off-budget state entity' and 'budget sector agency'. An off-budget state entity is defined in section 2 of the Act to means "a state entity that is not a budget sector agency" and a 'budget sector agency' is defined in relation to a financial year to means "a state entity that administers an appropriation for that year under an Appropriation Act or this Act."

[51] When considering these definitions, it would be easy to understand why the learned Counsel for the Petitioners has been strenuously arguing before the High Court and the Court of Appeal that RCDC is not a budget sector agency. As has been explained in the earlier part of this judgment, RCDC is a co-operative company owned mainly by farmers

involved in the dairy industry, and although RCDC has a minute indirect State shareholding, it is not a 'state entity' nor is there any evidence that it has received any appropriation under the Appropriation Act. In those circumstances, it is difficult to comprehend how the 1st Respondent Auditor General mistook RCDC to be a budget sector agency or made an even graver mistake in assuming that RCDC was governed by the Finance Instructions of 2010 when it was a purely a private enterprise which has from time to time received assistance from the government in view of its commitment to develop the dairy industry to make Fiji self-sufficient in milk and other dairy products.

[52] However, the question that has been raised in paragraph (a) of ground (1) is whether the Government is an *"agency"* to which the Finance Instructions apply thereby bringing government Ministries and Departments under tender limitations and procedures imposed by the said Instructions. In this context it is important to note that Finance Instructions 2005 and 2010 and the tender limitations and procedures contained therein apply exclusively to agencies. It is noteworthy that section 4 of the Finance Instructions 2005, which seeks to set out the purpose of the Instruction, provides that the purpose of these Instructions is to set minimum standards for the financial management of agencies. Section 3 of the Instructions defines 'agency' as meaning "a budget sector agency as defined in the Act." All other provisions of the Instructions apply to agencies as opposed to government Ministries or Departments. This raises the issue as to how then were the procurements of Government Ministries and Departments dealt with under the umbrella of the Financial Management Act 2004. The answer to this issue is that this aspect of financial discipline was governed by the Financial Management (Supplies and Services) Regulations 2005, which was made in terms of section 81 of the Financial Management Act 2004 and came into force on 27th January 2005. The Financial Management (Supplies and Services) Regulations 2005 and the Public Works Regulation of 2005 were repealed by the Procurement Regulation of 2010, thereby replacing the Major Tenders Board and the Public Works Tender Board of the Financial Management (Supplies and Services) Regulation 2005 with the Government Tender Board established under Regulation 9 of the 2010 Procurement Regulation.

[53] It is unfortunate that the attention of the learned High Court Judge and the Judges of the Court Appeal were not invited to the twin 2005 Regulations by the learned Counsel who appeared in those courts, and these regulations were not considered by the Courts below.

[54] Before parting with issues relevant to ground 1 (a) and (c) it is necessary to deal with a fairly important issue that arose in this case, and that is whether the 1st Petitioner was appointed as the consultant of RCDC for its restructure process by RCDC or the Government. The Petitioners had consistently taken the position in this case that the 1st Petitioner was appointed as consultant by the RCDC and not by the Fiji Government, but when the 2nd Petitioner Dr. Ali testified in the High Court, she was cross-examined by learned Counsel for the 1st Respondent as regards the source of the appointment of the 1st Petitioner as consultant. In particular, it was put to her that she had stated at a meeting of the RCDC Board held on 17th May 2010 that she had been appointed by the Government of Fiji as the consultant for RCDC, an allegation that loomed large at the trial before the High Court. The question was whether the 2nd Petitioner (referred to in the audit report as "a representative of 1st Petitioner) informed the Board of RCDC on 17th May 2010 that "she" was appointed by the government as the consultant for the restructure of RCDC. While the Petitioners had denied this allegation, it was the position to the Petitioners that such an appointment was unnecessary as Aliz Pacific was already appointed by RCDC as the consultant for the restructure by the resolution dated 20th November 2009 which is item 17 of the Board Minutes of RCDC marked P5.

[55] Had the 1st Respondent sought the views of the Petitioners prior to making the 2010 Audit Report, this aspect of the matter could have been easily clarified, but the Petitioners were never given the opportunity to explain matters before the Audit Report was sent to Parliament and placed on the website of the 1st Respondent. In fact, it is significant to note that the 1st Respondent could have used his enormous investigative powers by calling for the Minutes of the meeting of the Board of RCDC held on 17th May 2010 to ascertain the facts for himself, but none of these steps appear to have been taken.

[56] It is noteworthy that Mr. Lakhan, a former member of the RCDC Board who was called by the 1st Respondent to testify as to what transpired at the RCDC Board meeting of 17th May 2010, explained that the 2nd Petitioner and Ms. Amita Singh of the Ministry of Trade joined the RCDC Board meeting sometime after it commenced, and at that time the Board was discussing, in the words of Mr. Lakhan "calling three (3) tenders", by which he probably meant the calling for quotations and picking three of them for consideration before appointing a consultant for leading the RCDC team for restructure, and when Mr. Lakhan and others told the Chairman that this must be discussed in private, the Chairman requested officials of Ministry of Trade and Aliz Pacific including the 2nd Petitioner "to sit outside for a while" and the Board was quite firm in the discussion that ensued that the "job should be tendered."

[57] Answering a further question put by learned Counsel for the 1st Respondent Mr. Knight in his examination-in-chief as to what was discussed when the 2nd Petitioner and Ms. Amita Singh were invited back to the Board Room, Mr. Lakhan's response was as follows:

> *"Mr. Knight: And at some stage at that meeting was there any pronouncement as to who was to be appointed as the consultant for this restructure exercise?*
>
> *Mr. Lakhan: Just before they had come back inside the board the Rewa Dairy was quite firm that the job should be tendered but when Aliz's Pacific team and Ministry for Trade came there was some discussions on the top amongst Aliz's Pacific, Ministry for Trade and our Chairman. And our Chairman announced that the job has been given to the Aliz's Pacific and the money belonging to the government and they have a say that's how it came about. And then our Chairman Mr. Serulagilagi requested or asked questions to Mrs. Amita Singh if it was okay to proceed with allocating or appointing Dr. Ali and she said it was okay. [HCR Vol 2 top page 592 bottom page 260]"*

[58] It is clear from this response of a member of the RCDC Board as to what transpired at the meeting of the RCDC Board on 17th May 2010, that the 2nd Petitioner or any

representative of Aliz Pacific did not make any statement at that meeting, contrary to what has been stated in the 2010 Audit Report by the 1st Respondent.

[59] I am therefore satisfied that on the available material, the Court of Appeal has erred in the various paragraphs of its judgment mentioned in the preceding paragraphs of this judment with respect to limbs (a) and (c) of Ground (1).

Ground (1)(b)

[60] The second principle of law that the learned Counsel for the Petitioners claim that the Court of Appeal has failed to uphold is that *(b)The Auditor General was not required under the Constitution of Fiji to publish the 2010 Audit Report on his website.*

[61] At all times material to the matters arising in this case, the provisions of the Fiji Constitution Amendment Act of 1997 were in force, and while section 166 of the Constitution of 1997 established the office of the Auditor General and section 168 dealt with the mode of appointment of a suitable person to hold such office, section 167 outlined the functions of the Auditor General. It may be useful to reproduce herein section 167(1), (2), (7) and (8) as they are material to this case:

> (1) At least once in every year, the Auditor-General must inspect and audit, and *report to the Parliament* on:
>
> (a) the *public accounts of the State*;
> (b) the *control of public money and public property of the State*; and
> (c) all *transactions with or concerning the public money or public property of the State.*
>
> (2) In the report, the Auditor-General must state whether, in his or her opinion:
>
> (a) *transactions with or concerning the public money or public property of the State have been authorised by or pursuant to this Constitution or an Act of the Parliament*; and
> (b) *expenditure has been applied to the purpose for which it was authorised.*

.....

(7) The Auditor-General must *submit a report made by him or her to the Speaker of the House of Representatives and must submit a copy to the Minister.*

(8) Within 30 days of receipt, or if the Parliament is not then sitting, on the first sitting day after the end of that period, *the Speaker must cause the Leader of each House of the Parliament to lay the report before the House. (emphasis added)*

[62] The procedure for submitting the Report of the Auditor General to Parliament at the relevant time is spelt out in the above quoted sections, and in particular section 167(7) of the Constitution of 1997. The steps to be taken by the Speaker in this regard is outlined in section 167(8) of the 1997 Constitution. The Auditor General is neither required nor empowered to upload the Report on his website.

[63] It is noteworthy that in 2013 with the enactment of the Constitution of the Republic of Fiji, similar provisions have been included in sections 151 and 152 of the Republican Constitution, but those provisions are not applicable to the facts of this case. This is because the matters in issue in this case relating to the restructure of the Rewa Co-operative Dairy Company Limited (RCDC) took place prior to the enactment of the Republican Constitution in 2013. Though the section numbers may be different, identical provisions are found in both Constitutions and none have authorized or required the 1st Respondent to upload Audit Reports in his website.

[64] I am therefore hold that the Court of Appeal has erred in paragraph [32] of its judgment in rejecting the ground raised by the Petitioners as unmeritorious with respect to limbs (a) and (c) of Ground (1).

Ground (1)(d)

[65] The next ground raised by the Petitioners is to the effect that the Court of Appeal erred in failing to recognize that *(d) The Auditor General did not fulfil his work and constitutional obligations by confirming whether funds were properly acquitted under section 167 (2) of*

the Constitution of 1997 which corresponds with section 152 (2) of the Constitution of the Republic of Fiji, 2013.

[66] This aspect of the matter was raised before the Court of Appeal as evident from paragraph [18] of its judgment where the learned Counsel for the Petitioners submitted that the comments of the 1st Respondent contravened section 152 (2) (a) and (b) of the 2013 Constitution which corresponds with section 167(2) of the Constitution of 1997, but the Court of Appeal held that the ground raised by the Petitioners did not have any merit. However, it is important to note that section 167(2) of the Constitution of Fiji requires the Auditor General to focus on two aspects of the matter, namely whether the transaction in question has been properly authorised and the expenditure has been applied to the purpose for which it was authorized. The Court of Appeal not only overlooked the position that the transaction was approved by the Cabinet as apparent from items (i) and (ii) of the Cabinet Conclusion dated 27th April 2010 marked P7 but also failed to find that the Audit Report did not present a full picture to Parliament with regard to "acquittals", that is as regards the question whether the money has been spent for the purpose for which it was authorized.

[67] I am therefore of the opinion that the Court of Appeal has erred with respect to limb (d) of Ground (1) to uphold the principle of law contended to by the learned Counsel for the Petitioners.

Ground (1)(e)

[68] The final principle of law the Counsel for the Petitioners has claimed to have been erroneously dealt with by the Court of Appeal is *(e) that malice on the part of the Auditor General was established by his ignorance of the law, his wrongful opinion on compliance with tender process and transparency, his naming of the Petitioners in the Audit Report and the circulation of the 2010 Audit Report by publication on his website.*

[69] In this case the question of malice arises in the context that the High Court has held that the statements contained in the Audit Report relating to the Petitioners were substantially true and the opinions expressed were fair comments. In *Sutherland v Stopes* (1925) AC 47, Lord Shaw of Dunfermline observed at page 79 that "there may be mistakes here and there in what has been said which would make no substantial difference to the quality of the alleged libel or in the justification pleaded for it" and such mistakes may be disregarded. His Lordship also went on to deal with what we commonly call "half-truths" when he observed that-

> "In the second place, however, the allegation of fact *must tell the whole story*. If, for instance, in the illustration given, the facts as elicited show what my writing had not disclosed - namely, that the defendant had a saddle of his own lying in my harness room, and that he took by mistake mine away instead of his own and, still labouring under that mistake, sold it - then the jury would properly declare that the libel was not justified on the *double ground that there were facts completely explaining in a non-criminal sense anything that was done, and the jury would disaffirm the truth of the libel because, although meticulously true in fact, it was false in substance*." (emphasis added)

[70] What has taken place in this case is something in the lines explained by Lord Shaw of Dunfermline in *Sutherland v Stopes,* which is suggestive of malice. What has taken in this case is the failure on the part of the 1st Respondent to tell the whole story. The audit report alleged "tenders were not called for the restructure of the Rewa Co-operative Dairy Company Limited (RCDC)" but the audit report did not state who failed to call for tenders – whether RCDC or the government. It also failed to assert that for the purpose of the relevant transaction, tender procedure ought to be followed and if so under the provisions of which legal enactment, financial instructions or regulation this had to be done. The Auditor General also failed to state in his report whether the transaction in question has been properly authorised and the expenditure has been applied to the purpose of which it was authorised.

[71] While the above circumstances disclose a failure to tell the "whole story", from what subsequently happen in the lower courts, it is reasonable to suspect that the 1st Respondent himself did not know or had not given his mind to what is the applicable law

or subordinate legislation which required calling for tenders. This taken with the additional fact that the 1st Respondent sought to upload the Report on his website despite the Constitution and the Statutory Provisions empowered the Auditor General only to submit his audit report to Parliament.

[72] It is also material to mention here that in the High Court a Director of Audit Finau Seru Nagera testified from the office of the 1st Respondent. In her testimony she referred to Financial Management Act 2004 and the Finance Instruction of 2005 and 2010 and also mentioned the (INTOSAI) Guidelines and Good Practices relating to SAAI independence, which was produced in evidence marked D4. Answering to a question from court she agreed that INTOSAI is the acronym for the Intentional Organisation of Supreme Audit Institution. However, she did not produce other guidelines which dealt with audit such as ISSAI 100 Principles relevant to Public Sector Auditing paragraph 51 of which provides as follows:

> "Auditors should prepare a report based on the conclusions reached. The audit process involves preparing a report to communicate the results of the audit to stakeholders, others responsible for governance and the general public. The purpose is also to facilitate follow-up and corrective action. In some SAIs, such as courts of audit with jurisdictional authority, this may include issuing legally binding reports or judicial decisions.
>
> *Reports should be easy to understand, free from vagueness or ambiguity and complete. They should be objective and fair, only including information which is supported by sufficient and appropriate audit evidence and ensuring that findings are put into perspective and context.*
>
> The form and content of a report will depend on the nature of the audit, the intended users, the applicable standards and legal requirements. The SAI's mandate and other relevant laws or regulations may specify the layout or wording of reports, which can appear in short form or long form." (emphasis added)

[73] Furthermore the audit report itself is also suggestive of malice against the Petitioners. That is because if there had been non-compliance of any legal procedure that should be followed in the process of supply of goods or services, the fact of non-compliance could be reported on without naming the party who is alleged to have benefited from such non-

compliance. However, the audit report in question not only names the 1st and 2nd Petitioners but also sets out certain matters which in the High Court proceedings have turned out to be false. Prior to instituting action there was correspondence between Petitioners and the 1st Respondent in regard to a request by the Petitioners for an apology and compensation which should have resolved the matter. However, the 1st Respondent after seeking legal advice had not acceded to such a resolution of the dispute.

[74] I am therefore satisfied that on the available material there is abundant evidence of malice and the Court of Appeal has erred with respect to Ground (1)(e) in failing to find that malice on the part of the Auditor General was established by the evidence.

Ground (2)

[75] Ground (2) urged by the Petitioners is that the Court of Appeal erred in holding that the issue about the Government not being bound by tender process because it is not a budget sector agency was being raised for the first time in the Court of Appeal when it had already been raised in the High Court as well and overlooked by the Learned High Court Judge.

[76] From the judgment of the High Court, it could be seen that there were several issues raised in the High Court that would be relevant to the question as to whether the Government, not being a budget sector agency, was bound by the tender process, such as issue 2.2 Was the First Defendant under a duty to present his Audited Reports, including the 2010 Audit Report, to Parliament and once tabled in Parliament, did they become available to the general public? And issue 2.3 whether the statements were published maliciously? It is also clear that the learned High Court Judge was conscious of this issue from the following passage in his judgment:

> *" [26] The next issue to determine is as to whether a tender must be called for the procurement of goods, services or works valued at $30,001 and more. The Audit Report P13 has made reference to Section 11 of Finance Instructions 2010. The fact that a tender must be called for the procurement of goods,*

services or works valued at $30,001.00 and more is based on the said Finance Instruction 2010"

Conclusions

[77] Having considered the matters raised by way of appeal by the Petitioners, leave to appeal is granted, and I hold that ground (1) and (2) averred by the Petitioners have to be determined in their favour for the foregoing reasons, and the Petitioners are entitled to relief as prayed for in prayer (4) to the effect that the 1st Defendant – Respondent has defamed the Plaintiff – Petitioners. The Plaintiff – Petitioners are also entitle to an order in terms of prayer (5) of the statement of claim that the 1st Defendant – Respondent render a public apology to the Plaintiff – Petitioners in the form to be suggested by the Solicitors for the Petitioners within 14 days of this judgment, the case to be remitted to the High Court for it to be called before the Master for fixing a date for a public apology. The relief as prayed for in prayer (6) for general and special damages is also granted, and for the purposes of assessment of damages this case is remitted to the High Court of Suva which will fix a date of hearing on damages after it is mention before the Master for fixing a date for hearing.

[78] The injunction prayed for by prayer (1), and the order for removal and or expunging prayed for by prayer (2) is refused because the 1st Defendant – Respondent has already expunged the offending report from his website. The prayer for further injunction in terms of prayer (3) is refused in view of the Declaration prayed for by prayer (4).

[79] By way of costs, this Court is inclined to grant costs for the proceedings of appeal in this Court in a sum of $10,000.00 payable by the 1st Defendant – Respondent and further cost of appeal to the High Court in a sum of $5000.00, as such costs being payable to the Petitioners within 28 days from the date of this judgment. By way of costs, this Court is inclined to grant costs for the proceedings of appeal in this Court in a sum of $10,000.00 payable by the 1st Defendant – Respondent and further cost of appeal to the High Court in a sum of $5000.00, as such costs being payable to the Petitioners within 28 days from the date of this judgment.

Jayawardena, J

[80] I have read the draft judgment of Marsoof, J and I am in agreement with the findings and conclusions.

Orders of the Court:

1. Leave to appeal is granted.
2. Declaration prayed for by prayer (4) of the statement of claim filed in High Court Civil Action No. HBC 337 of 2014 is granted to the effect that the 1st Defendant – Respondent has defamed the Plaintiff – Petitioners.
3. The 1st Respondent do tender a public apology in terms to be approved by the Solicitor for the Petitioners and Master of the High Court.
4. This matter be referred to Master of the High Court for assessment of special and general damages.
5. The Petitioners shall be entitled to costs for the proceedings of appeal in this Court in a sum of $10,000.00 and further cost of appeal to the High Court in a sum of $5000.00 payable by the 1st Respondent to the Petitioners within 28 days from the date of this judgment.

.....
Hon. Justice Kamal Kumar
President of the Supreme Court

SUPREME COURT FIJI

.....
Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

.....
Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court