

**Ferme Marine de Mahebourg v Naicken**

**2025 INT 47**

**CN 1106/2017**

**THE INTERMEDIATE COURT OF MAURITIUS  
(CIVIL)**

**In the matter of: -**

**Ferme Marine de Mahebourg Ltd**

**Plaintiff**

**v/s**

**Noe Arminio Vurdapa Naicken**

**Defendant**

**Judgment**

The plaintiff is a company duly registered with the Registrar of Companies and the defendant is a former employee of the plaintiff.

The plaintiff avers that following a disciplinary committee held on the 14<sup>th</sup> May 2015 for charges of physical assault by the defendant on his supervisor, the plaintiff terminated the defendant's employment with effect from 20<sup>th</sup> May 2015.

It is the contention of the plaintiff that he has built a good reputation in the fish farming industry and has won several awards. It also holds a license by the competent authority of Mauritius and

is subject to quarterly assessment by the Albion Fisheries Research Centre (AFRC). The plaintiff has continuous inspections by the European Union in order to be able to export fresh and frozen fish to Europe. It avers that the fish farming practised by the company conforms to the Regulations put in place by the Food & Agriculture Organisation of the United Nations, ie, the “Aquaculture operations in floating HDPE cages.”

It further avers that in a Youtube video published on the 18<sup>th</sup> July 2017 containing English subtitles, which was publicly accessible, the defendant gave an interview in which he falsely, maliciously and with intent to injure the Plaintiff’s reputation, made or in the alternative have been grossly negligent in making some adverse statements wilfully against the Plaintiff.

The plaintiff avers that the statement made in the said interview contained improper motives with the objective to harm or knowing or having reason to believe that such interview will be harmful.

It is therefore praying for a judgment condemning and ordering the defendant to:

- (i) pay to the plaintiff the sum of Rs 500, 000 as damages;
- (ii) cause the said YouTube video to be withdrawn from the internet;
- (iii) unconditionally present his apology to the Plaintiff in Court and in two of the widely circulated local newspaper;
- (iv) any such order that the Court deems fit in the circumstances.

The defendant in his third amended plea made a general denial of the averments contained in the plaint but avers that the statements made in the interview were true or constituted fair comments. He also avers that he had no control over the use of the video recording and the translation made of his statement as it appeared in the subtitles.

### **Case for the Plaintiff**

The director of the plaintiff company, Mr Semaesse, was called to depone. He explained that his company is engaged in aquaculture and fish farming for export purposes. He produced a business registration card marked as **[Doc A]**, specifying the nature of the business of the plaintiff. He explained that the company started its business in the year 2002/2003 and today it exports 95%

of its produce to international markets<sup>1</sup> and has a very good reputation around the world. He pursued further by explaining that Ferme Marine de Mahebourg (FMM) follows international guidelines such as 'Food and Agriculture Organisation of the United Nations' (FAO) on aquaculture. This practice of fish farming exists in many other countries and one of the persons who was involved in the drafting of the handbook of (FAO), works for the plaintiff as Director of Operations. The director of the plaintiff thus produced a handbook from 'Food and Agriculture Organisation of the United Nations' (FAO) marked as **[Doc B]**. In the same breath, he produced a copy of the job description of the defendant which was marked as **[Doc C]** and stated that latter was a 'dive master.' He explained that the defendant has worked for the company for a long time but there was an incident following which the company decided to terminate his employment. The matter even went to the Court and an agreement was reached between the parties.

Mr Semaesse, explained in detail how the company has to abide by all the regulations and follow international standards. Moreover, there was a department which was created under the Ministry of Fisheries regarding aquaculture and at that time aquaculture was being practised only by FMM, thus, plaintiff was under scrutiny all the time. The plaintiff produced a certificate from 'Friends of the Sea' (FOS) **[Doc D, D1]** which is an international organisation that sets down criteria for sustainable aquafarming. FOS only issues such a certificate if the company is compliant. In the present case, various production unit were examined by FOS following which the certificate was issued. Mr Semaesse also produced the corporate and business registration certificate which was marked as **[Doc E]**. **Doc F**, which is a Halal certificate was also produced.

In order to show that the plaintiff is a company which is transparent and comply with all the laws and regulations, it was registered with GlobalG.A.P.<sup>2</sup> The GlobalG.A.P Standard Development Policy, is a platform which shows that a company is legally compliant, there is food security, observes workers Occupational Health and Safety, animal welfare, environmental and ecological care. In the assessment conducted by GlobalG.A.P, there are around 400-500 test which are conducted to see whether the company has established protocols to cater for different situations. This document was thus produced and marked as **[Doc G]**. The plaintiff also produced

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<sup>1</sup> Pg 3 of the proceedings of 7<sup>th</sup> October 2021.

<sup>2</sup> Pg 11 of the proceedings of 7<sup>th</sup> October 2021.

**[Doc H]** which is a document showing that the company is certified, responsible and transparent. Mr Semaesse stated that all these international accreditations were acquired to show the safeness of the produce of the company as many international companies which were interested in trading with the company didn't even know about Mauritius. Thus, before each and every export of fish to the international market, checks are conducted on the fish. He also produced four certificates to this effect which were marked as **[Docs J – J3]**.

The plaintiff explained that the physical inspections which are carried out by the international auditors are done on a span of several days or even weeks where they verify various departments of the company and the auditors include divers. Upon question being put to the plaintiff he explained that the company is in possession of a valid *Environment Protection Act Licence*, which was produced and marked as **[Doc K]** and that there has never been any objection with regards to this licence.<sup>3</sup>

Mr Semaesse explained that before any control by the FOS, they will have an audit plan, setting the objectives and produced a copy which was marked as **[Doc L]**. He emphasised on the fact that there has never been any objection or dispute in regards to the company's permits. They in fact hold all the necessary permits and Registration Certificate including that of *Competent Authority SeaFood* from the Ministry of Blue Economy, Marine Resources, Fisheries and Shipping. It is this Ministry which controls all the activities of the company and it also has a number of veterinaries who inspects the plaintiff's products on a regular basis and in a systematic way. These veterinaries control the food process, the products, the fish, the food hygiene and the water quality. Before the exportation of any produce of the company they have to be certified by these veterinaries and should there be any problem with these products it will put into question the certificate of the *Competent Authority* given to the plaintiff. The certificate from the Ministry of Blue Economy, Marine Resources, Fisheries and Shipping was thus produced and marked as **[Doc M]**.

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<sup>3</sup> Pg 16 of the proceedings of 7<sup>th</sup> October 2021.

The plaintiff then asked that a video be played in Court, the CD was produced and marked as [Exhibit 1].

Before playing the video, he explained that the statement made by the defendant in the video has caused a lot of prejudice to the plaintiff by causing harm to its image both locally and internationally. The plaintiff also produced a transcript of the video which was marked as **[Doc N]**. Mr Semaesse explained further that the defendant worked for the company for nearly 12 years until 2014. The interview was filmed during the time the plaintiff and the defendant had a case pending before Court regarding the termination of latter's employment. Moreover, Mr Semaesse confirmed in Court that during the defendant's employment with the plaintiff he never made any complaints regarding the issues raised in the YouTube video and as a matter of fact no one made any such complaints.

True it is that food is given to the fish but everything is monitored and that due to the food farming process , many others species which were never seen in the lagoon came thus enriching the fauna of the lagoon. He laid emphasis on the fact that it was not in the interest of the plaintiff to destroy the lagoon as they need same for their business and had vested interest in preserving same.

He explained that with the amount of local and international controls together with the visits of the international auditors it is impossible to hide anything. As far as the bad smell of the net is concerned, he said that the plaintiff uses normal nets without chemical products and that explained why there are so much algae on the net and obviously this will give a smell when placed on the shore but it is a natural algae smell. He again laid emphasis on the fact that the plaintiff relies heavily on certification to export its products and if ever there was chemical products given to the fish as food this would have been traced out when tests are carried out before exports. Thus, if this has never been the case therefore it can only mean that the food is not toxic and there cannot be any toxic gas.

The plaintiff was categorical that the YouTube video has caused much prejudice to his reputation and has economically affected the company. According to him, at the time the video was made there was strong opposition for the setting up of another fish farm which had nothing to do with

the plaintiff and there was even a page on Facebook called *'No to fish farming at sea'*. He pursued further by stating that it is prejudicial for an ex-employee of the plaintiff, with whom the company had an ongoing litigation in Court, to make a video stating facts which were not true and unjustifiable in order to attack the reputation of his ex-employer. He then produced a document from Facebook which introduces the said video made by the defendant on FMM which is marked as **[Doc P]**.

The plaintiff explained that following the lodging of this present matter the video has been removed from social media. However, this already had a bad effect on the reputation of the company. He also produced **[Doc Q]** which shows comments from the general public on issues which are not true but which have been made following the publishing of the video made by the defendant. The plaintiff then explained that although it is only asking for Rs 500,000 as damages but the lost incurred by the company is around 1.5-1.7 million.<sup>4</sup> Only for the local market it lost a business of around Rs 2.6 million with 'Finefoods' and Rs 10 million with Centro, an international company. These two companies had the intention of doing business with the plaintiff but retracted after the video was released.<sup>5</sup> The plaintiff produced his 'Sales loss calculation' which was marked as **[Doc R]**.

In cross-examination, the plaintiff was asked to produce two documents emanating from the Registrar of Companies regarding shareholders of the company and they were marked as **[Docs S and S1]**. He confirmed that the defendant has worked for the plaintiff from 2003 to 2015. Mr Semaesse stated that he joined the company in 2014 and at that time there were two sites where cages were placed and there were around 40 fish cages and as at now there are four sites with a maximum of 100 fish cages. The plaintiff was then asked to produce an ariel photograph taken by one Mr Ruben Pillay showing the different sites at FMM which was marked as **[Doc V]**.

Counsel for the defendant then referred to a document named 'Environment Impact Assessment Report' for Ferma Marine de Mahebourg and the document was produced and marked as **[Doc W]**. The plaintiff confirmed that the company used to produce two types of fish, *'Ombrine' and*

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<sup>4</sup> Pg 35 of the proceedings of 7<sup>th</sup> October 2021

<sup>5</sup> Pg 34 of the proceedings of 7<sup>th</sup> October 2021

'Sea bass' but the production of 'sea bass' was stopped in 2013-2014. Mr Semaesse denied the fact that 'Ombrine' can reproduce naturally in the Mauritian waters as certain specific factors must be present. On the issue of whether there was any objection to the project of aquaculture, the plaintiff explained that the objections were from the fishermen of the locality.<sup>6</sup> He also agreed that 5 percent of plaintiff's products are sold locally through Fine Foods and produced **[Doc X]**.

The plaintiff stated that the site of FMM was located after a study was made by a french company 'L'IDE' and reiterated the fact that the plaintiff is audited every year by local and international companies such as *Friends of the Sea*, *Golbal Gap*, *Compétent Autorité Européen*, *FDA*, *Carbon Footprint* and the Ministry of Fisheries and environment.<sup>7</sup> The plaintiff was asked to produce **[Doc Y]** the objectives of *Competent Authority Seafood* and confirmed that there are veterinaries who work there in order to ensure the security of the consumers. The plaintiff also stated that they are subject to audits from the Ministry of Environment. As far as the audits of the *Friends of the Sea* are concerned, the plaintiff explained that it is updated each year with new criteria being added. Counsel then went on and put several questions regarding the different criteria mentioned in the report of 2014 from *Friends of the Sea*.

When it came to the allegation that according to the defendant about 10-12 *dead dolphins* were stuck to the nets, the plaintiff categorically denied same. However, on question being put to him regarding presence of shark near the nets he confirmed that sharks have always been present in the lagoons of Mahebourg specially for reproduction purposes but their attacks have been very rare.<sup>8</sup> Mr Semaesse was then asked to produce the first review of 2014 from *Friend of the Sea Standard* which was marked as **[Doc z]**. He informed the Court that the presence of 'Ombrine' in the lagoons around the Island is due to illegal poachers who would damage the fish nets of FMM.

Mr Semaesse was adamant all throughout that he is not agreeable to the statement made by the defendant in regards to the dead dolphins and that at no point was these instructions given to him. He also maintained that since neither the food given to the fish nor the fish net contain any

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<sup>6</sup> Pg 18 of the proceedings of 14<sup>th</sup> June 2022

<sup>7</sup> Pg 23 and 24 of the proceedings of 14<sup>th</sup> June 2022

<sup>8</sup> Pg 29-30 of the proceedings of 14<sup>th</sup> June 2022

toxic component, it is therefore impossible for the food to release toxic bubbles or gases. He also laid emphasis on the *Environmental Impact Assessment Report* which was referred to by counsel for the defendant, which help companies like FMM to maintain a good practice.

As his witness, the plaintiff chose to call Mr Nadeem Nazurally, Senior Lecturer at the University of Mauritius in the field of Marine Aquaculture and Ocean Sciences and holds a PHD on Marine Science and Aquaculture. It was made clear right from the start that this witness is not being called as an expert but as a researcher who is also the president of an NGO which plant corals with the collaboration of fishermen and skippers. He explained that as a researcher he has worked on various projects with world renowned professors who has even come to FMM to validate his research work. He explained that his research work comprises of assessing the nutrient level, interaction of fish farm and the water.

The witness explained that as a professional diver he had put into place a live monitor under water which shows the growth of organism under water. He further stated that he has been diving at FMM every two weeks since 2009 and he even dives at night in order to collect sample. Upon question being put to him regarding '*dead dolphins*' he stated that he has never seen any dead dolphins near the site. On the contrary the fish farm has regenerated the marine biodiversity of the site where the nets are found.<sup>9</sup> He confirmed that he has never seen 12 to 13 dolphins in that part of the lagoon, according to him there were only around 5 dolphins and a small one.

In regards to the fish feeding, he said that true it is that a small amount of the feeds goes down to the sea bed but maintained that this has no negative impact on the marine environment. He insisted that the statement of the defendant that the food accumulates up to 10 to 15 cms is totally false '*since there is a very big amount of diversity of organisms that live around the site.*'<sup>10</sup> He supported the above with the fact that there are *nudibranchs* which eat the excess food that falls on the sea bed. As far as the '*bull toxique*' is concerned, he was categorical that if there were toxic bubbles then even the dolphins would not approach the nets. As for the fish nets, the

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<sup>9</sup> Pg 10 of the proceedings of 7<sup>th</sup> July 2022.

<sup>10</sup> Pg 12,13 of the proceedings of 7<sup>th</sup> July 2022.



witness deposed to the effect that the fish nets do not constitute any danger to the organism as through the live monitoring camera system one can see even sea turtles around the site.

Mr Nazurally explained that since 2009 he has been growing corals in the sea and the growth can take up to three years. He was then asked to identify a CD of a video which was broadcasted by BBC which he produced and was marked as [Exhibit 2] and was played in Court.

The witness produced several photographs which were marked as **[Doc AA]** to show the state of the site near the cages of FMM from 2010 to 2017. He started with a photograph [No.1] of April 2010 which was taken under the cages at FMM. This picture was taken after he undertook the first coral restoration project which was launched in order to assess the growth of corals and see the impact of the fish farm. He also made reference to several pictures where ropes have been placed and micrology can be seen growing together with several species. The witness explained that unfortunately he lost all his pictures between 2010 and 2014 which was kept in a data at the University. The pictures in 2014 shows the clarity of the water around the cages and the life surrounding that area. He maintained that since 2009 up to now he has never seen any dead dolphin in that area. He also stated that as a Senior Lecturer at the University of Mauritius, it was his responsibility to take his students to that area of the lagoon where they were allowed to swim, dive and collect sample for their dissertation.<sup>11</sup> Referring to picture 5 of 2014, he stated that it was taken 50 meters from the cages and there were living organism everywhere including sea cucumber. He thus stated near the cages he saw more than 100 species of corals, 100 species of fish including massive corals which clearly indicate life at these locations. The witness explained photograph 11 of 2014 where an equipment to measure the temperature and light intensity was placed. He also stated that the rope system that has been installed to help in the maintenance of life around the structure and confirmed that he did not notice any presence of chemicals in the water even after analysing a sample at the University.

Whilst describing the water 50 to 100 meters from the fish farm, Mr Nazurally stated that there are swarms of fish which live, grow and reproduce in the corals nearby. The photographs of 2016 show ropes which were installed to create a coral nursery and he went on to explain the rest of

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<sup>11</sup> Pg 13 of the proceedings of 23<sup>rd</sup> September 2022

the photographs. The photographs of 2017 have been taken 20 meters from the fish farm and a splash of the dolphins can in fact be seen at spot X on picture 3. In regards to the issue of sharks, he maintained that he has been diving near the cages at night but has never been attacked or noticed any sharks and this fact was made part of an international conference where he presented a paper. To sum up Mr Nazurally stated that near FMM there are more species, corals and natural refuge than other public places like Belle Mare and Flic en Flac.

In cross-examination, the witness stated that he is the president of an NGO, chairman of Mauritius Oceanography Institute and National Conservation area. He started working on the fish farm twice a month since 2010. He confirmed that prior to 2014/2015 the coral farms were suspended under the fish cages. He maintained that since he has been diving near the fish cages he has never seen any dead dolphins. He said that the excess of fish feed left on the bed of the sea was eaten up by nudibranch. He also deposed to the effect that sometimes he would dive for three consecutive days and noticed that the fish feed stayed on the sea bed for no more than a day and this is due to the water current of the sea that prevents the fish feed to be stacked in one place. He insisted that although he doesn't dive near the cages all the time, but as a scientific analyst he assesses the quality and knows how long residues take to disintegrate.

The witness was then referred to the EIA report of 2014 pg 615 which was produced and marked as **[Doc AB]**. He agreed that if the statement is part of the report it must be true but at the same time he stated that from the picture produced mud snail are eating the excess pellets. Another page of the same report was then produced namely, page 613 which was marked as **[Doc AC]**. In rebuttal to the statement at pg 615 of the EIA report Mr Nazurally stated that the increase of invertebrates/vertebrates and decrease of algae and sea grass is a normal process not just near the fish farm but in other locations as well since some species might find other location. The witness was adamant that there is no shark in that area of the lagoon being given that he is doing a research with Reunion Island which was financed by Interact European Union where he has himself placed baits and cameras but he has never seen any sharks coming to attack the cages.

The case for the plaintiff was then closed.

## Case for the Defendant

The defendant was called to depone. He stated he was working as diver for the plaintiff from 2003 to 2015 and holds certificates as dive master, namely, Sea Mas one star and Sea Mas 2 star. He was also involved in the setting up of the cages at FMM. He explained the structure of the cages which was found at page 4-6 of [Doc W] and said that the cages are reinforced at the bottom in order to prevent predators such as sharks and barracudas to attack it. He acknowledges having made the statement about the fish nets as on several occasions he has had to remove dead dolphins, sharks, barracuda, carangue and tortoise from the nets when they were stuck.<sup>12</sup>

The defendant confirmed the declaration he made regarding the fish nets and that when they are removed from the cages they discharge toxic gases. He said that the algae are so toxic that a person cannot breath near it.<sup>13</sup> As far as the third declaration regarding the antibiotics is concerned he stated that it was given to the fish only when they had a disease. When the statement mentioned in [Doc W] was put to him that *“since operation in 2003, the farm has NOT witnessed any disease outbreak”* the defendant was not agreeable with EIA report.

The defendant was then asked about the food residue which according to him took two -three months to go away and which are toxic. He explained that when food is given to the fish with the movement of the fish in the cage, three quarter of the food goes out of the cages and fall on the sea bed. He says that from the sea bed one can see the toxic bubbles coming out of the feed.<sup>14</sup> The defendant then clarified that only when there are excess of food that it goes to the bed of the sea.<sup>15</sup> He said that the bubbles are toxic as they burn his hands when he tries to move the cages. He also stated that near the food waste it is completely dark and there is no life.

When it came to paragraph 15 (5) of the plaint, the defendant explained that when the auditors would come, he would take them through a different route so that they would not be able to identify the problems under the cages. The defendant was then asked about the dead dolphins

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<sup>12</sup> Pg 11 of the proceedings of 29<sup>th</sup> March 2023.

<sup>13</sup> Pg 13 of the proceedings of 29<sup>th</sup> March 2023.

<sup>14</sup> Pg 18 of the proceedings of 29<sup>th</sup> March 2023.

<sup>15</sup> Pg 20 of the proceedings of 29<sup>th</sup> March 2023.

as per paragraph 15(1)(a) of the plaint. He stated that dolphins are present everywhere in the lagoons because of the food around the cages. According to the defendant, there are around 30 dolphins near the cages and from 2003 to 2015 around 15 dolphins have died. The defendant stated that it was upon the instruction of one Olivier working at FMM that he would attach the dolphins in such a way that it would get stuck to the bottom of the sea.

He said that back in 2003 there were no shark in that region but just before leaving he saw a lot of them and he even saw tortoise being stuck in the fish net. He also confirmed that when he left FMM, fish like *ombrine* and *bar* could be found in the lagoon. He was referred to photographs produced [Doc AA] and stated that all these were taken in the lagoon at 1m50-2 metres but not near the cages.

The defendant again explained that he made the video following the request of a *collective* to give some information regarding the construction of a site for aquaculture at Riviere Noire and maintained that he did not try to paint a bad picture of the plaintiff but he stated the truth.<sup>16</sup>

When he was asked questions about his hands being burnt with the *bulle toxique*, he stated that he didn't mean burning but felt like '*ene de l'eau bouillante in tombe lor mo la main.*'<sup>17</sup>

He conceded in cross-examination that plaintiff holds all the required authorisation to operate and has also satisfied the all the authorities that its operation is being conduction in a compliant manner.<sup>18</sup> The defendant also stated that when the authorities used to come for inspections he would take them to the cages through different routes so that they would not see the underlying issues under the cages. In the beginning he stated he was the one who took them to the cages all the time then upon question being put he stated that he altered the route only on 2 to 3 occasions.<sup>19</sup>

He stated that in 2004 near the cages he discovered wrecks of a ship named 'Le Coureur' and following this discovery there were divers from the Helicopter Squad, Fisheries and Coast guards

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<sup>16</sup> Pg 54 of the proceedings of 29<sup>th</sup> March 2023

<sup>17</sup> Pg 55 of the proceedings of 29<sup>th</sup> March 2023

<sup>18</sup> Pg 56 of the proceedings of 29<sup>th</sup> March 2023

<sup>19</sup> Pg 60 of the proceedings of 29<sup>th</sup> March 2023

who dived to verify the wreck however he confirmed that there was no shark at the time in the lagoons. Upon question being asked to him he agreed that the Youtube video was made in creole and that it was translated in English and therefore it was not meant only for those understanding creole.

The defendant was then asked question about life near the cages, as in defendant's statement reproduced under paragraph 15(ii) regarding *fish feeding*, he stated that due to the deposit of food under the cages nothing grows in the water. However, he accepted that in one of the pictures produced by Mr Nazurally, there was a living coral near FMM. It was then put to him that if corals have been living near the cages at FMM, this can only prove that the water is appropriate for the growth of those corals and that would explain why for example, near the harbour there is no corals.<sup>20</sup>

Counsel then put it to him that in regards to defendant's statement at paragraph 15 (iv) of the plaint, that it was a veterinary who controls the feeding of the fish to which he agreed.<sup>21</sup> The defendant also agreed that he is neither a veterinary nor has he got any expertise in toxicity. He conceded that after he left FMM, he entered a case before the Court and an out of court settlement was reached.

In re-examination, the defendant stated that he knew nothing regarding the English subtitles.

The defendant then chose to call as his last witness, Mr D.Intyre, a mechanical engineer. He stated that he is the Treasurer of the Sea Users Association which was created in 2017 and produced its certificate of Association marked as **[Doc AD]**. He explained that the association was set up in October 2017 after a group of people under '*Collectif non a elevage poisons dans la mer*' was created against an aquaculture project in the west coast of the Island. He got to know the defendant by a member of the collectif. According to the member the defendant had damning information about what was going on at FMM. The defendant was interviewed by a member of the *collectif* which was circulated on social media in order to create awareness. The witness explained the objectif of the Association and produced the rules of the Association which was

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<sup>20</sup> Pg 70 of the proceedings of 29<sup>th</sup> March 2023

<sup>21</sup> Pg 72 of the proceedings of 29<sup>th</sup> March 2023

marked as **[Doc AF]**. He also explained that in 2018 there was a huge escape of *ombrine* in the lagoons of Mauritius which triggered a PNQ in Parliament and such an escape is against FMM's EIA conditions.

According to Mr Mackin Tyre there were "shark attacks" but which has not been proven. The witness produced two letters sent to Ministry of Ocean Economy and Ministry of Social Security which were marked as **[Doc AG and AG1]**. He also produced the decision of the *Environment and Land Use Appeal Tribunal* which was marked as **[Doc AH]**.

In cross-examination, the witness stated that he is neither an expert in aquaculture nor has he contributed to the construction or building of any aquafarm in Mauritius or abroad. He conceded that he is in Court because of his Association whose object is to protect the marine environment. He was categorical that he was not involve in the production of the video nor did his association gave a right of reply to FMM. He conceded that neither him nor his association has taken any initiative against trawler ships in Mauritius.

## **Analysis**

### **The Law**

It is important from the outset to outline the basic principles of the law of defamation from the various case laws.

There is no doubt that any action for damages arising in a *defamation case* is based on the principles of Article 1382 of the Code Civil Mauricien. This was held in the case of **Cordouan v Jardin** [\[1883 MR 145\]](#) that action for damages in a case of defamation falls under Article 1382 of the Civil Code, namely that "*tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.*"

The fundamental principles of the law of defamation the purpose of which was to provide protection to the reputation of any person, was laid down in the case of **Lesage v Mason** [\[1976](#)

[MR 172](#)] and was reproduced in the **David & ors v Le Mauricien** [\[2017 SCJ 372\]](#). These principles may be summed up as follows:

1. *“A person who has suffered prejudice as a result of an allegation or imputation of fact may, when the making of the allegation or imputation amounts to a faute, claim damages from the person liable for that faute. Such an action, like all those founded on tort, has its source in articles 1382 et seq. of the Code Napoleon.*
2. *A prejudicial allegation or imputation of fact is always presumed to have been made with malice (intention de nuire or intention coupable). The author is, consequently presumed to be guilty of faute.*
3. *The ‘faute’ of the author being presumed, it is sufficient for the plaintiff in an action founded upon an allegation or imputation constituting defamation, to show that he has suffered injury as a result of the defamation.*
4. *It then becomes incumbent on the defendant to disprove the existence a ‘faute’. For that purpose, the defendant may rely upon any defence open to a defendant in such proceedings which include establishing the truth of the defamatory fact or fair comment.”*

It has been stipulated in the case **Oshan-Bellepeau v Kodarbux E & Anor** [\[2008 SCJ 81\]](#), that although there is *‘no wholly satisfactory definition of what constitute defamation’* but the test which has been adopted is more or else what has been decided in the case of **Lesage (supra)**:

1. *Would the imputation tend to “lower the plaintiff in the estimation of right thinking members of society generally?” see *Sim v. Stretch* (1936) 52 T.L.R. 669 at 671;*
2. *Would the imputation tend to “cause others to shun and avoid the claimant?” see *Yousoupoff v. Metro-Goldwyn-Mayer* (1934) 50 T.L.R. 581 at 581, CA;*

3. *Would the words tend to expose the claimant to “hatred, contempt and ridicule?”*  
*Parmiter v. Coupland (1840) 6 M.&W. 105 at 108, per Park B”*

### **Fair Comment**

In the case of **David & ors v Le Mauricien**, the Supreme Court went further and explained the meaning of the *defence of fair comment* under the English Common Law “*What is then the defence of fair comment in English Common Law?*” Quoting from the case of **Lyon v The Daily Telegraph Ltd [1943]1KB 746, 753–per Scott L.J**, the Judge stated that “*the right of fair comment was described to be one of the fundamentals of free speech and writing. The same view was echoed by Lord Denning in Slim v Daily Telegraph Ltd [1968] 2QB 157.*”

It was also stated in the case of **David** that the person expressing his opinion has to do so on a matter of public interest, should not do so maliciously and should get his facts right. There are three issues that the Court should address his mind to when taking such a decision and they are as follows: “*what were the facts on which the writer had made his comment?; Were they matters of public interest?; Were they accurate?*”

The principles that constitute the basis for a defence for fair comment was spelled out by Lord Nicholls in the case of **Tse Wai Chun Paul v Albert Cheng [2001] EMLR 777** before the Court of Final Appeal of Hong Kong, where the Court held that there are five “non-controversial” and “well-established” principles which govern the defence of fair comment:

- “16. *First, the comment must be on a matter of public interest.*
17. *Second, the comment must be recognisable as comment, distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example justification or privilege.*
18. *Third, the comment must be based on facts which are true or protected by privilege. [London Artists Ltd v Little [1969] 2QB 375 at p 395]. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available. [Underlining is mine]*



19. *Fourth, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.*
20. *Fifth, the comment must be one which could have been made by a honest person, however prejudiced he might be, and however exaggerated or obstinate his views. It must be germane to the subject-matter criticized and a defendant is not entitled to rely upon the defence of fair comment if the comment was made maliciously”.*

It was also uttered in the case of **David** that “the burden of establishing that a comment falls within these limits and hence within the scope of the defence of fair comment, lies upon the defendant who invokes such a defence.”

Moreover, the five propositions in the case of **Tse Wai Chun Paul**, were also endorsed by the U.K Supreme Court in the case of **Spiller v Joseph & Others [2010] UKSC 53** which was re-asserted by the European Court of Human Rights where the Court held that the defence of fair comment is made up of the following elements:

- “1. The matter in respect of which the comment is made is a matter of public interest.
2. Where that matter consists of facts alleged to have occurred, the facts are true.
3. The comment is “fair”.
4. The statement is not made maliciously.”

The defence in a defamation case is therefore *fair comment* and *bonne foi*. This has been explained further in **Dalloz Nouveau Répertoire V° Diffamation** under the heading “*Bonne foi*” and quoted in the case of **Walter v Boodhoo 1981 MR 131**, referring to **Dalloz, Nouveau Répertoire V° Diffamation, note 70** and stated that « *the defences available to a person making an imputation or allegation is stated as follows : «Le prévenu échappe à toute sanction pénale ou civile s’il établit l’existence de faits justificatifs démontrant sa bonne foi. – Cette bonne foi*

*s'apprécie d'après la légitimité du but poursuivi, la convenance du moyen employé, la prudence et la sincérité de l'agent. »*

It is thus incumbent on the defendant to plead "*fait justificatifs*" and prove that he was acting in good faith "*surgie d'un ensemble de faits justificatifs*". This was held in the case of **Dookhony v La Sentinelle Ltd & Anor [2008] SCJ 61**, where the Supreme Court said that "*... in an action for defamation where the defendant raises the defence of good faith, he must both plead and establish the "faits justificatifs"*". However, a plea of fair comment would undoubtedly fail if it is prompted by personal grudges as stated by the Supreme Court in the case of **Chong Leung v Selvon and Anor [1978] MR 81**.

Therefore, the issue to be decided by this Court is whether the extracts of Defendant's Youtube video as set out below are defamatory with the intent to injure the plaintiff's reputation and thus warranting an award of damages.

This Court shall consider same in the light of the above-mentioned principles of law regarding defamation, the pleadings, evidence on record as well as the submissions of both Learned Counsel.

*Each of the six statements made in the YouTube video will be examined taking into consideration the pleadings and the evidence:*

(i) *The first one is in regards to the 'dead dolphins being stuck in the fish net.'*

*"L'heure mone telephone mo patron li dire moi cumesa pren li avec ene bloque, attass li avek coule li au fond .....samem seki mone trouve ki sa veux dire pou zot sa pas compte nanrien.....wai zone obliz moi faire li....li ene obligation mo pas kapav refiser...."*

**The English subtitle in the video:**

***“When I called my boss to tell him what happened to the dolphin, he told me to tie a weight to it and drop it further out at sea. The reaction of my boss made me realize that he didn’t care at all.....”***

It is the contention of the plaintiff that the above statement imputes that FMM does not care about the environment and kill dolphins through the farm nets.

However, the plaintiff denies that there were dead dolphins stuck in the fish net as the cages are verified each day and this fact has never been reported to FMM. If this was the case being given the amount of national and international audits which are carried out at plaintiff’s premises, it would certainly have been noticed by the authorities during their surveys.

The plaintiff also stated that the defendant worked for FMM for at least 12 years and he never reported any such incident and no one as a matter of fact who worked for the plaintiff has ever reported that there was dead dolphin stuck in the fish net. Had this been the case then this would have been definitely reported and thus putting into peril the licence of the plaintiff.

It is also important to note that when Mr Nazurally, Senior Lecturer at the University of Mauritius, was apprised of the above statement he stated that *“since 2009, I am diving there, I have never seen 12 dolphins. I have seen around 5 dolphins only, small one also and never seen any dead dolphins. They have been playful. When we dive, they come about one metre next to us, playing around, swimming. We have videos to support this, pictures to support.”* He also said that this observation has been a constant one across the years.<sup>22</sup>

In [Doc W] which is the Environmental Impact Assessment Report (EIAP) 2014, it was stated that *“Dolphins are regularly observed inside and around FMM cage farming site. The staff has observed courting behaviour near the cages and also dolphin parents were observed showing their calf how to swim.....Dolphins do not cause any issue for the cage farm operations and do not interfere with the fish in the cages or with the operations.”*

Thus, the finding of EIAP 2014 is in line with the conclusions of Mr Nazurally.

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<sup>22</sup> Pg 11 of the proceedings of 7<sup>th</sup> July 2022

On the other hand, the defendant only stated that from 2003 to 2015 around 10 to 12 dolphins died after getting stuck in the nets but he never reported this to the authorities and no evidence whatsoever was adduced.

(ii) The second one is *'fish feeding'*

“...mais bannes nouritures ki zot ti pe donner mais des fois ena trop exces nourittires ki sa nourittires la faire ziska dix a quinze cm lor fond.....mais au fait kan li tomber tout seki ena en bas li mort, nanrien pas vivre: so coquillage, so lima, so hypocan.....narien pas vivre.....”

The English subtitles:

“Due to the excessive amount of feed given, it created a 10-15 cm layer of residue on the sea floor.....and whatever it touches when it reaches the sea bed dies, seashells, sea slugs, seahorses....nothing lives.”

(iii) *'fish feed residue on the sea bed.'*

“li pren deux trois mois pi li allez....li reste la et li largue bannes bulles .....bannes bulles ki bannes humain pas kapav respire....bannes bulles la....li bannes bulles toxiques....parcequi li ti dans bannes manger la ena tout bannes zafaires chimiques et du moment ki li cumence a dissoute dans l'eau, li vine ene toxic.....”

The English subtitles:

“It takes 2 to 3 months for it to disappear. Whilst it stays, it releases these bubbles, toxic bubbles, because of chemical composition of the feed. And once these chemicals are released into the sea, they become toxic.”

In examination-in-chief, counsel for the defendant informed the Court that paragraphs 15(2) and (3) of the plaint are going to be addressed together as they are linked.<sup>23</sup>

It is therefore the contention of the plaintiff that the above statements show that FMM does not care about the environment, pollutes the sea beds, contaminates marine species and damages the surrounding biodiversity of the aquatic ecosystem.

The defendant said that there was presence of excess of food in the water which in turn released a toxic gas that was constantly going up which even burnt his hands. At times the toxic gas felt like a sting.<sup>24</sup> However, he contradicts himself by saying that “...*trop beaucoup excess meme encore, pour qui sinon aliment la pou reste monter.*”<sup>25</sup> So on one hand he said that the excess of the food stay on the sea bed releasing a toxic gas and preventing the growth of the flora and on the other he said that the food goes up on the surface of the water.

Mr Semaesse whilst deponing stated that each year the company is subject to audits by different bodies both national and international as its products are exported to United States of America and Europe.<sup>26</sup> He thus produced [Docs D, E, F, G, H and J] which are all certificates received by FMM which demonstrates that the plaintiff is fully compliant with the rules and the certificates are issued after surveys have been conducted.

Mr Nazurally deposed to the effect that at times there are little amount of feed that goes down .....<sup>27</sup> He confirmed that the above statement cannot be true since “*there are very big amount of diversity of organisms that live around the site.....nudibranchs around the site that will instantly eat those excess of feed without having detrimental impact on the sea floor.*” In any case, he noticed during his diving sessions that the fish feed did not stay on the seabed for more than a day due to the current of the sea.

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<sup>23</sup> Pg 20 of the proceedings of 29<sup>th</sup> March 2023

<sup>24</sup> Pg 21 of the proceedings of 29<sup>th</sup> March 2023

<sup>25</sup> Pg 25 of the proceedings of 29<sup>th</sup> March 2023

<sup>26</sup> Pg 4 of the proceedings of 7<sup>th</sup> October 2021.

<sup>27</sup> Pg 12 of the proceedings of 7<sup>th</sup> July 2022

Besides, he said that had there been toxic bubbles even the dolphins would not have approached the fish nets.

He was categorical that there is more biodiversity under the cages of FMM than under controlled sites and laid emphasis on the fact that in his last finding more than 35,000 specimen have been assessed under the cages. This witness also produced a bundle of photographs taken under water by himself [Doc AA] from 2010 to 2017 showing life near FMM and some under the cages. It clearly demonstrates the presence of a great variety of living species and biodiversity.

As stated by Mr Semaesse, FMM has to protect the marine environment near the cages as should the environment be polluted then it would be difficult for the plaintiff to carry on with the fish farm business since the water would not be conducive for fish growth. This explains why FMM often pays external companies to carry out survey so as to preserve the flora and fauna near the cages. Mr Nazurally also explained that he started coral farming since 2009 near the cages and up to now nearly 27,000 fragments have been planted.<sup>28</sup>

It can therefore be concluded that a wide variety of marine life does exist near and under the cages.

**(iv) *'inclusion of antibiotics in fish feed'***

**“.....zot metter, zot metter, dans zot aliments zot metter, dans zot la nouriture poisson zot metter....zot metter zot aliments....zot metter bannes antibiotique.....”**

**The English subtitles:**

**“Yes, yes, they put antibiotics in the fish feed.”**

The defendant also stated that the plaintiff feeds the fish with antibiotics mixed in its food.<sup>29</sup> However, the report of EIA 2014 is referred to where at page 4-12, it says the following *“Since operation in 2003, the farm has NOT witnessed any disease outbreak. Nevertheless and in order*

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<sup>28</sup> Pg 5 of the proceedings of 7<sup>th</sup> July 2022

<sup>29</sup> Pg 15 of the proceedings of 29<sup>th</sup> March 2023

*to prevent any occurrence of disease outbreak, sanitary evaluations of the livestock have been undertaken by an external specialist; latest evaluation being in February 2013.150 samples taken.....All samples show a healthy livestock.”*

In the same breath, Mr Semaesse also stated that the plaintiff is very careful with the type of food given to the fish. “.....*que on ne donne pas n’importe quoi et notamment on ne donne pas des produits chimiques c’est que on a une tracabilite du debut jusqu’a la fin.....a travers le supplier qui sont eux soumis a des tracabilites exigeantes.*”<sup>30</sup> However, the plaintiff did state under cross-examination that some antibiotics are used on ad hoc basis.

Mr Semaesse thus stated that veterinaries do effect verifications in order to ensure that the process are being followed “*Ce sont des personnes veterinaires, aussi egalement qui sont specialises .....qui valide donc le bonne pratique, qui effectuent des controles de maniere reguliere .....des composants de poisson.....les respect des certification. C’est eux memes qui font les certificats veterinaires pour qu’on puisse exporter, travailler tous les jours qui puissant exercer notre activite.*”<sup>31</sup>

The defendant agreed in cross-examination that it was a veterinary of FMM who control the fish feeds.

It is essential to emphasise on the fact that Mr Nazurally mentioned during examination in chief that after analysis of the water near the cages at the University he did not find the presence of chemicals.

So, if the fish are subject to analysis and verification by both the local authorities and the suppliers of the plaintiff, had antibiotics been administered on a regular basis as stated by the defendant then this would have certainly been traced out thus putting at risk the exports of the plaintiff.

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<sup>30</sup> Pg 29 of the proceedings of 7<sup>th</sup> October 2021

<sup>31</sup> Pg 18 of the proceedings of 7<sup>th</sup> October 2021

(v) *'Marine surveys conducted by local authorities'*

**“....parcequi compangie la si ene dimoune p vine faire ene check.....et pu ena ene plongeur ki pu faire li faire ene l'autre chemin au lieu faire li ammene sa chemin kot ena problemes..... li pu ammene li dans en lotre chemin.....”**

**The English subtitles:**

**“because if someone is coming for inspection, the company sends a diver with the research team showing them around the areas that don't have any problems rather than taking them to the problems.”**

As far as this statement is concerned, it is the contention of the plaintiff that the above statement imputes that FMM deliberately and deceptively resorted to the dishonest step of giving instructions to its divers to choose definite site to wrongly influence the outcome of the surveys carried out by the authorities.

In examination-in-chief, the defendant stated that when the authorities visited FMM, he was the one who took them on site each time so that they won't be able to see the underlying problems and issues. However, in cross-examination he conceded that he only altered the routes on 2 to 3 occasions, which therefore mean that on the other occasions the auditors saw the state of the sea near and under the cages as it was at the time.

According to the defendant, the auditors were from Germany, Ministry of Fisheries and the authority of Albion<sup>32</sup> and that they would visit every 2 to 3 years.<sup>33</sup>

However, as per [Doc AB], which is part of the EIA report 2014, it was stated that the “bottom under the cages was checked every 4-6 months and a report is drawn up for external audit.” The defendant stated that there was a lady from India and two from the Ministry of Fisheries who came to verify the cages. He was the one who decided the route to the cages and they had to follow him as the water is very dense.

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<sup>32</sup> Pg 24 of the proceedings of 29<sup>th</sup> March 2023

<sup>33</sup> Pg 57 of the proceedings of 29<sup>th</sup> March 2023



However, he himself agreed that in the same dense water in 2005 he discovered a wreck. Thus, proving that the water under the sea was not so dense after all as he wanted to make the Court believe.<sup>34</sup>Besides, in the EIA report 2014, [Doc AB], it was stated that “..... *concludes that fish farming does not noticeably affect the water quality.*”

Therefore, it is very hard to believe that the national and international auditors who are also trained divers look only at what the defendant wants to show them.

**(vi) *fish nets***

**a. “sa filets ki zot metter pu protez zot poisons la....filets la li protez poisson la mais.....li pas protez bannes especes ki nu ena en dehors, par exemple Cuma dophin, requin, torti, barracuda, carangue li pas pu protez sa bannes zafaires la..... li pu detruire sa bannes zaferes la.....”**

**The English subtitles:**

**“ the nets that are installed for the protection of farmed fish protects the fish inside but doesn’t protect the species outside the net, for example, dolphins, sharks, turtles, barracuda, king fish....it won’t protect them.....it will kill those species.”**

This statement is also linked to statement (i) above where plaintiff says that it imputes FMM kills dolphins through the farm nets and damages the surrounding biodiversity.

During examination in chief, the defendant said that on numerous occasions he had to go and remove dolphins, sharks, turtles, barracuda and king fish from the fish nets. However, this has never been reported nor has any complaints been received by FMM. No evidence has been adduced by the defendant to show when and how the species are stuck in the fish nets and it was only after defendant’s employment was terminated that he decided to do this video on FMM.

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<sup>34</sup> Pg 58-61 of the proceedings of 29<sup>th</sup> March 2023

Even Mr Nazurally who has been diving near the cages of FMM since 2009 has stated that he has never seen dead dolphins near the cages.

**b. “.....sa bannes algues ki pousse lor la la, kan zot retire fillet la zot met li a terre, filet la si zot met li a terre, zot met li en boulle.....lendemain pas kapav coste r filet la....li ena ene espece gaz toxique ki p sorte ladans.....”**

**The English subtitles:**

**“there are algae that grow on them and when they take the nets out of the water.....the next day you cannot approach these nets, there is like a toxic gas that comes out of it.”**

As far as the above statement is concerned, the defendant in cross-examination admitted that he does not have any expertise in the field as he is only a diver. He also agreed that he doesn't have any understanding of toxicity. He even stated so under oath:

“Q: Et de ce fait m pe dire ou ki sans sa deux éléments d’expertise ki ou pena la, seki oune dire sa declaration la c’est enn declaration ki abusif, ine nuire à la reputation de la FMM de Mahebourg. Eski ou dakor avec moi?

A: Mo dakor, oui parski ou pe dire moi mone mal prescise sa mot toxique la mais Selman pou nous lors filet quand ti pe etale filet la nous tout ti pe dire coumsa gaz la enn gaz toxique.....”

Now, according to [Doc W], under the heading “As FMM adheres to a policy of sustainable fish farming, it was decided not to use anti fouling paints to treat its fish cage nets.” Thus, the report says that since FMM does not treat the nets with “any dangerous chemicals, this marine life can readily and healthily develop around the cages.....”

Likewise, Mr Semaesse did explain that the smell that comes out of the nets is a natural smell *“qu’il fait reference a peut-etre au niveau du filet peut seulement reference a l’odeur marine....”*<sup>35</sup>

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<sup>35</sup> Pg 28 of the proceedings of the 7<sup>th</sup> October 2021

Therefore, this proves that FMM does not use any chemicals which renders the fish nets toxic. It is also mentioned in the report that the nets are cleaned by spreading them on land to dry and when the dried fouling shrinks and falls off easily.<sup>36</sup>

Therefore, the Court takes into consideration the fact that the defendant had worked for the plaintiff for a period of nearly 12 years and that he never reported any incident to any authority. It was only after his employment was terminated due to an allegation of assault at work and after the filing of a claim for unjustified dismissal in 2016 before the Industrial Court that he decided to publish the video clip on YouTube. The Court is aware that the case was settled outside court and that the video has been removed from YouTube.

This being said, it is clear from the above that the defendant has been unable to prove the facts contained in the statements he made in the YouTube video clip. As stated in the case of **Tse Wai Chun Paul** mentioned above, this Court finds that the comments made are of *public interest*. However, taking into consideration the evidence adduced in Court and the pleadings, this Court fails to agree with the defendant that the alleged facts are true for the reasons mentioned above. Moreso since the Court was apprised with the fact that the defendant had worked for FMM for 12 years and had never made any complaint or reported any such matter to the authorities. It was only after his employment was terminated and had a pending case before another Court that he decided to make the YouTube video clip. Thus, the plea of fair comment undoubtedly fails given that the facts upon which the comments were based have not been proved and the more so *'as they were prompted by personal grudges.'*

In the absence of any defence, I therefore find that the comments made by the defendant are presumed to have been made with malice and are therefore defamatory to the plaintiff.

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<sup>36</sup> Pg 4-11 of Document W

The Court will now consider the quantum of damages to be awarded to the plaintiff. Guidance is thus sought from the case of **Lesage (Supra)** when it comes to damages and the following factors from the extracts below should be taken into consideration:

*“There remains the question of quantum. The damages claimed by the plaintiff are for moral suffering. The plaintiff has deponed that the articles caused him much distress. We willingly believe him. Imputations of dishonourable motives constitute by their nature a serious form of defamation. Apart from the effect of the defamation on the plaintiff, having regard to his position and standing, there are in actions for defamation a number of factors that will weigh with the Court in assessing damages. These are the nature of the defamation, the mode and extent of its publication, the absence or refusal of any retraction or apology and generally the whole conduct of the defendant, before and after action and at the trial”.*

The award of damages will therefore depend on the facts and circumstances of each case.

Mr Semaesse has deponed and explained that the plaintiff made a lost of Rs 2.6 million with a local company called *Fine Foods Ltd* with whom they were in negotiation and with another international company called *Centro* where they lost Rs 10 million of dealings. He explained further that because of this video many clients and potential clients were questioning the methodology used at FMM and whether the products can be trusted. He thus produced [Doc R] which is a *Sales Loss Calculation*.

It is also vital to state that the YouTube video had English subtitles and therefore catered for a greater audience hence amplifying the reputational damage of the FMM. The plaintiff stated it has suffered prejudice in terms of loss of reputation resulting from the vicious and ill-founded practices made by the defendant’s interview.

In light of the above, I find that the defendant should

- (i) pay the sum of Rs 200,000 as damages;
- (ii) cause the said YouTube video to be completely withdrawn from the internet;
- (iii) publish his apology to the plaintiff in two of the widely circulated local newspapers.

With Costs.

**A.Purryag-Ramful**  
**Vice- President, Intermediate Court (Civil Division)**  
**14<sup>th</sup> February 2025**