

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 347 OF 2005

BETWEEN: DOCTOR AYOADE OLATUNBOSUN-ALAKKIJA
PLAINTIFF

A N D: UNITED NATIONS CHILDREN'S FUND (UNICEF)
FIRST DEFENDANT
GILLIAN MELLOSP UNICEF REPRESENTATIVE
(PACIFIC REGION)
SECOND DEFENDANT
ADI DAVILA TOGANIVALU, PACIFIC OMBUDSPERSON,
UNICEF
THIRD DEFENDANT
KOFI ANNAN, SECRETARY-GENERAL OF THE UNITED
NATIONS
FOURTH DEFENDANT

Ms P. Narayan for Plaintiff

Mr. S. Banuve for Applicant/Intervenor

DECISION

BACKGROUND:

The plaintiff, the second defendant and the third defendant were employed by the first defendant. The second defendant is described on the writ as UNICEF Representative (Pacific Region) and the third respondent as Pacific Ombudsman.

The case concerns a letter written by the third defendant to the second defendant on 14th August 2003. The letter complains of the general conduct of the plaintiff in the office and poor management of financial resources, failing to submit trip reports and poor interpersonal relationship with staff. The plaintiff alleges that the contents of the letter are untrue and written maliciously. In short it is a defamation action.

INTERVENTION BY ATTORNEY-GENERAL:

As the case involved a United Nations agency, the Attorney-General made an application to be joined as an intervenor on basis that Fiji is a party to the Convention on the Privileges and Immunities of the United Nations and Fiji is obligated to grant immunity from legal process to the United Nations, its property or assets and to officials of the United Nations in respect of words spoken or written in their official capacity. The application was allowed and the Attorney-General joined as intervenor.

The present application is in respect of Order 18 application by the Attorney-General to strike out the action argued principally on the ground that it is an abuse of process.

IMMUNITY OF INTERNATIONAL ORGANIZATIONS:

The present case is not concerned with immunity accorded to a sovereign state when it is sued in a domestic court of another state. I say this as the plaintiff has submitted at length on this basis. This case is concerned with privileges and immunities which are extended to an international organization.

Hazel Fox in *"The Law of State Immunity"* at page 473 states that *"the source of immunities for international organizations is treaty or agreement, not international custom"*. The rationale for their grant is functional necessity so they can carry out their functions without interference by individual governments.

After the Second World War, a number of international organizations closely linked to the United Nations Organization have surfaced. These organizations performed important tasks in an era when massive social and economic challenges face members. UNICEF is one such organization. The development and growth of such organizations has given rise to problems associated with privileges and immunities which ought to be or are extended to the agents and officials of such organizations. Article 105(2) of the Charter of the United Nations provides that the *“Representatives of the Members of the United Nations and officials of the Organization shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization”*.

On 13th February 1946, the General Assembly adopted a Convention on Privileges and Immunities of the United Nations (Annexure A to the affidavit of Mataitoga) which provides for immunity from jurisdiction, inviolability of its premises, archives and documents, and provides fiscal privileges. Of particular interest for this case is Article IV Section 11(a) which provides immunity from legal process of every kind in respect of words spoken or written in their capacity as representatives. These privileges and immunities are extended to the representatives of the members not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which immunity is accorded – Article IV Section 15. Article V provides that officials of the United Nations shall also be immune from legal process in respect of words spoken or written in their official capacity. Immunity has not been waived in the present proceedings.

UNICEF:

Fiji has entered into an agreement with UNICEF on 2nd October 1972 conferring on UNICEF, its property and to its officials the benefits of the provisions of the Convention on the Privileges and Immunities of the United Nations. Hence the immunity from legal process for words spoken or written as outlined above is extended to the officials of the UNICEF in Fiji.

The present case involves consideration of an issue which arose out of internal matters of UNICEF. The incident arose out of matters while the two parties were employed by UNICEF. UNICEF may well have in place internal procedures to deal with inter employee complaints. This is totally an in-house matter; it deals with the administration of office of the UNICEF.

SOVEREIGN IMMUNITY – ABSOLUTE OR RESTRICTED:

Counsel for the plaintiff has submitted forcefully that the court ought to adopt a restrictive approach to immunity and allow the action to proceed. The history and development of the absolute immunity and restrictive Immunity has been thoroughly traced in Govind Reddy v. The Ambassador of the Independent State of Papua New Guinea – 1999 43 FLR 142 by Justice Fatiaki as he then was (now the Chief Justice) and I do not propose to embark upon a similar exercise as that would be unnecessarily duplicating the analysis. I shall refer to the two approaches very briefly.

Historically courts favoured and applied the absolute immunity rule in that a sovereign state cannot be impleaded in the courts of another country without its consent. Under international law all sovereign states are equal and it is against international comity that a state may be sued against its will in another country. However, recently it has been recognized that foreign states do participate in commercial transactions with citizens of other countries. Their embassies frequently engage in commercial transactions with private persons of the host state. States, like private citizens, ought to honour their commercial transactions. Absolute immunity therefore could spell unfairness to such citizens so the

emphasis today is to consider what the "*core sovereign functions*" are in considering the issue of immunity – Governor of Pitcairn v. Sutton – 1995 1 NZLR 426 and confine immunity to these core functions only.

CONCLUSIONS:

Fiji has entered into an agreement with UNICEF to grant certain immunities. The incident under consideration arose out of acts two employees of the UNICEF during course of their duties. It is not a commercial transaction involving UNICEF and a private individual in Fiji. It is in the interests of Fiji to uphold its obligations under the agreement. International organizations operating in Fiji must rest in comfort that Fiji would uphold agreements it signs, and is party to. Accordingly I allow the protest by the Attorney-General to the jurisdiction of the court to hear the matter. The action is struck out with costs to be granted to the intervenor in the sum of \$800.00 to be paid in fourteen (14) days. The Judgment in default entered on 25th October 2005 is hereby set aside.



[Jiten Singh]
JUDGE

At Suva
31st May 2006