

**JAMES MICHAEL AH KOY v KEMU QOROYA and 4 Ors**

HIGH COURT — CIVIL JURISDICTION

5 BYRNE J

10 November 2000, 12 October 2001, 18 February 2002

[2002] FJHC 277

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**Defamation — damages — service of writ of summons — whether 3rd, 4th and 5th Defendants have full diplomatic immunity from suit — absolute and restrictive diplomatic immunity — certificate of the Minister for Foreign Affairs — Diplomatic Privileges and Immunities Act (Cap 8) s 15.**

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Plaintiff sought damages for defamation from the Defendants which he alleged was caused by them disseminating and publishing defamatory material on the internet. Fifth Defendant has issued a summons for orders that service of the writ of summons on 3rd, 4th and 5th Defendants be set aside on the ground that they enjoyed diplomatic immunity from suit and legal processes by relying on a certificate of the Minister for Foreign Affairs.

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**Held** — International law recognises two types of diplomatic immunity, absolute and restrictive. The restrictive view makes a distinction between acts of a state which are done *jure imperii* (ie public or sovereign acts) and acts done by it “*jure gestionis*” (private actions). Two of the exceptions to diplomatic immunity are that a foreign sovereign has no immunity in respect of debts incurred in the host country for services rendered to its property there nor does a foreign government have any immunity when it enters into a commercial transaction with a trader in the host country and a dispute arises which is properly within the territorial jurisdiction of the host country’s courts. Effect has to be given to the certificate of the minister to grant the 3rd, 4th and 5th Defendants full immunity from suit.

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Orders allowed.

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**Cases referred to**

*Govind Reddy v Ambassador, Independent State of Papua New Guinea* Civ Act No HBC 153/1998S, considered.

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*R v Madan* [1961] 2 QB 1; *Compania Vaiera Vascongada v Steamship Cristina* (1938) 60 Ll L Rep 147; *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* (1976) 1 Lloyd’s Rep 234; *Thai-Europe Tapioca Service Ltd v Government of Pakistan and Ors* [1975] 1 WLR 1485, cited.

*W. W. Clarke* for the Plaintiff

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*R. Prasad* for the 1st Defendant

*G. Phillips* for the 2nd, 3rd, 4th and 5th Defendants

**Ruling**

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**Byrne J.** By the statement of claim annexed to the writ in this action which was issued on the 11th of July 2000 the Plaintiff claims damages for defamation from the Defendants which he states were caused by them disseminating and publishing electronic mail on the internet on the 6th of June 2000.

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It is alleged that the 1st Defendant was at all material times employed by the 2nd Defendant and the 3rd and 4th Defendants were at all material times employed by the 5th Defendant.

It is alleged that on the 6th of June 2000 the 1st Defendant in the course of his employment with the 2nd Defendant and by the use of the 2nd Defendant's internet service provider falsely and maliciously published defamatory material of the Plaintiff who at all material times was the Minister of Finance of Fiji and  
5 later a Member of the Opposition.

It is alleged that the words published bore the natural, ordinary and inferential meaning that the Plaintiff:

- (a) used his position as Minister for Finance to benefit himself;
- (b) entered into illegal arrangements with "TRG" to profit himself;
- 10 (c) misappropriated funds intended for the public;
- (d) stole US\$100 million; and/or;
- (e) was party to the misappropriation of USD\$100 million;
- (f) was party to and an instigator of the 19th May 2000 seizure of  
15 parliament.

The statement of claim then alleges that on the 6th of June 2000 the 3rd Defendant received and read through the 5th Defendant's internet service provider the words complained of above and that then on the same day in the course of her employment with the 5th Defendant added further defamatory words of the Plaintiff calculated to damage his reputation namely:  
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*Come on you guys over there send this out to as many as possible. Especially NZ now that the Ah Koys have fled to NZ to hide.*

All the Defendants have denied liability although only so far the 1st and 2nd Defendants have delivered statements of defence.

25 The 5th Defendant has issued a summons now before me for orders that service of the writ of summons on the 3rd, 4th and 5th Defendants be set aside on the ground that the 5th Defendant and through it the 3rd and 4th Defendants enjoy diplomatic immunity from suit and legal process. They rely on a certificate issued under the hand of the Minister for Foreign Affairs, Kaliopate Tavola on the  
30 21st of September 2000. That certificate, omitting formal parts reads as follows:

*I, Kaliopate Tavola, being the duly appointed Minister responsible for Foreign Affairs, External Trade and Sugar for the Government of the Republic of Fiji, HEREBY CERTIFY that:*

- 35 1. *The South Pacific Applied Geoscience Commission (SOPAC) has been recognized as an International organization since December 27, 1984, and has enjoyed diplomatic privileges and immunities conferred upon it by the Government of Fiji; and*
2. *That by virtue of such recognition, SOPAC is entitled to privileges and immunities specified in the Second Schedule to the Act, which are inclusive of*  
40 *immunity from suit and legal processes or requisition, confiscation, expropriation, or any other form of interference with its property and assets, wherever located and by whomsoever held.*

*Dated at Suva this 21st day of September, 2000*

*Kaliopate Tavola*

45 *(Minister for Foreign Affairs, External Trade and Sugar)*

The certificate was issued under s 15 of the Diplomatic Privileges and Immunities Act (Cap 8) which reads as follows:

*Certificate of Minister*

50 *If in any proceedings any question arises whether or not any person or any organisation is or was at any time or in respect of any period accorded any privilege*

or immunity under or by virtue of this Act, a certificate issued by the Minister stating any fact relevant to that question shall be conclusive evidence of that fact.

The second schedule to the Act mentioned by the minister in his certificate reads so far as relevant:

5 *Second Schedule*

*Privileges and Immunities of International Organizations*

1. Immunity from suit and legal process.
2. The like inviolability of official premises and archives as is accorded in respect of the official premises and archives of a diplomatic mission.
- 10 3. Immunity in relation to its property and assets, wherever located and by whomsoever held, from search requisition confiscation, or any other form of interference.

The 3rd, 4th and 5th Defendants submit that as it is alleged in the statement of claim that the acts complained of were committed within the scope of their employment by the 3rd and 4th Defendants the principles of vicarious liability would extend the protection conferred on SOPAC to these Defendants, so long as the acts were performed within the scope of their employment.

15 In reply to these submissions the Plaintiff submits that this is not a case to which diplomatic immunity applies. He says that the immunity only extends to official acts under its Charter and does not and cannot extend to acts such as that complained of, defamation, which cannot be said by any interpretation of the 5th Defendant's Charter to be official. The Plaintiff submits that diplomatic immunity is granted so as to ensure international comity that is, so as to foster good and friendly relations between international countries.

20 In Action No HBC 153 of 1998 *Govind Reddy v Ambassador, The Independent State of Papua New Guinea* unreported judgment of 30th July 1999 Fatiaki J considered many of the relevant authorities on diplomatic immunity. That case concerned a claim for building work performed by the Plaintiff at the official residence of the Head of Mission of Papua New Guinea in Suva. The judge referred to the principle of international law set out in para 1548, of vol 18 of Halsbury's Law of England (4th ed) which reads:

25 *An independent sovereign state may not be sued in the ... courts against its will and without its consent. This immunity from the jurisdiction is derived from the rules of international law, which in this respect have become part of the law ... It is accorded on the grounds that the exercise of jurisdiction would be incompatible with the dignity and independence of any superior authority enjoyed by every sovereign state. The principle involved is not founded upon any technical rules of law, but upon broad considerations of public policy, international law and comity.*

30 He also noted the observations of Lord Parker CJ in *R v Madan* (1961) 2 QB 1 when he said at 7:

35 *Certain things are, we think clear. In the first place, it is not for someone who is entitled to diplomatic immunity to claim it in the courts. It is unnecessary to refer to the authorities, but ... certainly civil proceedings brought against somebody entitled to diplomatic immunity, are, in fact, proceedings without jurisdiction and null and void, unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court.*

40 Later he quoted para 1575, vol 18 of Halsbury's Law of England (4th ed) which reads in part:

50 *The privileges and immunities of diplomatic agents ... may be waived by the sending state. A waiver by the head of the mission ... is deemed to be a waiver by that State.*

*Waiver must always be express. Accordingly, even if a person entitled to immunity has entered an appearance ... he may at a later stage prove that his government has not consented to a waiver of his immunity.*

In the present case the 5th Defendant has not waived its claim to immunity.

5 The judge held, and I agree that international law recognises two types of diplomatic immunity, absolute and restricted. The absolute view was stated by Lord Atkin in the *Compania Naviera Vascongado v Steamship Cristina* (1938) 60 Ll L Rep 147 who said at 156:

10 *The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seems to me to be well established and beyond dispute. The first is that the Courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.*

15 *The second, is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.*

By contrast the restrictive view makes a distinction between acts of a State which are done *jure imperii* (ie public or sovereign acts) and acts done by it “*jure gestionis*” (private actions). *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* (1976) 1 Lloyd’s Rep 234 (Privy Council).

20 In *Thai-Europe Tapioca Service Ltd v Government of Pakistan and Others* (1975) 1 WLR 1485 Lord Denning MR at 1401 stated some of the important exceptions to absolute immunity. Two of these are that a foreign sovereign has no  
25 immunity in respect of debts incurred in the host country for services rendered to its property there nor does a foreign government have any immunity when it enters into a commercial transaction with a trader in the host country and a dispute arises which is properly within the territorial jurisdiction of the host country’s courts.

30 The *Thai-Europe* judgment was apparently not cited to Fatiaki J but he mentioned other cases in England and New Zealand and Germany which considered the question of restricted immunity.

In the end on the facts in Reddy the judge applied absolute immunity although he said that his view had waxed and waned between the two types of immunity.  
35 In the instant case I have not entertained any doubts as to the decision I should make.

It will be immediately noted that this case is different on its facts from Reddy but in my judgment effect has to be given to the certificate of the minister which I am satisfied grants the 3rd, 4th and 5th Defendants full immunity from suit in  
40 this action against the Plaintiff. I accordingly grant the orders sought in the summons of the 4th of October 2000 and order:

(1) That service of the writ of summons on the 3rd, 4th and 5th Defendants be set aside;

(2) That the Plaintiff pay costs of this application which I fix at \$400.

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*Orders allowed.*

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