

**BETTY KASSIRI v. EASTERN AND SOUTHERN
AFRICAN MANAGEMENT INSTITUTE (ESAMI)**

HIGH COURT OF TANZANIA
AT ARUSHA
(Rutakangwa, J.)

CIVIL CASE No. 15 OF 1997

*Civil Practice and Procedure – Immunity from legal proceedings, how conferred
– Waiver of immunity, express and implied – Waiver ex post facto –
Preliminary Objections and their efficacy – Judicial*

*Notice – Ouster of statutory provisions by case law – Procedure of raising
Constitutional questions – The Vienna Convention.*

The plaintiff, an erstwhile employee of the defendant, sued the defendant for libel in which she was claiming general damages not exceeding TZS. 50 million. The defendant, who had entered an appearance and filed a defence, raised a Preliminary Objection to the effect that the suit against the defendant was not legally maintainable because the defendant was enjoying diplomatic immunity from legal process by virtue of the Agreement establishing it, to which Tanzania was a party, and also by virtue of subsequent legislation passed by the Tanzania Parliament, as alluded to in the written statement of the defendant. It was submitted by learned counsel for the plaintiff that the Preliminary Objection had no leg to stand on and that the case should proceed to trial because the Preliminary Objection had not been expressly and specifically raised in the pleadings.

Held: (i) The preliminary point raised by the defendant is a point of law. A point of law, like this one, touching on the lack of jurisdiction by the court, which may have the effect of disposing of the suit or proceedings without involving a trial or full hearing, if successfully argued, should be raised as soon as it becomes apparent either from the pleadings or from statutory (be it parent or subsidiary) law which, if upheld, might dispose of the case.

(ii) The issue of immunity was apparent from Annexure PK1 of the Written Statement of Defence. Why should the parties be put to the costly expenses of a trial when the matter can be disposed of more cheaply and speedily when it is clear that the proceedings will be dismissed or struck out as being barred by any law? Neither reason nor rhyme will ever countenance such a course of action. In the instant case, the point raised by the defendant was an unmistakable point of law which, if upheld, could dispose of the case.

(iii) The submission by learned counsel for the plaintiff that diplomatic immunity must be specifically and expressly pleaded by a party is misconceived. Immunity from legal process was conferred on the defendant by Act Number 5 of 1986, Act Number 3 of 1987 and G.N. Number 85 of 1988. The Acts and subsidiary legislation speak for themselves.

(iv) The learned counsel for the plaintiff had relied on **Dicey's Conflict of Laws** and an 1870 English Court decision on waiver of diplomatic immunity. These authorities could have been fairly resulted to if there had been a vacuum in our laws. Those authorities cannot be relied on to oust specific provisions of a statute, as was the case in point in the case before the court; and the language of the statute is impeccably clear: the defendant Institute had been granted unfettered immunity. Since the expression used in the law is "**expressly waived**", it goes without saying that an **implicit waiver**, even by the Director of the defendant, is not acceptable. To hold otherwise would be tantamount to rendering this legal provision otiose and that is not the function of the court. If the Member States and our Parliament had wanted such waiver to be implicit, they could have so provided. In this case there has been no waiver.

(v) If the Institute was abusing this privilege, as gallantly argued by learned counsel for the plaintiff, that was an issue of policy which could best be tackled and resolved by the executive and legislative branches of the Member States.

(vi) It is clear that proceedings brought against somebody, certainly civil proceedings, who is 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 proceedings to life and give jurisdiction to the court.

A (vii) A valid waiver of immunity from a suit and/or legal process is one which is obtained before the institution of the suit. Such a waiver cannot be obtained *ex post facto*. Immunity does not depend on whether a claim for it is put forward or not. It is there unless expressly waived.

B (viii) If during Dicey's time, the law and practice tolerated implied waiver of diplomatic immunity, all that has now been put to rest by the Vienna Convention, which has now been ratified by over 150 states (including Tanzania) and in this case by the Agreement establishing the Institute and enabling Acts and Order referred to earlier. In short, there has been no valid and/or effective waiver of the immunity from suit enjoyed by the Institute by virtue of the unambiguous provisions of the law.

C (ix) As regards the submissions by the plaintiff's learned counsel that paragraph 2 of the Schedule to Act Number 3 of 1987 is unconstitutional as being in contravention of article 13(3) and (6) of the Constitution, all that could be said here was that the court was not clothed with jurisdiction even to give a disguised comment on the complaint. This was because this is not an appropriate forum to determine the constitutionality or otherwise of this piece of legislation or any of its provisions. If learned counsel thought that it was so, then he could petition the court accordingly. The proper procedure is clearly spelt out in the Basic Rights and Duties Act 1984.

Preliminary Objection upheld and suit struck out

F Cases referred to:

- (1) *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd*. [1969] EA 697
- (2) *Regina v. Madan* [1961] 2 QB 1
- (3) *Schibsby v. Westernholz* [1870] 6 QB 155

Statutory provisions referred to:

- H (1) The Constitution, articles 13(3) and (6)
- (2) Act Number 5 of 1986, section 13(1)
- (3) Civil Procedure Code 1966, section 18(b)
- I (4) Evidence Act 1967, sections 58 and 59(1)(a)

(5) Diplomatic and Consular Immunities Act 1986, section 13(1)(a)

Mr Mahatane, for the Plaintiff

Mr P Shayo, for the Defendant

RULING

(Delivered 2 May 2000)

Rutakangwa, J.: The plaintiff, Betty Kassiri was an employee of the Eastern and Southern Africa Management Institute (or ESAMI), the defendant herein. She is now no longer working with the defendant. In the instant suit she is suing her erstwhile employer for libel. She is claiming to be paid general damages, not exceeding TZS. 50 000 000. The defendant has resisted the claim.

The suit was scheduled for trial on 22 November 1999. Before the trial commenced, Mr Shayo, learned counsel for the defendant, raised a Preliminary Objection on a point of law. The objection concerns the maintainability of this suit against the defendant which he says enjoys immunity from being sued. This objection was argued by filing of written submissions. The submission of Mr Shayo and Mr Mahatane learned counsel for the plaintiff, form part of the court record. This ruling is in respect of the said Preliminary Objection.

The thrust of the defendant's Preliminary Objection is that this suit against it is not legally maintainable because it is enjoying immunity from legal process. This stance of the defendant is predicated on the Agreement establishing the said ESAMI or the Institute. The said Agreement was entered into on 28 February 1980. Tanzania is a party or signatory to this Agreement. Indeed the Institute's headquarters are based in Arusha, Tanzania.

In article XVIII of the said Agreement provided as follows, in paragraphs 1, 2 and 3:

- A 1. To enable it to achieve its objectives and perform the functions entrusted to it, the Institute shall possess in the territory of each member state an independent juridical personality. To this end, the status, capacity, privileges, immunities and exemptions as set forth in paragraphs 2 to 12 of this article shall be accorded to the Institute in the territory of each member state.
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2. The Institute shall for the purposes of this Agreement have the capacity:
- C (a) to enter into contract;
- (b) to sue and be sued;
- (c) to acquire and dispose of movable and immovable property;
- D (d) subject to the provisions of this Agreement, have power to borrow such sums of money as it may require for its purposes.
- E 3. The Institute, its property and assets shall enjoy immunity from every form of legal process, except in so far as in any particular case it has, through the Director of the Institute, expressly waived its immunity.
- Provided, however, that no waiver of immunity shall extend to any measure of execution.
- F In order to fulfil its obligations under this Agreement, the United Republic of Tanzania, had to pass a specific legislation "for giving effect to certain provisions contained" therein. This is the Southern African Management Institute Act 1987 (or the Act).
- G The Act gave the Institute a legal personality capable of suing and being sued. In section 7, the Act specifically provides that:
- The provisions of the Agreement set out in the schedule to this Act shall have the force of law in the United Republic.
- H The provisions of article XVIII as above reproduced have been given the force of law in Tanzania by the Act. It is also provided in section 13(1)(a) of the Diplomatic and Consular Immunities Act 1986 (Act Number 5) as follows:
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13(1) The Minister may by order published in the Gazette-

- (a) provide that any organisation specified in the Third Schedule (hereinafter referred to as the Organisation) shall to such extent as may be so specified in the order, have the immunities and privileges set out in Part 1 of the Fourth Schedule, and shall also have the legal capacities of a body corporate.

The Institute appears in the said Third Schedule to Act Number 5 of 1986 and is listed as number 9. By virtue of this inclusion, among the immunities and privileges enjoyed by the Institute under the said Third Schedule is immunity from being sued and other legal process. Indeed the Minister for Foreign Affairs did provide that the Organisations specified in the Third Schedule to Act Number 5 of 1986 shall have all immunities and privileges set out in Part 1 of the Fourth Schedule to Act Number 5 of 1986: vide G.N. Number 85 published on 18 March 1988; i.e. "The Diplomatic and Consular Immunities and Privileges (Designation) (International Organizations) Order, 1986. Needless to over-stress here is the naked fact that the Institute has not through its Director, expressly waived its immunity in this particular case to be sued. It is now a glaring fact (see Annexure 1 to Mr Mahatane's written submission) that the plaintiff had, prior to instituting this suit, unsuccessfully petitioned the State House and Ministry for Foreign Affairs, to have the said Immunity from legal process granted to Esami/the Institute waived so as to sue it. She was told that the Foreign Ministry had no such power.

In view of these facts and the stance of the law, Mr Shayo has raised this question in his submission. Can the Institute/ESAMI be sued in a court of law without first obtaining a waiver of its immunity through its Director General? The learned counsel, basing on the same facts and law, has provided a negative reply to the question. He is accordingly maintaining that this suit is incompetently before this court and is praying for its dismissal with costs.

For his part, Mr Mahatane has prayed for the dismissal of the Preliminary Objection and the suit to proceed to trial on its merits.

- A Whence this courage in view of the above facts and state of the law? To him the Preliminary Objection has no leg to stand on because it does not arise from the pleadings available. According to the learned counsel, "it is a matter of principle and established procedure that a
- B Preliminary Objection ... can be taken up by a party to a civil suit pending in a court of law only if that particular point is raised or is brought up in the pleadings in that case". He has referred me to no single authority, be it binding or persuasive, to prop up this proposition.
- C In response to this attack, Mr Shayo is contending that:
- ... the preliminary point which the defendant Institute has taken, is a point of law. It is a point of law like the plea of limitation which can be taken at any time during the proceedings, or even at the submission stage.
- D The court could of its own motion raise it, and would be quite legitimate for this point to be cleared before the merits of the case are considered. It can be taken up even if it is not pleaded.
- E I fully concur with the contention of Mr Shayo. That is the reigning practice. A point of law, like this one touching on the lack of jurisdiction by the court, which may have the effect of disposing of the suit or proceedings without involving a trial or full hearing, if successfully argued, should be raised as soon as it becomes apparent either from
- F the pleadings or from a statutory law or subsidiary legislation; it is much better if it is raised and argued before the trial commences. It was also thus held in *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd* (1):
- G a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued may dispose of the suit.
- H Indeed, the issue of immunity is apparent from Annexure PK1 to the Written Statement of Defence. Why should the parties be put to the costly expenses of a trial (when the matter can be earlier disposed off more cheaply and speedily) when it is clear that the proceeding will be dismissed or struck out as being barred by law? Neither reason
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A nor rhyme will ever countenance such a course of action. In the instant case, the point raised by the defendant is an unmissable point of law which if upheld may dispose of the suit at this stage. The issue of lack of jurisdiction has been properly and fairly raised.

B Mr Mahatane has resisted the Preliminary Objection from another front. He is contending that, the defence of "*diplomatic immunity* like the plea or defence of estoppel or *res judicata* must be specifically and expressly pleaded by a party" relying on it. He is further contending that such immunity is subject to proof by admissible evidence. The C learned counsel is inviting this court not to take judicial notice of this plea of diplomatic immunity for "they are not matter of facts of notoriety." Attractive as this argument may appear to be, I think it cannot help the plaintiff in this particular case. Indeed, it is misconceived. D Immunity from legal process and/or suit was conferred upon the defendant Institute by Act Numbers 5 of 1986 and 3 of 1987, and G.N. Number 85 of 1988. As learned counsel is well aware, no evidence is needed to prove this. The Act and the subsidiary legislation speak E for themselves. By virtue of sections 58 and 59(1)(a) of the Evidence Act 1967, this court is bound to take judicial notice of the same, that they exist and confer the said immunity on the Institute.

F Mr Mahatane has also submitted that the Institute should be taken to have waived this immunity *impliedly* by submitting to the jurisdiction of this court, by making unconditional appearances filing a defence and/or submissions, etc. He has also relied on section 18 of the G Civil Procedure Code 1966. The learned counsel has relied on Dicey's **Conflict of Laws** and an 1870 English Court decision on waiver of diplomatic immunity. As rightly pointed out by Mr Shayo, these authorities cannot be relied on to "oust specific provision of a statute which is the case in point" here. To me these authorities could fairly only be H resorted to if we had a vacuum in our laws. There is no such lacuna. One has to look at the relevant laws. The language used therein is impeccably clear. The defendant Institute has been granted unfettered immunity from legal process unless and until has, through its Director, I

A expressly waived its immunity. The word used here is “*expressly waived*”. It goes without saying therefore that an *implicit waiver* even by the Director is unacceptable. To hold otherwise would be tantamount to rendering this legal provision otiose and that is not the function of this court. If the Member States and our Parliament had wanted such waiver to be implicit, they could have so provided. As already pointed out in this particular case there has been no such waiver of the Institute’s Immunity. If the Institute is abusing this privilege as gallantly argued by Mr Mahatane that is an issue of policy which can best be tackled and resolved by the executive and legislative branches of the Member States.

D If I may be allowed to advance this argument a bit further, I am confident in stating that contemporary jurisprudence on the issue does not support Mr Mahatane. While it may be said that his arguments are true in relation to *state immunity*, the same, at present, is not the case in relation to *diplomatic immunity* as he is alleging. In the case of *Regina v. Madan* (2) Lord Parker, C.J. had this to say in relation to English law on the issue:

F 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 we think it is clear that proceedings brought against somebody, 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 proceedings to life and give jurisdiction to the court ... at page 7.

H In my considered opinion, a valid waiver of immunity from suit and/or legal process is one which is obtained before the institution of the suit. Such a waiver cannot be obtained *ex post facto*. It was also correctly stated in *Madan*’s case that immunity does not depend on whether a claim for it is put forward or not. It is there until expressly waived. Professor Ian Brownlie is an eminent Public International Law scholar and writer. He has contributed a lot to the development

A of this branch of law. In his treatise, **Principles of Public International Law**, (4 ed) (1990), he has this to say in relation to waiver of diplomatic immunity:

B Previous practice had been to some extent tolerant of implied waiver based on conduct but article 32, paragraph 2, states that “waiver must always be express” (at page 358).

C The learned author here, has in mind article 32 of the Vienna Convention on Diplomatic Relations (1961), which has been in force since 24 April 1964. If during Dicey’s time and when *Schibsby v. Westenholz* (3) was decided (see (1840) 6 QB 155, 161), the law and practice tolerated implied waiver of diplomatic immunity, all that has now been put to rest by the Vienna Convention, which has now been ratified by over 150 states (including Tanzania) and in our particular case by the Agreement establishing the Institute and the earlier cited enabling Acts and Order. In short, there has been no valid and/or effective waiver of the immunity from suit enjoyed by the Institute by virtue of the unambiguous provisions of the law.

F Mr. Mahatane has also cited section 18 (b) of the Civil Procedure Code 1966 to bolster his “principle of submission or acquiescence”. With respect, I have been unable to find the relevance of this section to the issue under discussion. The section deals with places where suits may be instituted only. The principle of submission or acquiescence, relied upon by Mr. Mahatane here is applicable under this section when a suit is instituted in a court otherwise competent to try it, which is outside the local jurisdiction of the Defendant contrary to the provisions of section 18 and the Defendant submits himself to that court’s jurisdiction.

H Mr Mahatane has also raised the issue of the Constitutionality of paragraph 2 of the schedule to Act Number 3 of 1987. He is claiming that the proviso thereto is in contravention of article 13(3) and (6) of the 1977 Constitution. He is contending that it is therefore unconstitutional and should be struck out. All that I can say here out of courtesy, is that I am not clothed with jurisdiction ever to give a

A disguised comment on this complaint. This is because this is not the appropriate forum to determine the Constitutionality or not of this piece of legislation or any of its provisions. If he thinks that it is so, then he must petition this court accordingly. The proper procedure is clearly spelt out in the Basic Rights and Duties Enforcement Act 1994 (Number 33).

In his submission, learned counsel Mr Mahatene had the unexpected audacity to label the Institute "an impositor" which "has got no immunity upon it at all". He predicated this startling accusation on his belief that it is not a Gazetted Organisation as required by the provisions of section 13(1) of Act Number 5 of 1986. Had he been industrious enough he would have found the answer to his predicament in G.N. Number 85 of 18 March 1988 already cited in this ruling. It is plainly provided therein for every one to see that the Institute enjoys "all the immunities and privileges set out in Part 1 of the Fourth Schedule" to Act Number 5 of 1986.

In the light of the above, I uphold the Preliminary Objection raised by the defendant. The defendant Institute enjoys full immunity from suit and other legal process. In the absence of explicit waive by its Director, I am enjoined by law to hold and rule that this court has no jurisdiction to entertain this suit *against it*. I accordingly strike it out with costs to the defendant.

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RAYA SAID MTHANA v. REGISTERED TRUSTEES OF BARAZA KUU LA WAISLAM TANZANIA (BAKWATA)

IN THE HIGH COURT OF TANZANIA
AT MTWARA

(Kaji, J.)

CIVIL APPEAL No. 7 OF 1996

(An Appeal from Civil Cause No. 20 of 1994, the decision of Lindi Resident
Magistrate Court dated 2 May 2000)

*Islamic Law – Wakf – Founder of the Mosque – Whether the founder of the
Mosque can dedicate the Mosque.*

Islamic Law – Wakf – Whether the founder of a Mosque is the owner.

*Societies Act – Registration of Civil Societies – Bakwata – Registered as Civil
society – Whether its Constitution is enforceable.*

The appellant was the daughter of the founder of Mosque in Lindi Town one Said Mthana Bin Jabir Ibn Saady, situated on plot number 1 Block F. The founder left Wakf dedicating 67 coconut trees which were along the same plot where the mosque is, to his children and grand children. Between 1988 and 1994 Bakwata took over the management and supervision of the said Mosque, on behalf of the Muslims. Bakwata argued that article 10(3) of its Constitution gives it power to do so. The appellant opposed the take over of the Management and supervision of the Mosque, on the ground that the management and supervision were dedicated to the family of the founder of the Mosque through the Wakf. The matter went through the District Commissioner, Regional Commissioner, and the Minister of Home Affairs in vain. The appellant then filed a suit in the Court of the Resident Magistrate at Lindi where she lost, hence this appeal.

Held: (i) The founder of the Mosque did not dedicate the Mosque in the Wakf; what he dedicated in the Wakf were only 67 coconut trees.

(ii) Article 10(3) of the Constitution of the respondent must be given a strict (limited) interpretation to the extent that it gives power to the respondent to manage