IN THE HIGH COURT OF KIRIBATI)
CIVIL JURISDICTION)
HELD AT BETIO)
REPUBLIC OF KIRIBATI)

High Court Civil Case 10 of 2000

BETWEEN: **BINATAAKE TAWAIA** PLAINTIFF

AND: **ATTORNEY GENERAL ON BEHALF OF THE CHIEF REGISTRAR OF THE HIGH COURT OF KIRIBATI** 1ST DEFENDANT

ATTORNEY GENERAL ON BEHALF OF THE SINGLE MAGISTRATE OF THE SOUTH TARAWA LANDS COURT OF BAIRIKI 2ND DEFENDANT

FOR THE PLAINTIFF: IN PERSON
FOR THE DEFENDANT: MR DAVID JAMES

DATE OF HEARING: 14 APRIL 2000

JUDGMENT

Motion to strike out Statement of Claim for failing to disclose a cause of action and for other reasons set out in the Notice.

The action is for slander. The endorsement on the Writ:-

> The Plaintiff's claim is for damages for slander uttered by the Defendants to the Magistrates on South Tarawa and Betio and members of the public alleging that the Plaintiff was an unworthy person and unfit to be admitted as a lawyer and to assist friends in any Court throughout his life time and knowing that such utterance was false and that it would cause the Plaintiff to be avoided and prevented from carrying out business in the legal profession.

These are allegations in the Statement of Claim:-

> The plaintiff holds a Bachelor of Laws degree and a Professional Diploma in Legal Practice but he has not been admitted to practice.
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> Mr David Lambourne, referred to as the first defendant is the Chief Registrar of the High Court of Kiribati.
>
> Mr Karotu Tiba, referred to as the second defendant was at all material times the Single Magistrate of the South Tarawa Lands Court.
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> "Between July and October 1999, or thereabout, the 1st Defendant, with express malice and ill-feeling, uttered a slander about Plaintiff by directing the Magistrates on South Tarawa and Betio to consider the Plaintiff as an unworthy person and unfit to be admitted as a lawyer or even to appear to assist any of his friends in any court throughout his life time."
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> "The 2nd Defendant, on or about 5/10/99, with malice and knowledge to act without jurisdiction, uttered a slander about the Plaintiff to litigants who applied leave for the Plaintiff to appear with them to assist in presenting their case and without considering an application before him, uttered that the Plaintiff was an unworthy person who cannot be admitted as a lawyer or assist any of his friends in any court."

The Solicitor General appeared on the application to strike out. He made a number of criticisms of the Statement of Claim, arguing that it has many deficiencies. Mr James may well be correct but, apart from the one matter which is crucial to the success or otherwise of this application, they may all, in theory at least, be cured by amendment.

The crucial matter is whether or not what Mr Lambourne and Mr Tiba said were absolutely privileged. If they were then caedit questio: the action cannot succeed. If they were not, then the action should proceed.

In support of the application Mr Lambourne filed an affidavit to which are exhibited a judgment in the Magistrates' Court in 1984, Notice of Appeal dated 23 November 1984 and the judgment of the then Chief Justice dismissing the appeal on 10 April 1985. The exhibits shew the plaintiff had been

charged with 20 counts of fraudulent falsification of accounts, obtaining money by false pretences and larceny by a servant. He pleaded guilty to 8 counts and was found guilty on 10 others. The Chief Justice remarked that the plaintiff's "was a systematic series of crimes by a person in a position of trust."

The plaintiff was sentenced separately on each count of which he was found guilty and the sentences made cumulative. It is difficult to work out how long the total imprisonment was but the Chief Justice finished his remarks dismissing the appeal on sentence by saying:-

> I cannot find the sentences excessive. They were correctly consecutive. The total sentence, viewed in the light of the total amount involved ($1734-90) may seem severe, but the circumstances justify severity when a person in a position of trust breaks that trust and does so repeatedly by stealing from his fellowmen and attempting to cover his crimes by falsifying accounts which it was his duty to protect. I cannot find cause to reduce the sentence individually or in total. I confirm them.

The plaintiff complains in these proceedings of Mr Lambourne among other things having made known the facts of these convictions and the sentences and of Mr Tiba having refused the plaintiff leave to represent a party before him, of having made known in open court the facts concerning his convictions and sentences.

The plaintiff has not filed an affidavit in answer to Mr Lambourne's but he did appear on his own behalf in opposition to the application. As I understand him he argues that it all happened a long time ago and he was persuaded to plead guilty to some of the charges by the inexperienced lawyer who was representing him.

I should consider separately the question of privilege in relation to Mr Lambourne and in relation to Mr Tiba.

Yet there is one general principle applicable to both. Lord Pearson sitting as a member of the Court of Appeal in Drummond-Jackson *v* British Medical Association and Others

(1970 1 All ER 1094) said (at 1101), *"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases."* That principle has been accepted many times. I should not allow the application unless it is "plain and obvious" that the action cannot succeed. If I am in any doubt then the application should be dismissed.

The Solicitor General's argument is that Mr Lambourne was acting, if not judicially, at least in his capacity as an officer of state and therefore has immunity.

There is no doubt that Mr Lambourne is a senior member of the legal profession. He is responsible, subject to the Chief Justice, for the administration of the High Court and the Magistrates' Courts. He holds a commission as a judge of this court. He is also the Registrar of the Kiribati Court of Appeal and the National Judicial Education Co-ordinator.

I should consider first whether he was acting judicially in passing on the information about the plaintiff. Mr James cited the decision of McGechan J in Crispin *v* Registrar of the District Court (1986 2 NZLR 246). In that case the Registrar of the District Court mistakenly entered judgment by default against the plaintiff. The judge found that, because the Registrar had a discretion whether or not to enter judgment, he was acting judicially and was so protected.

That is quite distinct from the present in which Mr Lambourne was merely communicating information to the magistrates. I do not consider that in so doing Mr Lambourne was acting judicially. He was acting not judicially but administratively so he is not entitled to judicial immunity.

Is Mr Lambourne an officer of State?

Mr James reminded me of the decision of the Court of Appeal in Chatterton *v* Secretary of State for India in Council (1895-9 All ER Rep 1035). That was an action for libel brought against

the Secretary of State for India described as "a high official of State" relating to a document he wrote to his under secretary. Gatley (8th ed. at 414 note 46) says, "*Who is such an officer of State is unclear.*" The learned author goes on to refer to Gibbons *v* Duffel (47 CLR 520). Evatt J, at that time a member of the High Court of Australia, said (at 534):-

> By the year 1892 when the case of Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson was decided, the classes of publication to which the common law had attached a complete immunity were ascertained, and any proposed extension of the classes was looked upon with disfavour. "Absolute immunity from the consequences of defamation," as Mr E E Williams wrote in 1909,
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> "is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cut across this elementary right of civic protection; and any extension of the area of immunity must be viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated" (25 Law Quarterly Review p. 200).

Extension of the privilege by reason of analogies to recognized cases is not justified".

I bear in mind that it must be "plain and obvious" that it cannot succeed before an action is struck out. Is it "plain and obvious" that Mr Lambourne is an officer of state as the Court of Appeal found the Secretary of State of India to be? Even Mr James, in his written submission, implicitly acknowledged that I would be stretching the principle to extend the concept of "officer of state" to Mr Lambourne. It is not "plain and obvious" that I should. Accordingly I should not.

What Mr Lambourne said was not absolutely privileged. If the plaintiff were to prove express malice then he could succeed.

What about Mr Tiba? Unlike Mr Lambourne he has not filed an affidavit. I am left uncertain from the Statement of Claim as to whether Mr Tiba was speaking at large in court – in which case what he said may not have been in the course of legal proceedings – or whether he was speaking during the hearing

of a particular matter in which case what he said probably was in the course of legal proceedings.

If he were speaking in the course of legal proceedings, then he would be absolutely privileged and the plaintiff's claim against him must fail. As it is, I do not know.

The result is that this application fails.

THE HON ROBIN MILLHOUSE QC
CHIEF JUSTICE
(20 APRIL 2000)