

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 180 of 2011

**BETWEEN:**            **SUNITA DEVI**, Richmond Crescent, Nadi, Accountant

**PLAINTIFF**

**A N D:**                **DIRECTOR OF IMMIGRATION**

**FIRST DEFENDANT**

**A N D:**                **THE POLICE FORCE**

**SECOND DEFENDANT**

**A N D:**                **ATTORNEY GENERAL**

**THIRD DEFENDANT**

Appearances:            Natasha Khan & Associates for the Plaintiff  
                                 Attorney General's Office for the Defendants  
Trial Date:                26 May 2015  
Date of Judgement:      28 June 2019

## **JUDGMENT**

### **INTRODUCTION**

1. The plaintiff, Ms. Sunita Devi ("**Sunita**"), filed her Writ of Summons and Statement of Claim on 04 November 2011. She claims the following damages:
  - (i) damages for defamation
  - (ii) damages for breach of constitutional rights

- (iii) aggravated or punitive damages in the sum of \$100,000 for high handed and oppressive conduct of the defendants
- (iv) compensatory damages
- (v) special damages
- (vi) damages for mental anguish and suffering in the sum of \$50,000
- (vii) interest under the Law Reform (Miscellaneous Provisions) (Death & Interest) Act
- (viii) indemnity costs

2. The trial of this matter happened on 25 May 2015. Sunita called the following witnesses:

- PW1 - Sunita Devi
- PW2 - Sangeeta Singh

3. The defendant called the following witnesses:

- DW1 - Cpl 2043 – Alvin Kumar
- DW2 - Arun Kumar
- DW3 - Jone Ledua
- DW4 - Remi Tuivaga

### **UNCONTROVERTED FACTS**

- 4. On 16 August 2006, the New Zealand High Commission in Suva issued Sunita a 4-month Visitor's Visa which was to expire on 31 December 2006.
- 5. On 23 September 2006, Sunita boarded a flight from Nadi to Auckland. Upon arrival in Auckland, Sunita was taken aside by the New Zealand Immigration ("NZI"). She was refused entry into New Zealand and was sent back to Fiji on the very next flight.
- 6. Upon her arrival back in Fiji, Sunita was taken to the Namaka Police Station where she was told to wait for officers from Ba Police Station. She did so. However, when no one turned up from Ba Police Station, Namaka Police Station allowed her to go home.

7. The Namaka Station Diary records that Sunita was brought in at 1850 hours and released at 2006 hours. DW4 Remi Tuivaga gave evidence from the station diary. Sunita however, contends that she was kept at Namaka Police Station for a total of 3 hours or so. I prefer the contemporaneous record of the Namaka Station Diary over Sunita's recollection.

#### **TERMINATION OF EMPLOYMENT**

8. Sunita had been employed at the Fiji Development Bank ("FDB") in Ba. She was suspended from her employment on 24 March 2006 on allegations that she had fraudulently obtained monies from FDB customers. These led to a complaint to the Police.
9. Later, on 04 May 2006, Sunita was terminated from her employment.
10. On 23 September 2006, when Sunita boarded that flight to Auckland, she was already terminated from her employment and was unemployed.

#### **INVESTIGATIONS AGAINST SUNITA**

11. When Sunita left Fiji in September 2006, police investigations into her case were well underway. The investigating officer was DW1 Alvin Kumar. He said Sunita had been under investigation from March to September 2006. He identified and tendered Fiji Crime Docket 1314 1464 by consent (DEX1).
12. DW1 said twenty (20) farmers had complained about Sunita. The farmers had complained separately over a course of time. He recorded thirty four (34) statements in total between 09 January 2006 to 25 November 2006. In some instances, a farmer had to give two or three statements. These were recorded on different occasions. Because there were so many complainants, police investigations took longer than usual and Sunita was not charged until September 2006.
13. On 23 September 2006, the day Sunita departed Fiji, eighteen statements had already been taken. Sixteen more would be recorded after that. Sunita was interviewed on 13 October 2010.

## FARMERS' COMPLAINT

14. Apparently, the farmers all had a loan account with FDB. These loans were secured by a lien over their sugar cane crop, in favour of FDB. The complaints were all similar. Someone at FDB was misappropriating monies payable to the farmer.
15. There was a standing arrangement for the servicing of the loan. FSC would pay to FDB cane proceeds from each farm account. Upon receipt of the proceeds, FDB would then deduct 75% towards the loan account repayment. The 25% balance was then to be paid to each farmer by bank cheque.
16. The allegation is that Sunita would forge the signature of a farmer, and cash the cheque herself without any payment to the farmers<sup>ii</sup>.
17. DW1 said Sunita was arrested on 27 November 2006 and was later bailed to attend Court.

## POLICE INTEREST IN SUNITA

18. Police had been interested in Sunita as early as March 2006. However, their investigations were deferred so that FDB could complete its internal investigation first<sup>iii</sup>.
19. Vide a letter dated 25 May 2006, FDB would write to advice of its decision to terminate Sunita. The letter goes on to state as follows:

*This letter also serves as the Bank's official report to the Police of the involvement of the said officers in what seems to be a scheme to fraudulently obtain monies from Bank Customers under false pretenses.*

20. Attached to the said letter were copies of FDB investigation report plus other documents including a summary of allegations, Sunita's response dated 26 March 2006, and a Special Investigation Report dated 26 April 2006 by the FDB's Internal Audit Department.

## STOP DEPARTURE ORDER/WATCHLIST

21. In 2013, Sunita's lawyers wrote to NZI seeking confirmation as to whose "directive" NZI had acted in refusing her entry into New Zealand. NZI responded vide a letter dated 05 November 2013 as follows<sup>iv</sup>.

*I refer to your request for personal information dated 15 October 2013.*

*I attach copies of the following information which is covered by your request:*

*-Deleted client alert dated 23.09.2006*

*-AMS notes*

*Certain information is being withheld in reliance on section 27(1)(b)(i) Privacy Act 1993.....*

22. **DW3** is the Acting Immigration Manager, Western. In 2011 or 2012, he retrieved the relevant *Shift Supervisor Report* for the solicitors at the Attorney-General's office. According to the Report, Sunita's name was already on the Watchlist before she left Fiji. However, the system failed to trigger her details when she checked through immigration on her way to New Zealand.
23. **DW3** did not produce the Shift Supervisor Report. These were destroyed after information therein was provided to the A-G's office.
24. **DW3** said the supervisor had received information from Ba Police station that Sunita would depart on 23 September 2006<sup>v</sup>. The supervisor then informed Ba Police Station that she had already left on FJ 411. A Police Officer then requested the Supervisor to see if Sunita could be returned to Fiji as she was wanted by Police. Acting on that, the Supervisor then advised Air Pacific to liaise with NZI. He said Immigration Fiji gave no direction to NZI to have Sunita returned to Fiji.
25. **DW3** said that the Department of Immigration (Fiji) ("**DoI**") would act on any directive from the Court, FIRCA, FNPF, PSC, the Police, and even the i-taukei Affairs Board.
26. **DW1** said he was not aware of a Stop Departure Order against Sunita. However, he said a suspect who is a flight risk can be stopped from leaving the country by the DoI upon a request from the Director of CID<sup>vi</sup> - with or without a Court Order.

27. DW2 said the same in his evidence. In cross-examination, DW2 refuted that he was disciplined pursuant to any complaint of Sunita, nor was he ever given a warning letter<sup>vii</sup>.

## DEFAMATION

28. Sunita claims she has been seriously injured in her normal character and reputation and has been brought into public scandal, odium and contempt. She has suffered person distress as a result. At paragraph 13 of her Statement of Claim, Sunita sets out the following particulars of defamation that she alleges:
- (i) the plaintiff was under investigation for alleged misappropriation of funds
  - (ii) the plaintiff was suspected of having stolen monies from Fiji Development Bank.
  - (iii) the plaintiff was a convicted criminal and as such was not allowed to leave the country.
29. She then pleads that the natural and ordinary meaning of the above were understood to mean, and by way of innuendo, meant, and were understood to mean that:-
- (i) she was a thief and crook
  - (ii) she had stolen monies whilst in employment with Fiji Development Bank
  - (iii) she was a dishonest person and not a law abiding citizen
  - (iv) she was guilty of abuse of office
  - (v) she was deceitful and dishonest and unworthy of respect.
30. There is public interest in ensuring that some privilege is accorded to police officers. Otherwise, if police officers are to be freely open to a suit for defamation in respect of their investigative work, it would be counter-productive to their execution of criminal investigatory work.
31. In Fiji, under section 12 of the Defamation Act, the following is privilege “**subject to explanation of contradiction**”. In other words, a qualified privilege:

*12. A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any Government Ministry or department, or by or on behalf of the Commissioner of Police.*

32. **Wood v. Chief Constable of the West Midlands Police** [2004] EWCA Civ 1638 is a relevant case cited by the Fiji Court of Appeal in **Attorney General v Yaya** [2009] FJCA 60; ABU0037.2007 (9 April 2009).
33. In **Wood**, a police officer wrote to three persons in the insurance industry telling them that a person had been arrested for stealing motor vehicles, that he was awaiting trial and that he was involved in criminal activities under the guise of a legitimate business. Eventually the suspect was acquitted at his trial. He issued defamation proceedings against the police officer. He succeeded. On appeal, on a consideration of the defence of qualified privilege, the court held that:

*"The duty imposed on the police, as a public body, was that the police ought not generally to disclose information which came into their possession relating to a member of the public, being information not generally available and potentially damaging to that member of the public, except for the purpose of and to the extent necessary for the performance of their public duty. The principle rested on a fundamental rule of good public administration."*

## **BREACH OF CONSTITUTIONAL RIGHT**

34. Sunita also claims damages for breach of her constitutional rights. However, her statement of claim contains no reference to any specific provision of the Constitution. She merely pleads that the DoI and the Fiji Police Force acted in a high handed manner in absolute disregard to her constitutional and human rights.
35. The 1997 constitution is the one applicable to her case since it was in force at the time frame in question in this case.
36. The Fiji Court of Appeal, in **Yaya** (supra) reviewed some relevant cases dealing with the right to privacy<sup>viii</sup> which, under the 1997 constitution, was protected under section 37. The Court observed as follows:

[29] *In considering what is private, and what is not, this court adopts these principles. Private information which is protected by section 37 of the Constitution is information in respect of which there is a reasonable expectation of privacy. The purposive approach to interpreting this right involves an inquiry into whether there has been an intrusion into the private affairs of an individual. There is no exemption for information obtained by public bodies such as the police. Where the police, in the course of investigations, obtain information which the subject reasonably expects will be kept private, there is a duty not to disclose that information to the public unless it is for a purpose which is justifiable in a democratic society.*

[30] *To turn therefore to the facts in issue in this appeal, the information that the Respondent was a suspect in a violent robbery was information which any reasonable person would expect would not be disclosed to the public. The duty not to disclose goes beyond the good public administration duty. It is a duty to respect the privacy of the suspect until and unless there is a legitimate public interest in disclosing.*

## NEGLIGENCE

37. Sunita's case is held together by the presumption that, whatever directive was given to NZI, contained a reference to a Court Order. She alleges that the Police was negligent in informing DoI that there was a Court Order in relation to some criminal charges when in fact there was never such an Order, let alone, was she then under any criminal investigation, and, that DoI was negligent in conveying that to NZI without first verifying its truth<sup>ix</sup>.
38. DW3 said that DoI did not send any directive to New Zealand. Rather, DoI only informed Air Pacific of the situation. It was Air Pacific which informed NZI<sup>x</sup>. I have some misgivings about whether NZI would act on a "directive" from a private commercial airline such as Air Pacific, let alone, whether a private commercial airline would take it upon itself to convey such a directive.
39. I prefer Sunita's evidence.
40. However, what I am not prepared to accept is that the "directive" from DoI to NZI contained a reference to a Court Order. I prefer the evidence of DW1, DW2 and DW3 that in 2006, the Police was able to cause DoI to stop a suspect who is a flight



risk from departing Fiji, or, to put such a suspect on the watch list, in both instances, without a Court Order.

41. From where I sit, the Police had reasonable grounds to suspect Sunita, given her termination, and given the extent of police investigation already carried out up to that point in time when she travelled to New Zealand. In the circumstances, it is reasonable that the Police would want to interview her to wrap up its investigations and lay charges. That is exactly what happened.
42. The real issue is whether or not the Police had power to issue a directive that Sunita be brought back to Fiji for this purpose. This raises a freedom of movement issue, and whether or not such a directive, which would be based on police duties to apprehend a suspect, was justifiable in the circumstances to curtail her private-right to freedom of movement. In other words, is there is a valid legal basis for the Police to cause DoI to stop a suspect from departing Fiji. This was never argued before me. There is no submission before me as to the correctness or otherwise of the Police's actions in that regard.
43. Nonetheless, it appears to me that the police duty to **"detect and bring offenders to justice"** and /or the duty **"to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists"**, may justify police action in the circumstances of this case (section 17(3) of the Police Act). As I have said, this duty is ultimately supported by a public interest in seeing that Police be bestowed with such powers.
44. Was that negligent? I think it would be if the police did not have reasonable grounds to suspect that Sunita had committed a crime. In the circumstance of this case, the police had reasonable grounds.
45. Section 17(3) of the Police Act, would justify police action in stopping a suspect from fleeing the country, and apprehending him, if sufficient grounds exist<sup>xi</sup>. I see no reason why the same could not be extended to Police seeking co-operation from DoI and NZI in pursuit of that end, subject of course to proportionality.
46. In **Attorney General v Yaya** [2009] FJCA 60; ABU0037.2007 (9 April 2009), the Fiji Court of Appeal appeared to have no issue with the suggestion that section 17(3)

would authorize the Commissioner of Police to publish in the local TV the photograph and name of a suspect, subject of course to the proportionality issue which was raised in that breach of privacy claim:

[33] *We accept that there was evidence before the trial judge that Commissioner Hughes was purporting to exercise his powers under this section [section 17(3)], when he authorized the publication of the Respondent's name as a wanted suspect.*

[34] *However it is not enough, for the purposes of section 37(2) of the Constitution to say that you have a legitimate aim in publishing. It must be shown that the publication was proportionate to that aim. In simple terms, was it necessary, was it justifiable, was it a proportionate step to publish in this manner? The test of proportionality must be narrowly construed once an intrusion into privacy has been established.*

47. The FCA went on to comment that the Police is able to publish the identity and information about a suspect, where it is in the public interest to do so, for example, in the public interest in the apprehension of offenders and in the public interest in the prevention of crime, provided the publication is acceptable in a free and democratic society and is proportionate to the public interest aim:

[45] *We do not dispute the ability of the police to publish information, even about the identity of a suspect, where it is in the public interest to do so. The apprehension of offenders and the prevention of crime are two legitimate public interest aims. However, in each such case, the publication must be shown to be acceptable in a free and democratic society, and to be proportionate to the public interest aim.*

48. This must involve a balancing exercise of all the interests at stake:

[46] *In each case, there must be a balancing of the means with the end, and necessarily with the rights and freedoms of others. Is it acceptable to limit due process rights to enforce the rights of many to life without crime? What of the rights of suspects in custody? What is proportionate to a legitimate aim requires a careful balancing of the values and ideologies in a society. In the context of section 37 of the Constitution, it requires an assessment of what inroads can be made, in the public interest, into the rights of an individual to a private life. And this assessment must be done by judges in a world of regular covert surveillance, intrusive computer technology and greater legislative police powers.*

[47] *In this case, we find that the action of the Police Commissioner to be a disproportionate and unreasonable intrusion into the rights of privacy of the*

*Respondent. Had the Police Commissioner explained why the intrusion was the only reasonable step in the circumstances, and that he had attempted other means of locating the Respondent without intruding into his rights to privacy, his acts may have been held to be a proportionate step taken to further the legitimate aim of protecting the public from crime. He did not so explain and we find that the learned trial judge did not err in coming to the conclusion he did.*

49. In **Bachu v Commissioner of Police** [2004] FJLawRp 62; [2004] FLR 528 (11 November 2004) the Fiji Court of Appeal said as follows:

*As will be seen from the High Court's decision the principal ground for upholding the Respondents' application was that the court applied **Hill v Chief Constable of West Yorkshire** [1989]AC 53; [1988] 2All ER 238 which is settled authority for the proposition that while there is a general duty imposed on the police to enforce the criminal law an action for damages is not an appropriate vehicle for investigating the efficiency of the police force. Furthermore, as a matter of public policy the police are ordinarily immune from actions for negligence in respect of their activities in the investigation and suppression of crime.*

50. The Court went on to qualify the above as follows:

*That is not to say that in exceptional circumstances a police officer may not be held by reason of a sufficient relationship of proximity to owe the complainant a duty of care (**Knightley v Johns** [1982] 1 WLR 349; [1982] 1 All ER 851 and **Costello v Chief Constable of the Northumbria Police** [1999] 1 All ER 550; (1999) 11 Admin LR 81) however the High Court found that on the facts of the present case as emerging and as emerged from the affidavit evidence the Appellants had not established such a relationship. We agree.*

## **CONCLUSION**

51. Was the DoI negligent in issuing that directive to NZI? I think not. I am of the view that the DoI was entitled to rely on any directive from the Fiji Police Force.
52. Was the Fiji Police Force negligent in issuing that directive to DoI? In the circumstances of this case, I think not. The police had reasonable and sufficient grounds to want to apprehend Sunita.

53. I accept that the circumstances of this case may have caused some embarrassment to Sunita. However, Sunita was a suspect in a criminal investigation.
54. At the time she travelled out to New Zealand, investigation into her case were well in its advanced stages. She was on the verge of being formally charged. She had already been terminated from her job at the FDB because of conduct which precipitated the complaint(s) to the Police.
55. I dismiss the claim. Costs to the defendants which I lump together and summarily assess at \$800-00 (eight hundred dollars only).



Anare Tuilevuka

**JUDGE**

28 June 2019

<sup>i</sup> (as per FDB letter of Toganivalu dated 07 March 2006, Tab 43 defendants' bundle).

<sup>ii</sup> See page 53 of Defendant's Bundle of Documents – Memorandum dated 29 September 2006 by Crime Officer Ba to ACP (Crime).

<sup>iii</sup> **DW1** referred to a letter dated 07 March 2006 from a Mr. Deve Toganivalu, the General Manager, FDB, dated 07 March 2006 (page 43 of defendant's bundle). The said letter was addressed to the Commanding Officer, Ba Police Station. In the very first line of this letter, Mr. Toganivalu acknowledges:

*"...receipt of the Search Warrant dated 21<sup>st</sup> March 2006 that was served on our Senior Officer at our Ba office on that same day, by your officer, DC 2043 Arvind Kumar".*

*We also thank you for the opportunity to discuss the subject matter with the Deputy Commander, Keshwan, at the station in Ba on Friday 24<sup>th</sup> March 2006.*

*...all of the complainants mentioned in the warrant have raised their concerns directly with the Bank in (sic) different occasions over a period of time, mostly during the second half of last year. The difficulty each one had was the lack of hard-physical proof to support their allegations of fraud against two of our officers in Ba.*

*But because of the steady number of complaints that we received recently about the same officers, the Bank has decided to suspend the two Bank Officers temporarily from their employment so that we can carry out an internal investigation of the whole affair.....*

*...it would serve our purposes well if you allow the Bank to complete its internal investigations first and provide you with a report of the outcome later. ....We envisage completing our investigations within the next two weeks and should be able to hand you our report by no later than the end of this month.*

<sup>iv</sup> See Plaintiff's Supplementary List of Documents.

<sup>v</sup> A letter dated 15 August 2006 written by one Parmanand Sharma addressed to **DW2** was tendered. The said letter said as follows:

This is to advise that I have received information from a very reliable source that Sunita Devi Singh will be flying out of the country very shortly.

Since the matter is before the police, I thought to advise you to take necessary action or whatever is prudent to your department.

**DW2** recalled in chief writing the following memorandum dated 21 August 2006 to the DCO/ Western requesting Stop Departure Order:

**RE:STOP DEPARTURE OF SUNITA DEVI SINGH d/o KUAR SINGH (D.O.B 03/09/1979)**

The above is a suspect in a case of alleged conversion and information received that she is making arrangements for migration to overseas.

May a stop departure be made in respect of the above subject, please.

Ba PEP 29/06 is relevant.

<sup>vi</sup> **DW3** said usually, the Investigating Officer will inform the Crime Officer who will then request the Divisional Crime Officers who will then request the Director of CID who will then contact the Immigration Department. The Director of CID has the discretion to put a "Stop Departure Order".

<sup>vii</sup> In cross-examination, **DW2** was referred to a letter dated 20 June 2008 by Michael Nand, Superintendent of Police. By that letter, Nand was responding to Sunita that an inquiry was conducted into her complaint against Inspector Arun and a Disciplinary Tribunal was conducted following which Inspector Arun was found guilty of committing a disciplinary offence and was given a warning letter from the Commissioner of Police. **DW2** however maintained that he never ever appeared before a disciplinary tribunal. No such warning letter was tendered in Court.

<sup>viii</sup> The Fiji court of Appeal reviewed the following cases:

[27] In **Hosking and Hosking v. Simon Runtig & Anor** [2004] NZCA 34 a decision of the New Zealand Court of Appeal, a photograph of 18 month old babies was taken for publication in the New Idea magazine. The parent of the babies sought to restrain publication. The issue was the privacy rights of the children. In New Zealand there is a Bill of Rights Act. It is not part of any written constitution. The claim was for breach of a tort of privacy. It was accepted that because the photographs were taken in a public place, there could be no claim for breach of the common law tort of confidence. The New Zealand Bill of Rights Act includes no specific guarantee of a right to privacy. The court of first instance held that there was no separate privacy tort in New Zealand. The Court of Appeal held (per Gault and Blanchard JJ) that the scope of such a tort "should be left to incremental development by future courts", but that there were two fundamental requirements for a successful claim for interference with privacy. One was the existence of facts in respect of which there is a reasonable expectation of privacy and the second is that the publicity given to those private facts would be considered highly offensive to an objective reasonable person (at p32). A defence to the tort is that the publication is justified "by a legitimate public concern in the information."

[28] These principles are very similar to those of the English courts, and in particular to the principles adopted by the House of Lords in Campbell, and to the decision, for example of **Douglas and Other v. Hello Ltd** [2001] QB 967. In this latter decision, the law of privacy post-human rights jurisprudence, is no longer dependent on the existence of a confidential relationship. All it requires is evidence of the loss of personal autonomy as the result of a breach of the reasonable expectation of privacy.

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<sup>ix</sup> At paragraph 11, Sunita pleads the particulars of negligence she alleges against the Director of Immigration as well as the Fiji Police Force. Against the Director of Immigration, the particulars are that he was negligent in, I quote:

- (i) "sending a directive to NZI without first having sighted the purported Court Order",
- (ii) "giving the impression to NZI that she is a criminal thereby putting a hindrance to her obtaining further visas to New Zealand"; and
- (iii) "having her unceremoniously deported to Fiji without any due course and/or any course at all".

Against the Fiji Police Force, the particulars are that the Force was negligent in, and I quote:

- (i) informing the DoI that they had a Court Order restraining her from leaving Fiji when in fact no Court Order was ever granted.
- (ii) informing the DoI that the court Order was in regards to criminal charges when at the time, there were no charges laid.
- (iii) giving the impression to DoI that she was a fugitive and should be deported from New Zealand.

<sup>x</sup> The Shift Supervisor Report which DW3 was speaking from was not produced in Court.

<sup>xi</sup> Section 17(3) provides *inter alia* that every police officer has a duty to detect and bring offenders to justice:

*"It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists."*