**Beysne v Republic of Romania**

**Division:** High Court of Tanzania at Dar-Es-Salaam

**Date of Ruling:** 9 January 1998

**Case Number:** 88/94

**Before:** Chipeta J

**Sourced by:** A Bade

**Summarised by:** H K Mutai

*[1] State and diplomatic immunity – International law – Foreign sovereign state – Immunity from suit –*

*Agreement to lease part of diplomatic premises to Plaintiffs – Plaintiffs evicted from premises – Action to*

*recover damages – Whether Tanzania applies absolute or restrictive theory of diplomatic immunity –*

*Whether the Defendants could claim immunity – Articles 22, 32(3), and 39(2) – Vienna Convention on*

*Diplomatic Relations 1961.*

**RULING**

**CHIPETA J:** The Plaintiffs in this suit, namely, Surafel Beyene, said to be an Ethiopian national, and

Aduliu Zanzibar Ltd, have filed this suit against the Republic of Romania and Marin Ghetu, claiming damages arising from a tenancy agreement in respect of the property of the Republic of Romania situated on plot Number 11, Ocean Road, in Dar-es-Salaam.

The Defendants have pleaded state and diplomatic immunity in the suit. The Plaintiffs, through their learned advocate, Mr EH *Mbuya*, have resisted the plea, and Mr *Mbuya* has made submissions to the effect that on the facts and circumstances of the case, the plea of state and diplomatic immunity is not available to the Defendants. The Defendants filed no submissions but filed a copy of a *note verbale* written by the First Defendant to the Ministry of Foreign Affairs and International Co-operation of

Tanzania (hereinafter referred to as “the Ministry”). The copy of the *note verbale* was received by the

Court in this suit.

After receiving Mr *Mbuya*’s submissions, this Court (Kyando J) was of the view that the Attorney-General should be heard in the matter as an *amicus curiae.* The Honourable the Attorney-General has filed written submissions on the matter as invited by this Court to do.

Before I proceed to deal with those submissions and arrive at a decision of this Court, I think it is necessary to give a factual background of the matter, albeit briefly. From the contents of the plaint and what Mr *Mbuya* told the Court, it has come to light that on 10 June 1989, the First Defendant concluded and signed a lease agreement with the Second Plaintiff whose managing director was the First Plaintiff.

By that lease agreement, the First Defendant demised a part of the property on plot Number 11, Ocean

Road, described as Plot Number 5, for a period of four years and eleven months at a monthly rent of

US$.1 400. As per the terms of that lease agreement, the First Plaintiff went into occupation of the demised premises and used it as his residence as managing director of the Second Plaintiff.

It was an express term of the lease agreement on that failure by the Plaintiffs to pay rent 14 days next after the rent was due, the Defendants were empowered at any time thereafter to re-enter into and upon the demised premises whereupon the term of the lease would cease and determine. Apparently the

Plaintiffs breached that term of the lease agreement, and so, the Second Defendant, who was by then the

*Charge D’Affaires* of the First Defendant, and acting on the instructions of the First Defendant, evicted the Plaintiffs from the demised premises and, it is alleged in the plaint, removed the Plaintiffs’ properties worth US$ 100 000. The eviction was apparently done in the absence of the Plaintiffs. The Plaintiffs took offence to that action by the Defendants and so reported the matter to the police, but because of the First

Defendant’s diplomatic or state immunity, no criminal proceedings were instituted against the

Defendants.

Mr *Mbuya* further informed the Court that in 1992, the First Defendant filed civil application number

489 of 1992 in Dar-es-Salaam Regional Housing Tribunal seeking, among other remedies, the eviction of the First Plaintiff from the demised premises. In those proceedings, the First Plaintiff counterclaimed special and general damages for forcible eviction and loss of his furniture and personal effects. That application, however, was withdrawn at the instance of the First Defendant.

It is also said that after the present suit was filed, the First Defendant filed application number 102 of

1995 in Dar-es-Salaam Regional Housing Tribunal seeking the same remedies as those sought in the application which had been withdrawn.

At the time this suit was filed, the second Defendant was no longer the *Charge D’Affaires* of the

Republic of Romania in Tanzania and had in fact left Tanzania.

It is also relevant to note that the suit premises are within the premises of the *Charge D’Affaires* of the

Republic of Romania in Tanzania.

On learning of the existence of the suit, the First Defendant sent a *note varbale* to the Ministry, as pointed out above, protesting against the institution of this suit against the two Defendants and claimed state and diplomatic immunity in respect of this suit. The First Defendant accordingly requested the Ministry to inform this Court to abstain from dealing with this matter on that ground. In response to the *note verbale,* the Ministry wrote two letters to this Court, reference numbers FAC/D.30/67 of 12 April 1996 and FAC/D.30/67 of 15 April 1996, in which the Ministry informed the Court that the Defendants were not amenable to the jurisdiction of this Court by reason of state and diplomatic immunity and that this Court should accordingly desist from further dealing with the case.

From the very outset, I would like to express my sincere gratitude to Mr EH *Mbuya*, learned counsel for the Plaintiffs, and the Honourable the Attorney-General for their lucid and powerful submissions which have been of great assistance to the Court in this matter.

Mr *Mbuya* objected to the plea of state and diplomatic immunity of the Defendants on three main grounds. In the first place, he submitted that the Defendants’ actions in initiating proceedings in courts or tribunals of this country in the two applications over the same subject matter meant that the Defendants are now precluded from raising the plea of state and diplomatic immunity in this case in terms of article

32(3) of the Vienna Convention on Diplomatic Relations 1961 (hereinafter referred to as “the

Convention”).

Secondly, Mr *Mbuya* submitted that as far as the Second Defendant was concerned, the plea of diplomatic immunity was not available to him because at the time this suit was filed, the Second Defendant was no longer a diplomatic agent in Tanzania as he had left Tanzania, and was no longer an employee of the Ministry of External Affairs of the Republic of Romania.

Thirdly, Mr *Mbuya* submitted that the plea of state and diplomatic immunity was not available to the two Defendants because the cause of action and subject matter of the suit arose out of, and related to, a landlord and tenant relationship, which was a purely commercial transaction, and so, under the theory or doctrine of restrictive diplomatic immunity, the Defendants are amenable to the jurisdiction of this Court under international law.

With regard to Mr *Mbuya* first ground of objection, the Honourable the Attorney-General submitted that as this suit is different from the applications referred to, and that as this Court, constituted by the Constitution of this country, is different from these other tribunals, no inference should be drawn from the acts of the Defendants in the other courts or tribunals; and that article 32(3) of the Convention cannot be invoked by the Plaintiffs because these instant proceedings were not initiated by the Defendants but were initiated by the Plaintiffs themselves.

With regard to the second point that the plea of diplomatic immunity is not available to the Second

Defendant because he had ceased to be a diplomatic agent in Tanzania and had left the country, the

Honourable Attorney-General submitted that in view of the *note verbale* of the First Defendant, the two letters of the Ministry to this Court, and article 39(1) and (2) of the Convention, and further that as the

Second Defendant had at all material times been a diplomatic agent of the First Defendant, the plea of diplomatic immunity is available to the Second Defendant in the absence of a waiver from the First

Defendant.

Turning to the third ground, the Honourable the Attorney-General submitted, in effect, that in view of the fact that there was no evidence let alone a suggestion, that Tanzania, which is a common law orientated country, has ever adopted the restrictive diplomatic theory, and in view of the two letters of the Ministry to this Court, it was clear that Tanzania still adheres to the absolute doctrine of diplomatic immunity.

On the basis of those submissions, it was the opinion of the Honourable the Attorney-General that this suit be dismissed with costs to the Defendants.

Before I deal with the specifics, let me briefly discuss principles of international law, as far as they can be identified, on the questions raised in this case, particularly with regard to the absolute and restrictive theories of doctrines of diplomatic immunity.

From the authorities made available to me, there are, indeed, two schools of thought on the question of state and diplomatic immunity from civil suits, namely, the school of thought that advocates for the absolute theory of state and diplomatic immunity, and that which advocates for the restrictive state and diplomatic immunity in such cases.

The doctrine of absolute state and diplomatic immunity theory is, I think, to be found in the case of

*The Charkieh* [1873] LR 4 A and E 59 in which Sir Robert Phillimore said:

“The object of international law … is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they be dilatory and the issue distant and uncertain, for the ordinary courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state”.

Lord Atkin stated the absolute theory of state and diplomatic immunity in the case of *The Cristina* [1938]

AC 485 at 490, in the following terms:

“[Municipal courts] 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”.

The restrictive theory of state and diplomatic immunity seeks to differentiate between acts of the sovereign or head of state done in a public capacity *(acta jure* *imperii*) and those acts done by the sovereign or head of state or his department or other authority for commercial, financial, or professional purposes (*acta jure gestionis*). The restrictive theory grants immunity in the former and withholds it in the case of the latter. The restrictive immunity theory of state and diplomatic immunity as well as the purpose thereof were expressed in the case of *Victory Trasport v Comisaria General* 336 Federal Republic (2a) 354, in which the United States Court of Appeals said:

“The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts”.

Lord Denning MR stated the restrictive diplomatic immunity theory in the case of *Trendtex Trading*

*Corporation v Central Bank of Nigeria* [1977] QB 529, in the following terms at 558:

“If a government department goes into the market places of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place.

The seller is not concerned with the purpose to which the purchasers intends to put the goods”.

It appears, then, that the absolute diplomatic immunity theory emphasizes safeguarding international comity or promotion of harmonious diplomatic relations between the sending and receiving states, sometimes to the detriment or disadvantage of interests of individuals, while the restrictive diplomatic immunity theory puts to the fore interests of individuals in commercial transactions as far as possible.

It is also clear from the authorities that in applying the restrictive diplomatic immunity theory, the vexing question for the courts has often been drawing the demarcation line between public acts and commercial acts. It is likewise evident that each case has largely been decided on the basis of its own peculiar facts and circumstances and, in some cases, the decisions have been influenced by the stand taken by the government of the receiving state.

Having made the foregoing observations, I now proceed to deal with the points raised in the submissions and come to my own findings and conclusions thereon. I propose to deal with them in the order in which they were dealt with by Mr *Mbuya* and the Honourable the Attorney-General.

With regard to the first point, I think that it should be realized that this Court, constituted by the

Constitution, is different from, and superior to, the tribunals in the other two matters; and the suit before this Court is an independent suit. So, any acts done by the Defendants in other proceedings before other tribunals are, in my view, irrelevant for purposes of this suit. That being the position, no inference ought to be drawn from any other proceeding for purposes of this suit.

As for articles 32(3) of the Convention, it must be borne in mind that in this case, it was the Plaintiffs who initiated these proceedings and not the Defendants. Article 32(3) of the Convention provides as follows:

“32 (3) *The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction* under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with principal claim”. (Emphasis supplied.)

In the instant case, therefore, the Plaintiffs cannot call in aid the provisions of article 32(3) of the convention because the Defendants did not initiate these proceedings.

For the above reasons, the first ground of objection by the Plaintiffs must accordingly fail.

The second ground relates to the Second Defendant alone. It was argued on behalf of the Plaintiffs that because the Second Defendant was no longer a diplomatic agent of the Republic of Romania in Tanzania and is no longer in this country, and because, it was alleged, the Second Defendant is no longer an employee of the Ministry of External Affairs of the Republic of Romania, the plea of diplomatic immunity is not available to him.

From the contents of paragraph 5 of the plaint and the First Defendant’s *note verbale* to the Ministry, it is quite clear that at all material times, as far as this suit is concerned, the Second Defendant was a diplomat of the Republic of Romania accredited to Tanzania and, therefore, *prima facie*, enjoyed diplomatic immunity from civil, criminal, and administrative jurisdiction in Tanzania by virtue of articles 31 and 32 of the Convention, which have the force of law in Tanzania by virtue of Act Number 5 of 1986 of Tanzania. It is equally clear from the plaint insofar as the transactions that gave rise to this suit are concerned, that the Second Defendant, at all material times, was acting on the instructions of his principal, that is, the First Defendant, and not in his private capacity.

That being the position, the answer to this question, it seems to me, lies in article 39(2) of the

Convention which reads:

“2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. *However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist*”. (Emphasis supplied).

*Ipso facto*, the mere absence of the Second Defendant from Tanzania did not terminate his diplomatic immunity in this case because he performed the acts complained of in this suit in the exercise of his functions as a member of the First Defendant’s mission and on behalf of his state. That immunity could only cease if the Republic of Romania had waived it, and such waiver must be specific. (See Charles

Lewis on *State and Diplomatic Immunity* 1980 at 107).

In the instant case, there has been no such waiver. On the contrary, in the *note verbale* referred to above, the Republic of Romania has categorically stated that it has not and will not waive the Second Defendant’s diplomatic immunity in this case. On these grounds, the second ground of objection also fails.

Finally, I turn to the third ground of objection. It has been submitted on behalf of the Plaintiffs that since this was a purely commercial transaction, on the basis of the restrictive theory of state and diplomatic immunity, that plea is not available to the Defendants.

In certain jurisdictions, such as the United States, where courts jealously guard the principles of judicial independence and the rule of law, courts pay great heed to the stance taken by the government of the receiving state. As observed Charles Lewis in his book *State and Diplomatic Immunity* 1980 at page

16: “It appears in fact that the United States courts hardly exercise their own discretion since (the ‘Tate Letter’) … but merely accept the view of the State Department (although the United State statute transfers the responsibility to the courts)”.

This statement is inferentially confirmed by the *Victory Transport* case (*supra*) in which the United

States Court of Appeals observed:

“We do not think that the restrictive theory adopted by the State Department requires sacrificing the interests of private litigants to the international comity in other than these limited categories. *Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court.*

*Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement*”*.* (Emphasis supplied.)

I take the view that where the government of the receiving state takes no stance in the matter or has chosen to be silent in the matter, municipal courts should be free to exercise their judicial discretion on the basis of the authorities and the facts and circumstances of each case. But where the government of the receiving state has taken a definite stand, that is an indication of whether such receiving state adheres to the absolute or restrictive theory of state and diplomatic immunity, and in such a case, the courts would do well to defer to such a prouncement because the government could have more facts than the courts as to the delicacy of the matter and the competing claims.

In the instant case, the Ministry has stated in no uncertain terms that state and diplomatic immunity is available to the Defendants in this case. With regard to the absolute and restrictive theory of state and diplomatic immunity, I tend to agree with the submissions of Honourable the Attorney-General that from the tone of the two letters of the Ministry to this Court, Tanzania, which is a common law orientated country, is still adhering to the absolute theory of state and diplomatic immunity which, it would appear, is the cornerstone of the Convention.

Apart from the stance of the Ministry on this matter, I have taken into account the facts and circumstances of this case. Paragraph 6 of the plaint reads in part as follows:

“6 That the property on Plot Number 11, Ocean Road, Dar-es-Salaam which is owned by the Republic of

Romania is partly used as Chancery for the said Republic as well as a residence of its *Charge D’ Affaires* ..”.

In other words, this suit touches upon part of the premises of the Defendants’ Mission in Tanzania.

Article 22 of the Convention, which has the force of law in Tanzania by the provisions of the Diplomatic and Consular Immunities and Privileges Act, 1986, provides as follows:

“Article 22.

1 The premises of the mission shall be inviolable. The agent of the receiving state may not enter them, except with the consent of the head of the mission.

2 The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity”.

For these reasons, I am of the considered view that the third ground of objection must also fail.

In the upshot, I hereby uphold the Defendants’ plea and hold that state and diplomatic immunity are available to the two Defendants in this case. This suit is accordingly dismissed.

It was urged by the Honourable the Attorney-General that I should award costs to the Defendants.

With respect, I have not felt comfortable about making such an order in view of the fact that the

Defendants did not, as such, enter an appearance in this Court. I accordingly order that each party shall bear its/his own costs. Suit dismissed accordingly.

For the Applicant:

*Information not available*

For the Respondent:

*Information not available*