

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBM 01 of 2018

BETWEEN : **PAULA MALO RADRODRO** unemployed of Lot 45 VM
Pillay Road, Lautoka.

APPLICANT

AND : **FIJI TIMES LIMITED**, Lautoka

1ST RESPONDENT

AND : **SUN FIJI NEWS LTD**, Lautoka

2ND RESPONDENT

AND : **ATTORNEY-GENERAL'S OFFICE**

INTERESTED PARTY

Appearances: Applicant in Person
Mr. Ronal Singh for the first Respondent
Ms Wakowako on instructions of Patel Sharma Lawyers for the second
Respondent
Ms. Faktaufon for the Interested Party
Hearing: 30 May 2019
Date of Ruling: 25 July 2019

R U L I N G

INTRODUCTION

1. Before me are two striking out applications filed under Order 18 Rule 18 of the High Court Rules 1988 (see further below). The applications are filed by two local daily newspapers namely the Fiji Sun and the Fiji Times. They seek to strike out a constitutional Redress application filed by Mr. Paula Malo Radrodro ("**Radrodro**") on 16 January 2018.

2. Radrodro alleges that his constitutional rights to freedom of speech, expression and publication were breached when the two newspapers refused in December 2017 to publish an advertisement that he had paid for.
3. Radrodro was in the process of patenting a purported medical discovery of his. The Fiji Intellectual Property Office (FIPO) had written him a letter directing him to proceed with the advertisement in a local daily.
4. Radrodro also alleges that his right to economic participation was also breached.
5. There is a fundamental basic question to be asked in this case. Does a privately owned newspaper retain an editorial prerogative to refuse to publish any advertisement? Can this Court compel it to publish an advertisement?

BACKGROUND

6. Radrodro claims to have discovered a method of curing cancer by blood transfusion. On 25 July 2016, he lodged at FIPO an application to patent that discovery.
7. In January 2017, the Office of the Administrator General forwarded Radrodro's patent application to IP Australia ("IPA"). IPA is the office that administers patents in Australia. Upon receiving the documents, IPA then conducted a search. Based on the search results, IPA concluded that Radrodro's purported discovery was a novelty and, as such, it was patentable. This view was communicated to FIPO.
8. In a letter dated 19 June 2017, FIPO advised Radrodro to proceed with advertising in a local newspaper and gazette.

PATENT NO : 1233
OFFICIAL FILING DATE : 25/07/16
DATE : 19/06/2017

*Paula Malo Radrodro
Lot 45 VM Pillay Road
Rifle Range
Lautoka*

Dear Sir/Madam

Re: Invention Titled – "CANCER TREATMENT" by Paula Malo Radrodro

With reference to the above Patent Application lodged with our office on the 25th day of July 2016.

You can now proceed with the advertisements and advertise twice in the Gazette and twice in any local Newspaper.

In your notice, the following details are to be included:

[requirements set out in a list]

Please contact the Patents and Trade Marks Office should you need further clarification.

Yours faithfully,

.....
SANJAY RAM (Mr.)
For ACTG SOLICITOR GENERAL

9. On 14 December 2017, Radrodro went to Fiji Times Office in Lautoka. There, he completed the *Standard Classified Advertisement Order Form ("Form")*, and submitted it together with the requisite fee of \$29.20. Below is the wording which Radrodro wrote on the Form for his advertisement:

Paulo Malo Radrodro of Lautoka has been granted patent No. 1233 for Cancer Treatment through blood transfusion. Notice of Opposition to Registrar of Patents and Trademarks of Fiji within two months of this Notice.

10. Fiji Times had some misgivings. It sought and received the following legal advice:

...[that] the advertisement was misleading, appeared to be contrary to law, and was in breach of the General Code of Practice for Advertisements.

11. On 18 December 2017, Fiji Times advised Radrodro that his advertisements would not be published. Ten days later, on 28 December 2017, Radrodro went to Fiji Sun's Lautoka Office. There, he lodged a similar application. This time, the wording which he wrote was slightly different:

Patent number 1322 titled Cancer Treatment through blood transfusion is held by Paula Malo Radrodro of Lot 45 V.M Pillay Road Lautoka. Opposition to be filed at Registrar of Patents Office 8009836.

12. Fiji Sun too had some misgivings. Upon taking note of the nature of Radrodro's advertisement and its content, Fiji Sun decided to request additional

documentation from Radrodro to verify the truth in the proposed advertisement. Fiji Sun made this request because it felt that:

- (i) it had a duty “not to publish any material which might be inaccurate, misleading or distorted by wrong or improper emphasis or any other factor”- and
 - (ii) that if it were to publish Radrodro’s advertisement without verification, it would be compromising the above duty.
13. Radrodro however did not provide Fiji Sun with any verification. As a result, Fiji Sun simply refused to publish the advertisement. Fiji Sun then informed Radrodro to collect his refund.
14. On 16 January 2018, Radrodro filed in this Court an application for constitutional redress pursuant to section 17 and 32(1), (2) and (3) of the Constitution of the Republic of Fiji (“**2013 Constitution**”) and under Order 110 of the High Court Rules 1988.

THE RIGHTS ALLEGEDLY BREACHED

15. Section 17 of Fiji’s 2013 Constitution makes general provision for freedom of speech, expression and publication. Section 17(1) provides as follows:

Freedom of speech, expression and publication

17. – (1) *Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes –*

- a) *freedom to seek, receive and impart information, knowledge and ideas;*
- b) *freedom of the press, including print, electronic and other media;*
- c) *freedom of imagination and creativity; and*
- d) *academic freedom and freedom of scientific research.*

16. Section 17(3) recognizes that these freedoms can be restricted in order to pursue legitimate objectives such as public health and public safetyⁱ or in the interest of making provisions for the enforcement of media standards and providing for the regulation, registration and conduct of media organizationsⁱⁱ.

17. Section 32(1)(2)(3) provides:

Right to economic participation

32. – (1) *Every person has the right to full and free participation in the economic life of the State, which includes the right to choose their own work, trade, occupation, profession or other means of livelihood.*

- (2) *The State must take reasonable measures within its available resources to achieve the progressive realisation of the rights recognised in subsection (1).*
- (3) *To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights set out in subsection (1).*

APPLICATION TO STRIKE OUT

18. Fiji Sun's application was filed on 28 February 2018. It is supported by an affidavit of Peter Lomas sworn on 27 February 2018. Fiji Times' application was filed on 26 February 2019. It is supported by an affidavit of Christine Lyons sworn on 26 February 2019.
19. The media services provided by Fiji Sun and Fiji Times are regulated under the Media Industry and Development Act 2010 ("**MIDA**"). It is common ground that MIDA imposes upon them a duty to see that all their paid advertisements are accurate. It is also common ground that this duty entails a responsibility to ensure that no advertisement contains material which, either directly or by implication, has potential to deceive or mislead people about any product or service.

Fiji Sun's Case

20. Fiji Sun argues that if it were to publish Radrodro's advertisement without first verifying its accuracy, it would be compromising the MIDA ethical and moral standards. Such advertisements, if not checked, can be mobilized as a tool to exploit the public.
21. Fiji Sun also argues that it only refused to publish Radrodro's advertisement because Radrodro had not complied with its request to furnish it with further information.
22. There is an alternative remedy available to Radrodro under section 53ⁱⁱⁱ of MIDA. This section entitles him to lodge a complaint against the two newspapers to the Media Industry Development Authority ("**Authority**"). His failure to do so renders his constitutional redress application an abuse of process.

Fiji Times' Case

23. Fiji Times' case is based on the following arguments:

- (i) section 18(2) of MIDA makes provision for a *General Code of Practice for Advertisements* (“GCPA”) in Schedule 2 of MIDA, for all media organizations.
- (ii) clauses 2 and 3 of Schedule 2 are relevant.
- (iii) clause 2 stipulates that advertisements must comply with any written laws of Fiji and must be rejected if they do not. Radrodro’s advertisement failed to comply with the Patents Act 1879 and the Patents (Forms) Regulations 1971.
- (iv) clause 3 stipulates that the media is responsible for ensuring that advertisements comply with the spirit as well as the letter of this GCPA and any written laws of Fiji and must be rejected if they do not do so.
- (v) Radrodro’s Constitutional Redress application is an abuse of process because he had an alternative remedy to sue the Fiji Times for breach of contract.

MEDIA INDUSTRY DEVELOPMENT ACT 2010

24. MIDA is designed to ensure responsible behavior and public accountability by *media service* providers. Section 21 provides that all media organizations must conduct their activities in accordance with MIDA and any regulations made under it and in accordance with the media codes^{iv}. Section 22(a) provides that the content of any *media service* must not include material which is against public interest or order^v. Section 18(2) provides that the GCPA in Schedule 2 will govern the general advertising practice for all media organizations^{vi}.

25. Clauses 1, 2, 3, 5, and 12 of the GCPA provide:

1. Principles

Advertising must be legal, decent, honest and truthful.

2 Legality

Advertisements must comply with any written laws of Fiji and must be rejected by media if they do not.

3 Spirit of the Code

Media are responsible for ensuring that advertisements comply with the spirit as well as the letter of this Code and any written laws of Fiji and must be rejected if they do not do so.

5 Deception

Advertisements must not contain material likely to deceive or mislead people about any product or service, directly or by implication, by inclusion, omission, ambiguity, or false or misleading comparison.

12 Trust, superstition and fear

Advertisements shall not abuse the trust of consumers or audiences, or exploit their lack of experience or knowledge or exploit superstitions, or play on fears without justification.

26. I agree that Fiji Sun and Fiji Times have a duty to ensure that their paid advertisements are accurate and not contain material which are likely to deceive or mislead people about any product or service. That duty, I find, is imposed by section 21 as well as clauses 1,2,3 and in particular, clause 5 of GCPA.
27. In addition to all the above, section 22(a) imposes a more robust duty to ensure that the content of any “media service” does not include material which is against the *public interest or order*.
28. Section 2 defines “media service” to include:

...a service which is supplied in any manner by a media organization including print and broadcast media”

29. Clearly, the publication of a print advertisement is a “media service”. Hence, Section 22(a) would appear to impose a public interest ethic. It requires a media organization to apply some *public interest* screening assessment before accepting an advertisement for publication. Obviously, this is to ensure the content of the advertisement does not compromise any public interest^{vii} or order.
30. In **O’Sullivan v Farrer** HCA 61; (1989) 168 CLR 210 (7 December 1989, the High Court of Australia defined public interest thus:

“the expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view’”.

CAN THIS COURT THEN OVERRIDE AN EXERCISE OF EDITORIAL DISCRETION ON THE PART OF A PRIVATE MEDIA ORGANIZATION NOT TO PUBLISH AN ADVERTISEMENT BASED ON A PERCEIVED PUBLIC INTEREST?

31. The starting point is that a private media organization such as Fiji Times or Fiji Sun retains an editorial prerogative not to publish an advertisement. It is fair to say that this is the other aspect of the freedom of the press under section 17(1)(b) of the 2013 Constitution^{viii}.
32. However, to the extent that the Bill of Rights provisions in the 2013 Constitution binds also a natural or a legal person (see section 6(3) of the Constitution)^{ix} and

not just the state, the editorial prerogative of a private media organization is not an unfettered one.

33. In that regard, and in the context of the narrow issues in this case, a refusal by any newspaper to publish an advertisement, if it amounts to a compromise of any right protected under the 2013 Bill of Rights, will expose that decision to a constitutional redress action. Having said that, of course any newspaper may yet justify such a decision on any relevant public interest ground as MIDA and the 2013 Constitution would entitle it to, subject to a proportionality test.
34. The questions which then arise are:
 - (i) whether or not a right or freedom protected under the Bill of Rights has indeed been breached by any refusal to publish an advertisement, and
 - (ii) even if so, whether the refusal to publish is justifiable in the public interest.

Whether Or Not A Right Or Freedom Protected Under The Bill of Rights Was Breached?

35. As to the first question, it is worth remembering that Radrodro had been trying to patent an alleged discovery or invention of his. This discovery is in the field of medicine. He had lodged the necessary application with FIPO. A decision about the novelty, and the patentability of his purported discovery was made following advice from FIPO's Australian counterpart (IPA). Pursuant to that advice, FIPO then wrote to Radrodro:

You can now proceed with the advertisements and advertise twice in the Gazette and twice in any local Newspaper

36. Armed with that letter, Radrodro then approached the two newspapers to publish his advertisement.
37. The said letter was produced at the Fiji Times. However, they acted on legal advice and concluded that the advertisement still did not comply with GCPA. The letter was not produced to the Fiji Sun. They then requested for further verification which was not produced, and then decided not to publish the advertisement.

38. Although the relevant applicable provision in the local patent law or regulation was not cited to me by counsel, it is easy to say that the advertisement is a crucial requirement, as it is in every similar patent-registration regime the world over.
39. The fact that both newspapers had refused, separately, to publish the advertisement precludes Radrodro from compliance with the due process. *Prima facie*, that is a hindrance to his right to patent his discovery which right, is potentially an economic and a proprietary right when and in the event a patent is registered.

Whether The Refusal To Publish Is Justifiable In The Public Interest?

40. Ms Faktaufon of the Attorney-General's Office questions the two newspapers' exercise of editorial discretion in not publishing the advertisement. She submits that Fiji Times had failed to disclose the source of the legal advice it received which led to its decision to refuse publication. She cites Citizens Constitutional Forum v President of the Fiji Islands [2001] 2 FLR 127 and Savings Bank v Casco B.V (1984) 1 WLR 271.
41. Ms Faktaufon also submits that had Fiji Times sought advice from FIPO, "*this matter would not have likely come before this honourable court*".
42. Ms. Faktaufon appears to argue that FIPO would have verified its position on Radrodro's application, and the newspapers would have had to proceed anyway with publication of the advertisement.
43. Referring to the advice that Fiji Times received, Ms Faktaufon further submits that:

*This advice had to have verified that the Applicant's patent application was **in fact** misleading and **not presumed** to be misleading.*
44. I think the issues are deeper than that. We are dealing with two newspapers' exercise of editorial discretion, based on a public interest ethic, which the law requires of them, and which led them to refuse to render a *media service* to a citizen, and which refusal the two newspapers justify on a perceived public interest.
45. In other words, I am not inclined to believe that the two newspapers acted arbitrarily at all, a conclusion which I think Ms. Faktaufon urges me to reach.

46. As I have said, clause 1 of the GCPA lays down that advertising must be legal, decent, honest and truthful. Under clause 2, a media organization must reject any advertisement which does not comply with any written laws of Fiji, while section 22(a) requires them to screen using a public interest lens, before publication.
47. Clause 5, which is particularly noteworthy, simply states that an advertisement must not contain material likely to deceive or mislead people about any product or service.
48. Whether a material is “*likely to deceive or mislead*” entails a discretionary judgment on the part of any media organization (see O’Sullivan v Farrer (supra)).
49. From where I sit, had the newspapers sought verification from FIPO, all FIPO would have been able to offer, was:

“yes, we wrote that letter for Radrodro to advertise, and yes, IPA has verified that his invention is a novelty and is patentable”
50. Even so, the two newspapers would be justified in seeking a second opinion.
51. Also, in my view, as a matter of fact, unless FIPO had done a background check to verify the authenticity of Radrodro’s purported invention, which, I gather (but for which I make no comment) was not necessary in their set procedure, FIPO was hardly in a position to be of help to the two newspapers in terms of clarification on whether or not the advertisement would be misleading.
52. Having said all that, in any event, legal advice privilege would preclude the newspapers from disclosing their source in these proceedings. Different of course, if the matter at hand involved information about certain alleged material facts from an undisclosed source, the veracity of which goes to the heart of the case.

COMMENTS

53. This is not the first time that Mr. Radrodro has claimed to have made such a startling discovery. In 2012, Radrodro had filed an action against the Fiji Police Force (see Radrodro v Fiji Commissioner of Police [2012] FJHC 5; Civil Action 151.2011 (17 January 2012)).
54. He alleged in that case that thieves had repeatedly broken into his house and stolen his inventions and scientific discoveries. These stolen inventions and scientific discoveries, one way or another, would then start to emerge from

various parts of the World in the field of aircraft technology, medicine, music compositions, submarine technology, to name a few. He also claimed to have made some important discoveries about the speed of light which, he said, “challenged some of Albert Einstein’s theories”. He alleged that because of police inaction and lack of response to his complaints, his discoveries were stolen. I did dismiss his claim on a striking out application filed by the Office of the Attorney-General.

55. Notably, in the same 2012 case, the police officers concerned were all of the view that Mr. Radrodro may be of unsound mind. They produced reports recommending that Radrodro be subjected to some psychiatric assessment. Radrodro appeared to be aware of these police reports, which became the basis of his allegation of defamation of character against the Fiji Police.
56. Recently, Radrodro has claimed in Court before me that he has discovered a way to stop global warming. Given the global interest at stake, perhaps we will come to learn of the details soon, preferably, through publication of his theories in a reputable scientific journal rather than in yet another court proceeding – or – in yet another patent application.
57. When does the right to receive a patent accrue? In some jurisdictions, this right may accrue at the point of invention. In some others, this right may accrue at the point of application. It seems fair to say that in both instances, it is at least crucial that an invention must have been made.
58. In the particular circumstances of this case, it seems that the two newspapers were troubled by the above questions. Is it their place to be so concerned? I say it is, within their public interest ethic.

CONCLUSION

59. I am of the view that Fiji Times and Fiji Sun both acted responsibly in allowing themselves to be guided by the public interest ethic which MIDA and the General Code of Practice for Advertisements in Schedule 2 of MIDA demands of them.
60. I also agree with the submission by both counsels that there is an alternative remedy provided under section 53 of MIDA. Radrodro should have lodged a complaint with the Media Industry Development Authority. Given the public interest arguments involved, it is likely that the Authority would have referred his complaint to the Tribunal.

61. Under section 51(2), the Attorney General will be an interested party given the alleged public interest involved.
62. In the final, I strike out Radrodro's Constitutional Redress application in this court. Costs to the respondents which I summarily assess at \$500-00 each.



Anare Tuilevuka
JUDGE
Lautoka

ⁱ Section 17(3)(a) provides:

(3) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights and freedoms mentioned in subsection (1) in the interests of—

(a) national security, public safety, public order, public morality, public health or the orderly conduct of elections;

ⁱⁱ Section 17(3)(h) provides:

(3) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights and freedoms mentioned in subsection (1) in the interests of—

(h) making provisions for the enforcement of media standards and providing for the regulation, registration and conduct of media organisations.

ⁱⁱⁱ Section 53 provides:

PART 9 — COMPLAINTS TO THE AUTHORITY

Complaints to the Authority

53, — (1) Any person or entity may make a complaint against any media organisation to the Authority regarding the failure on the part of any media organisation to comply with the provisions of this Act, including non-compliance with any media codes.

(2) A complaint under subsection (1) may be made to the Authority orally or in writing.

(3) A complaint under subsection (1) may be made against the media organisation or any employee, officer, agent or servant of that media organisation.

^{iv} Section 21 provides:

Saving for other laws relating to the media

21(1) The provisions of this Act relating to codes of standards for the media do not displace any other written law or rule of law relating to obscenity, blasphemy, incitement to commit a crime, the publication of details of court cases, protection of witnesses, defamation, sedition or any other law relating to the media whatsoever.

(2) All media organisations must conduct their activities in accordance with this Act and any regulations made under it, and in accordance with the media codes, and have regard to the provisions of all written law including—

- (a) the Official Secrets Acts;
- (b) the Public Order Act 1969;
- (c) the Defamation Act 1971;
- (d) the Broadcasting Commission Act 1952; and
- (e) the Television Act 1992.

^v Section 22 provides:

Content regulation

22 The content of any media service must not include material which—

(a) is against the public interest or order;

(b) is against national interest; or

(c) creates communal discord.

^{vi} Section 18(2) provides:

Media codes

18 (2) *The General Code of Practice for Advertisements set out in Schedule 2 governs the general advertising practice for all media organisations.*

^{vii} It is hard to put an all-encompassing definition to the term “public interest”. In **Hogan v Hinch** (2011) 243 CLR 506, French CJ stated that when ‘used in a statute, the term [public interest] derives its content from “the subject matter and the scope and purpose” of the enactment in which it appears’ and that “the court is not free to apply idiosyncratic notions of public interest.”

^{viii} Section 17 (1)(b) provides:

17.—(1) Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes— (a) freedom to seek, receive and impart information, knowledge and ideas; (b) freedom of the press, including print, electronic and other media;

^{ix} Section 6(3) of the 2013 Constitution stipulates that:

6(3) A provision of this Chapter [i.e. Chapter 2 Bill of Rights] binds a natural or legal person, taking into account— (a) the nature of the right or freedom recognized in that provision; and (b) the nature of any restraint or duty imposed by that provision.

^x Clause 2 of GCPA.