

**BETWEEN: ENOCK BULE**  
Claimant

**AND: ANGELA MATANSUSU TABIGURU**  
Defendant

Coram: Judge Macdonald

Claimant: Mr. C. Leo  
Defendant: No Appearance

Date of Hearing: 9 August 2010  
Date of Decision: 17 September 2010

## **JUDGMENT**

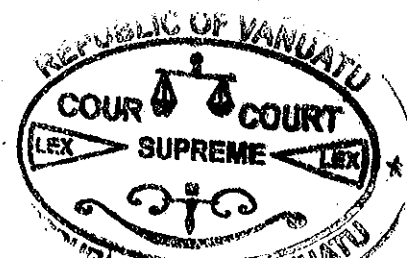
1. This is a claim in defamation.

### **Background**

2. The claimant alleges that in August 2008, the defendant threw copies of what was described as a public notice out the window of a red service bus, onto the streets of Port Vila. The notice, hand-written in Bislama, and on a single sheet of paper, said this:

#### **"BUPLICE NOTICE**

*I gat wan tok save long buplic se I kat wan criminal I stap work a bout Port.Vila. nem blong man ia Jeriri Tabi we hemi rapem small girl blong mi. Hemi wan man blong mekem troble hemi steal mo rape. Wan brother blong hem we hemi stap work long V.M.F, hemi stap devendem long ol troble blong hem. Nem blong brother blong Enock hemi wan police officer mo hemi wan jif. Mi saprice we wan Police officer hemi stap devendem wan rape case olsem long Court. Court hemi strikem out case ia folem wan investigation we brother Enock hemi makem. So wanem kind officer olsem ia we hemi stap sapotem crim olsem. Hemi good long wanem hemi wan police officer we hemi stap sapotem ol young fala boy long troble blong olgeta, osem rape mo steal, mi mama bong small girl ia mi wantem talem out long Public se fasin ia I mas stop blong wan police officer devendem wan rape case olsem. Hemi karem jif tittle blong sapotem ol young fala blong rape. Hemi wan fack jik. "*



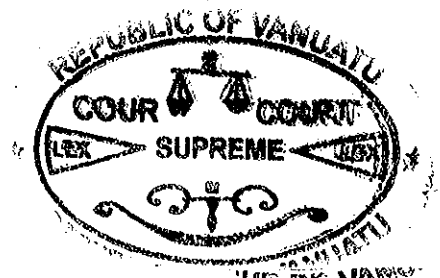
*Thank you blong pickemap notice blong readem."*

3. Translated into English it reads:

*"Public Notice*

*This is a public notice that there is a criminal walking around Port Vila whose name is Jeniri Tabi, who has raped my daughter. He is a trouble-maker; he steals and rapes. He has a brother working with the VMF [Vanuatu Mobile Force], who is defending him in his problems. His brother's name is Enock who is a police officer and a chief. I am surprised that a police officer is defending a rape case [such as this] in court. The court struck out this case following an investigation which brother Enock did. So what kind of officer is this who supports this kind of crime? What is he good for, he is a police officer but he is supporting young boys in their problems like rape and stealing. I am the mother of this little girl who wants to publicly say that this behavior must stop, that a police officer defends a rape case [such as this]. He has a chief title to support the youth to rape. He is a fuck Chief. Thank you for picking up this notice to read."*

4. The claimant says that the notice is linked to the trial of Mr Tabi, who in August 2007 was acquitted of raping the defendant's eight year old daughter.
5. The claimant is a cousin of Mr Tabi and supported him at his trial. The claimant is also a long standing member of the Vanuatu Police Force and is a chief representing a section of the community from Pentecost Island in Port Vila.
6. It is alleged that the defendant, as part of a reaction to the acquittal, took exception to the claimant supporting Mr Tabi at trial. She viewed that act as supporting or condoning Mr Tabi's conduct.
7. The claimant called three witnesses who claim to have seen the defendant throwing the notice out of the bus. It is also part of the claimant's case that the defendant admitted to another person, Chief Bule, that she was the author of the notice. This was when he visited her home on 12 October 2008.
8. As a consequence the claimant seeks general damages of VT4,000,000 for the loss of reputation and status in the community. He claims that he has been subjected to ridicule from friends and work colleagues. He has been shunned and looked down upon by members of the community from Pentecost Island in Port Vila.
9. The claimant also seeks special damages of VT6,000,000 relating to losses allegedly suffered in his kava and rental businesses. He relies on a reduced consumption of kava with a corresponding reduction in income after the notice was distributed. He relies on two tenants leaving his rooms for the same reason. The rooms had been rented out at VT20,000 per month.



10. The defence filed contains a denial that the defendant wrote the notice or was responsible for its distribution onto the streets of Port Vila. The defendant denies knowing the claimant and says that she only met him for the first time in the course of mediation. The defendant further denies making any admission to Chief Bule. She asserts that the claimant and his witnesses have fabricated a false story, so as to get back at her for making the initial rape complaint on behalf of her daughter.

### The trial

11. The defendant failed to appear at trial, which brought Rule 12.9(1) of the Civil Procedure Rules into play:

12.9 (1) If a defendant does not attend when the trial starts:

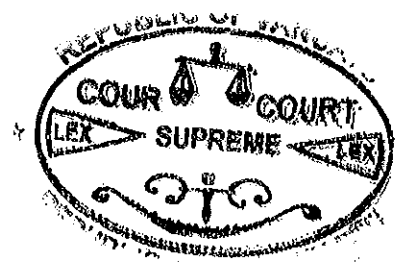
- (a) the court may adjourn the proceeding to a date it fixes; or
- (b) the court may give judgment for the claimant; or
- (c) the claimant, with permission of the court, may call evidence to establish that he or she is entitled to judgment against the defendant.

12. I chose the last option. The trial date had been fixed at a conference on 25 June 2010 and was confirmed at a subsequent conference on 21 July 2010. Her solicitor, Mr Kapalu, appeared on Monday 9 August 2010, the day of the trial, even though he had filed a notice of ceasing to act on the Friday before. He had not had any recent contact with the defendant. However, he confirmed that she was aware of the trial date, having spoken with her immediately after the conference on 21 July 2010. In light of that I was satisfied that her non-appearance reflected a deliberate decision on her part.

13. The proceeding had been filed almost 2 year previously, with a failed mediation along the way. Originally another solicitor had acted for her but he had filed a notice of ceasing to act in April 2009. The claimant was ready to proceed and in the circumstances I did not think there was sufficient reason to delay the matter further.

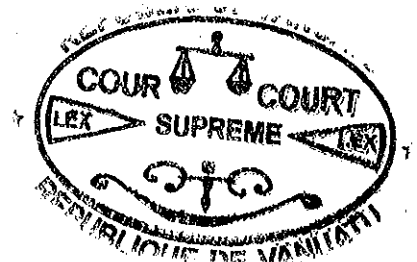
14. I can say, however, that had the defendant appeared on the day of the trial and sought an adjournment to instruct other counsel, then it is likely that it would have been granted. I would not have insisted that she defend herself in a claim such as this.

15. The matter effectively proceeded then by way of formal proof. I was required to make an assessment as to damages. Mr Vutusau, Chief Bule and Mr Tabi confirmed their sworn statements, as did the claimant. The sworn statement of Mr Tosiri was tendered to the Court.



## Defamation

16. In Vanuatu there is no statute that covers the tort of defamation and so it is necessary to turn to the common law.
17. It is possible to find a number of definitions as to what constitutes a defamatory statement. The one I adopt is a statement which may tend to lower the plaintiff in the estimation of right thinking members of society generally: ***Sim v Stretch*** [1936] 2 All ER 1237, 1240 per Lord Atkin (HL).
18. In deciding whether words are defamatory it is a question of looking at what they meant in context. The two categories of meaning are:
1. natural and ordinary meaning; and
  2. innuendo - a further meaning that would be appreciated only by a limited number of people in possession of specific knowledge. That has no application in this case.
19. The test for the natural and ordinary meaning is the "reasonable person" test. In New Zealand this was summarised by the Court of Appeal in ***Magazines Ltd v Hadlee*** (CA 74/96, 24 October 1996). The Court affirmed that
1. The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
  2. The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
  3. What matters is the meaning which the ordinary reasonable person would, as a matter of impression, carry away in his or her head after reading the publication. That includes what would be inferred.
20. To succeed in a claim in defamation the claimant must establish three elements:
1. that a defamatory statement was made;
  2. that the statement was about the claimant; and
  3. that the statement has been published by the defendant.
21. Once those elements are established it is for the defendant to establish a defence.
22. The substantial defences available are:
1. truth;
  2. honest opinion;
  3. qualified privilege; and
  4. consent



23. Of course, none of those defences has been pleaded in this case. Instead there is a simple denial by the defendant that she either made or published any statement at all about the claimant.

## **Issues**

### ***Is the statement defamatory?***

24. Giving the words in the notice their natural and ordinary meaning, and viewing them objectively, I am in no doubt that they are capable of bearing a defamatory meaning.

25. Right thinking members of society, or the ordinary and reasonable person, would understand the words to mean that the claimant supported or condoned crimes of rape and theft. And, he used his position as a police officer and as a chief to do so.

26. That in turn would undoubtedly mean that they would think less of him.

27. I am satisfied then that the statement is defamatory. It conveniently ignores the fact of the acquittal, and on the face of it the character and reputation of the person named in the notice is impugned in a serious way. The use of the description "fuck chief" would have been particularly hurtful.

### ***Was the statement about the claimant?***

28. The notice refers to the person named Enock and Jeniri Tabi as being brothers. Logically that would suggest that they shared the same surname of Tabi. But according to the claimant they are cousins; not brothers. I accept that. It means that the notice is incorrect in that respect but at the very least it still indicates that some relationship exists between the two.

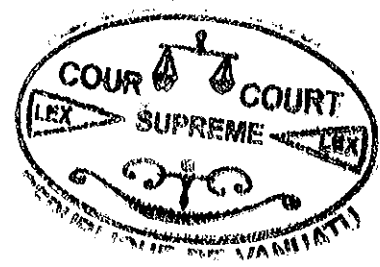
29. There are, however, two additional identifying features. The person named Enock is a police officer (a member of the Vanuatu Mobile Force) and he is a chief.

30. I can also have regard to the fact that the witnesses called by the claimant readily identified the claimant as being the person referred to in the notice.

31. In the circumstances I am satisfied on balance that the notice identifies the claimant, and it is about him.

### ***Did the defendant publish the defamatory statement?***

32. This turns in part on the identification evidence, that is, the persons on the bus who say that it was the defendant who threw copies of the notice out the window. These witnesses claim to have known the defendant. Given that this evidence went unchallenged there is no reason not to accept it. As it was the accounts given about



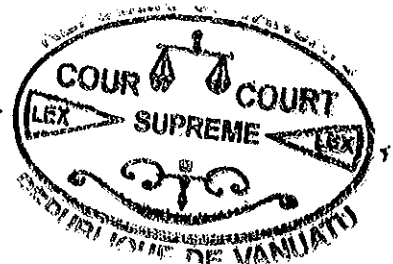
what happened on the bus are not identical. Each recounted an event that was plainly unusual and for that reason memorable.

33. In addition there was the evidence of Chief Bule who says that the defendant admitted authorship of the notice. Again that went unchallenged.
34. The claim by the defendant that the claimant and his witnesses were all part of some conspiracy against her has no evidential foundation to support it. It seems far-fetched in any event.
35. Finally, the notice purports to be written by the mother of the rape complainant in the trial of Mr Tabi. That person is the defendant. It would be perfectly understandable that she would be angry and disappointed at the outcome of the trial and the notice reflects that. In other words she of all people had a motive to write such a notice.
36. I am in no doubt that the defendant did just that, and she threw copies of the notice out the window of a bus as alleged.

## Damages

### *The law*

37. Damage to reputation is presumed if the elements of the tort are established, as I have found here. The law presumes that some damage will flow in the ordinary course of events from the mere invasion of that person's right of reputation.
38. The object of damages is to compensate the plaintiff for both the injury to reputation and the hurt to feelings (*Television New Zealand Ltd v Keith* [1994] 2 NZLR 84(CA) at 86). It is not, except in exceptional circumstances, to punish the defendant (*Rookes v Barnard* [1964] AC 1129).
39. In assessing the injuries to reputation, it is necessary to consider the pecuniary losses (other than those claimed as special damages) and social disadvantages which result, or may be thought likely to result from the wrong which has been done (*Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071). As to the hurt to feelings, what needs to be considered is the natural grief and distress which the plaintiff may have felt at having been spoken of in defamatory terms; if there has been high-handed, oppressive, insulting, or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation, and which may constitute injury to the plaintiff's pride and self-confidence, the award of damages may be increased to take account of those aggravating factors (*Cassell & Co Ltd v Broome* (supra), *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150).



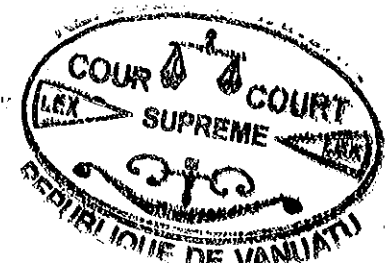
40. Generally, damages will increase with the circulation of the defamatory matter, although not necessarily in direct proportion to it. Sometimes a limited publication might be extremely damaging, for instance, if it is to an employer.
41. A failure to apologise may be regarded as something tending to aggravate the damages.
42. In fixing a figure for damages in this case I must consider the economic situation in Vanuatu. In **Moli v Heston** [2001] VUCA 3 the Court of Appeal said this:

*In our judgment the starting point is to look at the economic situation in this country. We recall that the minimum wage is in the vicinity of 200,000 VT per year. Senior and responsible people within the community often earn no more than 1,500,000 VT per year.*

*When one tries to reflect those figures back into comparison with New Zealand or Australia defamation awards (and realise that the levels of remuneration which are perhaps a tenth or even a twentieth of what it might be elsewhere), we are satisfied that a total award in this case of VT8 million is excessive. If translated by reference to the different economic standards in New Zealand or Australia it would create a figure which in those places would clearly be seen as excessive."*

### **Comparable cases**

43. The Court of Appeal in **Moli v Heston** (supra) had reduced on appeal an award of VT8 million for defamation to VT5 million. The case involved a front page article in a local newspaper, in which the respondent was said to have engaged in a range of sexual activities with female employees. It emerged that there had been no proper investigation into the matters and ultimately the appellant published a retraction and an apology.
44. Plainly the defamation there was far more serious than the present case and is therefore of little assistance for comparative purposes. I say that despite the fact that the present claimant sues overall for a greater amount than VT5 million.
45. I have searched for cases similar in a factual sense but to no avail. In terms of relative seriousness the closest I could find were **Kele-Malapa v Nangard** [2004] VUSC 54 and **Cyclamen Ltd v Minister of Lands** [2007] VUSC 51.
46. In **Kele-Malapa** the defamation arose from words spoken in a public car park outside a local supermarket. The defendant, in the presence of a number of people, said to the claimant in a loud voice, words to the effect that she and her lawyer were thieves and both of them wanted to take her land. The Court took the view that there was minimal damage to the claimant's reputation, especially as there was no

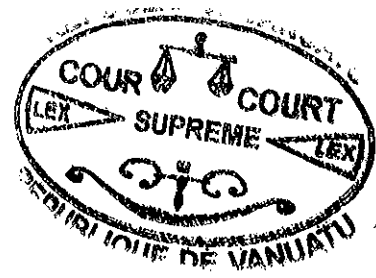


evidence to suggest that anyone who heard the exchange knew the parties involved. VT200,000 damages were awarded.

47. In *Cyclamen* the defamation claim arose out of a letter that the first defendant (being the Minister of Land) wrote to the Editor of the Daily Post. The letter was published in the inside cover of the newspaper. It suggested that the claimants (the company was the developer of a resort and Mr and Mrs Hogarth were directors of the company) had established a commercial/tourism business on the land before applying to change the status of the lease of the land from residential to commercial. In so doing it was suggested that they had failed to comply with the laws of Vanuatu, either consciously or carelessly. That was held to be defamatory but in a relatively minor way. Damages of VT50,000 were awarded, with the Court observing that an appropriate apology should have been enough to resolve the matter without litigation.
48. In my view the defamatory statements in the two cases just discussed are much less serious than in the present case, but I need to consider all the surrounding circumstances. There are matters that impact upon any final assessment.

#### ***What is an appropriate award?***

49. One difficulty I have is in determining the extent of publication. With an article published by a newspaper it is generally possible to rely on reasonably accurate circulation figures. Here, while the defendant wanted as many people as possible to pick up and read the notice, I have no idea how many copies of the notice were distributed. Were there 20, 100, 1000 or 10,000? I simply do not know and the evidence failed to establish even a very general figure. In light of that I feel obliged to approach the matter on the basis that publication was very limited.
50. There is a further limiting factor in that the notice was written in Bislama, which automatically excludes a segment of the Port Vila population.
51. It is also fair to assume that not all those who read the notice knew the claimant or would recognise that it referred to him. It was not as though it stated his full name or contained his photograph.
52. Moreover I am not convinced that everyone who read the notice would necessarily have taken it seriously. The notice is hand-written and on a single sheet of paper. The circumstances of the distribution were quite random. The notice itself could be viewed as an angry outburst from a person who was disappointed at the outcome of a criminal trial. A reasonable person of ordinary intelligence would readily appreciate that it was the Court that decided the outcome of the trial; not the claimant. And, merely supporting his cousin at the trial hardly constitutes an act of condoning or supporting the criminal conduct alleged, especially as there was an acquittal in any event.





53. If the contents of the notice had been published on the front page of one of the local newspapers then a significant award would be justified but, of course, that was not the situation at all. I also consider that a suitably fulsome apology would have mitigated the damage to a substantial degree.

54. In the circumstances I take the view that any award should be relatively modest and I fix that at VT250,000.

### **Special damages**

#### ***The law***

55. Special damages may be awarded to compensate the plaintiff for any readily quantifiable loss, sustained as a natural result of the publication of the matter complained of. This is subject to the same principles of causation and remoteness as apply to any other tort.

56. To establish a claim for special damages there must be:

1. loss of some material temporal advantage;
2. the loss must be pecuniary or be capable of being estimated in money;
3. the loss must have flowed directly and in the ordinary course of things from the act in question; and
4. that act must here been that of the defendant, or one for which the defendant is responsible.

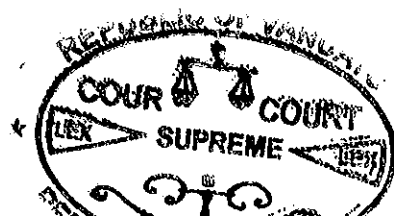
#### ***Have special damages been proved?***

57. I accept the claimant's unchallenged evidence that both his kava and rental businesses suffered financially, as a result of the defamatory notice. But what was the loss?

58. There is no independent verification of the loss suffered. I do not know whether any business records were kept. There is no record of the profits for either business or any comparative figures for the periods both before and after the publication of the defamatory notice. I do not know if the claimant is required to pay some form of tax on any profits. If so that might have been helpful. And, if his business did suffer the period over which that has occurred is not specified.

59. I have a further concern that the claimant appears to rely on hearsay evidence to establish any loss of revenue with the rental business. By that I mean there is no evidence from any departing tenant as to the reason for leaving.

60. The more fundamental difficulty, however, is that it appears that an extremely large figure has simply been plucked out of the air. The claim has not been particularised so as to show how the figure of VT6,000,000 is arrived at. So, while I accept that




the claimant might have suffered some loss, it has not been properly quantified and nor has it been proved.

61. The claim for special damages therefore fails.

**Result**

62. There will be judgment for the claimant in the sum of VT250,000 by way of general damages. He is also entitled to costs, which would be on the standard basis. If there is any issue about costs counsel may file a memorandum.

**Dated at Port Vila, this 17<sup>th</sup> day of September, 2010  
BY THE COURT**

  
.....  
**J. Macdonald**  
Judge

