

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appeal Jurisdiction)

Civil Appeal Case No. 35 of 2012

BETWEEN: CHARLOT SALWAI & OTHERS
First Appellants

AND: VINCENT BOULEKONE AND CHARLIE NAKOU
Second Appellants

**AND: THE UNION OF MODERATE PATIS
COMMITTEE (INC) (UMP)**
Respondent

Coram: *Hon. Justice Oliver A. Saksak*
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru

Counsel: *Mr. F. T. Laumae for the First Appellants*
Mr. R. T. Kapapa for the Second Appellants
Mr. C. B. Leo for the Respondent

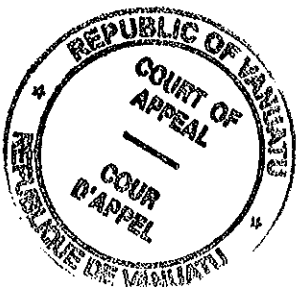
Date of Hearing: 13th September 2012

Date of Decision: 14th September 2012

REASONS FOR DECISION

1. There is an extreme urgency in this matter which requires this Court to render its decision within a very short time frame after submissions ended late yesterday afternoon. Under normal circumstances we would have preferred more time to render a complete decision with fuller reasons but such niceties must give way to the interests of expedition. Accordingly, we dismissed the appeals and ordered costs and we provided brief oral reasons for our decision. At the time we reserved the opportunity to provide fuller reasons for our decision which we now do.
2. On **5 September 2012** the trial judge (*Spear J.*) delivered his judgment in **Civil Case No.72 of 2012** between the Union of Moderate Patis Committee (**UMP**) ('the Respondent') and Charlot Salwai and 3 others ('the First Appellants') and Vincent Bulekone and Charlie Nakou ('the Second Appellants') who are collectively referred to as "*the Appellants*" in this judgment.
3. In his conclusion Spear J. granted the following injunctive orders:

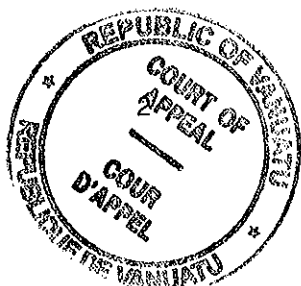
"(1) ... Charlot Salwai, Steven Kalsakau and Raphael Worwor are prohibited from either representing themselves to the public or being so represented as affiliated to or associated with any organization that includes the letters UMP or the words Union of Moderate Patis or close variations thereof in its name. The prohibition extends to the use of the open hand symbol and



the expression 'Ute Ute Ho' which have become clearly identifiable marks of UMP. Specifically, that prohibition includes any association or entity described as UMPC , UMP for Change or Union of Moderate Parties for Change;

- (2) ... they must not publically declare their allegiance to or affiliation with a political party that even suggests that they have remained with UMP;*
- (3) These restrictions apply to any other defendant who stands for parliament in the forthcoming national elections.*
- (4) All defendants are prohibited from representing or otherwise promoting to the public that there is an association or entity described as UMPC , UMP for Change or Union of Moderate Parties for Change or close variation thereof..."*

4. We immediately observe that **Orders (1) & (2)** are specifically directed at three (3) members of the First Appellants namely, **Charlot Salwai, Steven Kalsakau and Raphael Worwor.**
5. **Order (3)** extends the prohibitions in **Orders (1) & (2)** to any other Appellant (including the Second Appellants) who contests the forthcoming general elections at the end of October 2012. Needless to say, if an Appellant does not stand as a candidate in the election he will not be bound by the specific restrictions enumerated in Orders (1) & (2).
6. **Order (4)** applies generally to all Appellants and is concerned with the existence ("*there is*") of an association or entity bearing the name Union of Moderate Parties for Change or the letters **UMPC.**
7. The cumulative effect of the Orders is firstly, to recognize **UMP's** exclusive right to its name, letters, logo and custom slogan and secondly, to de-recognize the existence of an unincorporated association (**UMPC**) which could be seen as closely associated with the Respondent and of which the Appellants are currently members. The orders also reinforces the Appellants disassociation and/or expulsion from **UMP.**
8. On **10 September 2012** the Second Appellants filed an Urgent Notice of Appeal seeking the following orders:
 - "1. The decision of the court dated the 5th September 2012 be called up and quashed and that appeal is allowed;*
 - 2. That the Court of Appeal allow and grant judgment in favour of the appellants by allowing UMPC to proceed with its operations without any hindrances from the respondent;*



3. *That the Court of Appeal allow and declares the Second Appellants as the rightful owner of the slogan Ute Ute Ho, the logo, open hand and the yellow colour of the party;*
4. *That the respondent pay the appellants ' costs of this appeal on an indemnity basis or on such other basis as this Honourable Court may consider appropriate as taxed and or agreed."*

(our underlining)

APPLICATION TO ADDUCE FURTHER EVIDENCE

9. We observe that **Orders (2) and (3)** above, in terms, seeks judgment in favour of the Appellants and a declaration that the Second Appellants are the rightful owner of the slogan "Ute Ute Ho", the logo open hand and the yellow colour of the party. These orders were never sought in the Supreme Court nor are they supported by a counterclaim filed by the Second Appellants as their counsel was constrained to concede at the hearing of the appeal. In these circumstances, we cannot grant either **Order** which is accordingly dismissed.
10. The Second Appellants also filed an urgent application to produce fresh evidence at the hearing of the appeal pursuant to **Rule 27 (2)** of the **Court of Appeal Rules**. That Rule reads (so far as relevant):

"The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner:

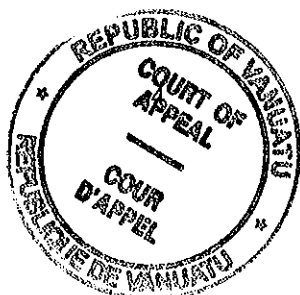
Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence ... shall be admitted except on special grounds".

(our underlining)

11. It is clear that the "*Proviso*" is the relevant provision in the present application. By its terms **Rule 27 (2)** is an exclusionary one unless "*special grounds*" exist to admit the further evidence. On being pressed, counsel for the Second Appellants vaguely submitted that the further evidence should be admitted "*to allow the Court to determine the appeal fairly*". The respondent opposes the application.
12. We accept that the phrase "*special grounds*" is wide in its ambit but the cumulative conditions which must be fulfilled by a party seeking to have fresh evidence received by an appellate court are well established. These are:
 - (a) That the evidence could not have been procured by the exercise of reasonable diligence for use at the trial;
 - (b) The evidence is relevant and otherwise admissible;



- (c) The evidence is apparently credible; and
- (d) There is a significant possibility that the evidence, if believed, would have an important influence on the result of the case.
13. The Court of Appeal also observed in **Adams v. Public Prosecutor** [2008] VUCA 20 that:
- "The purpose of these principles is to require that at a trial each party leads all of the evidence which they wish to rely on, and to prevent an unsuccessful party later reformulating the basis of this case and seeking to have a second attempt to establish a position which failed at the first trial. Finality in litigation both criminal and civil, is a fundamental object of the court process. Subject to the right of appeal, it is only in exceptional circumstances that a party can revisit the evidence by supplementing that given at the trial" (see also: **Neel v. Blake** [2004] VUCA 6).*
14. The further evidence provides additional support for the claim of **Vincent Boulekone** to personal ownership of a logo that he had used on a poster during his successful candidacy in the general elections in 1975, and which depicts, an open **left** hand wearing a pigs tusk on the wrist within a triangle with a yellow coloured background.
15. The ownership and the right to exclusive use of a logo that resembles the above logo was a hotly-contested issue before the trial judge who determined it in **UMP's** favour on the basis that the logo was "... *given freely to UMP that then adopted them as its own*" and had been used, without objection, by **UMP** candidates during all the elections that it contested since 1988. Whatsmore Spear J. was plainly aware of the historical origins of **UMP's** logo and more particularly, the Second Appellants' claim of ownership.
16. Having said that, the **UMP** logo is **not** identical to the one first used by **Vincent Boulekone** in that, it depicts an open **right** hand without a pig's tusk albeit contained within a yellow triangle. It also prominently features the written slogan: "*Ute Ute Ho*" which was **not** part of Vincent Boulekone's poster and logo.
17. The further evidence was also tendered to support declaratory **Order (3)** sought by the Second Appellants in their Notice of Appeal which has been earlier summarily dismissed.
18. In all the circumstances we did not accept that the further evidence sought to be adduced, satisfied any of the pre-conditions for its admission in the appeal and the application was accordingly refused.



FIRST APPELLANTS NOTICE AND GROUNDS OF APPEAL

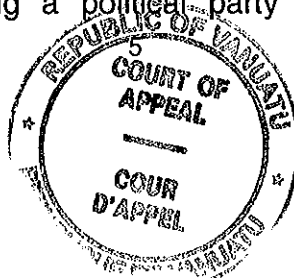
19. There was one further matter of procedure that needed to be disposed of and that concerned the absence of any Notice of Appeal filed on behalf of the First Appellants as required by **Rule 19** of the **Court of Appeal Rules**. In this regard with a view to regularizing matters and in exercise of the Courts' powers under **Rules 18** and **27 (4)**, counsel for the First Appellants was ordered to file and serve on the Respondent a formal Notice of Appeal and this was done.
20. The First Appellants' Notice of Appeal seeks an order setting aside the judgment of the Supreme Court and an order that the case "*be remitted to the Supreme Court for rehearing before another judge of the Supreme Court*".
21. **Rule 31** of the **Court of Appeal Rules** recognizes the power of this Court to order a new trial if it appears that a new trial "*ought to be had*". Such an order however, has been deprecated as a "*deplorable result*": **Kakhyl v. Laboucherie** [1908] 2KB 325 at **327**, which places a heavy burden on the First Appellants to satisfy the Court that a new trial ought to be ordered.
22. Nowhere in the submissions of counsel for the First Appellants are any reason(s) given for seeking a new trial, such as, where material new evidence has come to light since the judgment or where there are unresolved evidentiary conflicts. Nor does the submission identify what question(s) (if any) the new trial is being sought on as is contemplated by **subrule (3)** of **Rule 31**.
23. Be that as it may, the First Appellants' grounds of appeal are (with our preliminary observations interspersed after each ground):

Ground (1)

His Lordship erred in law when he made order to effect that "Accordingly Charlot Salwai, Steven Kalsakau and Raphael Worwor are prohibited from either representing themselves to the public or being so represented as affiliated to or associated with any organization that included the letters UMP or words Union of Moderate Patis or close variations thereof in its name. That prohibition extends to the use of the open hand, symbol and the expression Ute Ute Ho which have become clearly identifiable marks of UMP. Specifically, that prohibition includes any association or entity described as UMPC, UMP for Change or Union of Moderate Patis for Change" in total disregard of the first appellants' right of affiliation as guaranteed by Article 5(1) of the Constitution to affiliate or associate with a political grouping of their choice.

(our underlining)

24. We are of the view that this ground, as drafted, misconceives the order appealed against. Nowhere in the order does it purport to prohibit the First Appellants from forming a political party or associating or affiliating



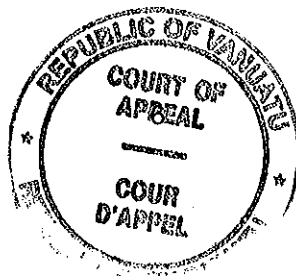
themselves with any political grouping of their choice. What it does prohibit the First Appellants from doing, is "... *representing themselves or being represented ...*" to the public that they have formed a political party or are members of an association with a name (**UMPC**) which closely resembles or uses the letters **UMP** in its name.

25. If we may say so this case, as we understand it, is not about the formation of a political party *per se*, or the exercise by the Appellants' of their constitutional right to "*freedom of association*". Rather, this case was started and has always been, about the First Appellants' declared intention to use a particular name (**Union of Moderate Parties for Change**), style, (**UMPC**) symbol (**open hand**) and slogan ('*Ute Ute Ho*') in the forthcoming general election which the trial judge determined, would constitute the tort of passing-off.

Ground (2)

"His Lordship erred in law and fact in ordering the First Appellants "prohibited from representing or otherwise promoting to the public there is an association or entity described as UMPC, UMP for Change or Union of Moderate Parties for Change or close variations thereof" when there is no evidential and legal basis to hold that the First Appellants are passing off themselves by affiliating with incorporated organization Union of Moderate Parties for Change."

26. This ground is clearly directed at the prohibition contained in **para 78** of the Supreme Court judgment which prohibits any representation and promotion by the Appellants to the public of an entity known by the name or letters, **UMPC**.
27. That prohibition is clearly based on an earlier order of the trial judge in a separate but related proceeding where "... *the incorporation of UMPC was quashed and UMPC remains an unincorporated association*". Although that decision is subject to a separate pending appeal to this Court, unless and until the decision is quashed or set aside, it remains lawful, effective and binding on the Appellants and **UMPC**.
28. This ground also suffers from a similar misconception in that nowhere in the Court's judgment is there a finding or statement to the effect that the First Appellants are prohibited from "*joining*" **UMPC**, rather, the prohibition is against: "... *publicity declaring their allegiance or affiliation with a political party that ... suggests that they have remained with UMP*" (i.e. the Respondent party).
29. On the common basis that the First Appellants have accepted their expulsion from **UMP**, there does not appear to be any logical reason for them to complain about this particular prohibition.



Ground (3)

"As set in the Notice of Appeal filed by the second appellants."

30. This unusually-worded ground of appeal adopts all of the Second Appellants' grounds of appeal but no written or oral submissions of counsel for the First Appellants was either generally or specifically directed at any of the seven (7) grounds set out in the Second Appellants' Notice of Appeal. So much then for our preliminary observations on the First Appellants' grounds of appeal.
31. At the start of the hearing of the appeal owing to the absence of the First Appellants' Notice of Appeal and mindful of the limited time available to the Court, it was agreed with all counsels that the appeal of the Second Appellants should be heard first to be followed by the First Appellants and finally, the Respondents.

SECOND APPELLANTS GROUNDS OF APPEAL

32. We turn next to consider in greater detail the Second Appellants grounds of appeal which are (with our preliminary observations interspersed after each ground as relevant):

(1) *His lordship erred in law and in fact in holding that the actions of the Appellants constitutes passing off;*

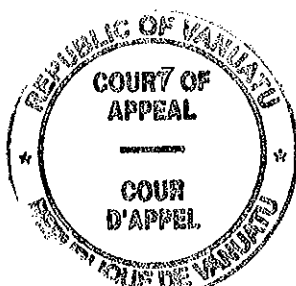
33. This ground of appeal makes no distinction between the Appellants as it should, and accordingly misconceives the Court's order (at **para 75**) which is specifically directed at the three (3) named First Appellants and no-one else. Nowhere does the Order name or refer to the Second Appellants and therefore, on its face, can have no application to them. Unless they are brought in under prohibition Order (3) upon which there was not a shred of evidence.

34. The order is clearly based on the trial judge's finding [at paras **5 (e)**; **7** and **71**] that the three (3) named individual's:

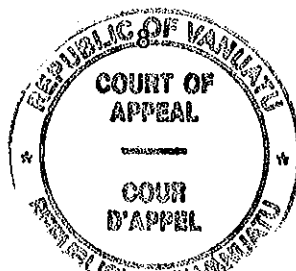
"... propose to stand again for election to parliament at the next election on 30 October 2012 under the UMPC banner".

which would constitute the tort of passing-off.

35. In the absence of a similar finding in respect of the Second Appellants or a sworn admission by each named individual of an intention to contest the 2012 general election "*... under the UMPC banner*", the Second Appellants are not affected by Order (1) and have no reason to complain that there was a finding of passing-off against them.



- (2) *His lordship erred in law and in fact in holding that the Appellants are holding allegiance or affiliation with the UMP or a party that suggest that they have remained with UMP;*
36. We note that this ground which also does not make any distinction between the Appellants, is misconceived as far as the Second Appellants are concerned, in that the particular Order complained about (at **para 76** of the judgment) is also directed at three (3) named individuals in the First Appellants, namely **Charlot Salwai, Steven Kalsakau and Raphael Worwor.**
- (3) *His lordship erred in law and in fact in prohibiting the Appellants from representing or otherwise promoting to the public that there is an association or entity described as UMPC, UMP for Change or Union of Moderate Parties for Change or any close variations to it.*
37. We consider this ground, as drafted, misconstrues the meaning and intent of the order appealed against which nowhere prohibits the Appellants from publicly promoting the existence of an association or political party formed by them so long as it does **not** bear any of the prohibited names or letters.
38. The prohibition in our view, is limited to the enumerated names and letters (**i.e.** "... an association or entity described as UMPC, UMP for Change ..."). In this regard the trial judge had earlier recorded in his judgment (at **para. 30**):
- "... the incorporation of UMPC was quashed and UMPC remains an unincorporated association"*
- and, for clarity, we would add, *"with no registered name or acronym"*. On this ground too, we repeat our earlier observations in respect of the First Appellants ground(2) **at para 26 to 29.**
- (4) *His Lordship erred in law and in fact in holding in his decision that without any mention of the role of the council of presidents, both the 1982 and 2003 constitutions gave no due recognition to the council of presidents;*
- (5) *His Lordship erred in law and in fact in his refusal to consider the originality of the party and its objectives;*
- (6) *His Lordship erred in law and in fact in holding the appellants are not as the rightful owners of the slogan Ute Ute Ho, its open hand logo, and the party yellow colour which in fact it rightly belongs to the appellants since 1975;*
- (7) *His Lordship erred in law and fact to accept Mr. Serge Vohor's reign under UMP when in fact no evidence was disclosed of his*

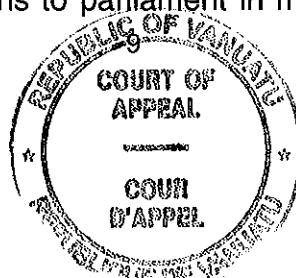


membership to any of the 10 movements or parties that were part of the original or founding members of UMP in 1982."

39. The Second Appellants' grounds of appeal may be reduced into three (3) broad categories:
- (a) Passing-off (ground 1);
 - (b) Constitutional arguments (grounds 2 and 3);
 - (c) Errors of fact (grounds 4, 5, 6 and 7).
40. We propose to deal with the latter two (2) categories first as they are more discrete and shorter than the first category.

CONSTITUTIONAL ARGUMENTS and ERRORS OF FACT

41. Specifically, grounds (2) and (3) are directed at the injunctive orders contained in the judgment which prohibits the First Appellants (**not** the Second Appellants) from publicly suggesting that they remain members of **UMP** (at **para 76**) and from representing or promoting that there is an association or entity described as **UMPC** (at **para 78**).
42. As to the former prohibition, even if applied to the Second Appellants (which is doubtful), their unequivocal acceptance of their expulsion from **UMP** makes it difficult to understand how they could possibly have any basis for opposing or objecting to that prohibition as framed against the First Appellants.
43. As to the latter prohibition, it must be clearly understood that the prohibition does **not** prevent the Appellants from forming a new political party or association with a new name, logo and symbol. What the Appellants' can't do under the prohibition, is to use the name or **UMPC** acronym which includes or closely resembles the Respondent's name and acronym, **UMP**, for any new association of political party that they decide to form.
44. Counsel for the Second Appellants submits that prohibiting them from using the name **UMPC** amounts to a denial of their freedom to form a political party and constitutes an unjust deprivation of the Appellants' ownership as the original creators, users of the name **UMP** and the open hand logo and slogan "*Ute Ute Hood*". We cannot agree.
45. The right to freely form a political party and the freedom to associate with like-minded individuals in the formation of such a party are recognized by **Articles 4 (3) and 5 (1) (h) of the Constitution**, but **both**, are subject to the principles of democracy and respect for the rights and freedoms of others and to the legitimate public interest in "*public order*."
46. There can be no doubting that some restriction or regulation is necessary in the holding of elections to parliament in maintaining the credibility and



integrity of the electoral process, and in the interest of an orderly democratic election. Many legitimate reasons may be advanced in support of such limitations including, limiting the size of the ballot and reducing the potential for voter confusion and public chaos so neatly identified in the judgment of the Chief Justice when he said in **Vohor v. Adeng** [1996] VUSC 14:

"... I accept ...that in the particular circumstances of Vanuatu, it is desirable, so as to avoid confusing less sophisticated voters, that there should be clear distinctions between political parties otherwise it will be practically impossible to hold democratic elections in this country

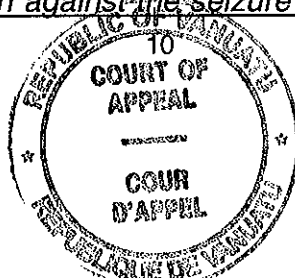
If two factions of a party or two separate parties are both allowed to use the same name, elections in Vanuatu would become impossibly difficult to administer (and) ... civil disturbances could occur if a group of people have built up a political machine, a popular following and some other groups, or factions within their own party appropriating (sic) that name to their own use."

47. The right to form political parties and to stand in elections does **not** include an unlimited right to choose the name and acronyms of the political party **or** the name and symbols which a party candidate may use or adopt in his election campaign and ballot paper, however similar or confusing it may be, to the name and symbol of another political party or candidate for election. If there was such an unrestricted right, the holding of orderly, fair, and democratic elections would be impossible.
48. Viewed in the above context, the denial to the Appellants, of the use of the name *Union of Moderate Parties for Change* and its acronym **UMPC** is not an unreasonable prohibition or curtailment of the Appellants' rights in breach of **Articles 4 (3)** and **5 (1) (h)** of the **Constitution**. Indeed "*public order*" demands it.
49. Counsel for the Second Appellants also submitted that the denial of the use of the logo open hand and yellow colour and the use of the custom slogan "*Ute Ute Hoo*" constituted an unjust deprivation of property in breach of **Article 5 (1) (j)** of the **Constitution**. Subject to our earlier observations at **para 12** we reject this submission.
50. In **François v. Ozols** [1998] VUCA the Court of Appeal described the purpose of **Article 5** of the **Constitution** as being:

"... to protect the individual against arbitrary or unjust treatment by the organs of government through which the affairs of the Republic are administered."

and later:

"... the protection afforded by Article 5 (1) (j) against unjust deprivation of property is a protection against the seizure or confiscation by government



action. The general law already provides a comprehensive package of rules to protect against the invasive of commercial, economic or proprietary interests of one person by another person. Such rights are protected by the criminal law and by civil law such as the laws of contract and torts" (including the tort of 'passing-off').

(our underlining)

51. In rejecting a similar argument in **Rombu v. Family Rasu** [2006] VUCA 22, the Court of Appeal said:

*"Inevitably, in the resolution of any disputed claim there will be parties who are dissatisfied with the result. So long as the process for determination of the claims is a fair and reasonable one, constitutional rights will not be infringed even though the process has the effect of defeating the alleged claim of an unsuccessful claimant. The result will not be an "unjust" deprivation of property. The judgment of the Court of Appeal in **François v. Ozols** [1998] VUCA 5; CAC No. 155 of 1996 is supportive of this view. In that case the Court of Appeal held that:*

"If the effect of one of its Orders was to remove property or money from the litigant, such removal could not constitute a 'unjust deprivation of property' within the meaning of Article 5 (1) (j). The deprivations would be one in accordance with law"

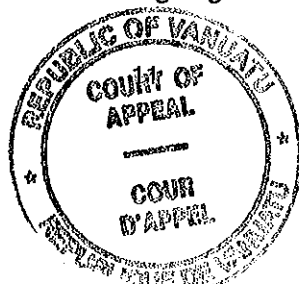
52. In light of the foregoing, counsel's submission in seeking to invoke **Article 5 (1) (j)** of the **Constitution** is plainly misconceived. In short there has **not** been any seizure or confiscation of any of the Appellant's property "*by government action*". Nevertheless, counsel argues that the Second Appellants are the original owners of the logo and slogan and therefore have some form of intellectual property or copyright in both items. Again we cannot agree.

53. Not only was there no counterclaim by the Second Appellants for an order recognizing their claim to original ownership or copyright in the logo of an open hand in a triangle with a yellow coloured background and in the custom slogan: "*Ute Ute Ho*", but there has also been no suggestion that the logo and slogan were registered marks of the Second Appellants.

54. On the contrary, in the Respondent's Constitution adopted at the **Ifira Congress** in 2003 under the heading Denomination, is recorded:

"The Party is named UNION OF MODERATE PARTIS (UMP). Its YELLOW colour and its symbol of OPEN HAND are its sole properties and it will use them at anytime".

55. In the absence of any such claims or detailed submissions, we would merely observe that no-one can claim exclusive ownership of a "colour", "number", "common words" or "language" or a "common geometric shape"



for that matter. Nor can copyright attach to an "idea" [*see: Ladbrooke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 ALL ER 465].

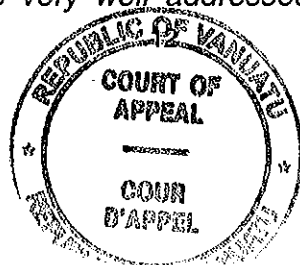
PASSING-OFF

56. Counsel for the Second Appellants began his submissions on this ground by attempting to distinguish the facts of the present case from previous decisions of the Supreme Court including, **Vohor v. Adeng** [1996] VUSC 14; **Vanuatu Mission of Seventh Day Adventists v. Seventh Day Church of the Republic of Vanuatu** [1996] VUSC 19; and **Mataskelekele v. Abbil No. 1.** [1991] VUSC 7.
57. We have considered the decisions and although they may differ on their individual facts, the legal principles that they establish are sound and applicable in the present case. These include –
- (i) The right and duty of the Courts to intervene in the affairs of a voluntary association when called upon to settle disputes within the association in accordance with its constitution or rules of association that binds its members;
 - (ii) That the tort of passing off can extend to a political association which has an established reputation and goodwill in its name, symbols, slogans and other forms of representation; [*see: Burge v. Haycock* (2001) EWCA Civ 900];
 - (iii) That the Court may issue injunctive relief to restrain any incidence of passing off occurring or threatened.
58. Consistent with these legal principles, Spear J. said (as **para. 61**):

"It is trite law that a voluntary association may acquire property in assets and it also recognizes that there can be property in a name. In this case there is no doubt that the claimant association has property in the name UMP and Union of Moderate Partis or close variation thereof. The evidence is overwhelming that the claimant association has been a significant, major political party in Vanuatu since at least 1982 and that it is well known by those names. This conclusion is of significance when the cause of action relied upon here of passing-off is examined more closely".

and later (at **para. 65**):

"The tort of passing off has its origins in commercial law. It is unnecessary to detail the history of the action and how it has developed to provide such protection, where appropriate, to both religious and political associations in respect of their name or names; essentially , the goodwill of the association. This development is very well addressed by his Lordship in Vohor v.



Adeng leading up to his Lordship's conclusion (again, with which I entirely agree) that "a political party should have the same protections as to its reputation and/or standing and goodwill in its name as is afforded by the law to commercial organizations and now extended to charities and church organizations."

With reference to **Vohor v. Adeng** (op. cit), Spear J. said (at **para. 68**):

*"That decision **Vohor v. Adeng** was not appealed. It has stood the test of time and, in my view, remains good and enforceable law in this country. It is a reflection of the development of the law in context with the context here being the political and social environment within which national election are contested in Vanuatu."*

And, lastly, with reference to the nature of the goodwill acquired by **UMP**, Spear J. said (at **para. 69**):

"... I find that UMP is entitled to protect the goodwill that it has built up over the years in its name whether in the style UMP or Union of Moderate Partis or close variations thereof. I accept that this must necessarily extend to clearly identifiable symbols, signs or marks of UMP that the voting public identifies as being part of the public face of UMP. They are the open hand and the expression Ute Ute Ho not withstanding that they may have their origin in the history of one of the original founding groups."

59. Principal amongst the submissions of counsel for the Second Appellants is that there was **no** evidence establishing a "reputation or goodwill" in the respondent's name (**UMP**) which has been declining over the more recent past and additionally, **no** evidence at all to establish the tort of "passing-off".
60. Spear J dealt with both of these issues in **paras. 71 to 74** of his judgment as follows:

"The final issue to be determined is whether the defendants or any of them would indeed be passing themselves off as UMP if they sought political advancement using a name that includes UMP or close variations to it. The case for UMP in that respect is overwhelming. However, it has to be considered in respect of each of the defendants.

The first three named defendants Charlot Salwai, Steven Kalsakau and Raphael Worwor are all standing for parliament in the forthcoming elections. They proposed to do so under the banner of a political party styled and known as UMPC, UMP for Change or Union of Moderate Parties for Change. If they are permitted to do so, there is more than just a risk that the general electorate will become confused as to who is indeed representing the well-known and long-

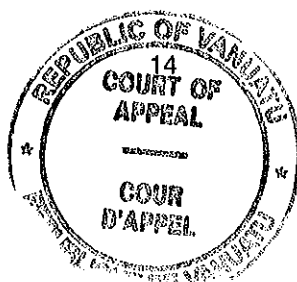


standing political party, UMP. That would provide those defendants with a significant advantage as they are likely to gain leverage by the inclusion of UMP in the name of the party that they are representing.

Those three first defendants have a high public profile as long standing members of parliament and members of UMP. Accordingly, it is likely to be difficult for the voting public to appreciate fully that they are no longer standing under the UMP banner when they have UMPC beside their names. This would also likely cause significant harm to UMP and any candidates that it has endorsed who will be standing against those three defendants.

It is the very essence of politics that a political party works to develop political strength so that its policies can be progressed. A party such as UMP is driven to have as many of its candidates elected as possible so that its voice in parliament is one that cannot be ignored. If there is confusion about its candidates then it is at least possible, if not probable, that one or more of the UMP candidates could miss out on election."

61. We note that Spear J had earlier observed that the evidence was "overwhelming" in support of the Respondent's claim to being "a major political party in Vanuatu since at least 1982 and that it is well known by those names."
62. Counsel for the Second Appellants laid emphasis in his submissions on the historical origins of **UMP**, but we did not detect any serious dispute or disagreement with the history traced in Spear J's judgment (at **paras. 10 to 29**) which was derived, principally, from the sworn statements of the Second Appellants. More importantly however, there was no disagreement with any of Spear J's observations on the rule(s) relating to unincorporated or voluntary associations especially at **paras 48 to 53** inclusive.
63. That history which dates back to **1988** on the Respondent's evidence, and, on the Second Appellants' evidence, extends to pre-independence custom groups or movements, also includes, within its achievements as a political party, a number of elected members in every Parliament since independence, and included amongst those elected members were, no less than five (5) former Prime Ministers.
64. There is not the slightest doubt in our minds, that a political party with that degree of longevity and success in parliamentary elections with its significant contribution to the leadership of the Government of this Nation has, an impressive reputation and enormous goodwill attached to its name, acronym, logo, slogan and other insignia associated with or used together with its name. That reputation in the present context, necessarily carries with it the support of a considerable number of loyal voters in all parts of the country mainly in the rural and outer-island groups.



65. In **Burge v. Haycock** [2001] EWCA Civ 900 (UK), the Court of Appeal in allowing the appeal against the trial judge's decision that a political party as such could not use the remedy of passing off to protect the value it had in a particular name, recognized the existence of a strong line of authority in the United Kingdom and overseas that:

"... shows that a claimant in a passing off action may be a charitable organization or a professional institution which does not carry on commercial activity in the ordinary sense of the word but which has unquestionably in the eyes of the law a valuable property in the sense of the goodwill which it is entitled to protect by bringing a passing off action if the three classic ingredients of a passing off action are present" (per Brooke LJ).

66. For her part **Lady Justice Hale** said in similar vein (at **para 69**):

"The right to protect such established goodwill cannot in my view depend upon the precise legal status of a body such as this, and in particular whether or not it is a charity. Many of the considerations in favour of those bodies in this context, apply equally strongly in this case and I bear in mind particularly that it is not just the loss of trade or of donations which may constitute the damage but particularly the goodwill that has been established".

67. Lastly **Rix LJ** said in referring to the political context of the case (at **para 83/84**):

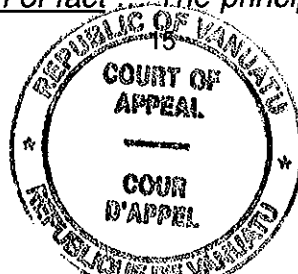
"Of course, in the election context courts would be very cautious indeed about any interference which might trespass upon the democratic process. In the present case, however, to permit Mr. Haycock to continue to represent himself in the electioneering as being an authorized candidate of the "Countryside Alliance" would be to permit the electorate to be deceived and would only serve to undermine that electoral process.

In the circumstances, therefore, where I am satisfied that Mr. Haycock threatens to commit the tort of passing off, I am relieved that this Court can do something to prevent such deception".

68. In the present appeal we find no merit in counsel's submission that there is no "goodwill" in the Respondent's name.

69. In **National Timber Co. Ltd. v. National Hardware Timber and Machinery Co. Ltd.** [1923] NZLR 1258 which was a similar name passing-off case in which an injunction was granted restraining the defendant from carrying on business in New Zealand under its (registered) name or any other name resembling the plaintiff's name, Reed J. conveniently summarized the principles to be applied in the following passage in his judgment (at p. **1270/1271**):

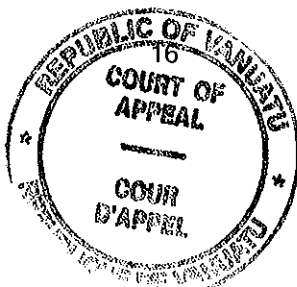
"In the first place it is unquestionable that the matter to be determined by the Court is a question of fact ... The principles, then, to be gathered from



the numerous cases seem to show that the question to be determined is: Are the names of the companies [political parties UMP and UMPC] so much alike that persons who under ordinary circumstances would be customers of such companies [voters of UMP] for the commodities in which they deal are likely to be deceived into dealing with the new company [voting for UMPC] in mistake for the old [UMP], to the detriment of the latter [UMP]? In considering this question it is material to ascertain: (i) Whether the two companies are dealing inter alia in the same commodity. (ii) Have mistakes already been made? It is not essential that there should be evidence of this fact, but where it exists 'it would be very material in assisting the Court in coming to the conclusion that the name complained of was calculated to deceive ... (iii) The nature of the business carried on by the two companies, and (iv) the probability, on account of that nature, of persons doing business with them making mistakes as to their identity.'

(our insertions in bold square brackets)

70. In the context of the present appeal we are satisfied that political parties that promote rival candidates in the same election and constituencies are, in the language of commerce, not only involved in the same "commodity" but also are engaged in the same "business activity" or "market" with the same "pool of customers" being the voters registered for the election in those contested constituencies.
71. The fact that such supporters have been described as "*less sophisticated voters*" (*per* Lunabek CJ in the **Adeng** case), means they are likely to be less discerning and more prone to manipulation and confusion if no clear and obvious distinctions are made in the names, acronyms and logos, of the political parties vying for their votes.
72. There was also evidence before the trial judge that a government official charged with registering charitable organizations refused the registration of **UMPC** as a charitable organization because formed the view that its chosen name "*closely resembled*" the Respondent's registered name **UMP** and, presumably, was likely to confuse.
73. Then counsel for the Second Appellants submitted that a detailed examination of the competing names and letters clearly shows that **UMPC** is different from **UMP** but that submission, in our view, misapprehends the nature and essence of what may be called "*similar name passing-off*" which looks at the general impression created by similarities in the names, their pronunciation, and get-up as opposed to their particular visual differences on close scrutiny.
74. The essence of a passing off action in a similar name case like that under appeal, is that the use of the name or description or device by the defendant is calculated to deceive others into a belief that the business or organization belongs to the Plaintiff or that there is some close association between them. An injunction will lie against the defendant even if there is no deliberate intention to deceive but, in fact, people are, or, are likely to



be deceived or led to believe that there is some close association between the plaintiff and the defendant.

75. As was said by Buckley CJ in **John Brinsmead & Sons v. Stanley Brinsmead** (1913) 30 R. P. C. 493, where the defendant claimed he was merely using his own name (at 506/507):

"The law, as I understand it, is this

if a man makes a statement which is true, but which carries with it a false representation and induces the belief that his goods are, the plaintiffs goods, he will be restrained by injunction. He cannot rely on the fact that his statement is literally and accurately true, if, notwithstanding its truth, it carries with it a false representation ...; but it is not necessary to prove intention to deceive."

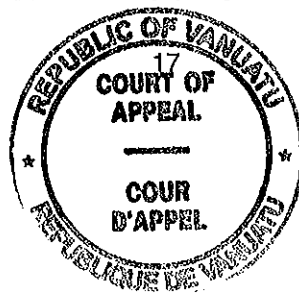
76. In similar vein, Lord Parker said in **AG Spalding & Bros v. AW Garage Ltd.** (1915) 32 R. P. C. 273 (at 284):

"Members of the ... public who are familiar with the plaintiff's use of a name, mark or get-up will infer from the defendant's use of a name, mark, or get-up which is the same or similar, that the goods or business concerned are the same or connected, and in this sense the representation is implied rather than expressed. Since this kind of misrepresentation arises by association with the plaintiff's mark or other indicia, it is unnecessary that the persons deceived should know the actual identity of the plaintiff with whose users of the name, marks or get-up they have been familiar."

77. In this latter regard the fact that **UMPC** is a relative "new comer" in the political arena having never contested an election under its name or banner, is telling, of the absence of any separate "goodwill" having been acquired through the use of the **UMPC** name or sign.

78. Appellants' counsels were also unable to satisfactorily respond to the Court's suggestion that the Appellants might consider adopting another name such as "*the Tan Union*" or a name that is more closely aligned with the identities of its founding custom groups. This inability or reluctance, calls to mind the question and answer posed by Harman CJ in **Hopman La Roche (F) and Company AG v. DDSA Pharmaceuticals Ltd.** [1972] RPC1 cited in **Tot Toys v. Mitchell** [1993] 1NZLR 325 at 340, when he said:

"Now I myself never received from the defendants a satisfactory answer to the plain question why do they wish to market their goods in green and black? I can only answer that they wish to do so in order to attract to themselves some part of the plaintiff's goodwill and trade on their reputation and in fact to represent to the public that their goods are the goods of the plaintiffs. That in my judgment, is exactly the classic case of passing off."

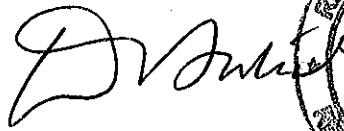


(our underlining)

79. In determining whether confusion is likely or probable, it is the impression on the casual unwary voter that is relevant [(see: **Singer Manufacturing Co. v. Loong** (1882) 8 AC 15, 18)] and, it is no answer that an observant voter making a careful examination of the names and logos of the competing political parties would not be misled. As Lord MacNaughten aptly observed in **Montgomery v. Thompson** (1891) AC 217, 225: "*Thirsty folk want beer not explanations.*" The appropriate standard is that of the typical unsophisticated rural voter in Vanuatu.
80. For the foregoing reasons the appeal of the Second Appellants was dismissed and, on the concession of counsel for the First Appellants at the hearing of the appeal, that the appeal of the First Appellants would depend on the outcome of the Second Appellants' appeal, we also dismissed the First Appellants' appeal.

DATED at Port Vila, this 24th day of September, 2012.

FOR THE COURT


Hon. Justice D. V. FATIAKI

