

IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

CIVIL APPEAL CASE NO. 52 of 2012

BETWEEN: AUGUST WARTE and THE ESTATE OF
MOSES MASSING

First Appellants

AND: CLAIRE DORNIC and LEA MCNICOL

Second Appellants

AND: THE REPUBLIC OF VANUATU

First Respondent

RONALD KALORIB

Second Respondent

SAMUEL WALTER

Third Respondent

MARK DONALD BULE

Fourth Respondent

THE PUBLIC PROSECUTOR

Fifth Respondents

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John Von Doussa
Hon. Justice Ronald Young
Hon. Justice Robert Spear
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: Robert Sugden for the First and Second Appellant s
Florence Williams for the Respondents

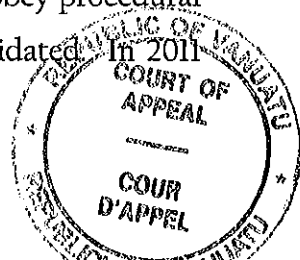
Hearing: 16 April 2013

Judgment: 26 April 2013

JUDGMENT

Introduction

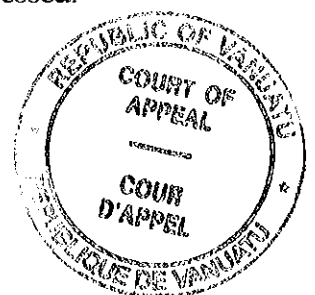
1. Mrs. Dornic and Mr. McNicol claimed that on the 27 November 2001 a number of police officers unlawfully entered and remained on Mrs. Dornic's property after they were told to leave by Mrs Dornic. They claimed that the Police officers unlawfully arrested them and detained them at the Police station. Later, Mr. McNicol was charged with willful damage but those criminal proceedings were subsequently withdrawn by the Police.
2. In February 2002 the Police charged two of Mrs. Dornic employees (the Appellants August Warte and Moses Massing; the latter has subsequently died) with theft. These charges were subsequently dismissed.
3. The Appellants claimed these actions by the Police were instigated by Philip Luankon; a for employee of Mrs. Dornic who had argued with her over his dismissal. Mr. Luankon had the ear of the local Police who supported him in his dispute with Mrs. Dornic.
4. Mrs. Dornic and Mr. McNicol sued the Police (CC 18/02 Santo) seeking damages for trespass (Mrs. Dornic alone) false imprisonment (both Mrs Dornic and Mr McNicol) and malicious prosecution (Mr. McNicol alone) arising from the November 2001 incident.
5. Additionally, in separate proceedings (CC 29/03 Santo), Mr. Warte and Mr. Massing sued the Police for malicious prosecution arising from the 2002 incident. In the meantime Mr. Massing died. Counsel for his estate accepted before us that his appeal against the Supreme Court verdict refusing him damages can no longer be pursued. He accepted that Mr. Massing's claim for damages was in his personal capacity and that the executor of his estate cannot pursue the damages claim. We therefore dismiss the appeal by the estate of Mr. Massing with no order for costs.
6. These proceedings had a remarkably lengthy history before resolution in the Supreme Court. The Respondents in CC 18/2002 had a long history of failure to obey procedural orders in the Supreme Court. In 2003 the two proceedings were consolidated. In 2011



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- the Appellants in CC 18/2002 sought orders that “the defences of the Defendants be struck out”. The Supreme Court granted that application in August 2011 with reasons issued a month later.
7. The Court then entered judgment in CC 18/02 for Mrs. Dornic and Mr. McNicol for liability with damages to be assessed at a further trial. The Respondents have not appealed that judgment.
 8. In the CC 29/03 judgment by default for liability was entered on 27 June 2006 with damages also to be assessed by the Court at a further trial. There was no appeal from that decision.
 9. After a hearing, in November 2012, the Judge ordered damages for malicious prosecution of Vt 125, 000 to both Mrs. Dornic and Mr. McNicol. The Court refused an award of damages under all other heads of damage sought in both sets of proceedings. The Court awarded the appellants 10% of their costs in CC18 /02 and no costs in CC29/03.

The Appellants' Case

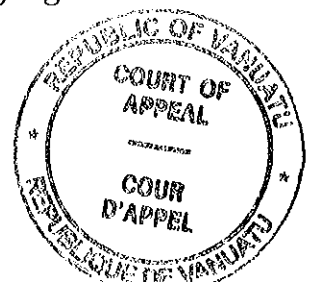
10. The Appellants now challenge the amount of damages awarded for malicious prosecution in CC 18/02 and the failure to award any damages for trespass, false imprisonment, and malicious prosecution in CC 29/03. The Appellants also challenge the costs award of 10% of the costs of the proceedings. The Appellants accept that the Judge erred when he awarded Mrs. Dornic VT 125,000 damages for malicious prosecution. Mrs. Dornic was not prosecuted and had not sought damages for such a cause of action.
11. The essence of the Appellants' case is that the Judge in the Supreme Court effectively revisited the question of liability when undertaking the assessment of damages. The Appellants say this approach was an error given that judgment for liability had already be entered in both proceedings before the damages claim came to be assessed.



12. Further, in refusing and reducing the Appellants' claim for damages, the Judge took irrelevant matters into consideration. Those irrelevant matters all related to the question of liability which, subsequent to the entry of judgment for liability, was no longer relevant to the damages.

The Supreme Court Judgment

13. In the 2001 incident (CC 18/02) the Judge noted that Mrs. Dornic claimed Vt 11,000,000 in damages and Mr. McNicol Vt 8,000,000 for damages. Some damages claimed were described as aggravated and exemplary damages.
14. The judge concluded that:
- (a) Mrs. Dornic had not proved her ownership of the land on which the Police entered to arrest her. Therefore there was no evidence of any trespass. In any event the Judge said there was no damage to the land and therefore no damages for trespass would be awarded.
 - (b) As to false imprisonment the Judge concluded that the Appellants had not established that their arrest was unlawful. The Judge said that there was evidence that the arrests were lawful and therefore no damages could be awarded for false imprisonment. We note that the Respondents said in their submissions to the Supreme Court "*An appropriate amount of damages would be within the vicinity of VT400,000 to VT600,000 for false imprisonment.*"
 - (c) As to the claim for damages for malicious prosecution with respect to Mr. McNicol, the Judge said that there was no evidence of any harm to Mr. McNicol's reputation nor were Mrs Dornic or Mr McNicol "*put in danger of losing their lives or liberty or that their properties were damaged*". However the Judge accepted the Respondent's submissions that an appropriate damage award with respect to the CC18/02 claim for malicious prosecution was Vt 250,000. The Judge then divided



that sum between Mrs. Dornic and Mr. McNicol although as we have noted Mrs Dornic was not prosecuted and had not made such a claim.

- (d) As for CC 29/03, the Judge said the Claimants had admitted the criminal charges relating to the malicious prosecution claim thus no damages could be awarded.
- (e) The Judge said that exemplary or aggravated damages could not be awarded because none were pleaded.

Discussion

15. We agree with the Appellants that having entered judgment for liability in favour of all Claimants the Judge could not revisit liability in his assessment of damages. The entry of judgment meant that the essential elements of each cause of action namely, trespass, false imprisonment and malicious prosecution in the 2001 and 2002 incidents were established. The situation can be equated with rule 9.3 (4) of the Civil Procedure Rules. That rule provides as follows:

“9.3(4) The Court may:

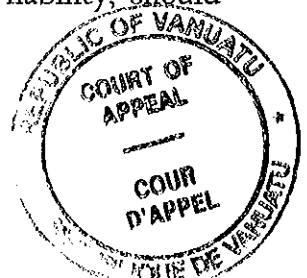
(a) give Judgment for the Claimant for an amount to be determined;
and;

(b) either

(i) determine the amount of damages; or

(ii) if there is not enough information before the Court to do this, fix a date for a conference or hearing to determine the amount of damages.”

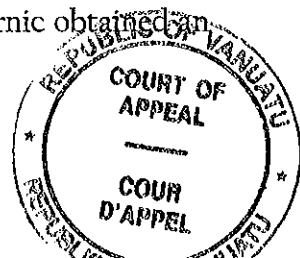
16. As Rule 9.3(4) notes the Court, once it has entered judgment for liability, should proceed to determine the amount of damages.



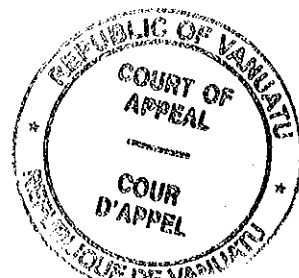
17. Given the Judge's error the appropriate course for this Court is to reconsider each of the appellants' claims for damages based on the pleadings, the evidence and submissions in the Supreme Court, and the submissions to this Court by all parties.
18. The Appellants' case throughout was that the Police action was based on their support of Mr. Luankon in his dispute with Mrs. Dornic. The Appellants said that the Police action that gave rise to these proceedings was not based on the rule of law but an ulterior motive.
19. In her evidence, Mrs. Dornic described how she dismissed Mr. Luankon from her employment. Mrs. Dornic had complained to the Police about Mr. Luankon's criminal activity but the Police took no action. Mr. Luankon was residing in a dwelling on Mrs. Dornic's land. When his employment ended he was told to leave the property. He refused to do so. Mrs. Dornic told the Police that she had dismissed Mr. Luankon and had told him to leave the property. She asked the Police for help in evicting him. The Police however returned Mr. Luankon to Mrs. Dornic's property. Mrs. Dornic protested against the Police action by letter from her solicitor to the Officer in Charge of the Santo Police station on 2 November 2001. She told the Police she was sending evidence of the Police failure to take action to Police Headquarter in Port Vila and to the Ombudsman. The letter further said:

"We understand that officers of CID in Luganville wish to interview our client in relation to complaints laid by Mr. Luankon. This letter is to advise you that our client does not wish to be interviewed by any Police officers from Luganville Police Station. This letter is also to advise you that, should any charge be laid against our client on the basis of any complaint by Mr. Luankon our client would be suing the officers involved for malicious prosecution and this letter will be tendered in evidence to show that you were warned these matters in advance."

20. On 15 November 2001, Mrs. Dornic issued proceedings in the Magistrates Court for the removal of Mr. Luankon from her land. On 23 November 2001 Mrs. Dornic obtained an



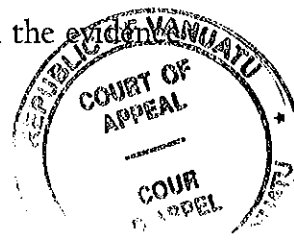
- ex parte* order prohibiting Mr. Luankon from entering her land. The Police were told of this order.
21. Eleven days later the Police arrived at Mrs. Dornic's property. They had Mr. Luankon with them. Mrs. Dornic and Mr. McNicol showed the Police the Court order prohibiting Mr. Luankon from being on Mrs. Dornic's property. They asked the Police to remove Mr. Luankon from the property but they refused. Mrs. Dornic and Mr. McNicol told the Police that they were trespassing and should leave the property. The Police refused to do so. The Police told Mrs. Dornic and Mr. McNicol that they had to accompany them to the Police station. When they refused the Police arrested them.
 22. Mrs Dornic's and Mr McNicol's evidence was that they asked the Police why they had to accompany them to the Police station and why they had been arrested. The Police refused to tell them. The evidence of the two Police officers Ronald Kalorib and Samuel Walter was that Mrs. Dornic was told she was arrested for theft and Mr. McNicol was arrested for willful damage.
 23. The Judge in the Supreme Court did not resolve this evidential difference. However the Appellants' case with respect to false imprisonment was based on a deemed admitted claim of an unlawful arrest (by virtue of the judgment as to liability). In those circumstances, for the purposes of assessing damages, it must be accepted there was no lawful arrest by the Police of either Mrs Dornic or Mr McNicol.
 24. As pleaded this was because the Police had no lawful reason to arrest either appellant. They were trespassers and they did not tell either appellant why they were being arrested. We note that Mrs Dornic was never charged with theft.
 25. The Appellants then say after her arrest that Mrs Dornic was seized by the Police and dragged to the Police vehicle. She suffered bruising to her legs and body. Mr McNicol was said to have been "*manhandled and forced into the Police vehicle.*" He was 67 years of age at the time.



26. The Appellants were then driven to the Police Station where they were detained for approximately three hours. As already noted Mrs Dornic was never charged with any offence arising from her arrest. Despite the Police officers' claims, there is no evidence that there was ever any legitimate basis for her arrest.
27. As for Mr McNicol, a charge of willful damage of a lock was laid in the Magistrate Court. The charge was never served on Mr McNicol and was withdrawn by the Police without Mr McNicol ever appearing in Court. Mr McNicol was alleged to have damaged a lock on the door of a house owned by Mrs Dornic but which had been occupied by Mr Luankon. Mr McNicol had removed the lock after Mr Luankon had been evicted from the property. It is difficult to see how Mr McNicol could be guilty of such a charge or even how it could legitimately form the basis of an arrest.
28. As for Mr Warte and Mr Massing, they were charged with the theft of 80 copra bags belonging to Mrs Dornic. The complaint of theft to the Police was made by Mr. Luankon. The two men worked for Mrs Dornic. Her evidence was that the two men had no reason to steal the bags. Mrs Dornic said she had over 60,000 of such bags in her possession at that time.
29. The two men pleaded not guilty to theft. When the case came for hearing the Police did not appear and the charges were dismissed. A purported appeal from the dismissal did not proceed. Prior to the prosecution hearing the appellants had advised the Police why this was an improper prosecution and that, if it proceeded, proceedings for malicious prosecution would follow.

Damages – Trespass

30. We consider that this was a serious trespass on Mrs Dornic's land by the Police. Mrs Dornic's solicitors had made it abundantly clear that the Police were not welcome to come and interview her. The Police knew that a Court order had been made prohibiting Mr Luankon coming on to Mrs. Dornic's land. Further it was clear from the evidence



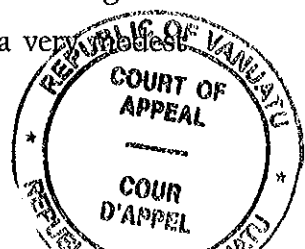
that the Police did not have a legitimate reason to enter Mrs Dornic's land on 27 November 2001. They had no evidence of any wrongdoing by her. The inference is irresistible that the Police (and Mr Luankon's) presence on Mrs. Dornic's land on 27 November 2001 was in support of Mr. Luankon's harassment of her. These circumstances makes the Police trespass very serious indeed. The Police were acting outside their lawful powers for the purpose of assisting an acquaintance in a private dispute with another individual. Their actions were contrary to eviction orders made by the Courts. They had been told they were not to interview Mrs Dornic. The abuse of Police powers in such circumstances requires clear condemnation by a significant award of damages. We consider an appropriate award is Vt 1,000,000. This award in favour of Mrs Dornic is made against each of the first to fourth respondents jointly and severally.

Damages – False Imprisonment

31. In our view the appellants were arrested and imprisoned without cause in circumstance where the arresting Police officers were well aware that the arrests were not justified. Mrs. Dornic was assaulted during the course of her arrest. Mr. McNicol was 67 years of age and in poor health. The appellants were also detained in custody for a relative short period of some 3 hours. However, neither appellant suffered serious or permanent injuries.
32. The respondents suggest an award of between Vt 400,000 to Vt 600,000 for each appellant. We agree this is an appropriate range. Mrs Dornic is entitled however to a somewhat higher award given the assault on her. Accordingly, we award Mrs Dornic Vt 600,000 and Mr McNicol Vt 400,000 damages under this head.

Damages – Malicious Prosecution – Mr McNicol

33. Damages for malicious prosecution are primarily based on loss of reputation, the humiliation of a prosecution and the extent of the claimant's vulnerability during the course of the prosecution. In this case Mr McNicol was not served with the charge nor was he ever required to appear in Court. In those circumstances only a very modest



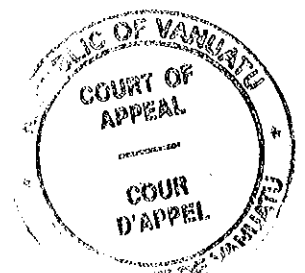
award is required. We consider the Vt 125,000 award by the Judge was within the range available to him. The appeal against this award of damages is therefore dismissed. The award made in Mrs Dornic's favour of VT 125,000 is quashed.

Damages – Malicious Prosecution – Mr. Warte

34. The malicious prosecution of Mr Warte is in quite a different category to Mr McNicol. Mr Warte was arrested, charged and actually appeared in Court on a number of occasions. It was three months before the charge was dismissed. Mr Warte incurred substantial legal fees of Vt 714,296 which he claimed as part of his damages. The Judge refused to make an award. In addition, Mr Warte sought damages for loss of reputation which was of particular relevance given that he was charged with theft. Mr Warte had an established reputation in his community. Finally we note the Police did not appear in Court to prosecute the charge.
32. We consider an award of damages of Vt 400,000 is appropriate. In addition he is entitled to reimbursement of his legal costs of Vt 714,296. The award is against the fifth respondent.

Summary

33. a) There will be an award of damages in favor of Mrs. Dornic as follows:
- a. Trespass - Vt 1,000,000 against the first to fourth respondents, jointly and severally;
 - b. False imprisonment - Vt 600,000 against the first to fourth respondents jointly and severally.
- b) The award of damages of VT 125,000 in Mrs. Dornic's favor for malicious prosecution is quashed.



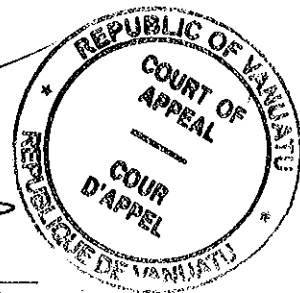
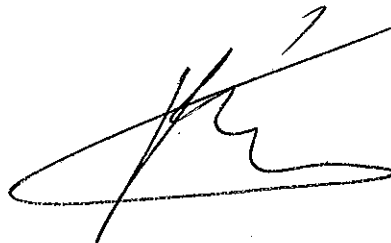
c) There will be an award of damages in favor of Mr. McNicol as follows:-

- a) False imprisonment, Vt 400,000 against the First to Fourth respondents jointly and severally;
- b) Malicious prosecution; the award of Vt 125,000 is confirmed against the Fifth Respondent.
- c) There will be an award of damages in favor of Mr. Warte for malicious prosecution of Vt 400,000 and Vt 714,296 a total of Vt 1,114,296 against the Fifth Respondent.

Costs

34. Given the result of this appeal all appellants (except the Estate of Mr Massing) should have full standard costs in the Supreme Court and in this Court.

BY THE COURT



Hon. Chief Justice V. LUNABEK