

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

**Civil Appeal  
Case No. 21/3374 COA/CIVA**

**BETWEEN: DORIANE NALIUPIS**  
*Appellant*

**AND: PROSPER BULETARE**  
*First Respondent*

**SILAS ROCROC**  
*Second Respondent*

**SANMA PROVINCIAL GOVERNMENT COUNCIL**  
*Third Respondent*

**Coram:** *Hon Chief Justice V Lunabek  
Hon Justice O Saksak  
Hon Justice D Aru  
Hon Justice J Hansen  
Hon Justice R White  
Hon Justice E Goldsbrough*

**Counsel:** *The Appellant appeared in person  
Mr S Garae Jnr for the First and Second Respondents  
Mr H Tabi for the Third Respondent*

**Date of hearing:** *15 February 2022*

**Date of Decision:** *18 February 2022*

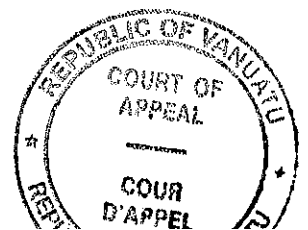
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## **JUDGMENT**

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### **Introduction**

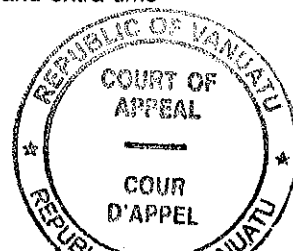
1. Until June 2018, the appellant was employed by the third respondent (the Council) as the Sanma Province Disability Officer. It seemed to be common ground that the appellant's employment had come to an end on 12 June 2018, following her provision of a typed letter of resignation to the Council.
2. At the times material to this litigation, the first respondent (Mr Buletare) was the Senior Planning Officer and/or Acting Secretary General of the Council. The second respondent (Mr Rocroc) was an elected councillor on the Council.



3. On 20 November 2017, a meeting of the Council resolved that the appellant be suspended from her duties pending the completion of a disciplinary investigation. Mr Buletare, as the Acting Secretary General, informed the appellant of that decision on the same day by providing her with a letter signed by himself on behalf of the Council. The letter did not tell the appellant of the allegations which were to be investigated, but said that the Council Administration would be in touch with her about that. The letter also told the appellant that during the period of suspension she would be on half pay.
4. The period of the suspension was not specified, but Mr Buletare's letter said that the Council Administration would keep it as brief as reasonably practicable.
5. The appellant's pleaded case at trial was that Mr Buletare had suspended her on 20 November 2017 as an act of "revenge", by reason of her refusal to accede to the sexual advances and harassment of himself and Mr Rocroc. The appellant also pleaded that, not having heard anything in relation to an investigation or her suspension after six months, she had provided a handwritten letter of resignation to the Council on 24 May 2018. The respondents' case at trial was that that letter was never received.
6. On 11 June 2018, Mr Buletare, as Acting Secretary General, provided the appellant with a letter which said that the Council had resolved to reinstate her as the Disability Officer. Mr Buletare's letter continued:

*"We are very sorry for the long delay of the suspension period but kindly requesting you to get back to your office as from the date of this letter.  
Your consideration on this Council Decision will be very much appreciated."*

7. On 12 June 2018, the appellant provided a typed letter of resignation to the Council. Apart from its opening paragraph, this letter was in substantially identical terms to the handwritten letter which the appellant said that she had provided to the Council on 24 May 2018.
8. The appellant brought a number of claims in the proceedings which she commenced on 12 September 2018:
  - (a) a claim for damages in respect of alleged sexual harassment by Mr Buletare;
  - (b) a claim for damages in respect of alleged sexual harassment by Mr Rocroc;
  - (c) in effect, a claim that the Council was vicariously liable for the conduct of Mr Buletare and Mr Rocroc in the sexual harassment;
  - (d) a claim for payment of the remaining half of the salary entitlement during the period of the suspension, in addition to payment of her outstanding annual leave and extra time allowances; and



- (e) a claim for damages for defamation in respect of alleged slanders by Mr Buletare and Mr Rocroc.
9. The appellant's Statement of Claim indicated that she sought relief in respect of these claims against all three of the respondents.
10. In the submissions at trial, the appellant also made claims that her employment had been terminated unlawfully and of constructive dismissal. Although represented by counsel, she did not seek to amend her claim or the pleadings to make these claims.

### **The judgment of the trial Judge**

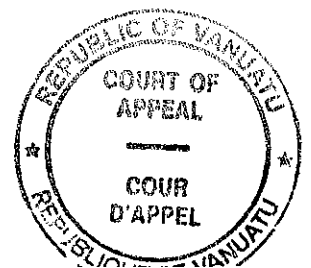
11. Each of the appellant's claims failed. The trial Judge found that it was the full Council, and not Mr Buletare, which had made the decision to suspend her; that the Council had, on 26 May 2020, paid to the appellant the balance of her salary entitlements during the period of the suspension, in addition to her annual leave and extra time entitlements; that the appellant's employment had come to an end by reason of her typed letter of resignation of 12 June 2018; that the appellant had not pleaded a claim of constructive dismissal; that her claim that she had been suspended for a period longer than permitted by the Council's Staff Manual did not support a claim of unlawful termination; that there was no known cause of action for sexual harassment; and that the appellant had not properly pleaded, let alone proved, the making of the claimed defamatory statements by either Mr Buletare or Mr Rocroc so as to found her claims for defamation.
12. These findings meant that it was unnecessary for the trial Judge to address the question of whether the Council could be vicariously liable for the conduct of Mr Buletare or Mr Rocroc.

### **The appeal**

13. Although the appellant had legal representation at the trial, she represented herself on the appeal. She provided an extensive appeal book as well as extensive written submissions. Some of the submissions extended to matters outside the grounds of appeal and, for that matter, outside the scope of her pleaded claims at trial. Nevertheless, the appellant conveyed strongly her sense of grievance about what has occurred.

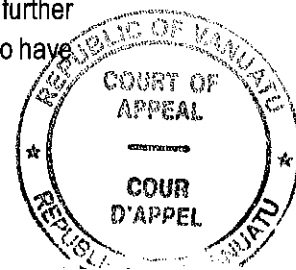
### **Grounds 1 and 2 – the suspension and termination of employment**

14. By Ground 1, the appellant complains that the trial Judge did not address and determine the issue of whether her suspension from employment on 20 November 2017 had been justified. By Ground 2, the appellant contends that the Judge should have found that her employment had been terminated unlawfully by the Council.
15. These two grounds can conveniently be dealt with together.



***The handwritten letter of resignation***

16. It is appropriate to deal here with an initial issue. As already noted, the appellant's claim was that she had provided a handwritten letter of resignation on 24 May 2018. She also claimed that it was the Council's receipt of that letter which prompted it to offer the reinstatement of her employment on 11 June 2018. The appellant also deposed that she had been induced by Mr Buletare on 11 June 2018 to revise the handwritten letter and to submit the typed letter of resignation on 12 June 2018.
17. Mr Buletare denied that he had received the handwritten resignation letter of 24 May 2018. He maintained that it was the typed letter of 12 June 2018 which he had received.
18. The Judge seemed to reject the appellant's account as she found that the appellant had written the letter of 12 June 2018 in response to the Council's letter of 11 June 2018. Her Ladyship went on to hold that, even if the appellant had written an earlier letter, it was evident that her employment had come to an end by her own resignation, and not by termination by the Council.
19. After the conclusion of the trial and while judgment was reserved, the appellant filed in the Supreme Court a further sworn statement in which she purported to provide further evidence in support of her claim that she had provided the handwritten letter of resignation to the Council on 24 May 2018. The Judge declined to have regard to this further sworn statement.
20. The appellant's Notice of Appeal does not contain any ground directed to that refusal but, in her submissions, she contended that the decision of the Judge on this point was in error.
21. We do not uphold that submission. First, if the appellant had really wished to pursue this point, her complaint should have been made the subject of a separate ground of appeal.
22. Secondly, it is an important principle in the conduct of litigation that parties bring forward all their evidence at the trial, and not later. Doing so has a number of consequences. The admissibility and relevance of the evidence can then be addressed. The opposing party has the opportunity to test the evidence, adduce any answering evidence, and to make submissions concerning it. Procedural fairness is thereby afforded and the efficient conduct of litigation is promoted. Effect is also given to the principle of open justice, that is, that litigation be conducted in public. This requires that the evidence be received and the submissions made in open court.
23. There are circumstances in which a party may apply to reopen a case while judgment is reserved but the circumstances in which reopening is permitted tend to be confined. No application to reopen was made in the present case.
24. This Court on appeal was not asked to receive the sworn statement of 24 May 2021 as further evidence on the appeal. Even if the appellant had made such an application, it is unlikely to have



succeeded, as the evidence was available to the appellant at trial, and she had made an assumption that it may not be needed.

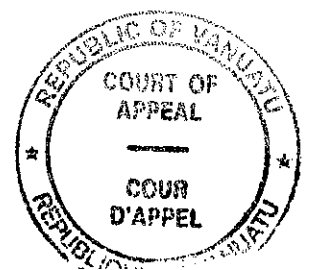
25. For these reasons, we will determine the appeal without reference to the appellant's sworn statement filed in the Supreme Court on 24 May 2021.

### **Discussion**

26. The appellant's Notice of Appeal contends, in effect, that her claim for unlawful termination had been made in proper form and that the evidence in trial had established that the Council had *meant* to terminate her employment. This latter allegation was particularised in the Notice of Appeal by allegations that the Council had refused to provide the appellant with the allegations of the conduct said to warrant her suspension; had deliberately refused to establish an investigatory team in relation to the appellant's conduct; had refused to convene a Council meeting to determine her status within the six month period after 20 November 2017; and, while the Council had been willing to reinstate her after receiving her letter of resignation of 24 May 2018, the conduct of Mr Buletare and Mr Rocroc had created such a toxic environment that it was not possible for her to return, and the first respondent and the second respondent had sought the revised resignation letter as part of a cover-up.
27. An initial difficulty for the appellant is that these contentions are not directed to the relief which she had claimed in the filed claim in the Supreme Court. As already noted, the only relief sought by the appellant in the Statement of Claim in relation to her suspension and termination of employment was that she be paid the balance of her salary during the suspension period together with her outstanding leave and extra time allowances. However, by the time of trial, that claim had become moot because, as the Judge found and the appellant accepted, the Council had, on 26 May 2020, paid VT220,220 to the appellant, being the amount of the balance of her salary during the suspension period, her accrued annual leave entitlements and the payment for an additional 15 days work.
28. The Judge noted that, in the final submissions at trial, the appellant had sought damages for "unjustified and/or constructive dismissal". Some of her other submissions had also alluded to such a claim. It seems that the appellant may, by these submissions, have been seeking to make a claim of constructive dismissal and/or to invoke s 53 of the *Employment Act (Cap 160)*. Section 53 provides:

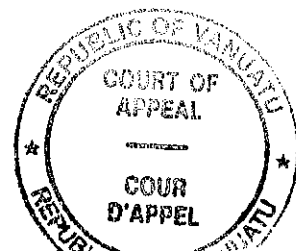
#### **53 Breach of contract by employer**

- (1) *If an employer ill treats an employee or commits some other serious breach of the terms and conditions of the contract of employment, the employee may terminate the contract forthwith and shall be entitled to his full remuneration for the appropriate period of notice in accordance with section 49 without prejudice to any claim he may have for damages for breach of contract.*



(2) *An employee shall be deemed to have waived his right under subsection (1) if he does not claim it within a reasonable time after he has become aware of his being entitled thereto.*

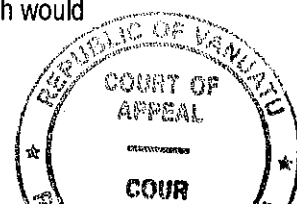
29. The Judge also noted that in her reply to Mr Buletare's filed defence, the appellant had pleaded that, by reason that her period of suspension had exceeded six months and that she had not, within that period, received any reasons for her suspension, Mr Buletare, Mr Rocroc and the Council had unlawfully terminated her employment. The appellant also pleaded that she had "by way of formality ... on June 11 2018 submitted her resignation having been convinced that the Council had effectively terminated her by [the] prolonged suspension, which went beyond the six month period mandated by law".
30. The Judge acknowledged that this pleading may have been intended to raise a plea a constructive dismissal but considered it an insufficient pleading of a such a cause of action.
31. In our view, a number of matters indicate that this was a correct conclusion:
- (a) the appellant's Statement of Claim cannot reasonably be construed as raising a claim of constructive dismissal. It did not in terms, or in effect, make a claim of constructive dismissal. Nor did the Statement of Claim indicate that the appellant was seeking any of the forms of relief which may be available when a constructive dismissal is established;
  - (b) nor did the Statement of Claim refer to s 53 of the Employment Act, let alone indicate that a claim was being made pursuant to it;
  - (c) a pleading by way of reply is an answer to a defendant's pleading. Its proper scope will be informed by the matters raised by way of defence, i.e, as an answer to the matters raised in the defence to the claim presented by the claimant. It is not a place for the making of entirely new claims; and
  - (d) the inappropriateness of the appellant's reply being regarded as a claim of constructive dismissal is that the pleading was contained in that part of the document directed to Mr Buletare's filed defence. It was obvious that any claim of constructive dismissal had to be brought against the Council, as it, and not Mr Buletare, had been the appellant's employer. At the time the appellant filed her reply, the Council had not yet filed a defence and so the appellant was not responding to such a defence.
32. We also note that the appellant's letters of resignation of 24 May 2018 and 11 June 2018 made no reference to s 53 of the Employment Act and did not convey that the appellant was exercising the rights conveyed by that section to bring her contract of employment to an end. Nor did the letters indicate, in terms or effect, that the appellant was asserting constructive dismissal.



33. In short, these grounds of appeal are directed to relief which the appellant had not claimed in her pleaded case at trial. It follows that this Court cannot uphold these grounds.
34. The matters to which we have referred underline the importance of claimants pleading their claims properly. An insistence on proper pleading is not merely a matter of technicality or of form for its own sake. Pleadings serve an important function in the fair conduct of litigation. One of their functions is to state with sufficient clarity the case which must be met by the defendant at the trial. In this way pleadings serve to ensure that a basic requirement of procedural fairness is satisfied, namely, that a party has a fair opportunity of meeting the case against him or her. Pleadings also define the issues for the Court's decision: *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* [1990] HCA 11, (1990) 169 CLR 279 at 286; *Williams v Australian Telecommunications Commission* (1988) 52 SASR 215 at 216.
35. Sometimes the omission of a claimant to plead a claim properly can be overlooked as, for example, when a defendant has had proper notice of the claim by other means and is not prejudiced by the absence of the proper pleading. However, that is not this case. The appellant now makes the serious charge that the respondents had acted in a premeditated way because they had *meant* by the suspension and subsequent conduct to terminate her employment. Such a serious charge should have been properly pleaded and particularised so that the respondents had the opportunity to meet it. The appellant's belated making of the claim involved unfairness to the respondents.
36. By dismissing the appellant's claims made in the final submissions in respect of constructive dismissal or unlawful termination, the trial Judge gave effect to the important principles to which we have referred. There was no error in doing so. Accordingly, Grounds 1 and 2 are dismissed.

### **Ground 3 – sexual harassment**

37. The Judge held that there is no known cause of action for sexual harassment and, on that basis, rejected the appellant's claim for damages for sexual harassment. This was despite Mr Buletare having formally admitted in his filed defence acts of indecency on the appellant, without her consent, for which he had been convicted by the Supreme Court in 2019.
38. By Ground 3, the appellant contends that she should have been awarded damages for the emotional suffering and distress she experienced in consequence of the sexual harassment of Mr Buletare and Mr Rocroc.
39. The Judge was correct in holding that the common law has not yet recognised a tort of sexual harassment or an equivalent, when the harassment consists of no more than non-threatening words.
40. However, it is well recognised that sexual harassment may take different forms. It may, for example, comprise the making of unwanted remarks of a sexual nature, sexual suggestions, the importuning of a person for sex, the inappropriate touching of another, and conduct which would



constitute an assault or battery. It may also involve other forms of conduct, so these examples are not to be understood as exhaustive.

41. In the present case, the appellant's claims, at least with respect to Mr Buletare, were not confined to harassment by words which were of a non-threatening nature. She alleged harassment of a much more serious kind. To demonstrate that that was so, it is necessary to have regard to the content of the appellant's Statement of Claim and of her first sworn statement.

42. With respect to Mr Buletare, the appellant alleged in the Statement of Claim:

[6] *From the period 2015, 2016 and 2017, [Mr Buletare] has subjected the Claimant to abusive and demoralising sexual harassments.*

**Particulars of abusive sexual harassments**

*[To be detailed in the sworn statement].*

[7] *At all material times the Claimant has tried to avoid [Mr Buletare's] sexual advances but [Mr Buletare] was forceful stating that he would assault the Claimant and that he was the boss for the Sanma Provincial Council and that the Claimant must obey him as directed.*

...  
[10] *[Mr Buletare's] continual abusive sexual harassment of the Claimant has resulted in the Claimant's continual distress and emotional breakdown making it difficult for the Claimant to attain the needs of the people with disability in Sanma Province and has also affected the Claimant's marital relationship with her husband and children.*

(Emphasis added)

43. With respect to Mr Rocroc, the appellant alleged:

[11] *At all material times [Mr Rocroc] is currently the Councillor and Chairman of the Recruitment Commission of Sanma Provincial Council, has also subjected the Claimant to sexual harassment.*

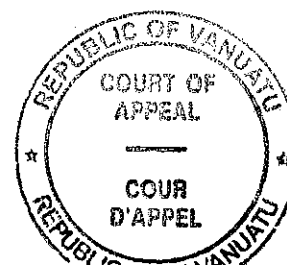
[12] *[Mr Rocroc's] continual abusive sexual harassment of the Claimant has resulted in the Claimant's continual distress and emotional breakdown making it difficult for the Claimant to attain the needs of the disabled people in Sanma Province and has also affected the Claimant's marital relationship with her husband and children.*

**Particulars of abusive sexual harassments**

*[The details to be in the sworn statement].*

44. With respect to the liability of the Council for the sexual harassment alleged against Mr Buletare and Mr Rocroc, the appellant pleaded:

[13] *The first and second defendants were at all material times ... employed as servants and agents of the [Council], and the assertions of abusive sexual harassment occasioned on the Claimant [were] done during their course of duty and or at the [Council's] Administration premises.*





45. The appellant did not plead expressly that the Council was vicariously liable for the conduct of Mr Buletare or Mr Rocroc but it seems to have been accepted at trial that this paragraph should be regarded as such a claim. We note that the appellant did not plead that the Council was itself in breach of a duty of care which it owed to her.
46. As is apparent, in the pleading of the alleged sexual harassment, the appellant indicated that particulars of the harassment alleged would be provided in her sworn statements.
47. In the first of her sworn statements (made on 5 February 2019), which was received at trial as Exhibit C1, the appellant deposed in relation to the sexual harassment of Mr Buletare:

[4] *That I confirm around 2015, [Mr Buletare] who at all material times was the Supervisor to me started making sexual advances at me which I had tried my best to avoid.*

[5] *That I confirm since my office was next door to [Mr Buletare's] office, to get to his office, [Mr Buletare] would walk past my office and when he sees that my office door was open, he would peep in and look and if he sees that I am alone, he [would] force his way in [slamming] and locking the door behind him and immediately demanding that I masturbate him.*

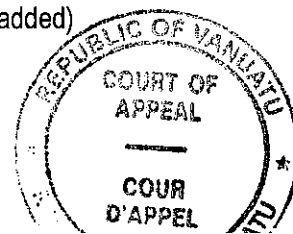
[6] *I confirm I would not expect [Mr Buletare's] sudden intrusions into my office and as a matter of fact, I would resist very much [Mr Buletare's] sexual advances and would complain that this was a public office and that I have people with disabilities who would walk into my office any time (hence the door to my office would be partially opened so handicapped and disabled people can have access to see me) so I can attend to their needs.*

[7] *That I confirm [Mr Buletare] being muscularly built would [cramp] me and told me to do as he said stating that he was my boss (Head of Planning and later Acting Secretary General) and I should obey him and if I refused, he would assault my face and my mouth. Despite my refusals, [Mr Buletare] would over power me and so I would reluctantly perform sexual masturbation on him as he demanded.*

...  
[9] *That I confirm in 2015 there [were] numerous times that [Mr Buletare] had sexually harassed me and these happened when the door to my office was open. At other times when there were no people around the Sanmar Province office and on other times at Meetings and Workshops organised around Santo.*  
...

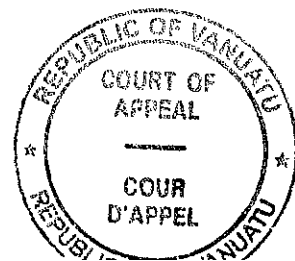
[11] *That I confirm [Mr Buletare's] continual abusive sexual harassment on me has resulted [in] my continual distress and emotional breakdown making it difficult for me to concentrate on my works and the needs of the disability people in Sanma Province and it has affected my marital relationship with my husband and children.*

(Emphasis added)



48. Thus, when the content of the appellant's sworn statement is read as the particulars of the pleaded sexual harassment as the appellant intended, it is apparent that she was not just alleging sexual harassment constituted by non-threatening words. She was instead alleging that the harassment included assaults (the making of the threats) and battery (the forced physical contact). These are recognised torts which, if established, sound in damages.
49. In his filed defence, Mr Buletare admitted that acts of indecency between the appellant and himself had occurred on more than one occasion in 2015, being those for which he had been convicted by the Supreme Court in 2019. Other evidence indicated that Mr Buletare had been convicted on two charges of committing acts of indecency without consent on the appellant on a number of occasions in 2015. The relevant conduct comprised his forcing of the appellant to masturbate his penis and his touching of both of the appellant's breasts. On 1 March 2019, Mr Buletare had been sentenced to imprisonment for three years for these offences.
50. Mr Buletare's pleaded admission of some acts of indecency made surprising the submission of his counsel on appeal that there was no evidence independent of that of the appellant supporting the truth of her claims.
51. It is not clear why the appellant did not plead directly the torts of assault and battery. If she had, the nature of her claim would have been more apparent. Nevertheless, it is sufficiently clear that the appellant was alleging a form of sexual harassment constituted not just of sexual suggestiveness and sexual importuning but of conduct comprising the torts of assault and battery. Mr Buletare's admission of at least some of the conduct alleged against him indicates that the appellant would be entitled to damages in respect of the assaults and batteries and those damages should take account of the emotional effects which that conduct has had on her.
52. Accordingly, this ground of appeal should be upheld with respect to Mr Buletare.
53. The position with respect to Mr Rocroc is different. The conduct which the appellant alleged against him was the importuning of her for sex. The appellant refused his advances and took steps to avoid contact with him. She did not make any allegations against Mr Rocroc of conduct which would constitute assault or battery.
54. In these circumstances, the Judge's dismissal of the claim of sexual harassment against Mr Rocroc was correct and the appeal in respect of Mr Rocroc should be dismissed.
55. The result is that the appeal should be allowed in part. Given the basis on which the Judge dismissed the claim of sexual harassment, we consider that the matter can be appropriately remitted to the trial Judge for further consideration of the claim of sexual harassment against Mr Buletare only. We will address the issue of the claimed vicarious liability of the Council for Mr Buletare's conduct at the conclusion of these reasons.

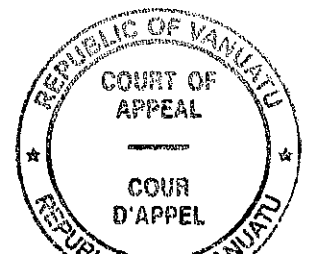
**Ground 4 – the defamation claim**



56. By her Statement of Claim, the appellant alleged that Mr Buletare and Mr Rocroc (and thereby the Council) had slandered her in two ways: first, by telling "third parties" that they were "entitled to sexually harass the claimant and that the claimant is their normal mistress and [that they could] therefore subject her to their sexual desires"; and, secondly, by telling "third parties that the claimant had been suspended for *misappropriation of funds allocated to [the disabled] people of Sanma Province and the evacuees from Ambae Island to Sanma Province*" (emphasis added).
57. The trial Judge rejected these claims for a number of reasons:
- (a) the appellant had not identified in her Statement of Claim any of the "third parties" to whom the slanders were said to have been spoken;
  - (b) the appellant had not proven that Mr Buletare or Mr Rocroc had made any of the statements said to comprise the first slander;
  - (c) with respect to the second slander, the appellant relied at trial on the evidence of three of her witnesses, namely, Ms Caroline Bani Hilton, Ms Merelyn Polines and Mr Abel Frank. The Judge said that none of the evidence of these witnesses evidenced statements made by any of the respondents and that what was required was first hand evidence of those who had heard Mr Buletare and Mr Rocroc make the alleged statements. The Judge held that the statements of Ms Hilton, Ms Polines and Mr Frank concerning what they had heard from others (but not Mr Buletare or Mr Rocroc) constituted inadmissible hearsay; and
  - (d) the appellant could not rely on Mr Buletare's acknowledgement in his cross-examination that he had spoken to his wife about the allegations against the appellant. This was because words spoken only to a person's spouse cannot be relied upon as a defamatory communication: *Wennhak v Morgan* (1888) 20 QBD 635.
58. By her Notice of Appeal, the appellant contends that the Judge had erred:
- (i) by not giving any weight to the evidence of her witnesses (Ms Hilton, Ms Polines, Mr Frank, Ms Moli and Ms Thomas) who she said had confirmed the statements alleged to have been made by Mr Buletare and Mr Rocroc; and
  - (ii) because it was incumbent on the Judge to act on this evidence, they not having been cross-examined, with the consequence that the defamations alleged had been made out.

### **Discussion**

59. The elements of the tort of defamation comprise (relevantly for present purposes):
- (1) a communication by the defendant to a third party;



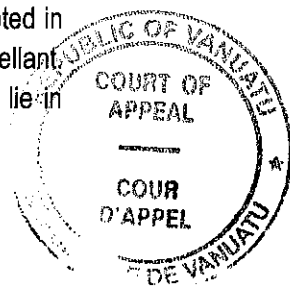
- (2) the communication conveying an imputation concerning the claimant; and
- (3) the imputation being defamatory of the claimant.
60. It is fundamental to an action of slander that the claimant *prove* the making of the particular slander alleged. A person cannot be found to have defamed another without proof that the person did, verbally or in writing, publish the defamatory matter. In a case of slander, this requires the claimant to prove that the defendant did speak the words said to constitute the slander.
61. The proper pleading of a claim of slander requires that the person to whom the impugned words were spoken be identified. As the Judge noted, this requirement is confirmed by *Bullen & Leake & Jacob's Precedents of Pleading* (13<sup>th</sup> ed), Sweet & Maxwell at 624. This may be done by identifying the particular persons to whom the words were spoken or by identifying those persons as a class, for example, a particular radio audience. But there must be some identification.
62. In the present case, the appellant did no more than allege that Mr Buletare and Mr Rocroc had made statements to "third parties". There was no identification of those third parties, whether by name, description or class.
63. However, there is a more fundamental difficulty for the appellant. That is the Judge's finding that none of the appellant's witnesses said that they had heard Mr Buletare or Mr Rocroc make either of the statements said to constitute the pleaded slanders.
64. The Court invited the appellant to indicate where in the sworn statements the witnesses had said that they had heard either Mr Buletare or Mr Rocroc make the pleaded statements.
65. The appellant referred first to the statement of Caroline Bani Hilton. Ms Hilton deposed to a conversation which she had had with Gina Buletare on Sunday, 11 December 2017, i.e, shortly after the Council's suspension of the appellant on 20 November 2017. Ms Hilton deposed:

*I then asked what was the exact reason for [the appellant's] suspension.*

*Gina then told me, she heard that [the appellant] had acquired 2 Cash impresst for the same activity in Port Olry. One from the Sanma office and the other was fund from DFAT. And her case is under investigation.*

*I then assumed that Gina must have got this information from her husband Prosper Buletare who works at the Sanma Provincial Government as the Acting Secretary General.*

66. As is apparent, Ms Hilton made the assumption that Gina had obtained this information from Mr Buletare, her husband. As it turns out, this was a fair assumption, as Mr Buletare accepted in his evidence that he had spoken to his wife about the allegations concerning the appellant. However, this does not assist the appellant because an action in defamation does not lie in



respect of words spoken by a person to his or her spouse: *Wennhak v Morgan* (1888) 20 QBD 635; *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1 at [63].

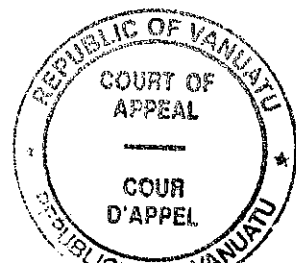
67. The appellant submitted that the principle of spousal privilege is inapplicable presently because Mr Buletare and Gina were not married, being only partners. We understood this to be a submission that their relationship was that of common law husband and wife, sometimes referred to as a *de facto* relationship.
68. We do not think that this affects the application of the principle of spousal privilege. In the first place, the evidence suggested that, whether they are lawfully married or not, Mr Buletare and Gina were living in a stable domestic relationship. We note, for example, that Gina had adopted Mr Buletare's surname and that Ms Hilton referred to Mr Buletare as Gina's husband.
69. Secondly, the principle is based on the confidential character of the relationship between a husband and wife. The relationship of persons who, even though not lawfully married, live in a stable domestic partner relationship has this character, so that the principle should also apply to them.
70. The appellant referred secondly to the statement of Dr Andrina Thomas who deposed (relevantly):

*When I confronted Prosper Buletare to enquire why [the appellant] had a filed a court case against him, he informed me that "Doriane had obtained a SANMA PGC Letterhead and used it to seek funding for her disability institution, frangipani" without the approval of the SPGC. Because of this incident, she was terminated from her employment.*

71. However, Dr Thomas was attributing to Mr Buletare a statement which differs from the second of the slanders pleaded by the appellant. It was a statement that the appellant had, by a form of false pretence, made use of her position to obtain funding for her own "disability institution". That differs from the pleaded slander that the appellant had been suspended "for misappropriation of funds" already allocated to particular people. Accordingly, the evidence of Dr Thomas does not assist the appellant.
72. Thirdly, the appellant referred to the statement of Vora Thomas, who deposed (relevantly):

*I confirm that I and Mr [Silas Rocroc] had a conversation in my office about the situation of [the appellant] and [Mr Buletare] and at that time [Mr Rocroc] told me that [the appellant] was his wife during the Janica time and that Tony had taken her for marriage later. After the prosecution of Mr Prosper I told Ms Moli that [Mr Rocroc] had told me that [the appellant] was his wife.*

73. These statements may be false, as the appellant asserts. However, it is plain that the statement which Vora Thomas attributed to Mr Rocroc is different from the first of the particular slanders pleaded by the appellant at first instance.

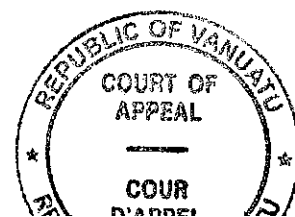


74. The evidence from the other witnesses called by the appellant at trial was of a hearsay nature and the Judge was correct to so hold. That is because evidence by A that he/she had been told by B that B had heard C make a slanderous comment about a claimant is plainly hearsay when it is adduced to prove what it is that C said. The proof of what C said should come from the person who actually heard the statement made by C. The Judge was correct to hold that the usual principles concerning hearsay applied in this context.
75. For these reasons, the Judge was correct to hold that the appellant had not proved the making of the slanderous statements she alleged and the appeal against the dismissal of the defamation claims fails.

#### **The claim of vicarious liability against the Council**

76. There remains the issue of the claimed vicarious liability of the Council. As already noted, it was not necessary for the Judge on her findings to address that claim.
77. Counsel for the Council submitted that it could not be held vicariously liable for the sexual harassment of Mr Buletare, first, because he was not its employee and, secondly, because his conduct was so far removed from the proper scope of his duties that it could not be vicariously liable for that conduct.
78. Counsel may turn out to be correct on both points but, in the absence of findings of fact by the trial Judge, this Court cannot rule on the position. We note, however, that the position with respect to vicarious liability of an employer for the intentional criminal acts of its employees requires a careful evaluation of the circumstances, in particular of the position in which the defendant had been placed by the employer in relation to the victim. So much is made plain by the conclusion of French CJ, Kiefel, Bell, Keane and Nettle JJ in the decision of the High Court of Australia in *Prince Alfred College Inc v ADC* [2016] HCA 37; (2016) 335 CLR 134. Having reviewed a number of authorities in Australia, the United Kingdom, Canada and elsewhere bearing on the vicarious liability of an employer for the sexual abuse of children by an employee, their Honours concluded:

[80] *In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As Lloyd v Grace, Smith & Co shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. As Deatons Pty Ltd v Flew demonstrates, depending on the circumstances, a wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in New South Wales v Lepore and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the*



*commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.*

[81] *Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.*

(Citation omitted)

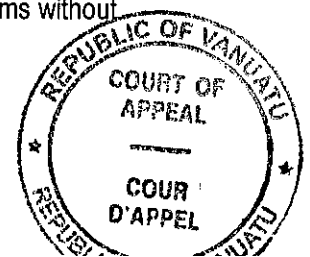
79. This decision indicates the importance of a close evaluation of the authority, power, trust, control and ability to achieve intimacy with the victim which is required in the ascertainment of vicarious liability in cases of an analogous kind. In our view, that evaluation in the present case is best performed by the trial Judge and for this reason, we will also remit to the trial Judge the issue of the claimed vicarious liability of the Council for the sexual harassment conduct alleged by the appellant against Mr Buletare.

#### **Costs**

80. The position with respect to costs is not straightforward. The appellant's appeal against the dismissal of her claim against Mr Rocroc has failed and this would ordinarily mean that she should pay his costs of the appeal. However, Mr Rocroc had common representation with Mr Buletare and the appellant's appeal against the dismissal of her claim against him has succeeded in part. In relation to her appeal against the Council, the appellant has succeeded in part.
81. It is not clear what, if any, costs the appellant has incurred as a self-represented litigant.
82. In the circumstances, we think that justice will be done if there be no order as to costs of the appeal.

#### **Conclusion**

83. For these reasons, Grounds 1, 2 and 4 are dismissed. Ground 3 is upheld with respect to Mr Buletare.
84. Before making the formal orders to finalise the appeal, we add these matters.
85. First, it would be sensible for the appellant to obtain competent legal representation at the further hearing before the Judge. As she does not have legal qualifications or experience, and some of the legal issues which arise are complex, it will be difficult for her to present her claims without such representation.



86. Secondly, counsel may wish to give attention to the amendment of the pleadings. We note, by way of example only, that the appellant has not pleaded in her Statement of Claim the groping of her breasts by Mr Buletare about which she gave evidence in his criminal trial.
87. Thirdly, in her submissions, the appellant referred to difficulties which she has experienced in obtaining employment which she attributes to concerns held about her honesty and reliability by those who have heard of her suspension by the Council. This Court is not in any position to comment on the accuracy of the appellant's submissions or of the attribution which she makes. However, we raise for the Council's consideration whether, if it is satisfied that there was no reasonable basis for the allegations which led to the appellant's suspension, it could now issue her with some form of statement to that effect so as to facilitate her obtaining further employment. We emphasise, however, that this is a matter for the Council.
88. The formal orders of the Court are:
- (a) The appeal is allowed in part, namely, in respect of the dismissal of the appellant's claim of sexual harassment by the first respondent and her claim that the third respondent is vicariously liable for the first respondent's conduct.
  - (b) That part of the judgment at first instance is set aside.
  - (c) The appellant's claim of sexual harassment by the first respondent and the claim that the third respondent is vicariously liable in respect of his conduct is remitted for further consideration by the trial Judge.
  - (d) It will be for the trial Judge to determine whether the parties should be permitted to amend their pleadings or to lead further evidence with respect to the sexual harassment claim against Mr Buletare and the liability of the Council.
  - (e) The appeal is otherwise dismissed.
  - (f) There be no order as to costs.

**DATED at Port Vila, this 22<sup>nd</sup> day of February 2022**

**BY THE COURT**

**Hon. Vincent LUNABEK**  
**Chief Justice.**

