

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Civil Jurisdiction)

Civil Appeal Case No. 06 of 2010

**BETWEEN:** NATASHA ITO NGUYEN  
First Appellant

**AND:** PATRICK TRANNE  
Second Appellant

**AND:** JEAN FRANÇOIS NGUYEN  
Respondent

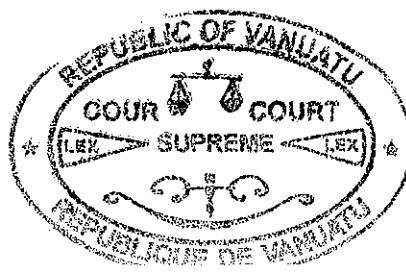
**Coram:** Justice D. V. Fatiaki

**Counsels:** Mrs. M. N. Patterson for the Appellants  
Mr. C. Rarumai for the Respondent

**Date of Decision:** 8 November 2013.

**JUDGMENT**

1. This is a joint appeal against the judgment of the Magistrate's Court awarding the respondent "VT700,000 for the damage caused to his marriage and family life" against the second appellant only. No award was made against the first appellant who was the respondent's estranged wife. Accordingly, on the court's reading of **Section 18 (2)** of the **Matrimonial Causes Act** the first appellant's appeal must be considered doubtful and incompetent.
2. Be that as it may from the very outset the proceedings in this case encountered problems in being commenced and entitled as a "Matrimonial Case" and then being converted by the magistrate's direction into a "Civil case". The claim also named the estranged wife as the first defendant yet sought no relief or orders against her and, finally, the case was decided without hearing oral evidence from the witnesses albeit with the agreement of both counsels and in the absence of any request for cross examination.
3. A brief chronology of relevant events may be summarized as follows:
  - On 9 December 1995 the first appellant and the respondent were married in a civil ceremony at the Port Vila Town Hall;
  - On 14 March 2006 the respondent filed a petition for dissolution of marriage in **Matrimonial Cause No. 1 of 2006** on the sole ground:



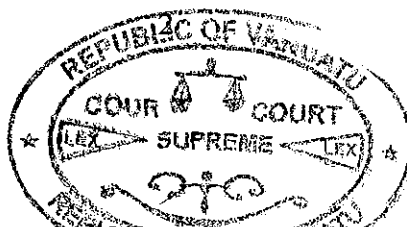
*"That the (first appellant) has since the celebration of marriage have committed adultery with another (unnamed) man".*

4. With hindsight, it was extremely unfortunate that no co-respondent was named or disclosed in the respondent's petition as required, nor were particulars of the alleged adultery including date(s) and place(s) supplied or requested. This "*lacuna*" in the petition was exacerbated by the absence of any opposition to the petition from the first appellant and the absence of any sworn statement or evidence from the respondent in support of the petition.
5. I say "*with hindsight*" advisedly because it became very clear during the course of the respondent's subsequent claim for damages that the parties had been labouring under a common and mutual mistake as to the particular incident(s) of adultery that was relied upon in the respondent's earlier divorce petition. The appellants say it was the first appellant's "*one night affair*" in June 2005 with an unidentified Canadian man in Thailand. The respondent, equally forcefully, asserts: "*I filed for divorce purely on the ground of adulterous affair between ... (the appellants) ... because of the fact that I was convince and proof of it*".
6. If I may say so, the petition should not have been entertained in its defective form irrespective of whether or not it was being opposed and, most certainly, in the absence of a Court order excusing the inclusion of a named co-respondent. This latter requirement clearly assumes that the Court has carefully read the petition, noted the "*defect*", and has satisfied itself that "*special grounds*" exist to excuse a named co-respondent. Plainly this did not occur in this instance.

- On 8 May 2006 at an uncontested hearing of the petition a Decree Nisi was issued by the Magistrate's Court dissolving the marriage;
- On 6 December 2007 a Decree Absolute was issued in the absence of any appeal and the marriage was "*... declared absolutely dissolved*";
- Fourteen (14) months later on 25 February 2009 the respondent issued a Magistrate's Court claim in Matrimonial Case No. 17 of 2009 against the first and second appellants seeking damages of VT1 million against the second appellant only;
- On 12 November 2009 the Magistrate's Court file records several (agreed) issues and the following timetable:

*"Claimant to file submissions 26-11-09  
Defendant to file submissions 10-12-09  
17-12-09 – Date of decision 9.30".*

- On 17 December 2009 (before judgment was delivered) the (appellants) filed a submission challenging the Magistrate's Court



jurisdiction to determine the respondent's claim for damages as instituted;

- After several unsuccessful applications to remove the second appellant and strike out the claim including an abortive judicial review application, judgment was finally entered against the second appellant in the sum of "VT700,000 for the damage caused to (the respondent's) marriage and family life" on 17 December 2009;
- On 13 January 2010 an appeal was filed by the appellants advancing eleven (11) grounds of appeal with thirty six (36) particulars;
- On 26 January 2010 the appellants sought a stay of execution of the judgment. The fate of this application remains unclear;

### **THE MAGISTRATE COURT JUDGMENT**

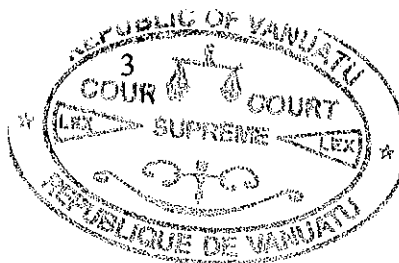
7. In the **Introduction** the magistrate dealt with a complaint about the "form" of the claim and dismissed it as a "... *misunderstanding because of the way the matter was registered in the Magistrate's Court. The name of the case is not the same and the substantive issues are not the same as in Matrimonial Case No. 01 of 2006*". The magistrate then identifies two (2) main grounds or issues for determination as follows:

- "1. *That the relationship between the (appellants) only commenced after the divorce and that the adultery committed by the (first appellant) which was the ground for the dissolution of her marriage with the (respondent) was with a Canadian man in Thailand*" and also;
2. *That the (respondent) is barred by his agreement with the (first appellant) to bring this action against the (appellants)*".

8. As to **issue (2)** which was based on a **Deed of Settlement**, the magistrate found that "... (it) *does not prohibit the claimant from claiming damages as in the present case*" and furthermore:

*"... Section 17 of the Matrimonial Causes Act ... imposes no obligation on the petitioner to claim damages on grounds of adultery at the same time on the petition for divorce. There is also no time limit provided as to when a claim for damages on grounds of adultery may be commenced."*

9. As to **issue (1)** which entailed a consideration of the evidence in the case, the magistrate summarily rejected the evidence of the appellants' four (4) witnesses as "... *merely opinions and therefore unreliable and inadmissible*" and accordingly in the absence of any acceptable defence evidence, the magistrate said:

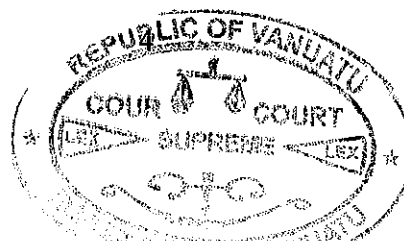


*"Based on those facts, and the circumstantial evidences adduced (by the respondent), this Court is satisfied on a balance of probabilities that (the appellants) were already developing an intimate and adulterous relationship before the commencement of divorce proceedings ..... Circumstantial evidences of the (second appellant) seducing and enticing the (first appellant) away were proven on the balance of probabilities as contributing to the separation of the (respondent) and the (first appellant)."*

10. Needless to say in so finding, the magistrate necessarily rejected the first appellant's assertion that her divorce was based on her admitted adultery with a Canadian man in Thailand in June 2005 and preferred instead, the respondent's evidence and the independent eye-witness evidence of the security guard **Jean Pierre Bourdet**.

### **THE APPEAL**

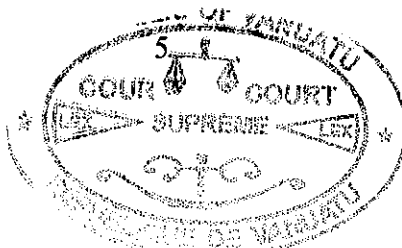
11. Despite the numerous grounds and particulars, counsels agreed that the appeal raised 3 separate and distinct issues as follows:
- (1) The form of the proceedings and absence of jurisdiction;
  - (2) The absence of a hearing; and
  - (3) The quantum of damages.
12. In this latter regard, although no specific evidence was led in support of the amount of damages claimed, the trial magistrate did have the following undisputed factors and findings to consider:
- (1) This was a marriage that lasted 10 years and produced two (2) dependant children who were aged 12 years and 10 years at the date of the claim;
  - (2) There was the undisputed evidence of the respondent that his "*marriage broke up*" and his "*family was separated and torn apart*" and he suffered "*hurt feelings and emotional distress*" as well as "*stress*" and "*worry*";
  - (3) The respondent owned and ran a beautician business from which she derived a separate income for the family;
  - (4) The amount claimed of VT1 million was within the civil jurisdiction of the Magistrate's Court;
  - (5) The respondent had forgiven the first appellant's earlier indiscretion during her holiday in Thailand in an effort to "*save the marriage*";



- (6) The appellants had commenced an "intimate and adulterous relationship before the commencement of the (divorce) proceedings";
- (7) The second appellant had "seduced and enticed" the first appellant away from the matrimonial home thereby contributing to the separation of the parties to the marriage;
- (8) The Deed of Settlement did not bar the claim for damages; and
- (9) The second appellant was "... not the sole cause" of the breakdown in the respondent's marriage;

13. The magistrate also had the leading local case of **Banga v. Waiwo** [1996] VUSC 5 drawn to his attention where the former Chief Justice in a lengthy and wide-ranging judgment observed:

*"In nearly all decisions (1) the conduct of the adulterer [or adulteress] has been regarded as important. (2) It is in my view important to consider the conduct of the co-respondent. It is important on the question of damages and of cost to ascertain whether or not the co-respondent knew that the man or woman with whom the adultery was committed was married or not. ....But if the conduct of the co-respondent is important, then it ought to follow as a matter of juristic logic that the damages should vary with the conduct. Thus if the co-respondent's conduct be marked by treachery, wantonness, cruelty, or gross depravity, the damages should be so much the more than if the co-respondent's conduct be free from such circumstances of aggravation. There is no reason that I can see why damages awarded in Vanuatu under the Matrimonial Causes Act 1986 [CAP 192] should not vary with the impropriety and gravity of the misconduct. .... (3) Such things as the pecuniary value of the spouse, may properly be taken into consideration. In these modern days where both spouses often work, the value of the spouses to each other in sharing the financial burdens of a modern household are only too clear. .... When a family unit is broken up, one has to bear in mind that it entails considerable financial upheavals in the domestic lives of the parties. Is this not something that ought to be borne in mind when assessing damages. (4) The other matter one ought to bear in mind is the proper compensation for the injury to the petitioner's feelings, and the serious hurt to the matrimonial and family life. The old English authorities do recognise (though it of course refers to the husband only) that the blow to the petitioner and the shock to his feelings clearly depend to a large extent on the conduct of the co-respondent. It follows therefore that any feature of treachery, any grossness of betrayal, any wantonness of insult and the like circumstances may add deeply to the petitioner's sense of injury and wrong, and, therefore, call for a larger measure of compensation. This also accounts to a large extent for the importance attached to the question whether or not the co-respondent knew that the respondent was married. Therefore it will be seen that the general conduct of the adulterers is important and relevant only so far as it bears (a) on the value of the respondent; and (b) on the extent to which the feelings and pride of the petitioner have been injured by it. It is important to note that*

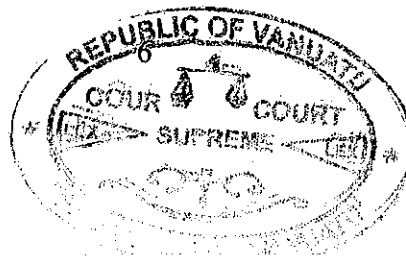


the Court is not there to punish mere immorality. We are not concerned with the moral aspect of the adulterers. (5) The conduct of the petitioner must also be taken into consideration when assessing damages. In assessing damages it is essential that the whole character and conduct and affection of the petitioner should be tested. These matters bear directly not only on the value of the petitioner as a spouse, but also on the question of any shock to feelings which may assert to have been caused by the adulterer. The character and conduct of the petitioner are as fully in issue as is the character and conduct of the respondent. Hence the importance of careful investigation whenever a claim for damages is made. It may be that the behaviour of the petitioner within the marriage, the harshness of language or negligence or cruelty in marriage of the petitioner towards the respondent may have destroyed the affection of the one for the other or sapped at the matrimonial fidelity of the respondent. I now turn to the question of (6) whether or not the Court is entitled to consider the fortune of the adulterer in assessing damages. There are two ways in which this is relevant. Firstly, the manner in which a wealthy seducer has used his fortune to obtain the object of his seduction, may be relevant to the hurt feeling of the petitioner. The manner in which the adulterer has used his fortune may greatly accentuate the outrage to the feelings of the petitioner and family pride. It is part of the conduct of the adulterer which the Court can legitimately take into account in assessing damages. But I do not feel that the adulterer's fortune should play any direct role other than that. .... (7) There is also another matter that I wish to touch upon, that is the aspect of damages that may be awarded against an innocent adulterer. In other words the amount that should be paid by a co-respondent who was not aware that the person with whom he had a relationship was a married person. In that event the hurt feelings of the innocent petitioner would be the same whether the co-respondent knew or did not know. But since we are here talking about exemplary damages i.e. punitive damages, it would seem to me that it would be wrong to make such an order against an innocent third party. But unlike English decisions on the matter, I see no reason why the onus of proving, as a matter of mitigation, that he did not know that the respondent was married should not rest on the co-respondent. In that event the Court if it does find that the co-respondent was indeed an innocent third party, should award only nominal damages against the co-respondent. The Court is not a Court of morality and damages should not be awarded to punish mere immorality. But when it comes to costs, (8) I see no reason why the ordinary rules as to costs should not be followed, namely that the petitioner who has successfully proved an allegation of adultery with the co-respondent should not recover those costs against the co-respondent. I am fully aware that this is not in line with English authorities on the matter, but our Courts are not bound by English decisions. As a matter of juristic logic I see no reason why the co-respondent should not be made to pay for the cost of the divorce."

(my underlining and numbering)

#### **FORM OF PROCEEDINGS and ABSENCE OF JURISDICTION**

14. In this regard the appellants' straight forward submissions based on **Sections 8 and 17 of the Matrimonial Causes Act** is that a claim for damages for adultery can only be sought in a "petition" under the Act and in no other way and, as there was no such claim in the respondent's petition,



he could no longer sue for damages once the decree became absolute which occurred on 6 December 2007.

15. The respondent's submission on the other hand, co-incides with the magistrate's view where it states:

*"Section 17 allows a petitioner who petition for divorce to claim damages on the basis of adultery. It does not prohibit a petitioner to make a claim for damages on the ground of adultery in a different proceeding as long as the petitioner claims under the Matrimonial Causes Act. Neither does it state that the petitioner loses his or her right to claim if the claim was not in the petition nor did it state a time limit in which such claim should be made."*

Furthermore,

*"... section 17 ... states that the petitioner can claim for damage on the ground of adultery from 'any person'. It does not strictly mean the co-respondent otherwise the word 'co-respondent' would have been mentioned. It must have reason(s) as to why the word 'co-respondent' was not put in place of 'any person'"*

and finally,

*"any person' means in this provision ... a person who committed adultery with the respondent ... In other words, it can be the co-respondent or any (other) person who has done injury to the petitioner ..."*

16. **Section 8 of the Matrimonial Causes Act** provides as follows:

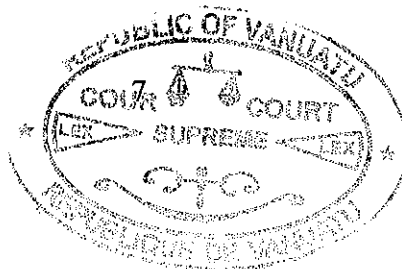
*"Where adultery is alleged in a petition or by a respondent, the petitioner or respondent as the case may be shall make the alleged adulterer a co-respondent unless he or she is excused by the Court on special grounds from doing so."*

(my underlining)

and **section 17** provides:

- "(1) A petitioner may on a petition for divorce claim damages from any person on the ground of adultery with the respondent.*
- (2) The Court may direct in what manner the damages recovered on any such petition are to be paid or applied."*

17. In **Banga v. Waiwo** (op. cit) the then Chief Justice said of section 17:

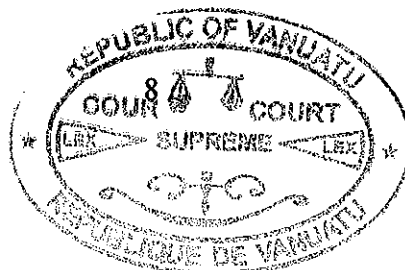


"... the duty of the Court is to give to the word whose meaning is to be ascertained its natural and ordinary meaning in the context in which it occurs, without going through a process akin to speculation ... (the Chief Justice then set out section 17 and continues) ... The word of the Act could not be more straight forward or clearer. What it does is to permit those who petition for divorce on the grounds of adultery to claim damages. It does not enjoin the Court to award those damages on any particular basis ..."

(my underlining)

18. I respectfully agree with the underlined words and therefore reject the submissions of counsel for the respondent on this issue. The submissions in my view, are not based on the plain words of the section or the context in which the section is found in the Act, instead, they are founded mainly on what the section does not say or prohibit and blithely ignores the mandatory requirements of **Section 8**.
19. The submissions also completely ignores the existence of the phrase "... on a petition for divorce" ... which falls between the words "may" and "claim" in **section 17(1)**. That phrase must be given a meaning independent of the word "may" which immediately precedes the phrase and which counsel seeks to highlight. In my view, the word "may" refers to "the petitioner" and the choice that he/she makes whether or not to include a "claim" for damages at the time of completing and presenting the petition. It does not refer to a "petition for divorce" or to the procedure by which a claim under **section 17** is to be invoked.
20. I am fortified by the mandatory requirements of **section 8** (ibid) that "the petitioner ... shall make the alleged adulterer a co-respondent ..." where the petition alleges adultery. In my view, this mandatory requirement is consistent with the requirements of "natural justice" and a desire to bring finality to what is often an emotionally-charged and unsettling process.
21. In other words the only "choice" (arising from the word "may") that a petitioner has in a divorce petition alleging adultery is whether to claim damages against the alleged adulterer or choose to forgo such a claim altogether. The petitioner is not additionally, given a choice as to the timing or the procedure by which he may invoke **section 17**.
22. The submission also ignores the special character or status of the person invoking **section 17**, namely, "A petitioner" who is the person presenting a divorce petition under the **Matrimonial Causes Act**, as opposed to, a "claimant" filing a claim under the **Civil Procedure Rules**. Furthermore, **section 7** states that a petition "... shall be in Form C in Schedule 1 ..." which, **Form** in turn, contains the following relevant paragraphs:

"5. That the petitioner claims from the said ..... damages in respect of the adultery of the said ..... with the respondent".





and

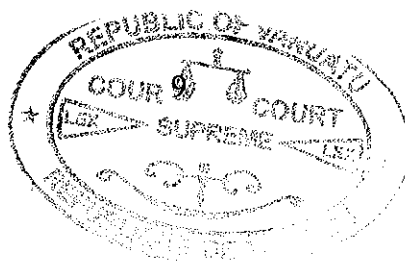
"6 (c) that the said ..... co-respondent, do pay the petitioner the sum of VT..... damages in respect of his/her adultery with the respondent".

23. I accept that **Section 17** refers to the alleged adulterer as "*any person*" rather than "*co-respondent*", but, that expression in my view, is merely to cover the unusual situation where the person against whom damages is claimed in the petition may not be the named co-respondent. It does not mean as counsel appears to suggest, that a "*co-respondent*" is not within the contemplation of the expression which he or she undoubtedly is, or that the claim for damages can occur years after the divorce.
24. In light of the foregoing the appeal must be allowed on this first procedural issue. That is sufficient to dispose of the appeal, however, in deference to the submissions of counsels, I shall deal briefly with **issues (2) & (3)** which complains about the magistrate's findings on the evidence led before him in the form of sworn statements and the amount of the damages awarded against the second appellant.

#### **ABSENCE OF HEARING AND QUANTUM OF DAMAGES**

25. Although it appears that the procedure adopted by the magistrate was agreed to by counsels, it is difficult to accept the magistrate's categorization of the appellant's witnesses evidence as unreliable and inadmissible "*opinions*". In my view that was an appealable misdirection of law.
26. The witnesses' evidence did not purport to deal with technical or scientific matters upon which only expert opinion is admissible. The evidence was based on each witnesses' personal observations and personal knowledge acquired over a lengthy period of close association with the appellants and concerned the nature of the relationship that existed between the appellants and their observed behaviour towards each other, viewed from a predominantly "*francophone*" cultural perspective.
27. The relevant principle is clearly explained in **Vol. 17 Halsburys Laws of England** (4<sup>th</sup>edn) at para.88 under the heading: Opinion of lay witnesses which states:

*"Where a person is called as a witness in any civil proceeding a statement of opinion by him on a relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived."*

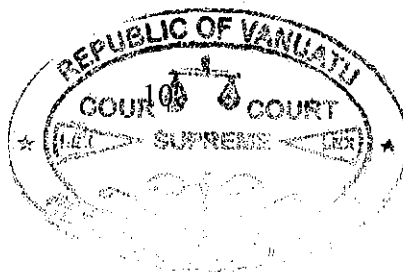


And in the related "footnote" to the above paragraph one finds the following relevant extract:

*"Witnesses have long given evidence of quasi-opinion on such matters as identity ...; age ...; affection between two persons [Greenslade v. Dare (1855) 20 Bear 284 Wright v. Tatham (1838) 5 Cl & Fin 670 H. L. ....]"*

28. In my view the exculpatory evidence of the appellants' witnesses was both relevant and admissible and, in the absence of cogent reasons or any cross-examination should not have been summarily dismissed as "unreliable".
29. In this regard too **Rule 11.2 of the Civil Procedure Rules** relevantly provides as a general rule: "*Evidence in the magistrate's court is to be given orally*" unless otherwise ordered to be given by sworn statement.
30. I accept that the evidence of witnesses is not dependant on superior numbers but on the reliability and weight that the Court attaches to the evidence. Equally, a witness' credibility is incapable of being determined or evaluated solely on the basis of opposing sworn statements as occurred in this case.
31. Having said that, the respondent's sworn statement that, after being told by the first appellant of her infidelity in Thailand, he "... forgot everything about it as I was trying to save our marriage and willing to forgive her ...", constitutes "condonation" in my view and prevents that particular adulterous incident being advanced in a divorce petition [see: **Section 9 (2) & 3 (b) of the Matrimonial Causes Act**].
32. I turn finally to deal with the **QUANTUM OF DAMAGES** upon which I specifically requested written submissions. I have read and considered the submissions and can do no better than to repeat the words of the former Chief Justice in **Banga v. Waiwo** (op. cit) where he said in the final paragraph of his judgment setting aside the damages awarded in the case:


*"..... because there has been, on the face of it, no inquiry or evidence regarding damages, on that ground and no other, I set aside the award. If the petitioner wishes to pursue her claim, then the matter ought to be relisted before the Magistrates' Court and the inquiry as to damages gone into fully and carefully. .... If this is a case that warrants exemplary damages, then evidence must be heard about it. Affording both sides the opportunity to call evidence proving or disproving the conduct that may or may not warrant the award of exemplary damages."*



33. Given the above, even if the appellants were unsuccessful on **issues (1) and (2)**, this court would be constrained to allow the appeal against the damages awarded and return the case to the Magistrate's Court for assessment in accordance with **Rule 9.4** of the **Civil Procedure Rules**.
34. Accordingly the appeal must be allowed and the damages awarded, if already paid, is ordered to be refunded within 30 days.
35. The appellants having succeeded in the appeal are awarded costs of the appeal to be taxed if not agreed.

**DATED at Port Vila, this 8<sup>th</sup> day of November, 2013.**

**BY THE COURT**



**D. FATIAKI**  
**Judge.**

