

**BETWEEN: JIANG SU PROVINCIAL CONSTRUCTION GROUP
(VANUATU) LIMITED**
Appellant

AND: ZHINJIAN PANG
Respondent

Coram: *Chief Justice Vincent Lunabek
Justice Raynor Asher
Justice Dudley Aru
Justice Richard White
Justice Gus Andrée Wiltens
Justice Viran Mollisa Trief*

Counsel: *Mrs Stephanie Mahuk for Appellant
Mr Ihinjian Pang in person, assisted by his McKenzie friend Elvira (daughter)*

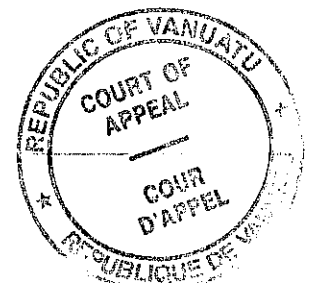
Date of Hearing: 6th May 2021

Date of Decision: 14th May 2021

REASONS FOR JUDGMENT

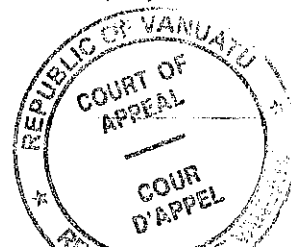
I. Introduction

1. At the conclusion of the hearing on this appeal on 6 May 2021, we gave our decision and reserved the right to publish reasons at a later date. We recorded that the appeal against the refusal to grant summary judgment has been abandoned by the Appellant. We accordingly dismiss the appeal on this aspect. We instead allow the appeal against the order of the Judge in the Supreme Court dismissing the claim of the Appellant without a trial. We decided that in the circumstances, there will be no order as to costs. We now publish, on 14 May 2021, our reasons.
2. The appellant issued proceedings against the Respondent alleging defamation.
3. The Supreme Court, on 9 February 2021, refused to grant summary judgment as sought by the appellant (claimant) but instead, dismissed the claim of the appellant (claimant).
4. This appeal is against those aspects of the Supreme Court judgment of 9 February 2021.



II. Background

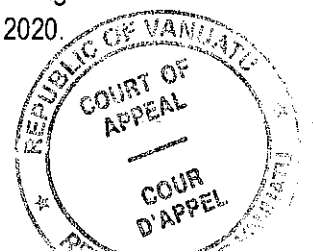
5. The Appellant Company operates in Vanuatu under a VIPA certificate and Business licence as a construction company.
6. On or about 19 March 2018, the Appellant company entered into a contract with the Respondent (Defendant) to provide the labour required to construct the Respondent's motel.
7. The contract required the Respondent to supply all materials in a timely manner to meet the construction and planned completion date of September 2018.
8. The construction was incomplete when a Supplementary Agreement was entered into to re-work the walls of the motel.
9. The Respondent, after entering the Supplementary Agreement and before work commenced thereunder, demanded the Appellant Company to admit to certain allegations by the Respondent of misconduct, before allowing access to the Appellant Company to complete work under the contract and Supplementary Agreement.
10. The Appellant's company denied the allegations and was refused access to the construction site by the Respondent.
11. The relationship of the parties broke down as the Respondent demanded in excess of VT 30 million in damages from the Appellant Company.
12. Despite attempts to resolve the issues between the parties, the Respondent caused the public display of a banner and signage that contained allegations against the Appellant Company.
13. On 6th May 2019, 4th June, 11th June and 13th June 2019, the Respondent caused the display of a banner and signage at the Family Mart, USP and PTH Roundabouts in Port Vila. These are the major traffic intersections. The banner and signage were displayed at peak traffic hours from 7:00am - 8:00am, 9:00am – 11:00am, and 2:30pm - 5:00pm on each of the four (4) days.
14. On 24th June 2019, the Appellant company sought and obtained restraining orders against the Respondent, its agents or assigns to the following effect:-
 - (a) be prohibited from displaying for public view, any banner or signage that contain any allegations against the Appellant company;
 - (b) be prohibited from protesting in public places against the Appellant company;



- (c) be prohibited from causing the publication in any media outlet whether print or online medium, any remarks or allegations against the Appellant company; and
 - (d) that the appellant shall file and serve a statement of claim within 14 days from the date hereof.
15. On 10th July 2019, the Appellant Company filed a Supreme Court Claim claiming damages for defamation against the Respondent in the sum of VT 8 million, together with costs and interests. The Appellant Company specifically alleged the display of the banner was defamatory to the Appellant Company, calculated to injure the Appellant Company's reputation and good will in Vanuatu.
16. The Respondent filed a defence on 19th August 2019 through Mr Nigel Morrison of Ridgway Blake Lawyers denying any wrong doing. After Mr Morrison ceased to act for the Respondent on 05 August 2020, the Respondent filed another defence on 18th August 2020 denying all claims and allegations made in paragraphs 3 to 20 inclusive of the statement of claim.
17. On 27th August 2020, the Respondent filed a counter-claim claiming, among other matters, economic losses caused by the demolition of the building, damages and other related costs and interests.
18. On 9th September 2020, the Appellant company filed an application for summary judgment against the Respondent on the basis that:-
- (a) the Respondent has filed a defence which did not have any real prospect of defending the Appellant company's claim; and
 - (b) the Respondent has failed to file any evidence in support of his defence.
19. The Appellant Company relied on the sworn statements of Ge Yihun filed on 12th June 2019, 9th July 2020, 9th September 2020 and 29th September 2020.
20. The Respondent relied on his sworn statement filed on 25th September 2020 and the counter-claim filed on 27th August 2020.

III. The decision in the Supreme Court.

21. It appears that the Judge dealt with the summary judgment application and the striking out application filed by the Appellant Company on the same date of 9 September 2020.



22. Mrs Mahuk objected to the counter-claims on the grounds they were filed late. The Judge accepted that submission and rejected the Respondent's counter-claims.
23. The Judge at the first instance considered Rule 9.6 of the Civil Procedure Rules as applicable when determining an application for summary judgment. The Judge referred to Rule 9.6(7)(a) which pointed to the test that the Court must be satisfied the Respondent (Defendant) has no real prospect of defending the claims of the Appellant company (claimant). The Judge below also commented on the Respondent's evidence showing that:-
- (a) the Respondent obtained authorisation from the Port Vila Municipal Council to display his banner on the four days as alleged. The Judge then concluded that the action of the Respondent was therefore not an independent deliberate action intended to defame the claimant in any way; and
 - (b) his intention was to get assistance from any member of the public who might wish to offer assistance.
24. The Judge below was of the view that those were good defences of truth or justification and privilege. It is noted that the Judge below did not stop there for the purpose of the summary judgment application which would have led him to the refusal of the summary Judgment application and to allow the claim to go to trial.
25. The Judge below went on to consider the Appellant Company's evidence showing the banner as contained in the sworn statement of Ge Yihun dated 12th June 2019. The banner reads:-

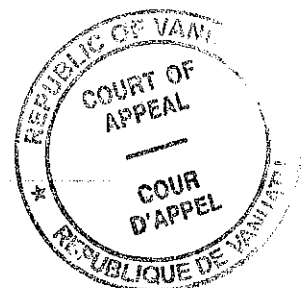
"CHINESE (JIAN SU PROVINCIAL CONSTRUCTION GROUP) CHEATING CHINESE." It was observed that what was written in Chinese language below the English Version, in large letters and with a red ink.

26. The Judge below referred to the allegation of "cheating" made in the banner, and commented that the Respondent's evidence was contained in his sworn statement of 25th September 2020. The Judge below noted that none of the Appellant Company's evidence addressed or responded to those issues raised by the Respondent. The Judge finally concluded that:-

"There may be truth in the allegation made in the banner. In law where there is truth, there is justification and no action for defamation can lie.

For those reasons the application for summary judgment is refused and is dismissed.

The claims of the claimant are dismissed at this point...."

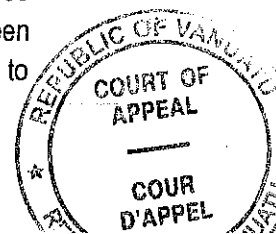


IV. This Appeal

27. The Appellant Company advanced this appeal principally on two (2) main grounds that the Learned Judge in the Supreme Court had erred in:-
- (i) refusing the summary judgment application; and
 - (ii) dismissing the entire claim of the Appellant.

V. Discussion

28. At the hearing of the appeal, Counsel for the Appellant Company informed the Court that the Appellant abandoned the first point of appeal which challenged the Learned Judge's ruling that the Summary Judgment application was rejected and dismissed.
29. We accordingly dismiss this point of appeal.
30. The second major challenge of this appeal is about the Learned Judge's ruling dismissing the entire claim of the Appellant without a trial to test the evidence.
31. The second contention is that the Court below erred in satisfying itself as to the truth and privilege defences by virtue of the existence of the Port Vila Municipal Council permits. These were seen as curing the characteristic of this being independent and deliberate action to protect the Respondent. This, led up to the Judge accepting that the intention of the Respondent was to seek assistance from the public.
32. It is also contended that the Court erred in determining that the allegation of "cheating" was established in the sworn statement of the Respondent.
33. We are satisfied the Judge took the wrong approach to dismiss the entire claim of the Appellant at the hearing of the Appellant's application for summary judgment. The purpose of the summary judgment is to satisfy whether the defence and sworn statements filed in support of the defence have a real prospect of success. If they have no prospect of success, then, the judge must grant the summary judgment application. If they have a prospect of success in defending against the claim, then the judge is duty bound to dismiss the summary judgment application and allow the claim to go to trial (see Rules 9.6(9) of the Civil Procedure Rules).
34. We note the learned Judge adopted privilege as a defence.
35. We accept from the outset the submissions of the Appellant's Counsel that the rationale of the defence of qualified privilege is the law's recognition that there are circumstances when there is a need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source: see **Reynolds v Times Newspapers Ltd [1999] 3 WLR 1010**. These occasions have been described, traditionally, in terms of persons having a duty to perform or an interest to



protect in providing the information. We note further, that if, adopting the traditional formulation for convenience, a person's dominant motive is not to perform this duty or protect this interest, he is outside the ambit of the defence.

36. In **Horrock v Lowe [1975] AC 135** at page 150, Lord Diplock said this:

"Even a positive belief in the truth of what is published on a privileged occasion ... may not suffice to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames."

37. Lord Diplock continued by noting that there may be other improper motives, which destroy the privilege. He instanced the case where a defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege.

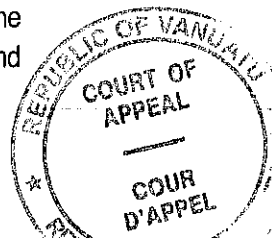
38. Lord Diplock's observations are on point to the extent that they enunciate the principle that express malice is to be equated with use of a privileged occasion for some purpose other than that for which the privilege is accorded by the law.

39. In the present case before the Court, we observe the following:

- a) The Appellant and the Respondent have contractual agreements between them. Issues arose between them in the execution of the said agreements causing grievances;
- b) The Respondent was an aggrieved private citizen and he has the recourse to the courts in his disputes and differences with the Appellant;
- c) The Appellant had attempted to settle the matter amicably prior to, during and after the protests by the Respondent;
- d) The Respondent sought instead to protest for 4 days at peak traffic hours on the main intersections with allegations that the Appellant says are defamatory.

40. The Appellant alleged that the actions of the Respondent were devised to tarnish the reputation of the Appellant and do not qualify for the defence of privilege.

41. We note that the defence of truth or justification is recognized as a complete defence. However, in this case, at the date the summary judgment application hearing was scheduled in the Supreme Court, there was clear evidence presented by the Appellant, which directly, contradicted the evidence of the Respondent as referred to in the judgment in the sworn statements of Ge Yihu filed on 12 June 2019, 09 July 2020 and 29 September 2020.



42. We are of the view that the mere fact that the statement was made on oath does not render the statement as conclusive evidence of the truth, as such evidence has to be tested (see *Kakula Island Resorts Ltd v Government of the Republic of Vanuatu* [2006] VUSC 33 applying *Haines v Guthrie* [1884] 13 QBD 818).
43. We also note and accept the submissions of the Appellant that, at the summary judgment application hearing, the Court ought to have held, among other matters, that:
- a) The defence of truth or justification remains a live issue to be determined at trial; and
 - b) The evidence of the Respondent filed 25 September 2020 is directly contradicted by the evidence of the Appellant filed 12 June 2019, 09 July 2020 and 29 September 2020.
44. The Court ought to have allowed the claim to proceed to trial instead of unilaterally dismissing it. The Judge in the Supreme Court erred in not doing so. (See *Aheimhalahlah v Republic of Vanuatu* [2017] VUCA 50; Civil Appeal Case 2195 of 2017 (17 November 2017) and *Gouras v Naca Ltd* [2020] VUCA 53; Civil Appeal Case 2599 of 2020 (20 November 2020) and others).

VI. **Note to Respondent in person**

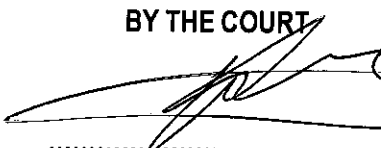
45. Before we dispose of this appeal, in the interest of justice and because of the complicated issues of facts and law to be involved in the defamation claim and the defences intended to be raised in opposition to the claim, we strongly advise the Respondent to instruct a competent and experienced professional counsel to assist him in his defence to the Appellant's claim.

VII. **Result**

46. The appeal is allowed on this second point of appeal.
47. There is no order as to costs.

DATED at Port Vila, Vanuatu, this 14th day of May, 2021

BY THE COURT


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Hon. Chief Justice V. Lunabek

