

BETWEEN: **Bessie Tamtam**
Petitioner

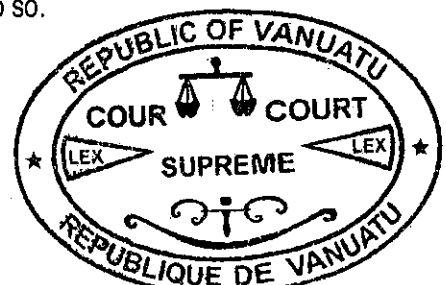
AND: **Christie Philip**
First Respondent
Merry Lerr
Co-Respondent

Date: 6 August 2018
By: Justice G.A. Andrée Wiltens
Counsel: Ms T. Matas for the Applicant
No counsel for the Respondent

JUDGMENT

A. Introduction

1. The petitioner has divorced the first respondent on the grounds of his adultery with the co-respondent. The division of matrimonial property and custody/maintenance/access issues have all been resolved between the petitioner and the first respondent.
2. The petitioner seeks damages VT 500,000 from the co-respondent for pain and suffering, and loss of consortium.
3. Counsel for the petitioner has filed written submissions and asks this Court to determine the matter on the basis of those submissions – “on the papers”. Previous counsel for the co-respondent has filed a Notice of Ceasing to Act. The co-respondent has not filed any submissions. Ample opportunity has been provided for her to do so.

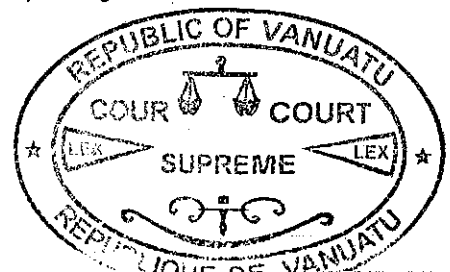


B. Basis for Claim

4. The first respondent and the co-respondent have both filed sworn statements admitting to having committed adultery.
5. Accordingly, under section 17 of the Matrimonial Causes Act [Cap 192], the petitioner may claim damages.
6. Three authorities have been tendered in support: *Banga v Waiwa* [1996] VUSC 5; Civil Appeal Case 001 of 1996 (17 June 1996), *Maltok v Maltok* [2002] VUSC 70, and *Ligo v Ligo* [1997] VUMC1; Civil Case 004 of 1996 (30 June 1997).
7. In *Banga*, a number of considerations were identified as impacting on the decision whether to award damages, and if so, to what extent. The petitioner relies on those considerations:
 - The conduct of the adulterer
 - The conduct of the co-respondent
 - The pecuniary value of the spouse
 - The proper compensation for injury to the petitioner's feelings, and the serious hurt to the matrimonial and family life
 - The conduct of the petitioner
 - The fortune of the adulterer, and
 - Damages against an innocent adulterer.

C. Evidence

8. It appears that the petitioner and the first respondent married on 6 October 1998. They had three children together, but by 2009 the marriage was no longer on a solid footing, with lots of arguments. The first respondent and co-respondent (who was also married at the time) were both employed by the Vanuatu Mobile Force, and they began a relationship in about 2011.
9. In August 2013 there was a custom meeting held at VMF offices to try and resolve matters. Both the first respondent and the co-respondent were ordered to resume their marriages, which they have both failed to do. As well, each was ordered to pay VT 50,000 to the other's former spouses and VT 10,000 to their own former partners. Those sums have apparently been paid.
10. The petitioner asks that I deal with this application on the basis of all the material provided and his written submissions.
11. The material filed is wholly inadequate. There is very little available to me to assess the issues. I have no indication of salary levels, or even if the petitioner is in work. Is the petitioner in a new relationship? There is no concrete evidence as to the first respondent's conduct, nor that of the co-respondent, or the petitioner. I have no evidence of the first respondent's worth or earning capacity. There is a suggestion that the first respondent and the co-respondent met and possibly commenced their relationship when both were working overseas, and a long way from home and their previous partners – if so, that would diminish the grounds for making an award in my view. The petitioner has claimed distress, and I accept things must have been



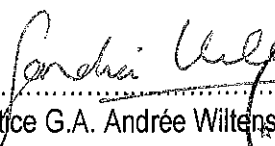
difficult financially while she was looking after her children – but to what extent is unclear. There is simply no justification for the VT 500,000 claimed.

D. Decision

12. I note that the award in *Ligo* was VT 30,000; that the award in *Banga* was VT 100,000 (but that was not upheld on appeal).
13. I note also that former Chief Justice d'Imécourt in *Banga* clearly identified that for an award to be made, there had to be clear evidence to support not only the making of the award but also justifying the amount.
14. I am not satisfied that has been done in this case. In the circumstances I decline the application *in toto*. Costs are to lie where they fall.
15. Qualification: I accept the 2002 sentiments of Justice Saksak in *Maltock* acknowledging the "...serious breach of contract" where parties divorce due to adultery. However, I question whether society has moved on. In my view, the need for an award of damages in these circumstances has greatly diminished, in recognition of a more liberal view of individuals' rights. The bond of marriage that was very strong in earlier times is much less strong today. The evidence for that, if required, can be seen in the ease by which divorce is attainable in our current time, than it was in say the 1960's. Everyone's expectations at the commencement of a marriage undoubtedly are that the marriage will last "until death do them part" – but there is a multitude of evidence that more and more marriages end well short of that, and everyone currently embarking on marriage has to be realistic. There are of course also marriages of convenience, and so-called "open" marriages where couples agree to be together but are unconstrained with whom they pursue sexual relations. I suggest an award for damages for loss of consortium in those instances would be extremely rare.
16. I seriously question, even in a very religious society such as here in Vanuatu, whether awards of damages for loss of consortium and hurt feelings are still expected in the 21st century by ordinary-thinking members of the community. The lack of authorities on the point might suggest not.
17. Regardless, I accept that Vanuatu's law in relation to such damages awards continues to exist. However, I wonder if perhaps it is time for Parliament to re-visit and modernise this particular area of the law?

Dated at Port Vila this 6th day of August 2018

BY THE COURT


Justice G.A. Andrée Wiltens

