

**BETWEEN: Alumecei Lumuni Kaltonga**  
*Claimant*

**AND: Public Prosecutor**  
*First Defendant*

**AND: The Republic of Vanuatu**  
*Second Defendant*

**AND: The Reserve Bank of Vanuatu (RBV)**  
*Third Defendant*

**Coram:** *Justice Aru*

**Counsel:** *Mr. J. Tari for the Claimant*

*Mr. S. Aron for the First and Second Defendant*

*Mrs. E. Blake for the Third Defendant*

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## JUDGMENT

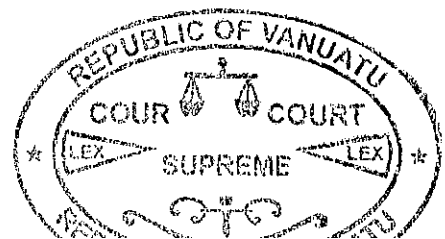
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### Introduction

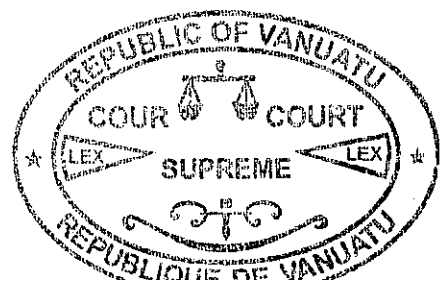
1. The claimant signed a consultancy agreement with the Central Bank of Bahamas in July 2019. Her contract was to start on 27 August 2019 for a period of one (1) year. Subsequently criminal proceedings were brought against her which led to the cancellation of the contract. The proceedings were later nollied by the Public Prosecutor (PP) and as a result the claimant now claims damages against the Republic of Vanuatu (the State), the PP and the Reserve Bank of Vanuatu (RBV).

### Background

2. The claimant has been and still is an employee of the RBV for over 22 years and she currently serves as a Senior Economist.
3. In 2017, Lina Interiors a United Kingdom based company (which later turned out to be a sham) offered the claimant a position as their company representative in Vanuatu. She accepted the offer. Her role was to withdraw funds deposited into her account and to remit them to the Company's overseas branch. In due course funds were deposited into her account and she made a number of withdrawals.



4. As it turned out, the funds were transferred from Benjor's ANZ Account and a C Thierry's Account also with ANZ bank into the claimant's account with Bank South Pacific (BSP).
5. On 7 October 2017 the ANZ bank reported the matter to the Financial Intelligence Unit (FIU).
6. On 16 October 2017 the FIU reported the matter to the Police. Two months later on 6 December 2017 the claimant also reported the matter to the FIU.
7. On 12 March 2018 C Thierry made a statement to the Police confirming that funds were transferred from her account without her consent.
8. On 8 November 2018 the claimant applied for the position of Balance of Payments Consultant with the Central Bank of Bahamas. Her application was successful and on 14 July 2019 the claimant signed her contract which was for a period of one (1) year starting on 27 August 2019.
9. On 25 July 2019 the claimant applied to the Governor of the RBV for a one year sabbatical leave to undertake the consultancy. The specific request was "*I would like to request for a one year sabbatical leave in order to assist the CBB. This will be from August 15 2019 to August 15 2020*".
10. On 7 August 2019 the Deputy Governor replied "*I hereby approve your requests to the 1 year sabbatical leave...*"
11. On 9 August 2019 the claimant was charged under a draft Information with six (6) counts of money laundering contrary to s 11 (2) (a) and six (6) counts of obtaining money by deception contrary to s 130B of the Proceeds of Crime Act [CAP 284 ]. A further draft information was prepared on 24 September 2019 for a preliminary hearing in **PI Case No 19/2054 MC/PRIN- PP v Alumeci Lumuni Kaltonga**.
12. Similarly on 9 August 2019, the claimant was remanded on bail under strict conditions namely that she "*...must not leave the island of Efate ...and she must surrender her passport to the Magistrate Court Registry by Monday 12 August 2019 before 4.30pm...*"
13. On 16 August 2019 Mr Tari on behalf of the claimant wrote to the Public Prosecutor requesting an urgent consideration of the evidence against the claimant and to enter a nolle prosequi on the basis that the evidence does not support the draft charges. The urgency was that the claimant was due to begin her contract in the Bahamas on 27 August 2019.

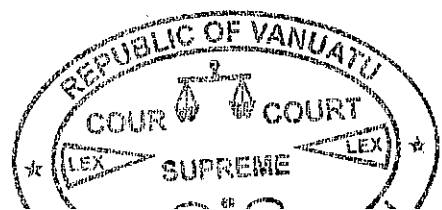


14. On 29 August 2019 Mr Morrison upon being instructed by the claimant to provide a second opinion on the strength of the evidence against the claimant, made a follow up request to the Public Prosecutor.
15. On 25 September 2019 Central Bank of Bahamas enquired of the claimant about the charges against her and sought her clarification on 28 September 2019.
16. On 1 October 2019 the claimant's consultancy agreement was terminated by the Central Bank of Bahamas.
17. On 7 May 2020 the Public Prosecutor entered a nolle prosequi on all the charges against the claimant. Accordingly, the Magistrate ordered that "*the defendant (Mrs Kaltonga) is thereby discharged of the charges and it now follows that her passport kept in custody of the Court be surrendered to her forthwith.*"

## **Pleadings**

### *Claim against the State and PP*

18. The claimant claims that the defendants' actions or the lack thereof and the continued delay in their investigations led to the cancellation of her consultancy agreement by the Central Bank of Bahamas. Second, she alleges that the PP's actions in pursuing criminal charges against the claimant in **PP v Alumecei Kaltonga** Criminal Case No 19/2054 were defamatory. As a result she suffered loss and claims the following relief:
  - VT 15,366,000 for the loss of the consultancy agreement.
  - Punitive damages to be assessed for defamation.
  - VT 76,830,000 in damages for loss of future earnings.
  - VT 10, 000,000 in damages for trauma and distress.
  - Interest
19. The defendants deny the claim and the allegations made on the basis that they were not privy to the consultancy agreement and second, the criminal proceedings against the claimant were initiated by a complaint lodged with the Police pursuant to s34 and 35 of the Criminal Procedure Code [CAP136] (CPC). Once the complaint was made, the PP had to satisfy himself that there was a prima facie case before proceeding and that took time as it required a full and thorough investigation.
20. Third, s 29 of the CPC gave the PP discretion to enter a nolle prosequi at any stage of the proceedings before verdict or judgment if he was satisfied that there were sufficient grounds to nolle the proceedings. Fourth, the defendants deny that the proceedings were defamatory as the CPC provides and sets out the procedures for lodging criminal complaints, the laying of charges and entry of nolle prosequi where justified.



21. The defendants deny the relief sought and also say that the claimant is not entitled to any damages for trauma and distress.

*Claim against RBV*

22. The claim against RBV is for unpaid salaries during the period of sabbatical leave. The claimant alleges that RBV has a standard practice that when a staff member takes sabbatical leave, she will continue to receive her salaries until she departs Vanuatu to take up her new assignment. The claimant alleges that she remained on sabbatical leave in Vanuatu for a period of one (1) year after her consultancy contract was terminated but was not paid any salary. She claims VT 3,500,000 for loss of salary.
23. The RBV denies such entitlement relying on the RBV staff Guidelines - clause 3.13.0 which provides that sabbatical leave is leave without pay .It further says that the practice of the office is what is stipulated in the staff Guidelines.

*Counterclaim against the claimant*

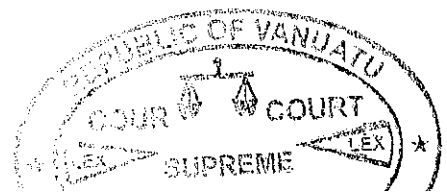
24. The RBV counterclaims against the claimant and alleges that from 16 August 2019 to 15 October 2019 whilst the claimant was on sabbatical leave she was paid and received a sum of VT 507,604 by mistake as under the staff Guidelines, a member of staff on sabbatical leave is considered to have forfeited her salary and allowances .
25. The RBV claims a refund of the sum of VT 507,604 from the claimant. The claimant denies the counterclaim and says that the payment to her was in line with the staff Guidelines and practice that has been applied to previous staff members.

**Evidence**

26. The claimant's evidence is contained in her sworn statements filed on 27 October 2020 [Exhibit CL 1] and 4 February 2022 [Exhibit CL2]. She was cross-examined .For the First and Second defendants they rely on the sworn statement of Simcha Blessing filed on 9 March 2021 [Exhibit FSD1]. He was also cross-examined on his evidence. The third defendant relies on the sworn statements of Linnes Moli Tarianga filed on 10 September 2021 and 17 February 2022 [Exhibit TD3] and [Exhibit TD4] respectively. She was also cross examined on her evidence. Documentary evidence tendered by the third defendant included [Exhibit TD1] and [Exhibit TD2] confirming the claimant's annual salary.

**Discussion**

*Issue 1 – whether PP's decision to nolle the criminal proceedings at the time that he did on 7 May 2020 was exercised properly?*



27. The claimant in her submissions submits that there is no dispute about the duties and procedures of the PP's office, what she disputes is the exercise of the PP's discretion to nolle the proceedings in a timely and reasonable manner. She alleges unfair delay on the part of the PP which resulted in the cancellation of her consultancy. The PP decision could have been challenged by filing judicial review proceedings however the claimant admits they have not pursued that avenue.

28. Article 55 of the Constitution vests the prosecution function in the PP and in addition states:-

*"..He (the PP) shall not be subject to the direction or control of any other person or body in the exercise of his functions."*

29. Section 29 of the Criminal Procedure Code [CAP 136] provides for the PP's discretion in entering a nolle prosequi in a matter and states :

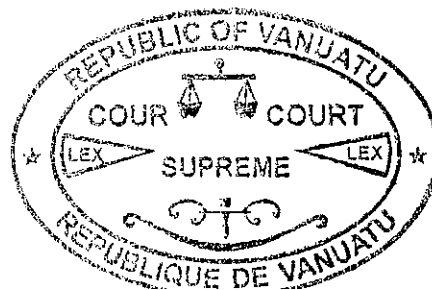
***"29. Nolle prosequi***

*(1) In any criminal case and at any stage thereof before verdict or judgment, the Public Prosecutor may enter a nolle prosequi by informing the court that he intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released; such discharge of an accused person shall operate as a bar to any subsequent proceedings against him on account of the same facts and he shall be treated in all respects as though he had been acquitted.*

*(2) If the accused shall not be before the court when a nolle prosequi is entered, the registrar of such court shall forthwith cause notice in writing of the entry of such nolle prosequi to be given to the keeper of the prison in which the accused may be detained."*

*(emphasis added)*

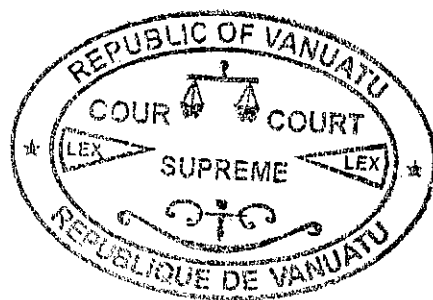
30. The Constitution gives the PP independence to perform his functions free from any direction or control by any person or body. In doing so, in some matters he may decide to enter a nolle prosequi and may do this at any stage of a criminal proceeding before verdict or judgment is entered. Second once a matter is nollied, the PP may not subsequently bring fresh proceedings against the accused person on the same facts. On that basis the PP is obliged to be satisfied that he has reviewed all the evidence available before deciding to nolle a proceeding.



31. Mr Tari wrote to the PP on 16 August 2019 seeking a withdrawal of the charges based on three (3) documents namely: a letter from the FIU acknowledging the claimant's reporting of the transactions involving her account, a letter from BSP detailing the events and a copy of the claimant's report to the Police. Following this letter a follow – up meeting was held between Mr Blessing, the PP and Mr Fiuka of Mr Tari's office. Mr Blessing in his evidence said the information provided by Mr Tari was insufficient. The claimant's husband, Mr Kaltonga also met with Mr Blessing and the PP and he was informed of the meeting with Mr Fiuka.
32. Mr Kaltonga was requested to provide further information namely all correspondences (emails/letters/notes etc between the claimant and BSP and copies of the money gram transfers forms and (vouchers if any). Nothing was provided in response to the PP's request.
33. The claimant then engaged Mr Nigel Morrison of Ridgway Blake Lawyers for a second opinion. Mr Morrison also wrote to the Public Prosecutor. In his evidence, Mr Blessing said because no information was forthcoming from the claimant and her lawyers, he took steps on behalf of the PP to obtain more information. Mr Blessing confirmed under cross examination that through his investigations he obtained further information which was not provided to him earlier either by Mr Tari, Mr Kaltonga or Mr Morrison.
34. As a result of the information obtained, the PP was then in a position to enter a nolle prosequi which he did on 7 May 2020.
35. Progressively, there was constant dialogue between the PP and the claimant and her representatives with a view to nolle the matter. The delay was due in part to the claimant not providing all the information requested. In any event, the PP is not subject to the direction or control of any other person or body in the exercise of his functions.
36. In view of the circumstances, and in answer to issue 1, the PP acted in a timely manner. Based on the information before him the criminal proceedings were nollied.

*Issue 2- whether the claimant is entitled to any damages claimed against the first and second defendants?*

37. The claimant claims damages for defamation, trauma and distress and entitlements under the contract and loss of future earnings .The first and second defendants submit that the claimant is not entitled to any damages as the PP acted lawfully within his powers.



*a. Defamation*

38. Mr Tari submitted at the end of his oral submissions that the damages sought are in respect of the delay by the PP to act not defamation. The claim for defamation was also not pursued. No evidence was led on that aspect of the claim to prove damage to her reputation and if so what she is entitled to in damages. This aspect of the claim therefore fails.

*b. Trauma and distress*

39. The claimant claims VT 10,000,000 for trauma and distress. No medical evidence was filed or led to show that the claimant suffered trauma and distress. In the absence of such evidence, the claim under this head of damage must also fail.

*c. Claim for monies under the consultancy agreement and loss of future earnings*

40. The claimant claims VT 15,366,000 for monies she would have been paid under the contract had it not been terminated. Second she also claims loss of future earnings in the sum of VT 76,830,000.

41. First, the first and second defendants were not party to the claimant's consultancy agreement with the Central Bank of Bahamas therefore they could not be sued for any breach. Second, the contract was never performed by the claimant as it was terminated before the claimant could travel to the Bahamas. This was confirmed by the claimant in her evidence. It's the performance of work under the contract that entitles her to a remuneration. In the absence of any service any claim for remuneration is futile: *see Robertson v Luganville Municipal Council [2001] VUCA 14.*

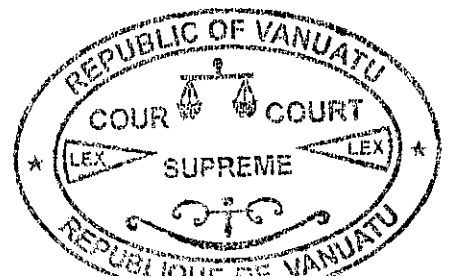
42. Furthermore, the claimant has not made out her claim for loss of future earnings. She remains a staff member of the RBV as Senior Economist. In answer to issue 2 -the claimant is not entitled to any damages against the first and second defendants.

*Issue 3 – whether the claimant is entitled to any salary during her sabbatical leave?*

43. Under the RBV staff Guidelines, sabbatical leave is different to secondment. Each is provided for separately. Clause 3.13.0 provides for sabbatical leave and states:-

*“3.13.0 Sabbatical leave*

*Sabbatical leave is leave without pay that may be sought from the department head and approved by the Governor or in his absence the Deputy Governor. It may be granted for the purpose of undertaking short term assignments locally or overseas.”*



44. And clauses 3.13.6 and 3.13.7 provides :

*“3.13.6*

*Sabbatical leave must not exceed one (1) year, if however this happens the bank reserves the right to terminate the officer. During the one (1) year the officer is considered to be in continuous employment although only their salary and other allowances are considered to have been forfeited.*

*3.13.7*

*During sabbatical leave the Reserve Bank of Vanuatu will not be responsible for paying any salary and allowances, holidays or grant and any entitlements to the officer.”*

45. Regarding secondment , clause 3.14.0 provides:-

*“3.14.0 Secondment*

*The Bank may nominate officers for secondment based on merit, to represent the interest of Vanuatu in any regional or international organisation or locally for the purposes of assisting any government department or statutory organisation.”*

46. Clause 3.14.1 states:

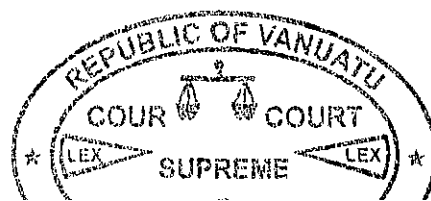
*“The Governor may approve the secondment after consultation with the Directors of the respective department and the secondment may be for a period of two years. ”*

47. And clause 3.14.3 states:-

*“The receiving organisation shall be responsible for the payment of the employee’s salary, pension contribution and any other payments or benefits received by the employee during the period of secondment.”*

48. Differences between sabbatical leave and secondment are that sabbatical leave is a private arrangement undertaken by the employee and is to be for not more than one year. During that period he or she is taken to have forfeited her salary and allowances and the RBV will not be responsible for any salary or allowance. Secondment can only be undertaken by nomination by the Governor and may be for a period of two years. The receiving organisation is responsible for all salaries and allowances.

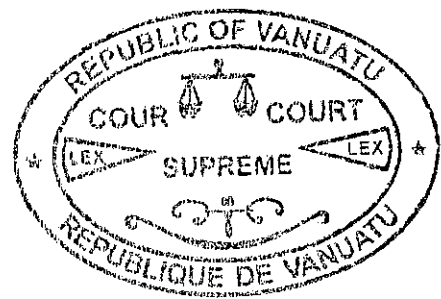
49. The damages claimed against the third defendant is VT3,500,000 being salaries due for the 1 year period of sabbatical leave .It was submitted by Mr Tari that despite the RBV’s policy guidelines and procedures the accepted practice is different. The claimant said in her evidence that a staff member going on sabbatical leave will continue to receive their salaries up to the date they depart Vanuatu. She asserts that she never left Vanuatu and remained on sabbatical leave for one year as her contract was terminated by the





Central Bank of Bahamas. She relies on advice she got from a Mrs Loneth Jonas from RBV administration and Ms Andrea Molisa Human Resource Manager.

50. Both Mrs Jonas and Ms Molisa did not file any sworn statements to confirm the claimant's assertions. The claimant says that the process of payment of salaries during sabbatical leave until departure from Vanuatu was applied to a Mr Brennan Garae and a Mr Simon Tiwok. Again these individuals did not file any sworn statement to confirm the claimant's assertions.
51. Mrs Blake submitted that given the lack of evidence to substantiate the claimant's assertions I should prefer the RBV's evidence over the claimant's. The RBV relies on the evidence of Linnes Moli Tarianga. She deposed that Mr Tiwok and Garae were on secondment not sabbatical leave. She referred to a copy of Mr Tiwok's Secondment agreement annexed to her sworn statement as Annexure LT1 to Exhibit **TD4**.
52. Mrs Blake also submitted that the claimant's annual salary was not VT 3,500,000 but VT 2,909, 426 as stated in **Exhibits TD1** and **TD2**. It was submitted that even if the claimant was entitled to salary during sabbatical leave she would not be entitled to VT3, 500,000.
53. Under cross examination Mrs Tarianga denied that there was another process apart from the staff Guidelines. She confirmed that sabbatical leave is a personal matter for a member of staff to apply for. Whereas secondment can only be undertaken if nominated by the Governor. In both instances, no salary is paid to staff whilst awaiting departure to take up these assignments. I accept Mrs Tarianga's evidence as consistent with the staff Guidelines.
54. The claimant was on sabbatical leave which is what she applied for on 25 July 2019 and which was approved by the deputy Governor on 7 August 2019. Consistent with the staff Guidelines during the period of the sabbatical leave she is considered to have forfeited her salaries and allowances. The claimant admitted under cross examination that after the termination of her consultancy by the Central Bank of Bahamas she never applied to cancel her sabbatical leave. She remained on sabbatical leave as initially applied for and after the 15 August 2020 she returned to work with the RBV.
55. The answer to Issue 3 is - No. During sabbatical leave the claimant was not entitled to any salary.
56. The claimant admitted that during her sabbatical leave she received a lump sum payment of VT 507,604 from the RBV. Given my answer to issue 3, the counter claim must be allowed. The RBV is therefore entitled to recover the some of VT 507,604 from the claimant.



**Result**

57. The claimant's claim is dismissed. The claimant is ordered to refund the RBV the sum of VT507, 604 within 28 days. The first, second and third defendants are entitled to costs to be agreed or taxed by the Master.

58. An enforcement conference is listed for 19 April 2022 at 8:15 am.

**DATED at Port Vila this 10<sup>th</sup> day of March, 2022**

**BY THE COURT**

**D. Aru  
Judge**

