

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

Civil

Case No. 18/2461 SC/CIVL

BETWEEN: Dorianne Naliupis
Claimant

AND: Prosper Buletare
First Defendant

AND: Sanma Provincial Council
Second Defendant

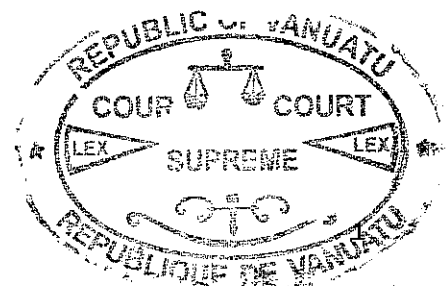
AND: Republic of Vanuatu
Third Defendant

Date: 8 May 2024
Before: Justice V.M. Trief
Counsel: Claimant – Mr W. Kapalu
First Defendant – Mr J. Garae
Second Defendant – Mr H. Tabi
Third Defendant – Attorney General

**DECISION AS TO CLAIMANT'S APPLICATION FOR SUMMARY JUDGMENT
ON LIABILITY AND VICARIOUS LIABILITY**

A. Introduction

1. This was a contested application for summary judgment against two of the Defendants and for dismissal of the other Defendant's Cross-Claim.

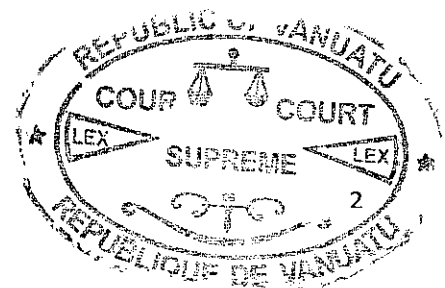


B. The Pleadings

2. By the Amended Claim filed on 4 November 2022, the Claimant Dorian Naliupis is seeking damages against the First Defendant Prosper Buletare for assault and battery against her person from 2015-2017. Mr Buletare was then the Provincial Planner and on occasions, the Acting Secretary General of the Second Defendant Sanma Provincial Council (the 'Council'). In 2019, he was convicted after trial and then imprisoned on two charges of committing indecent acts without consent on Mrs Naliupis. The Claim alleges vicarious liability on the part of the Council.
3. Mr Buletare is relying on his Defence to the Amended Claim filed on 27 March 2023 in which he denied all allegations against him. Further, he said that he never used violence or manipulations or threatened assault as alleged.
4. On 8 September 2023, the Council filed its Amended Defence to the Amended Claim and Cross-Claim against the Third Defendant the State on the basis that at all material times, Mr Buletare was employed by the State therefore the State is vicariously liable for his actions.
5. On 12 February 2024, Mrs Naliupis filed her Reply to the Second Defendant's Amended Defence to the Amended Claim (and Defence to Cross-Claim).
6. The State has not filed a Defence to the Cross-Claim.

C. Discussion

7. On 12 February 2024, Mrs Naliupis filed Application for Summary Judgment on Liability and Vicarious Liability against the Defendants in reliance on rule 9.6 of the *Civil Procedure Rules* (the 'CPR'), that is, that the Defendants have no real prospect of defending the Claim and there is no need for a trial of the Claim (the 'Application').
8. She relied on the supporting Sworn statement of Dorianne Naliupis in support to the Application for the Summary Judgment previously filed on 5 December 2023.
9. On 19 February 2024, Mrs Naliupis filed Submissions on Application for Summary Judgment.
10. On 13 March 2024, Mr Buletare filed his Sworn statement in which he deposed that there are clearly substantial factual and legal issues as to vicarious liability and quantum therefore the Court should not enter summary judgment. On 19 March 2024, the Council filed Submissions on Summary Judgment Application. On 26 March 2024, Mrs Naliupis filed Submissions in reply to those submissions.



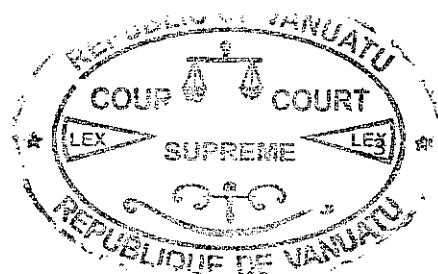
Summary judgment sought against the First Defendant

11. Claimant's counsel Mr Kapalu submitted that Mr Buletare's Defence does not address the Claim for sexual assault and battery. He cited the Supreme Court and the Court of Appeal decisions in relation to the criminal case against Mr Buletare, and submitted that there could be no denying that Mr Buletare sexually assaulted and committed battery on Mrs Naliupis' person within the Council's premises. He submitted that since Mr Buletare had not filed a sworn statement to support his defence nor could point to a difficult question of law, the Court should enter judgment on liability against Mr Buletare for sexual assault and battery.
12. Unlike in his previous Defence filed on 20 September 2019, Mr Buletare has not in his Defence to the Amended Claim filed on 27 March 2023 admitted that he was convicted of indecency without consent committed on Mrs Naliupis.
13. The offending for which he was convicted occurred in 2015: *Public Prosecutor v Buletare* [2019] VUSC 18 (Verdict); *Public Prosecutor v Buletare* [2019] VUSC 21 (Sentence); and *Buletare v Public Prosecutor* [2019] VUCA 38.
14. However, the Amended Claim contains allegations of assault and battery during the period 2015-2017. As these are all disputed, it follows that there are disputed questions of fact as to what acts occurred in each of those years and whether or not these constituted assault and/or battery. These must be proved at trial. Accordingly, summary judgment cannot be entered against Mr Buletare.

Summary judgment sought against the Second Defendant

15. The Council's Defence denies vicarious liability on the basis that Mr Buletare's sexual assault and battery committed against Mrs Naliupis was not part of his employment duties and/or was not committed within the course of his employment. In addition, that Mr Buletare was employed at all material times by the State therefore it is the State who should be vicariously liable for his actions (sought in its Cross-Claim against the State).
16. In *Naliupis v Buletare* [2022] VUCA 2 at [78] and [79], the Court of Appeal held as follows:

[78] ... 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...*

[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 employer 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.*

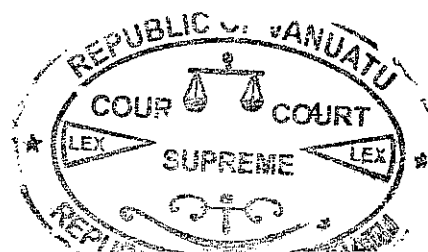
(Citation omitted)

[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.*

17. The Court of Appeal's judgment makes clear that the claim for vicarious liability against the Council requires 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. A Judge can only undertake such evaluation after trial as this involves disputed questions of fact as well as law. In the circumstances, summary judgment cannot be entered against the Council.

Order sought for dismissal of the Cross-Claim against the Third Defendant

18. Mr Kapalu submitted that the Council's Cross-Claim against the State does not disclose a cause of action which directly links Mr Buletare's actions to the State. He submitted that the Council had not set out a statement of the case in the Cross-Claim, in breach of rule 4.2 of the CPR. He submitted that therefore the Council had not raised a substantial question of facts and difficult question of law which would require a trial.
19. I am unable to agree with those submissions. The Cross Claim does contain a statement of the case which in summary, is that at all material times, Mr Buletare was employed by the State therefore the State is vicariously liable for his actions. Whether or not the State is held vicariously liable for Mr Buletare's actions can only be determined after determination whether or not the State employed Mr Buletare,



and after a close evaluation of the authority, power, trust, control and ability to achieve intimacy with the victim which can only be undertaken after trial as this involves disputed questions of fact as well as law. Accordingly, summary judgment cannot be entered against the State.

D. Result and Decision

20. For the reasons given, the Claimant's Application for Summary Judgment on Liability and Vicarious Liability filed on 12 February 2024 is **declined and dismissed**.
21. The costs of the Application are reserved.

**DATED at Port Vila this 8th day of May 2024
BY THE COURT**


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Justice Viran Molisa Trief

