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Solicitor General  
  A   08/08/22

IN THE SUPREME COURT OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY

CV 9 of 2019

BETWEEN:

**MELE TEUSIVA 'AMANAKI**

Plaintiff

-and-

~~[1] GOVERNMENT OF TONGA~~  
~~[2] TONGA WEEKLY NEWSPAPER LTD~~  
~~[3] FAKA'OSI MAAMA~~  
~~[4] WILLIAM CLIVE EDWARDS~~

Defendants

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## JUDGMENT

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC  
Appearances: The Plaintiff in person  
Mr W.C. Edwards SC for the Second and Third Defendants  
Trial: 11 to 13 July 2022  
Judgment: 29 July 2022

### Introduction

1. In this proceeding, the Plaintiff claims damages for defamation arising from the publication by the Second Defendant ("**the newspaper**") of articles and a photograph on three occasions in 2014.
2. At all material times, the Plaintiff was and is the Secretary General of the Public Service Association Incorporated ("**the PSA**").
3. The newspaper was established in June 2012 by its sole shareholder, the First Defendant, the Government of Tonga. The Third Defendant, Mr Maama, was the newspaper's editor. The Fourth Defendant, Mr. Edwards, was one of the newspaper's directors along with the Hon. Samiu Vaipulu and Paula Maau. In December 2014, following a change of Government, the newspaper ceased operation and, in 2016, it was removed from the Companies Register.
4. The Plaintiff's claims against the Kingdom of Tonga and Mr Edwards have been

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struck out.<sup>1</sup> The Plaintiff was reserved leave to replead. She did not do so.

5. The Plaintiff applied, pursuant to s. 338 of the *Companies Act* to have the newspaper restored to the Companies Register, for the purpose of pursuing her claim herein against it. The application, in which the Solicitor General appeared, was opposed. On 3 August 2020, the application was granted.<sup>2</sup>
6. Earlier in the proceeding, on 9 December 2019, judgment was entered against Mr Maama in default of defence with damages to be assessed. Notwithstanding Mr Edwards' involvement in the case throughout, both as counsel and as a party, it was not until March 2022, after the case had been listed for trial, that he filed an application on behalf of Mr Maama to set aside the default judgment on the grounds that Mr Maama had never been served with the originating process. The Plaintiff deposed that she and her husband, pursuant to an order for substituted service, had traveled to New Zealand in 2019 and effected service on Mr Maama after others had attempted but he had allegedly evaded service. Mr Maama deposed that he had not left Tonga during the relevant period and "had lived continuously" in Tonga since 2004. An order was made requiring the Ministry of Immigration to produce Mr Maama's travel history. That information revealed that between 2015 and 2019, he had left the country on 26 occasions, mostly to New Zealand. The application was listed to be heard on 27 May 2022. That morning, the application was withdrawn.
7. The trial therefore proceeded as against the newspaper, and upon any finding of liability being established, for damages against the newspaper and Mr Maama.

### **Evidence**

8. The Plaintiff gave evidence and called evidence from Vilai 'Ilolahia and Siasoi Hakeai who are members of the National Committee and Executive Bboard of the PSA. She also relied on an affidavit from Dr Fotu Fisi'iahi, Chief Executive Officer of the Ministry of Internal Affairs and a former Vice President of the PSA, who was not required for cross-examination.
9. The newspaper called evidence from Mr Maama and Alifeleti Tu'ihalamaka, a former employee of the newspaper.

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<sup>1</sup> *Amanaki v Government of Tonga - Ruling* [2019] TOSC 47; *Amanaki v Government of Tonga* [2020] TOSC 80.

<sup>2</sup> *Amanaki v Government of Tonga* [2020] TOSC 56.

10. From that largely uncontroversial evidence and the other documents relied on by the parties,<sup>3</sup> the following facts may be recited.

### **Background**

11. Since 2007, the PSA has negotiated with Government for a biennial Cost of Living Adjustment ("**COLA**") for its members. In 2013, the Public Service Commission engaged Dr Kioa (currently the Governor of the Tonga National Reserve Bank) to undertake an external review of the COLA from 2005 to 2013. As a result, in December that year, the PSA submitted a proposal to Cabinet for a 20% COLA to be paid to civil servants over the next three years.
12. On 24 January 2014, having not received a reply from Cabinet to the proposal, the Plaintiff, on behalf of the PSA, followed up on the submission with the then Prime Minister, Lord Tu'ivakano.

### *The PSA press release*

13. On 31 January 2014, having still not received any reply, the PSA issued a press release entitled "A Matter of National Priority". In it, the PSA called on the then Prime Minister to resign over what the PSA regarded as an unlawful payment directed by Lord Tu'ivakano in 2011 of approximately TOP\$32 million to Friendly Islands Satellite Communications Ltd (also known as '**Tongasat**'), a private company said to have been owned by Her Royal Highness Princess Pilolevu. The PSA also called for legal action to be taken in respect of a similar payment in 2008 to Tongasat of TOP\$22 million directed by then Prime Minister, Lord Sevele. The bases for the PSA's belief that the payments were unlawful were detailed in the press release. The statement concluded with:

*"The PSA will follow this matter closely to ensure that justice is done. The most logical thing to resolve this problem quickly is for Prime Minister Tu'ivakano to voluntarily resign, Government to undertake appropriate actions to recover the funds from Tongasat and legal action against the former Prime Minister Sevele. This will ensure that the future Prime Ministers will not repeat the same illegal actions.*

*For more information, please do not hesitate to contact the Secretary General of PSA."*

14. The press release did not name or otherwise refer to the Plaintiff.

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<sup>3</sup> The court book ran to approximately 600 pages.

15. Mr Maama described the PSA's call on the then Prime Minister to resign as "a big issue" at the time because of the large amount of money that was said to have been paid to Tongasat. However, he could not remember whether the newspaper published it. There was no evidence adduced of the PSA press release having been published by other media outlets in the Kingdom at the time, although it seemed likely.
16. On 7 March 2014, the Plaintiff wrote again on behalf of the PSA in relation to the COLA proposal and the payments to Tongasat.

*The Prime Minister's response*

17. On 10 March 2014, the Prime Minister wrote two letters to the Plaintiff in her capacity as Secretary General of the PSA. In the first, which addressed the COLA issue, Lord Tu'i vakano wrote:

*"... Your submission will be dealt with in the normal manner and given appropriate consideration.*

*I should however make it clear to you that as from now and in the future my office will not recognize your organization as representing the views and interests of the public servants. I will not negotiate with you or members of your committee because your organization is nothing more than a political organization bent on promoting your own personal interest as a prospective politician.*

*The interests of the public servants are represented by Public Service Commission whose submissions and recommendations on this subject have been considered and interim decisions made.*

*Any members of your organization can communicate with the Public Service Commission or directly with my office and the CEO of the various Ministries, and in particular the Human Resource [sic] of each Ministry.*

*I regret to advise that your conduct to date and unfounded allegations make it necessary for me to write this letter to you and to state the situation outlined above."*

18. That letter was copied to the Chief Executive Officers of the Public Service Commission and all Government Ministries.
19. In his second letter, which addressed the PSA's allegations in relation to the Tongasat payments, the then Prime Minister wrote:

*"... Your letters are not only factually incorrect with the allegations made therein but totally intemperate with its language.*

*There is no basis for you to make these false allegations against me. The matters have been before the Courts and the Kele'a and Solomon Palu<sup>4</sup> were adjudged liable for defamation. 'Akilisi Pohiva's false allegations were thrown out in the Magistrates Court as well as in the Supreme Court because there were [sic] no factual basis for the allegations that you are making.*

*May I suggest that if you see fit to write to me in the future that you consider your language and endeavour to provide the correct facts.*

*I reject your letters totally as nothing more than political propaganda."*

20. That letter was copied to Members of Parliament, Cabinet Ministers, the Auditor General, the Attorney General and all Government CEOs.
21. On 13 March 2014, the newspaper published the Prime Minister's letters, as images (as opposed to reprinted text). According to the Plaintiff, that was the same day she received them. According to Mr Maama, the letters were issued by the Prime Minister's office on the date they bore (that is, three days before the Plaintiff received them) as a press release although, again, he could not recall whether any other media outlets published them.
22. During her closing submissions, the Plaintiff tendered examples of Government press releases to demonstrate that they were not in the form of the letters issued by the Prime Minister to the Plaintiff. Mr Edwards did not object to the tender.
23. The Plaintiff expressed doubts about the timing of receipt of the letters by the newspaper and therefore its motivation in publishing them. She said that from her own previous experience in publishing a newspaper, it would have taken at least two days to prepare the material and send it for printing before publication. Mr Tu'ihalamaka gave similar evidence to effect that when the Tonga Weekly was being printed in New Zealand, payment had to be made in advance on a Friday in order to have the printed papers delivered in Tonga for publication the following week. Even when the newspaper was printed in Tonga, lead time was required to meet publishing deadlines and then only "when the printers were working well".
24. The article, which covered a full page of the newspaper (the two images of the Prime Minister's letters taking up the bottom half), was entitled "*Honorable Prime Minister, Lord Tu'ivakano to the letter by Mele 'Amanaki (Secretary General PSA)*". At the top left corner was a small photograph of the Plaintiff which, according to her, was taken from her Facebook page. As the Plaintiff explained

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<sup>4</sup> Another newspaper and its editor.

in evidence, that photograph showed her in a black gown at her niece's wedding in Vanuatu. She was also wearing a "Fakaha'apai" around her waist which confirmed that she was dancing. The pleaded claims in the proceeding do not include any complaint about that photograph.

25. However, the article concluded with:

*"That is the end of the first reply by the Prime Minister to Mele 'Amanaki's letter. There was another letter which is the Prime Minister's reply to another letter from Mele 'Amanaki regarding the COLA (cost of living adjustment) or the pay rise of the public servants. A short summary of this letter, the Prime Minister make it clear to Mele 'Amanaki that from this day onward the Prime Minister's office will not recognize the organization that Mele 'Amanaki led to represent the voice of the public servants. Because it is very obvious that Mele 'Amanaki is using the Association to advance her political interests.*

*And he made it clear that it is the Public Service Commission who looks after the welfare of the public servants.*

*The Prime Minister said that it is unfortunate but he has to make this reply to enlighten the allegations made by Mele 'Amanaki."*

[emphasis added]

26. As is evident from the above text, as he agreed during his evidence, Mr Maama regarded the Plaintiff as the PSA, not just one of its Board members or spokesperson. His transposition of the Plaintiff for the PSA was distinctively reflected in his oral evidence that:

*"The PSA is Mrs 'Amanaki. Everyone knows that it was Mele 'Amanaki who threatened the PM to resign".*

27. On 24 March 2014, the Plaintiff, again in her capacity as Secretary General of the PSA, replied to each of the Prime Minister's letters.

28. In relation to the COLA, and the Prime Minister's statement that his office would not recognize the PSA as representing the public servants, the Plaintiff wrote that *"The PSA is a legal entity under the laws of Tonga since 2005 and we represent the views and interests of our members who are employees in the public service including all line ministries, police, magistrates and some public enterprises"*. She added that the main objective of the PSA was to *"build an organization able to influence the political, industrial, economic and social environment to advance the individual and collective interest of the members"*. Finally, the Plaintiff stated that the Public Service Commission did not represent the public servants, that

the Commission's mandate was clearly outlined in the *Public Service Act* in respect of which the Prime Minister was the Minister responsible, and the Prime Minister could not be both employer and employee representative at the same time.

29. In her letter concerning the Tongasat payments and the Prime Minister's reference to the Plaintiff using "intemperate" language, the Plaintiff wrote:

*"Unfortunately, the English language does not have the discriminative social language structure that we have in our Tongan language so that we communicate with you in the language that you want us to use when writing to you."*

30. Further on, the Plaintiff returned to the call for the Prime Minister's resignation:

*"... As the two weeks we gave for Your Honour to voluntarily resign ended last Friday, we will continue our call for good governance by Government to a higher level.*

*Lastly, kindly note that our call for Your Honour to resign is not a political propaganda as the PSA has no interest to take over Your Government. We are interested in good governance which includes transparency, accountability and ensuring that Government funds are used for the benefit of the people of Tonga including the COLA for our members and employees in Government in accordance with procedures as directed by the Constitution of Tonga and relevant legislation."*

31. At the direction of the PSA Executive Board, the Plaintiff's letters were also sent to the newspaper with a request that they be published. Mr Maama did not respond to that request and the newspaper did not publish the letters.

### **The first publication**

32. Meanwhile, in February 2014, Dr Fisi'iahi, who was then living in Auckland, wrote an opinion article criticising the call by the PSA for the Prime Minister to resign. The article was entitled "*PSA's ship has lost its course from its purpose*". In it, Dr Fisi'iahi opined that the PSA's press release contained 'political elements', was 'threatening', 'sounded arrogant and selfish' and appeared to signal that the PSA had exhausted its negotiating position with the Government (under the subtitle 'Looks like they have no more bullets'). The article was published on the Kaniva Tonga website.
33. Mr Maama gave evidence that he interviewed a number of people about the PSA's press release, including Dr Fisi'iahi. Dr Fisi'iahi gave evidence that he was

contacted by Mr Maama for permission to publish the article, to which he agreed.

34. Mr Maama also gave evidence, generally, that nothing was published in the newspaper unless he, as the editor, had examined and approved it.

*The photograph*

35. On 20 March 2014, the newspaper published Dr Fisi'iahi's two-page article together with a photograph of the author in academic dress and another photograph depicting the Plaintiff sitting cross legged on the knee of a man seated on a couch in a room with a bed in the background. The man appeared to be asleep. The Plaintiff had her right arm around the man's shoulders and her right cheek was against his forehead. She was wearing a long sleeve dark top and a skirt, the side slit of which exposed part of her left thigh. The photograph was in black and white and measured somewhere between 1/6th and 1/8th of a page. That photograph is the subject of the Plaintiff's claim.
36. The caption under the photograph of the Plaintiff read: "*Mele 'Amanaki, the Secretary General of PSA and she is the one who wrote the letters which is supposed to be from PSA*". The introduction to the article also referred to the Plaintiff as having written "*the letter of PSA*" to the Prime Minister.
37. Dr Fisi'iahi deposed that he did not provide the photograph to the newspaper, that he respected the Plaintiff as a classmate from high school and a work colleague in Government, that her brothers were his friends whom he respected and that he "*would never do such a thing as publishing an indecent photo of her in any newspaper*".

*Provenance of the impugned photograph*

38. The Plaintiff and Siaso Hakeai gave the following evidence in relation to the provenance of the photograph.
39. In January 2010, they attended a one week Pacific Meeting in China funded by the All China Federation of Trade Union Congress ("*the Congress*"). The Plaintiff also then held the position of Chair of the South Pacific Council of Trade Unions. They were accompanied by Mosese Fakatou, the then President of the Friendly Islands Seafarers Union Incorporated.
40. At the conclusion of the meeting, the Congress hosted a farewell reception. After

the reception, which the Plaintiff described as a "happy night", a group of about eight 'trade union friends' including the Plaintiff finished their drinks in one of the participant's rooms in the hotel where they were staying. One of the group was Daniel Urai, the then President of the Fiji Trade Union Congress. Mr Urai was the man depicted in the photograph asleep sitting on the couch. He was said to have "passed out too drunk". One of the topics during the leader's meeting was sexual harassment in the workplace, particularly by employers against employees. Therefore, the photograph of the Plaintiff sitting on Mr Urai's knee was "intended to be a joke" and aimed at him for passing out. The photograph was taken by the then President of the Tuvalu Trade Union Congress. It and other humorous photographs taken that evening were sent by email to Mr Urai "to surprise him". The photograph was never intended to be distributed beyond the group and the Plaintiff never gave permission for it to be published anywhere. At that point, she thought nothing more of it. Her evidence, in that regard, was never challenged.

41. However, on 6 November 2012, and unbeknown to the Plaintiff, the photograph appeared on a website by the name of "Fiji Coupfourpointfive". The website was self-styled as a "blog [a]s a result of the heavy censoring of the media by the military dictatorship regime". According to the Plaintiff, the website was anonymous, meaning the name of the host or owner of the website is not shown on it.
42. The article was entitled "*Fiji's sleeping bandas and rugby goons*" and commenced with:

*"Surely a case of people in the wrong slots: Fiji Trade Union Congress president Daniel Urai asleep in the arms of Tongan trade unionist Mele Amanaki and QEB Goon, Aseri Rokoura, (below front right), leading the Fiji Rugby Team.*

*The Amanaki picture, sent to us with the caption 'Classified: The Royal Flash and Sleeping Banda', was taken at the FTUC biennial gathering earlier this year."*

43. The balance of the article was dedicated to denigrating Mr Urai and another man by the name of Aseri Rokoura, who featured in another photograph at the bottom of the page. It did not contain any other reference to the Plaintiff nor any reference to the time, place or context, according to the Plaintiff's above evidence, in which the photograph was actually taken. The Plaintiff did not know how the photograph

got onto the Fijian website. The article is still visible on that site today.

*The reason for publishing the photograph*

44. When he was asked how he came across the photograph, Mr Maama explained that one of his staff found it online. When asked why his staff were looking for a photograph of the Plaintiff at that time, Mr Maama was less clear. He said that the newspaper “kept files” on all public figures like the Plaintiff.
45. In his affidavit, Mr Maama described the photograph as being “of public interest”<sup>5</sup> and that it “was news” because the Plaintiff, as Secretary General of the PSA and Mr Urai, as President of the Fiji Trade Union, were both public figures.<sup>6</sup> During cross-examination, Mr Maama described the photograph as “a big deal” and “very rare”. He further deposed that:

*“12. The Tongasat fiasco and the subsequent appearance of the Plaintiff and the Fiji Trade Union President in the Fijicouppointfive website and subsequently published in the Tonga Weekly newspaper was not planned. The publication in my respectful view was based on the fact that it was news and the public had a right to know what was happening.*

...  
*16. It would be fair to say that she [the Plaintiff] is the author of what was published and she should be made to accept the responsibility for what she now claims as indecent. The photo is not indecent. In hindsight, the Plaintiff might feel that she does not look too well or her appearance in the photo is not good but the photo portrays what she is and what she wanted to look like. It should be remembered she wanted the photo as a joke to tease the President.”*

[emphasis added]

46. During cross-examination, Mr Maama was asked why he chose to publish this particular photograph of the Plaintiff instead of any other in the public domain, such as the one earlier published with the Prime Minister's letters. He initially responded that the photograph was “neither indecent nor inappropriate” and that it was “not hard to get hold of because it had already been distributed around all media and Fiji”. He eventually agreed with the proposition that he published it because he considered that it was “consistent with the title of the article”. By that, Mr Maama explained, he saw a connection between the title to Dr Fisi'iahi's article and the photograph because it showed that the Plaintiff “had lost her moral course

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<sup>5</sup> [8], [17]

<sup>6</sup> [9]

*or compass*".

47. Mr Maama also said that there was no requirement on the newspaper to identify the source of the photograph before publishing it. He conceded, however, that neither he nor his staff had made any enquiries to confirm or verify the source of the photograph, the context in which it was taken (such as when, where or why it was taken) or what it actually depicted. Later in his evidence, Mr Maama said that he and his staff did not know anything about the provenance or context of the photograph, and that they "*were negligent in not following up*" on those matters.

***The Plaintiff's reaction***

48. The Plaintiff did not see the newspaper article and the photograph until 27 March 2014 when it was brought to her attention by the late President of the PSA, Mr Vili Vete. She was shocked. To the best of her knowledge, it was the first and only time the photograph had been published in Tonga. She formed the view that the newspaper, being a 100% Government owned company set up by the Cabinet of Prime Minister Tu'ivakano in 2012, and Mr Maama were "actuated by anger" at the PSA's call for the then Prime Minister to resign because of the Tongasat payments and that therefore the photograph was published to discredit and damage her character and reputation. During cross-examination, the Plaintiff further elaborated on her belief that the photograph was published in 'retaliation' for the PSA's call on the Prime Minister to resign. Mr Maama denied that.
49. According to the Plaintiff, neither Mr Maama nor anyone from the newspaper contacted her before publishing the photograph. In his affidavit evidence, Mr Maama did not make any mention of whether he tried to contact the Plaintiff before publishing. However, during cross examination, he said that he tried to call her 'about three times' for comment and left a message for her but did not hear back. The Plaintiff denied ever receiving any message from Mr Maama and added that if a message had been left, one of her assistants would have recorded it in writing.
50. On 1 April 2014, the Plaintiff emailed the Executive Board of the PSA, explained the photograph and informed them of her intention to sue the newspaper and its owner.
51. On 4 April 2014, pursuant to a direction by the PSA Board, the Plaintiff emailed

Mr Maama and asked him to publish the PSA's replies (penned by the Plaintiff) to the Prime Minister's letters published by the newspaper which, she noted, were not addressed to the media. The Plaintiff's email was copied to numerous members of Government and the media.

52. Again, according to the documents discovered in the proceeding, Mr Maama did not respond. During the trial, the Plaintiff produced a list of headings from her email system during the relevant period which indicated that Mr Maama did not respond to her emails. When asked during evidence whether he did in fact respond to any of the Plaintiff's correspondence during that period, Mr Maama initially said that he did not know. He confirmed that he had been asked by Mr Edwards to go through his records to identify any documents which were relevant to the case but that he had not done so. Later in his evidence, he sought to clarify that last answer by saying that "what he meant was" that he had looked through his emails and social media; that when the newspaper closed, he and the staff had to leave everything behind for the new Government at the time; that he used to have records on a laptop but which was damaged; and that he did not keep anything that he did not consider important.
53. In relation to the Plaintiff's email of 4 April 2014, Mr Maama said initially that "it had been a long time and he might have responded" but then went on to state variously that if he did not respond, it was because:
- (a) he "knew what the email meant";
  - (b) he received many emails and he "may have missed" the Plaintiff's;
  - (c) he was "possibly negligent;
  - (d) her letter "did not pass the standard for the day";
  - (e) the newspaper "was not obliged to publish everything requested";
  - (f) his "work ethic" did not require him to publish both sides of the debate;
  - (g) he would not approve the PSA's request because it was "unreliable";
  - (h) the Prime Minister had already issued his response; and
  - (i) the Tongasat issue had not been decided by the court and was "all just suspicions and allegations".

54. Mr Maama also denied a suggestion that he would only publish articles that “*made the Government look good*”. He said that he was “*more independent and free*” when working at the Tonga Weekly than when he was working at a private newspaper because even though the Tonga Weekly “*was under the Prime Minister at the time*”, neither he nor any of the directors ever instructed Mr Maama on what to publish. By contrast, he said, when he was working at a private newspaper, the owner regularly ordered what was to be published. In that regard, Mr Tu’ihalamaka deposed that, apart from some archived editions of the newspaper, no other company records for the newspaper had been retained.

### **The second publication**

55. On 11 April 2014, the newspaper published the photograph again. A copy of the article was no longer available, but its publication was referred to by the Plaintiff in her letter to Mr Maama on 26 April 2014 (referred to below) and its existence was not denied by him during his evidence. According to the Plaintiff, the photograph this time was still in black and white but was increased in size to half a page. The article was entitled “Disgrace to Tonga”. The gist of it was that by virtue of her conduct as depicted in the photograph, the Plaintiff, as a public figure, was a disgrace to Tonga.
56. On 18 April 2014, the Executive Board of the PSA called a special meeting due to concerns by some Board members over the photograph and what they perceived it depicted of the Plaintiff’s behaviour while traveling overseas on behalf of the PSA and the SPOCTU. A number of Board members proposed that the Plaintiff’s employment contract be terminated. However, as Vilai ‘Ilolahia and Siaso Hakeai testified, the Board accepted the explanation of the context of the photograph, that it had fallen into the wrong hands in Fiji, that it was posted on the anonymous website to defame Mr Urai and that the newspaper had downloaded it from that website and published it to defame the Plaintiff without verifying what it was about. The Board also agreed to the Plaintiff complaining, in her personal capacity, to the newspaper and Mr Maama.
57. The Plaintiff gave evidence that on 24 April 2014, her daughters, then aged 14 and 17, came home from school crying. They were devastated and ashamed because some boys at their school teased them about the photograph and said that their mother was a prostitute. The girls asked their mother to write to the

newspaper and explain what the photograph was about so that people would know that she was not a prostitute. The Plaintiff's daughters were not called to give evidence. The Plaintiff's evidence as to what her daughters told her was hearsay. Despite those statements having appeared in the Plaintiff's Statement of Claim and her affidavits for trial, Mr Edwards did not object to their admissibility.

58. On 26 April 2014, the Plaintiff wrote to Mr Maama again. The purport of her four-page letter was firstly to (somewhat facetiously) thank the newspaper for making her and the work of the PSA the 'most important topic' by publishing the photograph, a second time, on the front page on the 11 April 2014 edition; and secondly, to correct a number of "mistakes" in what had been published. The essence of those corrections was an explanation about the provenance of the photograph, complaints about how it was being used by the newspaper to defame her, complaints about how the newspaper was being run and a repeat of the previous concerns about the Government's payments to Tongasat.
59. The Plaintiff letter was sent by email to Mr Maama on 2 May 2014 and a hard copy was delivered to the office of the newspaper. The letter included reference to it also being copied to the Prime Minister, Cabinet and all other members of Parliament. The Plaintiff's email was copied to a number of other media outlets. The Plaintiff asked Mr Maama to publish her letter.
60. Perhaps needless to say, Mr Maama did not respond, and the Plaintiff's letter was not published by the newspaper.
61. During his evidence, Mr Maama said that he did not publish the Plaintiff's letter because "*there was nothing to correct*" and the photograph was "*not intended to make her look bad*".
62. The importance of having the explanation (or 'correction') for the photograph published was explained by the Plaintiff during her oral evidence. She said that according to Tongan culture, the photograph, without its proper context and meaning being explained, would be regarded or interpreted by most Tongans as improper or indecent. She cited as examples how her daughters had been teased by boys who saw the photograph saying that their mother was a prostitute and the reaction of some of the PSA Board members who initially called for her employment to be terminated. The Plaintiff further explained that had the proper

explanation or context for the photograph been published, it would have been understood as “just a bit of fun”, in which event, she would not have brought this action.

63. Mr Maama then volunteered that he had other “information” about the Plaintiff and Mr Urai which had led to Mr Urai’s marriage, relationship with his family and his professional responsibilities in Fiji being “ruined”. That other information, he said, was from news published in the Fiji Sun and other media (which he could not then identify) to the effect that the scene depicted in the photograph was “*not the first time something had happened between*” the two. None of that information was discovered in the proceeding nor produced by Mr Maama during his evidence. Further, Mr Maama’s allegations were never put to the Plaintiff during her cross-examination.
64. Mr Maama then agreed that he considered the photograph was evidence of the Plaintiff conducting an “*improper relationship*” with Mr Urai.
65. Mr Maama continued that he had decided not to publish “70%” of the other information he had in order to protect the Plaintiff and because he “*had respect for her*”. He said he did not feel the need to do so because publishing it would have been like “*kicking a dead horse*” and that what he had published to date “*was enough*”. In publishing what he had, Mr Maama said that he had “*done his job by informing the people of the country what their leaders were doing*” and that he “*could have run the story eight times and overseas*”.
66. On 2 May 2014, the Plaintiff wrote to the Prime Minister expressing concerns in relation to the publications and how the newspaper was being operated. Among other things, the Plaintiff wrote:

*“... What can be a proper and important reason for me and my family and members of the PSA to continue to pay taxes to the government if the government uses tax revenue to establish a newspaper company that disseminates gossip about us and does not uphold the media code of ethics and government policy for media releases? That the editor first ensures the accuracy of information printed in the paper especially if the purpose is to cast aspersions on someone or Tongan people who pay their taxes?”*

...

*It is the responsibility of the Board to monitor the operations of the company, in accordance with the Government policies and laws. If the Government neglects this company, then its registration should be duly removed from the company register, or new directors be appointed who are not ministers,*

*so that they can properly manage this company in accordance with the law of the nation. Kindly note that there is considerable difference between the management of the company which is the responsibility of the Board and the editorial management of information printed in the newspaper which is the responsibility of the editor. ...”*

[emphasis added]

67. On 5 May 2014, the Plaintiff also emailed her letter to the Prime Minister, copied to various media outlets, the members of the PSA National Committee and Executive Board, other members of Government and the newspaper’s directors, including Mr Edwards.
68. The Prime Minister did not respond. However, Mr Edwards did. The ensuing e-mail exchanges between he and the Plaintiff (all copied to the same raft of recipients) became the subject of separate but related litigation which is referred to briefly below.

### **The third publication**

69. On 9 May 2014, the newspaper published the photograph again. This time, however, the photograph was on the front page, in full colour, and increased in size to more than half the page. When asked why he decided to publish the photograph again in that size and location, Mr Maama said:

*“This can happen. It is all according to ongoing contents of the article. We were free to move the photos around depending on the content but if the text on the page is small, we can’t change the font, so we had to enlarge photo to fill the page.”*

70. The headline on the photograph, which was in very large font, read: *“TERMINATE THE NEWSPAPER — Political grievance to deregister the newspaper for telling the truth.”*<sup>7</sup> The by-line beneath (which was in a smaller font but larger than other text on the front page) read:

*“Mele ‘Amanaki with the President of the Trade Union of Fiji, Daniel Urai. This photo and news has been distributed in Fiji and the world on the internet, which Mele is not happy with our newspaper to deregister, but it is not our photo or news. See inside.”*

71. The article inside the newspaper was entitled “Political grievance by the

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<sup>7</sup> The Plaintiff provided that translation. The Court interpreter translated the headline as “Call to shut down newspaper for telling the truth”.

Secretary General of PSA to deregister the newspaper for telling the truth". To understand the context for this third publication of the photograph and the Plaintiff's complaints in respect of the article published with it, it is necessary to recite the article in full:

***"The newspaper will not back off from publishing the truth.***

*Despite the obstructions made by Mele 'Amanaki this newspaper will not back off from publishing the truth and what is right. Including this photo of Mele 'Amanaki from an official travel she took. And she is in this room and it is not known whose room is it and she is sitting on the lap of the leader of the trade union of Fiji which also showed that they are drunk. This photo was also known in the news in Fiji and there was dialogue about it. But why is Mele mad when it is being brought up here in Tonga. It is being brought up as she is the leader of PSA here in Tonga, this is something big and it was also something big in Fiji as it is the leader of PSA or the trade union in Fiji.*

***Mele 'Amanaki should resign, Tonga's image is bad***

*Mele 'Amanaki is mad that she is called to resign from her position in PSA because of the photo and the dialogue about her and the Fijian man. And there was the same call made to this man from Fiji who was in the same photo with Mele. But what kind of other calls should be made? As she goes and says that she is the representative of the Public Service Association, which she claimed is a legal entity. And she went overseas and conducted this indecent behaviour and it is a shame for Tonga in Fiji and in the world. It is very much needed for Mele 'Amanaki to resign as the image of Tonga is bad because of the behaviour of this woman and it was a very big dialogue in Fiji and the news website on the internet.*

***There have been many people called and preached to them***

*This is the same person (Mele 'Amanaki) who always calls to the Prime Minister to resign and same to the Ministers, Solicitor General and also to the Attorney General. And preaches and criticises in many issues. The question is, is it fair for this person to... when she does something that is shameful for Tonga in Fiji and the world during a meeting that she went to?*

***The court decision***

*The issue which Mele 'Amanaki has alleged against the Prime Minister and the Minister of Finance and also the Minister of Justice, Clive Edwards regarding the funds that was given to Tongasat. There has been a decision from the Magistrates Court that the Prime Minister did not do anything unlawful especially the allegation of theft. The Chief Justice of the country made the same decision after the decisions (from the Magistrates Court). Only Mele 'Amanaki who said that this legal proceeding cannot continue because of technical issues. After all, this issue was in two of the country's courts, the Magistrates Court and the Supreme Court, and it has been confirmed that there wasn't any unlawful actions, or anything close to any wrongdoing in this case."*

72. Dr Fisi'iahi's opinion piece was then reprinted. Under that, the newspaper's article

continued:

“That is the complete letter written by Fotu Fisi’iahi regarding the issue which made Mele ‘Amanaki angry but he was not angry.

***It is better to speak to the people, do not speak to us***

*This is a sign of uncertainty that is shown from the secretary general of PSA, Mele ‘Amanaki. There are also the same kind of people in our country. They want to condemn anyone. But they do not want others to condemn them. After all, this is not condemnation that the newspaper is doing to this person. This is news that is being delivered in Fiji and the world, and this is the first time that it reaches Tonga, and it is related to a Tongan person in a high position as a leader like the person in Fiji, that is why the news was distributed in Fiji with same purpose. But Mele ‘Amanaki is acting as if she is eating a hot pepper in something she did in an official meeting and was published and distributed in the Fijian media and the internet, and it reaches this newspaper and this person blames us and recommended to deregister our newspaper. This is like blue stole something and red was disciplined for it. That Fiji media companies distributed the news and it was recommended to deregister the media company in Tonga.*

***Too many threats***

*The threat by this person is like a laughing matter now. Threatening is not something to be done without a reason. This woman when there is an issue she threatens like what she is doing now as if there will be a strike. And now she threatens for legal action and what not. Threatening is like a carton now because of this woman. She conducted a threat like fasting and now this proposed strike action is still planned. It has reached a point that her threats [do not have] weight and it shows that it is not properly planned together with the workers and members before she makes the threats and it is a big thing to make threats. In conclusion the newspaper invites this person to continue her threat and legal action as the newspaper is ready for her threats and legal actions.*

*The newspaper still stands in our position as we have confirmed everything that we published regarding this issue and it was not meant to be done maliciously to anyone. The reason why it has taken so long and the dialogue has continued on this issue is because this person (Mele ‘Amanaki) kept bringing it up.*

*We believe if it was not brought up but left it as it was as the news from Fiji, the matter would have been reduced and finished. But it does not feel like this. It shows that this person (Mele ‘Amanaki) wants it to be brought up again.”*

[underscoring added]

73. During his evidence, Mr Maama agreed that in her letter to the Prime Minister, the Plaintiff did not actually call for the newspaper to be shut down. However, he said that she had done so on “other platforms” such as the Talaki newspaper and Kaniva online. None of those articles were discovered or produced in evidence.

The Plaintiff denied ever making such a call.

74. Mr Maama also confirmed his belief when writing the article that "*because of what the photo depicted*", the Plaintiff should have resigned as Secretary General of the PSA
75. On 13 May 2014, one of the Plaintiff's relatives told her that he was very angry with the repeated publications and that he was "going to bash" Mr Maama and the newspaper's directors. She urged him not to do so and that she would let the newspaper know of her family's concerns.
76. On 14 May 2014, the Plaintiff again emailed Mr Maama with her concerns (also copied to the coterie of previous recipients). Again, Mr Maama did not respond (although Mr Edwards did). During cross-examination on this point, Mr Maama said that the Plaintiff should have been thankful he did "*not run the story for two months given how much was being published out there*". No other relevant publications from other media outlets were discovered or produced in evidence.
77. The Plaintiff gave evidence that she stood as a candidate for Tongatapu 3 at the general election in November 2014. One of the other candidates was Mr Edwards. In the lead up to the election, the Plaintiff became aware of the publications of the photograph being circulated, which she considered harmed her campaign.

#### **Subsequent related proceedings**

78. In May and June 2014, Lord Tu'ivakano and Mr Edwards commenced defamation proceedings in the Magistrates Court against the PSA and Mrs Amanaki in relation to the Tongasat allegations.<sup>8</sup>
79. On 16 September 2015, and because of the public importance of any ruling in relation to the Tongasat payments, the Court of Appeal ordered that the Magistrates Court proceedings be removed to the Supreme Court.<sup>9</sup> Those actions proceeded as CV 49 of 2014 in the Supreme Court and were effectively stayed pending the determination of the claim in CV 48 of 2014 by the PSA and the late 'Akilisi Pohiva against the Kingdom and Tongasat as to whether the

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<sup>8</sup> CV 87 and 95 of 2014

<sup>9</sup> AC 5 of 2015

payments were unlawful.

80. On 17 August 2018, Paulsen LCJ determined that the payments to Tongasat were unlawful.<sup>10</sup> Lord Tu'ivakano then discontinued his claim against the PSA and Mrs Amanaki.
81. Tongasat appealed.<sup>11</sup> On 3 February 2020, after it failed to deposit security for costs as ordered, or take any further step, Tongasat's appeal was dismissed.
82. The exchange of emails between Mrs 'Amanaki and Mr Edwards referred to in paragraphs 68 and 73 above,<sup>12</sup> became the subject of separate defamation proceedings by Mr Edwards against the PSA and Mrs Amanaki and a counterclaim by Mrs Amanaki against Mr Edwards.<sup>13</sup> On 29 March 2021, the parties settled those proceedings.
83. The Plaintiff commenced these proceedings on 29 March 2019 (five days before the limitation period in respect of the first publication expired). She explained the delay on the basis that she had earlier received legal advice to await determination on the lawfulness of the payments to Tongasat.

#### **The Plaintiff's claim**

84. By her Statement of Claim and submissions at trial, the Plaintiff's claim may be summarized, relevantly, as follows:
  - (a) By the three publications, the newspaper and Mr Maama published, republished, distributed and redistributed the photograph of the Plaintiff that was "not decent" and made "false and malicious statements and threats" to defame and discredit her character after her employer, the PSA, called on the then Prime Minister to resign over unlawful payments to Tongasat.
  - (b) In their natural and ordinary form, the photograph and the 9 May 2014 article meant and were understood to mean (that is, they conveyed imputations) that the Plaintiff was a prostitute, an irresponsible mother, a bad and irresponsible leader, a bad woman, a party girl and that she had acted wrongly.

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<sup>10</sup> *Public Service Association Incorporation v Kingdom of Tonga* [2018] TOSC 41

<sup>11</sup> AC 15 of 2018

<sup>12</sup> 14 and 16 May 2014

<sup>13</sup> CV 57 of 2018

- (c) The newspaper and Mr Maama published the defamatory material without caring whether it was true or not and with the intention of injuring the Plaintiff's reputation and character.
- (d) In publishing and republishing the defamatory material, the newspaper and Mr Maama were actuated and "fuelled by ill-will, anger, hatred, malice and contempt" and acted in retaliation at the PSA's call for the then Prime Minister to resign.
- (e) The publications damaged the Plaintiff's reputation and exposed her and daughters to hatred, contempt and ridicule and caused them to be shunned by their peers.

### **The newspaper's defence**

85. By its Statement of Defence, as echoed by Mr Maama in his affidavit evidence,<sup>14</sup> the newspaper's defence may be summarized as:

- (a) The photograph was not defamatory.
- (b) In the alternative, "the publication of the photograph and the articles were matters of general public interest and were made bona fide by the newspaper in discharge of a legal, moral or social duty in which it has an interest and the readers of its newspaper had an interest in reading and knowing of the publications", and it thereby relies on the defence of qualified privilege.
- (c) The newspaper:
  - (i) "endeavoured to maintain a balance with all the conflicting news concerning the call for the Prime Minister to resign and the allegations made by the Plaintiff and PSA as well as the publication on the internet of the photograph of the Plaintiff and the President of the Fiji Trade Union"; and
  - (ii) "performed and maintained its normal function of independently publishing the news and information for the benefit of its readers".

86. In his closing submissions, Mr Edwards did not press that limb of the pleaded

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<sup>14</sup> [18], [19]

qualified privilege defence in which it was asserted that the publications were in discharge of a legal, moral or social duty. Otherwise, Mr Edwards submitted, in summary, that:

- (a) The photograph was not indecent and did not convey the imputations alleged by the Plaintiff.
- (b) The photograph was "*a normal photograph*" and only became indecent, according to the Plaintiff, when it was published.
- (c) The scene depicted in the photograph "*appeared to be a lovely and friendly gesture to a fellow trade unionist notwithstanding the evidence of Fakaosi Maama who stated that the photograph caused the breakup in Daniel Urai's marriage and family*".
- (d) However, the Plaintiff's "*statement is not unnoted that in the Tongan custom [the photograph] doesn't look too good but there is no evidence of custom on the point*".
- (e) Alternatively, if the photograph was indecent, then:
  - (i) "*any indecency has been deliberately created by*" the Plaintiff; and
  - (ii) it was the Plaintiff "*who created it by having the photo taken and giving it out and subsequently having it leaked to the media*".
- (f) The newspaper is entitled to a defence of qualified privilege because:
  - (i) the photograph was a matter of public interest; and
  - (ii) there was no malice, hatred, bad will or intention to defame the Plaintiff.

### **Liability**

87. In considering the issue of liability, I adopt an approach consistent with that taken in *Manu & Haidas v The Editors of the Tonga Chronicle*, reported at [1990] TLR 7 which may be summarised, relevantly, as follows:

- (a) Were the publications defamatory?
- (b) Alternatively, insofar as the Plaintiff's allegations may be interpreted to include an allegation of innuendo, was there a secondary meaning to the photograph depending on special facts and extrinsic circumstances or

relating to a special meaning?<sup>15</sup>

- (c) If the publications were defamatory, were they bona fide and justified in the public interest?
- (d) If so, were they actuated by anger, ill-will or other improper motive?

*Was the photograph defamatory?*

- 88. Section 2 of the *Defamation Act* defines defamation of character as speaking or in writing, printing or otherwise putting into visible form any matter damaging the reputation of another or exposing another to hatred, contempt or ridicule or causing him to be shunned. The repetition of defamatory matter concerning another also constitutes defamation of character.
- 89. Section 17(1) provides that if at the trial of any civil action for defamation of character it appears to the judge that the words complained of are not reasonably capable of a defamatory meaning, judgment shall be entered for the Defendant.
- 90. In *Trkulja v Google LLC* (2018) 263 CLR 149 at 160–161 [32], Kiefel CJ, Bell, Keane, Nettle and Gordon JJ discussed how the ordinary reasonable reader understands what meaning a publication conveys [citations extracted and footnoted]:<sup>16</sup>

“... That exercise is one in generosity not parsimony. The question is not what the allegedly defamatory words or images in fact say or depict but what a jury could reasonably think they convey to the ordinary reasonable person;<sup>17</sup> and it is often a matter of first impression. The ordinary reasonable person is not a lawyer who examines the impugned publication over-zealously but someone who views the publication casually and is prone to a degree of loose thinking.<sup>18</sup> He or she may be taken to ‘read between the lines in the light of his general knowledge and experience of worldly affairs’,<sup>19</sup> but such a person also draws implications much more freely than a lawyer, especially derogatory implications,<sup>20</sup> and takes into account emphasis given by conspicuous headlines or captions.<sup>21</sup> Hence, as Kirby J observed in

<sup>15</sup> *Edwards v Moala* [1999] TOSC 522 citing *Kingdom of Tonga and Editor of the Chronicle v Mataele* [1974-1980] TLR 34.

<sup>16</sup> Cited recently in *Sarina v O’Shannassy* [2021] FCA 1649 at [78].

<sup>17</sup> *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1721 [17]; 221 ALR 186 at 192 per Gleeson CJ, McHugh, Gummow and Heydon JJ.

<sup>18</sup> *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245; [1971] 2 All ER 1156 at 1162-1163 per Lord Reid.

<sup>19</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258 per Lord Reid; *Favell*, supra, at 1719–1720 [10]; 221 ALR 186 at 190.

<sup>20</sup> *Lewis*, supra, at 277 per Lord Devlin; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 573–574 [134] per Kirby J; *Favell*, supra, at 1720 [11]; 221 ALR 186 at 190.

<sup>21</sup> *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646 per Aickin J; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657 at 1661–1662 [26]; 201 ALR 77 at 83 per McHugh J; at 1699 [187] per Callinan J; *Favell*, supra, at 1719 [8]; 221 ALR 186 at 189.

Chakravarti v Advertiser Newspapers Ltd<sup>22</sup> '[w]here words have been used which are imprecise, ambiguous or loose, a very wide latitude will be ascribed to the ordinary person to draw imputations adverse to the subject'."

91. Where words and/or, as here, images, are used which impute discreditable conduct, the person to which they relate will be defamed even if the recipients or viewers of the words or image do not believe the imputations and may even know that they are untrue: *Hough v London Express Newspapers Limited* [1940] 2 KB 507 at 515
92. In deciding whether the words and/or, as here, the photograph complained of are defamatory, Court must consider the whole context of the publications: *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234, 238.
93. Having considered the whole context of the photograph and impugned articles, the evidence and submissions as outlined above, I am satisfied, for the reasons which follow, that the photograph was defamatory as defined by s. 2 of the Act in that the ordinary and natural meaning of what it depicted (without a proper explanation as to its provenance and context) and the purpose for which it was deployed by Mr Maama and the newspaper was calculated to, and did, damage the Plaintiff's reputation, exposed her to contempt and ridicule and caused her to be shunned.
94. Firstly, I accept the Plaintiff's evidence that without a proper explanation or context given for the photograph, most Tongans were likely to have regarded it as indecent and interpreted it as the Plaintiff having an improper relationship with Mr Urai. Her evidence, and that assessment, was supported by the evidence of Dr Fisi'iahi, Vilai 'Ilolahia and Siaosi Hakeai. Even Alifeleti Tu'ihalamaka, at the end of his cross-examination, opined that, in his experience, it was not normal in Tonga to publish, and the majority of Tongan newspapers would not publish, a photograph of this nature and that it was inappropriate to do so.
95. In that regard, I do not accept Mr Edwards' submission that there was no evidence of Tongan custom on this point. Section 5 of the *Evidence Act* permits such evidence to be given. The evidence of the witnesses referred to above reflected their common view of Tongan custom or cultural norms on this issue

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<sup>22</sup> Ibid, at 574 [134]

and it was unchallenged. Further, and in any event, had it been necessary, I would have been prepared to take judicial notice of the fact that the photograph, taken out of context, would likely have been seen as offending Tongan custom as to appropriate behaviour by a married woman on the basis and experience of the court in numerous previous cases (criminal and civil) so as to recognise such standards or custom as being notorious in Tonga: e.g. *Browne v Munokoa* [2018] UKPC 18.

96. Secondly, the newspaper, through Mr Maama, gave inconsistent and somewhat dissociative evidence about whether the photograph was 'indecent'. Despite what it had pleaded, and was contained in his affidavit, Mr Maama eventually conceded, as was pellucid from the text of his article in the third publication, that he considered the photograph to be evidence or suggestive of the Plaintiff having an illicit relationship with Mr Urai, so much so, that he publicly called for her to resign from her position in the PSA because he considered her to be a 'disgrace to Tonga'.
97. Thirdly, I accept the Plaintiff's evidence as to the true provenance and context of the photograph. As noted, that evidence was never challenged by the newspaper. In that light, and with that explanation, it is unlikely, in my view that the photograph would be regarded by a reasonable person with that knowledge as indecent or imputing impropriety on the part of the Plaintiff. It follows, therefore, that the newspaper's submission that any indecency was deliberately created by the Plaintiff must be rejected. The photograph imputed impropriety when it was published by the newspaper without any proper and factual description or context and with the evident purpose of casting aspersions on the Plaintiff's character and damaging her reputation.
98. Fourthly, and allied to the last point, there was no evidence whatsoever to support the newspaper's contention that the Plaintiff gave out the photograph or that she had it leaked to the media. The only evidence was that she had no knowledge and no part in the photograph being distributed beyond the group she was with on the night it was taken.
99. Fifthly, I am satisfied that the photograph, as published by the newspaper, conveyed one or more of the imputations advanced by the Plaintiff, all of which would be understood as consistent with a general or collective impression of

unchastity or impropriety.

100. Sixthly, even though the newspaper did not rely on a defence of truth, I am satisfied that the imputations conveyed by the manner in which the newspaper published the photograph were untrue. I found Mr Maama to be an unimpressive witness. His evidence was, at times, evasive, vague and self-serving. A striking example of that last characteristic was his evidence that he did not publish more of the information he said he had on the Plaintiff because he respected her. In circumstances where Mr Maama had already been responsible for publishing the photograph on three occasions, each time enlarging the photograph and giving it greater prominence, and as part of blistering attacks on the Plaintiff, any assertion of respect he had for her was clearly disingenuous. Moreover, Mr Maama's assertions of other news reports and information he had which were consistent with the Plaintiff having an improper relationship with Daniel Urai was never referred to in the pleadings or his affidavit for trial, nor were they ever substantiated beyond his unsolicited statements in cross-examination. As such, that part of his evidence (i.e. the content of any such information) rose no higher than impermissible hearsay and I have not acted on it.

101. Seventhly, I accept the Plaintiff's evidence in relation to members of the PSA Board initially calling for her employment to be terminated because of the publications of the photograph and that the publications had at least an indirect and adverse effect on her political aspirations later that year. By that evidence, I am satisfied that the imputations conveyed by the publications damaged the Plaintiff's reputation, exposed her to contempt or ridicule and caused her to be, at least temporarily, shunned.

102. I have excluded from the above analysis any reference to the Plaintiff's daughters. They were not parties to the action, and they were not called to give evidence.

*Qualified privilege?*

103. Section 10 of the Act provides:

No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made bona fide by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such communication is made has an

interest in hearing it unless it is proved that the person making such communication was actuated by anger, ill-will or other improper motive.

104. Subsection 11(3) provides that if the Court rules that the communication was made under any of the circumstances mentioned in section 10, then if there is no evidence that the Defendant was actuated by anger, ill-will or other improper motive, judgment shall be entered for the Defendant.
105. Sections 10 and 11 are intended to express the common law: *Tu'ionetoa v Pohiva* [2001] To. L.R 58, 62. The defence of qualified privilege reflects the view that there are occasions upon which, on grounds of public policy and convenience a person may, without incurring legal liability make statements about another which are defamatory and in fact untrue: *Palu v Edwards* [2016] TOSC 15 at [15].<sup>23</sup>
106. To attract privilege, the communication must have been made *bona fide*. Bona fide means 'in good faith' but is used also to mean honestly, sincerely or genuinely. It is an adverb and modifies the phrase 'in discharge of a legal, moral or social duty or by reference to a matter in which he has an interest'. The maker of the communication must act honestly for the purpose of discharging a duty or have an interest to make the communication.
107. Next, the communication must be made to a person who has an interest in hearing it. Not only must the person claiming the privilege have a duty or interest in making the communication, the recipient of the communication must have a reciprocal interest in receiving it. Reciprocity is essential.: *Edwards v Tapueluelu* [2018] Tonga LR 176 at [24].
108. When a defence of qualified privilege is set up, it is for the Defendant to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege. Where, as here, the newspaper relies upon the public interest limb of section 10, that interest must have existed in fact. It is not sufficient that the Defendant honestly and reasonably believed that the person to whom he made the communication had an interest in the subject matter.<sup>24</sup> While the Courts throughout the Commonwealth have to one extent or another recognised the obligation of the press, media and other publishers to

<sup>23</sup> Citing *Watt v Longsdon* [1930] 1 KB 130, 142.

<sup>24</sup> *Palu v Edwards*, *ibid*, at [17], citing *Hebdich v MacIlwayne* [1894] 2 QB 54, 60.

communicate important information upon matters of general public interest and the general right of the public to receive such information, the subject matter of the article must be “of real public interest”. It is not sufficient if the information merely interests the public. There must be some real public interest in having information of this kind in the public domain.<sup>25</sup>

109. In *Laucala Tapueluelu & ors v Vaipulu* (unreported, Supreme Court, AM 24 of 2012, 1 September 2015), *Tapueluelu v Vaipulu* [2015] TOSC 29 and *Edwards v Tapueluelu* [2018] TOSC 21, [2018] Tonga LR 176, Paulsen LCJ surveyed a number of authorities which were illustrative of the development of the common law in the UK,<sup>26</sup> Australia<sup>27</sup> and New Zealand<sup>28</sup> in relation to the defence of qualified privilege in recent years. His Honour saw no reason why those developments should not inform the development of the law of defamation in Tonga in so far as they are consistent with the *Defamation Act* and Tonga’s local conditions.

#### *Reynolds*

110. After considering the state of the law in each of those Commonwealth jurisdictions, Paulsen LCJ adopted the UK approach in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 as being suitable in Tonga due to its particular legal, political or social conditions (other than the terms of s. 10 itself). With respect, I agree.
111. The *Reynolds* approach strikes a balance, and seeks to harmonize the common tension, between, on the one hand, the need for the news media to be able to freely communicate with the public on matters of government and politics (including matters relating to the conduct of individuals holding or seeking election to positions in Government) and ensuring that freedom of expression is not curtailed (whether by Government, the fear of litigation or public opinion) beyond what is necessary and proportionate in a democratic society, and the protection of personal reputation as an integral and important part of the dignity

<sup>25</sup> *Palu v Edwards*, *ibid.*, at [18], citing *Tu’i’onea v Pohiva* [2001] TOCA 1 and *Jameel v Wall Street Journal* [2006] 4 All ER 1279, 1321.

<sup>26</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, *Bonnick v Morris* [2002] UKPC 31, *Jameel v Wall Street Journal* [2006] 4 All ER 1279.

<sup>27</sup> *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 532.

<sup>28</sup> *Truth (NZ) Limited v Holloway* [1960] NZLR 69, *Lange v Atkinson* [2000] 3 NZLR 385, *Templeton v Jones* [1984] 1 NZLR 448

of the individual and which forms the basis of many decisions in a democratic society which are fundamental to its well-being, on the other. "In Tonga, those decisions cover all aspects of people's lives including such matters as whom to employ or work for, where to worship, whom to marry, whom to do business with and whom to vote for. Unfounded allegations published widely can damage one's reputation forever".<sup>29</sup>

112. However, as Paulsen LCJ opined:<sup>30</sup>

*"... society has no interest in receiving untruthful and defamatory information and will not be well served by news media that is driven primarily by commercial considerations, particular political agendas or that is indifferent to truth."*

113. His Honour also observed, somewhat presciently, that in Tonga:

*"[55] ... some news and social media outlets are plainly aligned to particular politicians or political agendas. Some news and social media outlets have clear political perspectives and have been known to misreport official proceedings, dress up supposition as fact and make or publish ad hominem attacks on people holding different perspectives. This is a strong factor in favour of the adoption of the Reynolds approach."*

*The public interest test*

114. The *Reynolds* approach presents three key issues for the Court to consider, namely, whether:<sup>31</sup>

- (a) the subject matter of the publication was of real and sufficient public interest;
- (b) it was reasonable to include the particular defamatory material complained of; and
- (c) the publisher met standards of reasonable journalism or publication.

115. In relation to the first enquiry:

*"The concept of public interest is pliable but it is reasonably settled that it can include matters concerning the conduct of government and political life, elections and public administration. However, if a Defendant chooses to make a specific and defamatory charge about a Plaintiff the defence will not be available simply because it is presented against background material which is regarded as of public interest."*<sup>32</sup>

<sup>29</sup> *Edwards v Tapueluelu*, *ibid*, at [42].

<sup>30</sup> *Edwards v Tapueluelu*, *ibid*, at [54].

<sup>31</sup> *Gatley on Libel and Slander*, 12<sup>th</sup> Ed at page 643.

<sup>32</sup> *Edwards v Tapueluelu*, *ibid*, at [30], citing *Miller v Associated Newspapers Limited* [2003] EWHC 2799 (QB).

116. In relation to the second:<sup>33</sup>

*“The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no useful public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element of the article”.*

117. In my view, and for the reasons which follow, the photograph (as published by the newspaper) was not a matter of real or sufficient public interest, nor was it reasonable to include the photograph with the articles in the three subject publications:

- (a) The photograph and what it depicted (either in truth or supposition) had nothing whatsoever to do with the initial issue which resulted in the first publication, namely, the PSA’s call for the Prime Minister to resign on account of the Tongasat payments. While there can be no doubt that the allegations concerning the Tongasat payments and the call on the then Prime Minister by the largest employee representative body in the Kingdom were matters of legitimate public interest, a photograph of the Plaintiff in a private setting some four years prior was never part of that story. This was a clear case of the newspaper dragging in damaging allegations or imputations which served no useful public purpose.
- (b) The imputations sought to be conveyed by the manner in which the newspaper published the photograph were serious. There was no attempt by the newspaper to present the photograph as a real contribution to any public interest element in any of the subject articles.
- (c) The first publication was the product of Mr Maama’s erroneous belief that it was the Plaintiff, not the PSA, who made the Tongasat allegations and called for the Prime Minister to resign. There was no evidence to support that assumption. It was patent on the face of the press release that it was issued by the PSA. The PSA is and was an incorporated society pursuant to the *Incorporated Societies Act*. It was and is therefore a separate legal entity including at the time it issued the press release. Clause 21 of the PSA’s Constitution<sup>34</sup> provides that the Executive Board shall consist of the

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<sup>33</sup> *Jameel*, *ibid*, page 1296 per Lord Hoffmann at [51].

<sup>34</sup> CB 279

president, vice-president, legal counsel, nine executive members and the secretary general. Pursuant to clause 22(1), the executive board is empowered to exercise take any action as in its opinion may be necessary to promote the principles and object of the PSA and the interests of its members and to implement its policies. Further, the executive board may, subject to any limitation specified by the National committee, exercise any other powers in rule 4 which included that in the pursuit of its objects, the PSA shall be free to express opinions or take other actions in respect of any act or omission of governments, organisations or persons, and to express its opinion on any issue or topic.

- (d) Any supposition by Mr Maama that the photograph showed that the Plaintiff had 'lost her moral course' was not connected with the title to Dr Fisi'iahi's article because it specified the PSA (not the Plaintiff) as, in his opinion, having lost its course.
- (e) The second and third publications were the newspaper's public responses to the Plaintiff's letters of complaint addressed to Mr Maama and the Prime Minister and copied to a relatively small number of Government and media recipients. The Plaintiff's complaints stemmed from the first publication of the photograph, which, for the reasons stated above, was not a matter of public interest. Notably, the newspaper did not respond to the Plaintiff's letters, nor did it publish them as she requested. Rather, the initial use, albeit erroneous, of the photograph to illustrate Dr Fisi'iahi's article about a matter of public interest devolved into a vendetta by the newspaper against the Plaintiff personally after she complained to Mr Maama about the improper use of the photograph. Thereafter, the newspaper used its power of circulation to engage with the Plaintiff through the subsequent publications in an endeavour to embarrass and discredit her in what was clearly retaliation (notwithstanding Mr Maama's denial, which I reject) for her complaints about the photograph being published without its context and meaning being properly explained and how the newspaper (at the Board and editorial levels), as a result, was being operated. None of those matters were in the public interest.
- (f) The headline for the third publication (and the content of the article)

demonstrated further errors and inaccuracies in the newspaper's response to the Plaintiff's complaints. Firstly, she did not call for the newspaper to be terminated. In her letter to the Prime Minister of 2 May 2014, the Plaintiff stated that *"If the Government neglects this company, then its registration should be duly removed from the company register, or new directors be appointed who are not ministers, so that they can properly manage this company in accordance with the law of the nation"*. Secondly, what the newspaper had published in the form of the photograph, and what the newspaper insinuated it depicted (e.g. the Plaintiff being "a disgrace to Tonga"), without any accurate context, and without any actual details of the so-called other information about the Plaintiff and Mr Urai being disseminated in Fiji and around the world, as asserted by Mr Maama, was not "the truth". Had the newspaper properly investigated (considered further below) and reported on the photograph accurately and truthfully, not only would it not have been a matter of public interest, it would have vindicated the Plaintiff's complaints about the publication and the operation of the newspaper. Thirdly, the Plaintiff was not a public servant. Fourthly, there was no evidence that her trip to China was funded by government or the public purse.

- (g) A plain reading of particularly the third article shows that the "story" was never about the Plaintiff's behaviour at the trade union conference in China in 2010. In fact, that fact was never faithfully reported. Had that fact been appreciated by Mr Maama, then it is difficult to see how he could, in 2014, genuinely have considered the photograph to be "a big deal". As he said in evidence, it was not his practice to publish or republish old or "second hand" news. The real purport of that article (and so far as the available evidence suggested, the second article too) was to discredit and disparage the Plaintiff personally through the suggestion in the historical photograph and thereby attempt to deflect and defeat the gravamen of the Plaintiff's well-founded complaints and divert public attention from the issue of the Tongasat payments.
- (h) Finally, the calls by the newspaper, through Mr Maama, for the Plaintiff to resign as Secretary General of the PSA, further compounded its original

error in conflating the PSA and the Plaintiff and amply demonstrated the personal nature of the newspaper's responses to the Plaintiff's complaints and its attacks on her. The ensuing feud between the newspaper and the Plaintiff, in her personal capacity, was not a matter of public interest. As noted above, in circumstances where the newspaper chose to repeatedly present the defamatory photograph against initial background material of public interest, the defence of qualified privilege was not available to it.

*The responsible journalism test*

118. Had the publications passed the public interest test, they would not have passed the third inquiry which calls for an examination as to whether the steps taken to gather and publish the information were responsible and fair. The publisher must have taken the care of a responsible publisher to verify the information published. The actual steps taken will vary with the nature and sources of the information.<sup>35</sup>
119. In *Reynolds*, Lord Nicholls suggested<sup>36</sup> the following non-exhaustive list of factors that the Court may take into account in considering whether a publisher met the standards of reasonable journalism or publication:
- (a) The seriousness of the allegation. The more serious the allegation the more the public will be misinformed and an individual harmed if the allegation is untrue.
  - (b) The nature of the information and the extent to which the subject matter is of public concern.
  - (c) The source of the information. Some informants might have direct knowledge of events whereas others may have axes to grind or are being paid for their stories.
  - (d) The steps taken to verify the information.
  - (e) The status of the information. The allegation may already have been the subject of an investigation which commands respect.
  - (f) The urgency of the matter.
  - (g) Whether comment was sought from the Plaintiff as he may have information

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<sup>35</sup> *Jameel*, *ibid*, at page 1322, paragraph 149, per Baroness Hale.

<sup>36</sup> At page 627.

others do not possess or have not disclosed.

- (h) Whether the article contained the gist of the Plaintiff's side of the story.
- (i) The tone of the article bearing in mind that a newspaper can call for an investigation. It need not adopt allegations as facts.
- (j) The circumstances of the publication including timing.

120. "In its assessment of what constitutes responsible journalism the Court will likely have to balance a number of factors sometimes pointing in different directions. It should not judge harshly with the benefit of hindsight. Prior decisions, particularly in other jurisdictions or concerning other news mediums than the one in question should be viewed with caution. Due regard should be paid to editorial discretion and professional appreciation of journalists."<sup>37</sup>

121. Application of the above factors to the present case clearly indicates that the defence of qualified privilege was not available to the newspaper:

- (a) As noted above, the imputations sought to be conveyed by the publications of the photograph were serious, particularly by Tongan standards. Without an appropriate explanation as to its source and context, it was highly likely that members of the public would be misinformed and the Plaintiff's reputation would be harmed given, as I have found, the imputations were untrue.
- (b) In the above circumstances, the nature of the photograph was a matter of significant personal concern to the Plaintiff and, as explained above, was used to falsely conjure public concern.
- (c) The source of the photograph was plainly dubious. The anonymous Fijian website was self-described as railing against Fijian censorship at the time and was primarily dedicated to criticism of certain Fijian public figures. The article in that website did not contain any suggestion of the Plaintiff conducting an improper relationship with Mr Urai or that she was complicit in any breakdown of his marriage or family. The description of the source of the photograph in the website (that it was taken at "the FTUC<sup>38</sup> biennial

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<sup>37</sup> *Edwards v Tapueluelu*, *ibid*, at [32], citing *Gatley* (*supra*) at page 652.

<sup>38</sup> Which I understood to mean Fiji Trade Union Congress.

gathering" earlier in 2012) was also plainly wrong.

Further, like much of his other unsupported assertions revealed only during cross-examination, I do not consider Mr Maama's evidence of having other news reports or information about the Plaintiff and Mr Urai from Fiji media or elsewhere at the time to be reliable. And, as noted above, the content of the asserted information was, in any event, hearsay. The newspaper could have called Mr Urai or any Fijian publisher of any such information. It did not do so nor did it proffer any explanation for failing or choosing not to. I have little doubt from the venomous invective in the articles he did publish about the Plaintiff, that if any such information actually existed, Mr Maama would more likely than not have published it to further damage the Plaintiff.

- (d) As Mr Maama admitted in evidence, neither he or his staff took any steps to verify the photograph or the information purportedly depicted in it. In that regard, Mr Maama frankly and correctly described that failure as having been "negligent". By that conduct, he and the newspaper were reckless as to what the photograph conveyed and indifferent as to the truth of the situation.
- (e) There was no evidence that the photograph had already been the subject of an investigation which commanded respect.
- (f) In circumstances where the photograph was taken in 2014 and published on the Fijian website in 2012, there was absolutely no urgency in the newspaper publishing it in 2014.
- (g) I do not accept Mr Maama's evidence that he attempted to contact the Plaintiff for comment before publishing the photograph. There was no reference to any such attempts in either the newspaper's Defence or Mr Maama's affidavit evidence. As stated above, I generally found Mr Maama's evidence to be unreliable particularly where he made unsupported assertions during cross-examination. The Plaintiff denied receiving any messages from him. I did not discern any basis for doubt in respect of any of the Plaintiff's evidence and I accept her evidence in this regard. In my view, it is highly likely that if Mr Maama had left messages for the Plaintiff, she would have contacted him and, as she subsequently wrote in her letter

to him seeking to "correct" the publication of the photograph, would have apprised Mr Maama of the true nature of the photograph and the circumstances surrounding it.

- (h) Neither the repeated publications of the photograph or the second and third articles contained the gist of the Plaintiff's side of the story.
- (i) The tone of the articles and the manner in which the newspaper deployed the photograph was one of condemnation and retaliation in response to the Plaintiff's complaints about the publication of the photograph and how the newspaper was being operated.
- (j) The timing of the publications corresponded with the PSA's public pressure on the Prime Minister in relation to the Tongasat payments and then continued as Mr Maama and the newspaper waged public, reputational attacks on the Plaintiff personally.

#### *Malice*

122. In the event that I am wrong in the above analysis in respect of whether the impugned publications were in the public interest or whether they passed the responsible journalism test, such that the defence of qualified privilege was open to the newspaper, the final limb or exception in section 10 falls to be considered.

123. If occasion is privileged, the Plaintiff must, in order to succeed in the action, prove that the Defendant was not using the occasion honestly for the purpose for which the law gave it to him, but was actuated by some indirect ulterior motive, e.g. malice in the popular acceptance of the term: *Tu'i'onetoa v Pohiva* [2001] TOCA 1 at [18].<sup>39</sup>

124. A Defendant will be held to have acted with malice if it is proved that the Defendant did not honestly believe that what he published was true or was indifferent to its truth or falsity: *Tu'i'onetoa v Pohiva*, *ibid*, at [22].<sup>40</sup> A person who publishes untrue material recklessly without considering or caring if it is true or not is to be treated as if he knew it to be false: *Horrocks v Lowe* [1975] AC 135 (HL).<sup>41</sup>

<sup>39</sup> Citing Gatley on Libel and Slander at § 583.

<sup>40</sup> Citing, with apparent approval, the view expressed by Lord Diplock in *Horrocks v Lowe* [1975] AC 135.

<sup>41</sup> See also *Lange* (NZ), *ibid*, at 401.

125. For the reasons stated in the preceding sections above, I have no hesitation in finding that in publishing the photograph on three occasions together with, at least, the third article, the newspaper and Mr Maama were actuated by malice.

Further:

- (a) The initial use of the photograph was clearly an attempt to defend the newspaper's owner, and its leader, the then Prime Minister. In other words, that publication was politically motivated.
- (b) In refusing and/or failing to publish the Plaintiff's letters, the newspaper's subsequent articles incorporating the photograph lacked balance in reporting.
- (c) When the Plaintiff drew the attention of the newspaper, through her letters to Mr Maama, to the true context of the photograph, he failed to acknowledge her request for "corrections" to be made, nor did the newspaper issue a retraction or apology for any of the defamatory imputations.
- (d) The newspaper's third publication of the photograph on the front page in greater size and in full colour together with its calls for the Plaintiff to resign as Secretary General of the PSA on the basis of the untrue and misleading allegations conveyed by the photograph and commentary on it in the articles was clear evidence of animus towards the Plaintiff personally.

*Conclusion on liability*

126. For those reasons, I find that:

- (a) the publications of the photograph and impugned articles were defamatory;
- (b) the unqualified publications of the photograph and commentary on it in the 9 May 2014 article conveyed (of those pleaded) imputations that the Plaintiff was an irresponsible mother, a bad and irresponsible leader, a bad woman, a party girl and that she had acted wrongly; and more generally, of unchastity and impropriety and that she was having an illicit relationship with Mr Urai;
- (c) the subject matter of the publications were not matters of public interest;
- (d) the newspaper and Mr Maama did not meet standards of reasonable

journalism or publication;

- (e) the newspaper and Mr Maama were actuated by malice and other improper motives; and
- (f) therefore, the defence of qualified privilege was not available to justify the publishing of the defamatory material.

## **Damages**

### *Submissions*

127. The Plaintiff claims general and “exemplary (aggravated)” damages for “the hurt and stress” caused by the defamatory publications to her and her two daughters.

128. The Plaintiff’s claim totals \$1,125,000, comprising:

- (a) against the newspaper:<sup>42</sup>
  - (i) general damages of \$600,000;
  - (ii) exemplary damages of \$300,000;
- (b) against Mr Maama:
  - (i) general damages of \$150,000;
  - (ii) exemplary damages of \$ 75,000.

129. In support of the quantum of damages claimed, the Plaintiff relied on the decisions in *Nationwide News Pty Limited v Rush* [2020] FCAFC 115, *Craig v Williams* [2019] NZSC 60 and *Wilson v Bauer Media Pty Ltd* [2017] VSC 521

130. In relation to those decisions, the Plaintiff submitted:<sup>43</sup>

*“87. In the case of the Nationwide News Pty Limited vs Rush [2020], where it dealt with 2 publications and 1 billboard portraying sexual imputations against Mr. Rush; and Wilson vs Bauer Media Pty Ltd [2017] where it dealt with publications and accusation of Ms Wilson as a liar, the general damages and aggravated damages averaged at AUD750,000 which is TOP1,193,697. On average for 1 defamatory publication, the damage is estimated at around TOP350,000 which is similar to the total damages in the case of the Attorney General vs Tapueluelu & ors [2013] of around TOP390,620 although the nature of the defamatory accusation is different.*

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<sup>42</sup> At paragraph 89 of her affidavit sworn 1 December 2021, the Plaintiff included the First and Fourth Defendants as being “the owner and director” of the newspaper in her claim for damages against the newspaper.

<sup>43</sup> Affidavit sworn 1 December 2021.

88. *The defamatory accusations in the cases of the Nationwide News Pty Limited vs Rush [2020] and Wilson vs Bauer Media Pty Ltd [2017] are similar to the defamatory accusations made by the Second & Third Defendants against me in their 3 publications from 20 March 2014– 09 May 2014 with sexual imputations, a prostitute, a liar, a party woman, a bad and irresponsible mother & leader. The total damages originally sought against the 4 Defendants was \$1,125,000 which is in line with damages awarded mentioned above for defamatory damages.*”

131. Further, the Plaintiff submitted that:

*“92. For justice to be served, fair and just damages should be awarded. This will also be an example and set [a] precedent to ensure that any media owned by Government, in whatever form: newspaper, radio or television, shall not be used by Government as a tool to defame & discredit the people and taxpayers of Tonga in the future, especially those who are speaking out on the corruption and unlawful actions by Government.”*

132. In her submissions in relation to the Tongan decision of the *Attorney General v Tapueluelu & ors* [2013], the Plaintiff described the awards there as being *"Editor, Mateni Tapueluelu = USD70,000; Publisher, Lautala Tapueluelu = USD70,000; Solomone Palu = USD34,000"*.<sup>44</sup> However, the purported copy of that decision included by the Plaintiff in the court book was in fact the decision of *Tapueluelu & ors v Vaipulu* [2015] TOSC 29 (AM 24 of 2012, 1 September 2015).<sup>45</sup> In that decision, the Supreme Court dismissed an appeal from a Magistrate's decision awarding the respondent damages for defamation of \$10,000. It did bear any relevance to the Plaintiff's summary of the decision in *Attorney General v Tapueluelu & ors*.

133. As a result, during the course of preparing this judgment, I directed that enquiries be made of the Plaintiff to clarify which decision she intended to rely upon and/or to provide a copy of the decision in *Attorney General v Tapueluelu & ors*, as it was not to be found on the Attorney General's website or PACLII. In response,<sup>46</sup> the Plaintiff referred to and provided a copy of the decision of the Court of Appeal in *Solomone Palu & ors v William Clive Edwards & ors* (unreported, AC 4 of 2016 from AM 25 of 2013, 14 September 2016). In that two-page decision, the Court of Appeal dismissed the appeal for want of prosecution. It did not contain any reference to any damages award from the decisions below. The decision

<sup>44</sup> Paragraph 84 of the Plaintiff's primary affidavit.

<sup>45</sup> Pages 284 to 306.

<sup>46</sup> By email to the Registry, 29 July 2022.

appealed from was an appeal to the Supreme Court from a decision of the Magistrates Court in favour of the Respondents (the Plaintiffs in the initial action) in respect of defamatory statements published by the Appellants to effect that the then Prime Minister and his Ministers (at the time) were guilty of theft and embezzlement.<sup>47</sup> Chief Justice Scott dismissed the appeal. That decision did not refer to any quantum of damages either, although the jurisdictional limit of the Magistrates Court is \$10,000.

134. In his written submissions, Mr Edwards did not address the issue of damages. However, in his oral submissions, Mr Edwards contended that:

- (a) not only had the Plaintiff not suffered any damage to her reputation as a result of the publications, but that her popularity and standing as “a national figure” had in fact increased;
- (b) the Plaintiff had not called any witness to testify that she was defamed, ridiculed or hated as a result of the publications; and
- (c) therefore, damages should be “nominal or none”.

***Consideration***

135. Section 16 of the Act provides that if, in any civil action for defamation of character, the defamatory matter complained of is (relevantly) in connection with the Plaintiff’s trade, business or calling; or imputes unchastity to a woman or girl, it shall not be necessary for the Plaintiff to prove that [s]he has sustained any monetary or other actual loss by reason of the publication of such defamatory matter.

136. The imputations conveyed by the defamatory publications were, in my view, of the kind specified by the above provisions of s. 16. As such, the Plaintiff is not required to prove actual loss or damage. The question then becomes whether, as Mr Edwards contended, the Plaintiff is entitled to more than nominal damages?

137. In determining that question, the following remarks of Finnigan J in *Edwards v Moala*, *ibid*, are instructive:

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<sup>47</sup> *Palu v Edwards* [2016] TOSC 15 (AM 25 of 2013, 6 May 2016).

*“A good reputation is a right, and therefore once an unjustified defamation has been proved, general damage to reputation is presumed. The amount of an award in general damages is ‘at large’, and depends on what damage a Plaintiff proves, and is an assessment of fact. Such award is intended to compensate a Plaintiff for the injury to his reputation and the hurt to his feelings, as well as social disadvantages that have resulted or may be thought likely to result. Aggravating factors, such as high-handed, oppressive, insulting or contumelious behaviour that increases the mental pain and suffering caused by the defamation can be taken into account. If so, that element of an award may be called aggravated damages, but these are included in the award in general damages. Exemplary damages, ... introduce the element of punishment of the Defendant, which is otherwise not present in a damages award. Damages of this kind are generally not available in defamation unless the Defendant has cynically published a statement knowing it to be untrue, or not caring, with the object of making a profit greater than whatever damages might be awarded to the person defamed.”*

138. In *Nationwide News Pty Limited v Rush*, the purposes to be served by an award of damages for defamation were further explained as:<sup>48</sup>

*“ ... **consolation** for the personal distress and hurt caused to the appellant by the publication, **reparation** for the harm done to the appellant’s personal and (if relevant) business reputation and **vindication** of the appellant’s reputation. The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant’s reputation. The gravity of the libel, the social standing of the parties and the availability of alternative remedies are all relevant to assessing the quantum of damages necessary to vindicate the appellant.”*

139. Further, in that case, the Full Court of the Federal Court described the assessment by a judge of damages for non-economic loss in a defamation proceeding as “an intuitive process” where, subject to any statutory constraints, “damages are at large”. Also, because the assessment of damages is “the product of a mixture of inextricable considerations”, the question of their assessment does not admit of one correct answer.<sup>49</sup>

140. Other considerations relevant to the present case include:

- (a) the extent of the publication: *Lasalosi v Hausia* [2000] Tonga LR 415;
- (b) the “undeniable fact that many of the people who have read and believed the false statement may continue to believe it and the victim is left to some

<sup>48</sup> *Ibid*, at [453] citing *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; 178 CLR 44.

<sup>49</sup> *Ibid*, at [472], citing *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 at 150.

extent with the feeling that people he meets may still believe the worst of him in relation to the allegations”: *Taufa v Editor of Taimi ‘O Tonga* [2001] Tonga LR 101;

- (c) the Court is entitled to look at the whole conduct of the newspaper and Mr Maama from the time of the defamatory publications to the time of judgment, that is, their conduct before action, after action, and during the trial: *Sarina v O’Shannassy*, *ibid*, at [100];<sup>50</sup> and
- (d) damages should be consistent between closely comparable cases: *Cerutti v Crestside* [2014] QCA 33 at [54].<sup>51</sup>

141. In relation to the extent of the publications:

- (a) It was common ground that, at the relevant time, the newspaper was published once a week.
- (b) Mr Maama gave evidence that, at the relevant time, the newspaper was only published in Tonga, although at other times, it was also published in New Zealand. The Plaintiff asserted<sup>52</sup> that the newspaper was published “throughout Tonga and to the Tongan Communities in New Zealand, Australia and the United States”. However, there was no evidence of any broader international circulation of the impugned publications.
- (c) Mr Maama gave evidence that at the start of its operation, the newspaper sold about 800 papers per week. The Plaintiff extrapolated from that figure the following:
  - (i) 800 copies of each of the three publications makes a total of 2400 newspapers displaying the defamatory photograph;
  - (ii) according to the 2011 census, the average Tongan household comprised “around five people”;
  - (iii) if 80% of the newspapers (1,920) were sold, then the photograph “reached around 9,600 people which is around 10% of the population”.

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<sup>50</sup> Citing *Praed v Graham* (1889) 24 QBD 53 at 55 per Lord Esher MR (with whom Lindley and Lopes LJJ agreed). See also *Nationwide News Pty Ltd v Rush* [2020] FCFAC 115 at [431] citing *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153 at 184.

<sup>51</sup> Referred to in *Nationwide v Rush*, *supra*, [453].

<sup>52</sup> At paragraph 68 of her primary affidavit.

142. The Plaintiff also gave evidence that copies of the defamatory photograph, as it appeared on the front page of the newspaper were distributed for free to almost all the homes in her father's village of Ma'ufanga in the Tongatapu 3 constituency in the last week of the campaign before the November 2014 general election in which she was a candidate. The 2011 census also recorded that there were 1,214 households in Ma'ufanga. Ma'ufanga is divided almost evenly between Tongatapu 3 and Tongatapu 4, so that around 607 households (containing approximately 3,035 people) would have received the publication. There were around 800 registered voters in the Tongatapu 3 part of Ma'ufanga. About 80% of the people in Ma'ufanga were her relatives. The Plaintiff said that she and her relatives in her campaign team were shocked when she received only about 95 votes in Ma'ufanga. When she was later informed by a relative that "someone had been distributing the photograph on behalf of another candidate", she realized that, as a candidate, she had been shunned by the voters because of the photograph.
143. Even though Mr Edwards did not object to that evidence, nor was it challenged, the obvious deficiencies in terms of admissibility and uncertainty mean, that at best, it attracts very little weight.
144. As to the effect of the publications on the Plaintiff, I accept her (admissible) evidence in terms of professional impact on her, particularly, when some members of the PSA board initially called for termination of her employment. It may also be accepted, in terms of personal impacts, that the Plaintiff's feelings were hurt, she has suffered distress and anguish and she was embarrassed and ridiculed. However, for the reasons explained above, I exclude from consideration of any damages award, any upset or hurt occasioned to the Plaintiff's daughters by reason that they were not joined as Plaintiffs to the action nor were they called to give evidence. I also take into account the contemporaneous email by the Plaintiff at the time to Mr Maama conveying the apparent anger of some of her relatives who saw the photograph, and who threatened to cause harm to Mr Maama and others.
145. The Plaintiff gave evidence during cross-examination that she perceived adverse reactions or attitudes towards her following the publications for a period of about two years. As an example, she explained that during that period, those who had

initially proposed termination of her employment continued to display negative attitudes to against her such as rejecting her proposals. She added that the women appeared more critical than men. Again, that evidence went unchallenged.

146. In answer to Mr Edwards cross-examination about whether the Plaintiff's position or reputation had been diminished since the publications, the Plaintiff said that she considered that her personal position in Tonga had been diminished but that her professional popularity and reputation had improved by reason of her work and other professional associations with which she has since become involved. The Plaintiff did not call any other independent evidence in that regard.
147. Having regard to the seriousness of the defamatory publications, that they were repeated on three occasions in ever increasing size, colour and prominence, the extent of their circulation, the manner and malice with which the newspaper and Mr Maama published them, their conduct in response to the Plaintiff's complaints and the effects of the publications on the Plaintiff and her reputation, I do not regard this as a case for only nominal damages. In fact, far from it.
148. The decisions from Australia and New Zealand relied upon by the Plaintiff are of little assistance in assessing damages for defamation in Tonga. The differences between those countries and Tonga, in terms of population, extent of circulation by online and print media, cultural and social norms, economic factors and comparable awards of damages in other defamation cases in those countries, are stark.
149. Moreover, those cases may be further distinguished from the present on the basis that the Plaintiffs in *Rush* and *Wilson* were Hollywood actors with a presence, as it were, on the world stage.
150. The award in *Wilson v Bauer* (as relied upon by the Plaintiff) totalling \$4,749,920.60 was reduced on appeal to \$600,000.<sup>53</sup>
151. The original damages award in *Craig v Williams* of NZ\$1.27 million, was also upset on appeal. That case concerned statements that the Plaintiff had engaged in sexual harassment. The trial Judge set aside the verdicts and ordered a new

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<sup>53</sup> *Bauer Media Pty Ltd v Wilson [No 2]* [2018] VSCA 154.

trial on both liability and damages.<sup>54</sup> Mr Williams appealed against the decision to set aside the verdicts. The Court of Appeal allowed the appeal in part, restoring the verdict on liability, and ordered that the retrial proceed on the basis of damages only.<sup>55</sup> In the process, the Court said the jury should be directed that an appropriate award for compensatory damages including aggravation, would be “up to \$250,000”. Mr Craig appealed the Court of Appeal’s decision to restore the verdict on liability, and the Supreme Court allowed the appeal, ordering a retrial on both liability and damages.<sup>56</sup> Subsequent to the jury trial, Mr Craig commenced proceedings against Mr Williams based on evidence that had emerged during the trial.<sup>57</sup> Both parties’ claims were ultimately settled on the basis that Mr Williams retracted his statements about Mr Craig, apologised to him and paid a confidential settlement sum.<sup>58</sup>

152. Returning then to Tonga, in *Edwards v Moala* [1999] TOSC 52, Mr Edwards, who was then the Minister of Police, sued a newspaper and its editor for defamation arising from statements published which conveyed imputations of a similar tone to the present case, including that he was he was “an unfair person, not fit to hold office, acted for political reasons, that he was an evil or corrupt person, and that he was responsible for Tonga’s ‘bad image overseas’ and for the criticism of the country and its leaders”. Finnigan J held the statements to be defamatory. He too took ‘a restrictive view’ in assessing damages only in respect of the injuries suffered by the Plaintiff and not, as claimed, by members of his wider family. His Honour rejected Mr Edwards’ submission that \$100,000 was ‘the realistic yardstick’ for damages and ‘and not as a notional outer limit’ and described the amount claimed as ‘very high in the Tongan context’. Neither party furnished the Court with any comparable decisions. His Honour noted that it was ‘difficult to be precise, but the amount must be sufficient to solace a substantial injury to the reputation of a pivotal public official’. Finnigan J concluded:

*“The amount I fix in general damages is \$25,000. In the present case, the Plaintiff has argued for exemplary damages. Exemplary damages are not available to him, but aggravated damages are. He submitted that after inflicting the injury to his reputation, the Defendant went further. In*

<sup>54</sup> *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215.

<sup>55</sup> *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1.

<sup>56</sup> *Craig v Williams* [2019] NZSC 38, [2019] 1 NZLR 457.

<sup>57</sup> Referred to in *Craig v Stringer* [2020] NZCA 260, (2020) 25 PRNZ 367 at [11](a).

<sup>58</sup> Referred to in *Craig v MacGregor* [2021] NZHC 3082 at [17].

*particular, he submitted that when he protested to the Defendant, the Defendant replied, and published his reply by faxing it, that he would not accept the Plaintiff's rebuke, and would not change. Then after that, when the Plaintiff commenced proceedings, he submitted, the Defendant compounded the error of his actions by including not only his false allegations in his pleadings, but also fresh public accusations of the type complained of. Then, the Plaintiff submitted, he failed to bring evidence directed at proving either the original allegations or the fresh accusations. ... The award of **aggravated damages** that reflects the seriousness of the aggravation should be substantial, but not as high as the \$40,000 that the Plaintiff has claimed. I fix the amount at **\$15,000.**"*

153. In *Taufa v Editor of Taimi 'O Tonga* [2001] Tonga LR 101, the Plaintiff was a serving police officer. He was a passenger in a car that was the cause of an accident which resulted in the death of one young woman and injury to another. The Taimi 'o Tonga published, on page 3, a prominently displayed report of the accident and death including a photograph of the victim. The article suggested that the Plaintiff was driving the vehicle at the time and that the police investigation of the case was being delayed because the Plaintiff was the son of a senior officer of the Prisons Department. The father of the Plaintiff spoke on the telephone to one of the editorial staff of the paper in Tonga and pointed out the falsity of the allegation. He was told the other man did not care to speak to him and that he should speak to a lawyer. The Plaintiff's father did so and the lawyer wrote to the newspaper pointing out that the report was false and had caused considerable distress to the Plaintiff and his family. The letter sought publication of an apology and correction and payment of \$5,000 and modest costs as compensation for the tort. The paper did not reply to the letter but did publish an apology albeit on page 27 and far less prominently than the original article. No defence was filed and judgment was given on liability against both Defendants. On a hearing to assess damages, the Chief Justice held that:

- (a) any effect on the Plaintiff's family could not be part of the award except to the extent that it caused the Plaintiff added distress to know that the untrue allegation had caused his family to doubt and to criticise him;
- (b) it was relevant to consider the extent of the publication;
- (c) the court "will always take into account the undeniable fact that many of the people who have read and believed the false statement may continue to believe it and the victim is left to some extent with the feeling that people he

meets may still believe the worst of him in relation to the allegations”;

- (d) the attitude of the Defendants may aggravate the award but, in most cases, will be taken as part of the assessment of general damages; and
- (e) punitive damages are generally only awarded where the court considers that the general damages, after taking into account any aggravating factors, do not sufficiently punish a particularly bad case.

His Honour then awarded general damages of \$5,000 and costs.

154. More recently, in the 2012 decisions of *Leong v Fusimalohi*,<sup>59</sup> the Defendants co-authored a letter about the Plaintiff which contained a number of false, derogatory and defamatory statements about him and then, actuated by malice, published the letter by sending it to the general manager of the Plaintiff's employer. In assessing damages, Chief Justice Scott identified a number of factors which aggravated the damages such as 'the particularly nasty tone of the defamatory letter', 'the demeaning allegations' contained in it, the Defendants' 'express intention to damage the Plaintiff's reputation both personal and professional' and the letter's publication to the Plaintiff's employer which caused the Plaintiff to be summoned to offer an explanation. His Honour considered an appropriate award, for both general and aggravating damages, to be \$10,000.
155. The only decision in Tonga, of which I am aware, which involved damages for defamation far higher than the awards referred to above, but still less than half of that contended for by the Plaintiff here, is that of *Pohiva v Solomon* [2009] TOCA 18. However, as will be seen, it too, is of limited assistance. In that case, Chief Justice Ford was asked to set aside orders made in 2009 for leave to appeal and a stay of execution on a summary judgment obtained in 2008 in which the Plaintiff was awarded general damages of \$250,000 and aggravated damages also in the sum of \$250,000. Unfortunately, there is no published record of the allegations of defamation in that case or other circumstances which might explain the magnitude of those awards. However, given the orders were the product of a summary judgment application, it is perhaps unlikely that the assessment of damages was subjected to any indepth scrutiny.

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<sup>59</sup> Liability: [2012] TOSC 24; damages: [2012] TOSC 55.

156. Of all the above decisions, I consider *Edwards v Moala* to be the most apposite to the instant case and instructive on the issue of damages. I take into account, however, the difference between the respective Plaintiff's public positions at the relevant times and the effluxion of time and effects of inflation since that decision was handed down.
157. After considering all the features of the defamatory publications, and their effects on the Plaintiff, as detailed above, I consider that an appropriate award for general damages is \$30,000.
158. Further, I consider the conduct of the newspaper and Mr Maama both at the time of the publications and during the course of the proceeding to warrant an award of aggravated damages, which I fix at \$20,000.
159. In relation to the Plaintiff's apparent claim (conflated with aggravated damages) for exemplary damages, I am not satisfied that the compensation awarded by way of basic and aggravated damages is an inadequate punishment for the relevant Defendants here: *Edwards v Pohiva (Cross Appeal)* [2003] TOCA 8 at [64].<sup>60</sup>
160. Further, the object of the Plaintiff's claim in this regard was to have the Court effectively punish the Government as the newspaper's owner at the time and to deter future Governments from engaging in similar conduct. There are three problems with that:
- (a) Firstly, the Plaintiff has not succeeded in demonstrating, whether by seeking to 'lift' or 'pierce' the corporate veil,<sup>61</sup> or otherwise, that the Government at the time, was responsible for the impugned publications.
  - (b) Secondly, while the Government was originally joined as the First Defendant to this action, as indicated at the outset of this judgment, the claim against it was struck out and the Plaintiff did not seek to replead against it. As such, it is no longer a party to the action and any award of damages aimed, either directly or indirectly at the Government, in those

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<sup>60</sup> Citing *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 at 517; *Kaufusi v Lasa & ors* [1990] Tonga LR 139; *Manu & Kingdom of Tonga v Muller* [1997] Tonga LR 192; *Health Practitioners Registration Council & Kingdom of Tonga v Schafer-Macdonald* [1997] Tonga LR 101. In that case, the Court of Appeal observed that the award for general and aggravated damages for thirty days of false imprisonment of \$87,000 was, in Tonga, "a very substantial amount".

<sup>61</sup> As discussed in the ruling striking out the Plaintiff's claim against the First Defendant.

circumstances, would not be permissible.

- (c) Thirdly, even though exemplary damages are not only punitive, and 'may also be a deterrence with an effect beyond the wrongdoer',<sup>62</sup> there was no evidence before the Court that the current Government has been, or is likely in the foreseeable future to be, involved in owning or operating a newspaper or other media outlet which might engage in defamation of the kind engaged in by the newspaper here. Further, as there was no evidence that the newspaper will be resuming operations after this case is concluded, and given that it was only reinstated to the Companies Register for the purpose of this proceeding, any need for specific deterrence does not arise.

161. For those reasons, I do not consider that any further amount by way of exemplary damages is necessary to show the Court's condemnation of the conduct for which the newspaper and Mr Maama must bear responsibility.

162. The Plaintiff did not make any claim for interest up to judgment.

163. Finally, as it was the newspaper which published the defamatory material, as a result and at the direction of Mr Maama's editorial decisions, both are liable for the loss and damage caused. The newspaper is also vicariously liable for Mr Maama's tortious conduct. In those circumstances, I see no basis for separate awards against the two for the same damage. Accordingly, the liability of the newspaper and Mr Maama for the damages assessed and costs is joint and several. On that issue, Mr Edwards agreed.

## **Result**

164. Judgment is entered for the Plaintiff against the Second Defendant.

165. The default judgment against the Third Defendant is confirmed.

166. The Second and Third Defendants are to pay the Plaintiff damages in the sum of \$50,000.

167. The Second and Third Defendants are to pay the Plaintiff's legal costs of the proceeding, if any, to be taxed in default of agreement.

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<sup>62</sup> *Edwards v Pohiva (Cross Appeal)*, *ibid*, at [68], citing *Lamb v Cotogno* [1987] HCA 47; (1987) 74 ALR 188, 192.

NUKU'ALOFA  
29 July 2022



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC  
LORD CHIEF JUSTICE