N8291

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS NO. 19 OF 2018

BETWEEN
PETER WALIET as Chairman of Asuale Business Group Inc.
First Plaintiff

AND
ASUALE BUSINESS GROUP INC.
Second Plaintiff

AND
MR STEVEN MAISAM, Chairman of Asuale Development Corporation Ltd
First Defendant

AND
ASUALE DEVELOPMENT CORPORATION LTD
Second Defendant

AND
MR TUNOU SABIN as Managing Director of PNG Forest Authority
Third Defendant

AND
DR. KEN NGANGAN as Secretary, Department of Finance
Fourth Defendant

AND
Ms HAKAUA HARRY as Secretary,
Department of National Planning& Monitoring
Fifth Defendant

Waigani: Thompson J
2020: 18th March, 30th April

Claim against State entities for damages - declaratory relief– S11(2) of Public Money Management Regularization Act 2017 - Claims By and Against the State Act - claim against funds in State trust account – S121A of Forestry (2007 Budget Amendment) Act 2006 - meaning of interest arising out of customary land - financial benefit arising from use of customary land - Land Disputes Settlement Act - courts have no jurisdiction to determine disputes over interests

in customary land - funds no longer existing - futility of declaratory relief.

Counsel:

Mr T. Yai, for the First & Second Plaintiff
Mr P. Kewa, for First & Second Defendant
Mr T. Dalid, for the Third Defendants
Mr M. Wangatau, for Fourth - Fifth & the State Defendants

30th April, 2020

1. THOMPSON J: FACTS: In 2001, an overseas project developer shut down its operations in the Apalik Agricultural Reserve land area, and left PNG, after unlawfully having its performance bond of about K196,000.00 returned to it by the Papua New Guinea Forest Authority ("the PNGFA"). Various landowner groups then claimed compensation from the State, presumably based on the State's failure to enforce compliance with the project performance obligations.

2. In 2005 the second Defendant issued proceedings against the PNGFA claiming for the loss of the performance bond of about K197,000.00. Those proceedings were dismissed in September 2006 for failing to disclose a cause of action. In 2007 the second Defendant issued fresh proceedings for the same claim, and in 2009 those proceedings were also dismissed.

3. In 2007, a log export development levy was introduced on the export of logs, and the levy payments were paid into a trust account operated by a committee of the third, fourth and fifth Defendants as trustees ("the LEDL trust account"). Under S 121A of the *Forestry (2007 Budget Amendment) Act* 2006, payments out of the LEDL trust account can only be made '...in accordance with plans for agriculture or infrastructure development projects in logging areas submitted by the relevant Local Level Government or Provincial Government."

4. In May 2011, the Plaintiffs made a claim against the third Defendant for K10,602,464.00 in damages arising out of the stoppage of the Apalik project. In November 2011 the PNGFA was said to have prepared an Assessment Report which valued the loss and damage caused by the stoppage of the project, at K10.2million. It appears that the third Defendant accepted this Report as showing liability, and not just the value of the damage, and notwithstanding that any claim for damages arising out of the conduct of the project in 2001, would have been long since time-barred.

5. On this basis, in November 2011 the PNGFA asked the State to pay K10.6m to the second Plaintiff.

6. On an unknown date, the State paid K502,000.00, but apparently to the second Defendant, from the LEDL trust account.

7. In August 2012, the State paid K3m to the second Defendant, and approved a further payment of K7.1m to be paid to the second Defendant from the LEDL

trust account.

8. It appears that the State then became aware of a dispute between the second Plaintiff and second Defendant as to who should be paid the monies.

9. In 2016 the State Solicitor was said to have advised the State and the PNGFA that the two payments had been unlawfully made from the LEDL trust account, because the 2001 project had ceased to exist long before the LEDL export levy commenced in 2007. It must also be observed that LEDL payments can only be made for proposed future development projects submitted by the relevant LLG or Provincial Govt. A payment to a landowner group for damages for past loss,is clearly outside the authorized scope of payments. Any agreement by the trustees to make such a payment, would be in breach of the Act, and would not be valid.

10. It appears that the State Solicitor's advice was that if the State was liable to pay damages to the claimant, payment could not come from the LEDL but could only come from the State.

11. Notwithstanding this, in September 2017 the third Defendant signed a cheque for K7.1m from the LEDL trust account, payable to the second Defendant.

Current proceedings

12. In January 2018, the Plaintiffs issued these proceedings, amended in March 2018, by way of an Originating Summons seeking Declarations that they are the lawful recipients of the sum of K10.6m for the damages claim for the Apalik Agricultural Reserve land area, and that K3.5m has been wrongly paid to the second Defendant, Orders that the first and second Defendants account for those monies, and mandatory orders for the cheque for K7.1m to be cancelled by the third, fourth and fifth Defendants, and issued to the second Plaintiff.

13. In February 2018, the *Public Money Management Regularization Act* 2017 ("the PMMR Act") had the effect of compelling the transfer of all public monies in trust accounts to Consolidated Revenue. In April 2018, monies held in the trust accounts of the PNGFA including the LEDL trust account, were transferred to Consolidated Revenue.

14. Under S 11 (2) of the *PMMR Act*, "*A claim for payment, compensation, restitution,damages or any other form of relief including injunctive or declaratory relief against the State or a statutory body based on the undertaking or promise of any person ... shall not be enforceable through the Courts or otherwise unless the person making the claim produces a properly authorized ILPOC or an Authority to Pre-Commit Expenditure relating to the undertaking or promise ... to the full amount of the claim.*"

15. In June 2018, the Plaintiffs and second Defendant agreed to a Consent Order for the third Defendant to issue cheques to the second Plaintiff and second Defendant for K3.5m each. That Consent Order was stayed in September 2018.

16. In August 2018 the third, fourth and fifth Defendants filed two Motions

seeking to set aside the Consent Order, and to summarily dismiss the proceedings.

17. In March 2019 the Plaintiffs filed a Motion to set aside the Consent Order.

18. In July 2019 the first and second Defendants filed a Motion seeking the payment of K7.1m by the Defendants into the National Court Trust Account.

19. In September 2019 the Plaintiffs filed a further Motion seeking to set aside the Consent Order, and to also have summary judgment entered for the Plaintiffs.

20. All the Motions were heard on 18 March 2020.

21. On that date, it was first agreed by all parties that the Consent Order would be set aside.

Summary Judgment

22. Next, I refer to the Plaintiffs' application for summary judgment pursuant to O12 R 38.

23. The law on such applications is well settled - the Plaintiffs must show that on the facts and on the law, the Defendants have no defence, that it is a clear case having no triable issue, and the Plaintiffs must depose that in their belief, the Defendants have no defence. *(NCDC v Peter Yama* (2003) SC 707, and *Hornibrook Constructions v Kawas Express Corp* (1986) PNGLR 301).

24. The Plaintiffs had issued these proceedings by way of an Originating Summons. Order 4 Rule 3 makes it clear that an OS should only be used where the principal question is construction of an Act or a document, and where there is unlikely to be any real dispute of fact.

25. Here, the principal issue is not the construction of an Act or a document. It is whether or not the Plaintiffs have a lawful entitlement to be paid monies, and whether or not there is any legal obligation on the Defendants to make such payment. The Plaintiffs' entitlement is not clearly shown in the material. There are numerous disputes on the facts, as well as on the law, and the proceedings were seriously contested by the Defendants.

26. The proper procedure would therefore have been for an order under O4 R35 that the matter should proceed by way of pleadings, so that the Plaintiffs could set out their cause of action in a statement of claim, and the Defendants could file a defence. However, this was not done.

27. These matters are relevant to the application for summary judgment. The affidavit material shows a serious conflict on questions of fact and law, and there is a clear triable issue on the primary question of the Plaintiffs' entitlement to be paid the monies, as well as the Defendant's liability to make such a payment. This is not a clear case where the Court should deprive the Defendants of their right to defend the Plaintiffs'claim, without a trial.

28. It follows that the Plaintiffs'application for summary judgment must be refused.

Summary Determination

29. Next, I refer to the Defendants'applications to dismiss the proceedings. There were several grounds for the applications.

30. The main ground arises out of the fact that, pursuant to the *Land Disputes Settlement Act* ("the LDS Act"), this Court lacks jurisdiction to determine issues relating to disputes over interests in or ownership of customary land. The LDS Act gives exclusive jurisdiction to the Local and Provincial Land Courts to determine disputes over interests in customary land.

31. The Plaintiffs plead that they are entitled to receive payment for damages for loss sustained arising out of the Apalik land, but the legal right or cause of action from which the entitlement is said to have arisen, is not readily identifiable. The affidavits indicate that the primary facts are those concerning the consequences of the stoppage of the Apalik Project which had been carried out on customary land.

32. The Plaintiffs say that they are and represent the customary landowners, and that in March 2009 the second Plaintiff was determined by the Kandrian District Land Mediation Committee to be the business group which validly represented the ten customary landowner groups of the Apalik customary land. This determination was said to have been made pursuant to the provisions of the *LDS Act.*

33. The first and second Defendants assert that they are the company which properly represents the Apalik Land Group Inc. There are also other ILGs and companies which at various times have made claims to be or represent the true customary landowners of the Apalik Project area.

34. The principal issue in the proceedings is whether or not the Plaintiffs are entitled to be paid any monies which may be payable by way of damages arising out of the stoppage of the Apalik Project. It is not clear from the OS or the affidavits if this entitlement is based on the Plaintiffs being/representing the customary landowners making the original claim for damages arising out of the 2001 stoppage, or if it is based on breach of an agreement to pay damages, which was entered into between the Plaintiffs and the third, fourth and fifth Defendants in 2012. For the reasons given earlier, the actual cause of action relied on by the Plaintiffs to make their claim, should have been particularized in a statement of claim, but was not.

35. On the present material, if the claimed entitlement is based on customary ownership of the Apalik land, then it cannot succeed in this Court. The National Court has no jurisdiction to determine interests arising out of customary land. In *Louis Lucian Siu v Wasime Land GroupInc* (2011) PGSC 4, the Supreme Court held that interests in customary land, as used in the LDS Act, means "*...interests over the use of the...land and includes financial benefits and any other benefits derived from the use of such land. It also means any monetary or financial benefits arising from...the use of...such customary land, and includes financial payments*

and benefits paid to landowners."

36. The relief sought in *Siu's* case included "A Declaration that the Plaintiff and its members are the lawful recipients of royalties from the National Forest Service...from logging operations conducted..."on the customary land. In the present case, the relief sought similarly includes "An order declaring that the 2nd Plaintiffs are the rightful recipient of the compensation monies...being for the damages claim over Apalik Agriculture Reserve Land area..."

37. A claim for damages arising out of the use of the customary land in the Apalik Land Project area, is plainly a claim for financial benefit and payments derived from the use of the customary land. It is therefore an interest in customary land within the meaning of the *LDS Act.*

38. It follows that this Court has no jurisdiction to deal with or determine any issues relating to disputes over interests, including financial interests, in the customary land of the Apalik Project area.

39. If the Plaintiffs'claim is not based on its customary ownership of land, but is based on an agreement for payment reached with the third, fourth or fifth Defendants, then other considerations arise.

40. Pursuant to the *Claims By and Against the State Act* ("the *CBAATS Act*"), claims against the State may only be enforced by suit, if notice of intention to make a claim is given within 6 months of the date on which the cause of action arose, or such time as may be extended. The third, fourth and fifth Defendants, and the PNGFA, are agents of the State for the purposes of the Act (see, for example, *Uriap v Tokivung* (2008) PGNC 119). There was no evidence that such notice was given either within 6 months of the tortious action for damages arising in 2001, or of the contractual action for breach of agreement arising in 2012, or in any extended time.

41. Further, the Plaintiffs' claim is for payment, compensation and/or damages, and forms of relief including declaratory relief, against the third, fourth and fifth Defendants in their capacity as trustees of the LEDL monies held by the PNGFA, a statutory body. If this claim is based on an agreement by the third or other Defendant/s to accept and pay the claim, then it is subject to S 11(2) of the *PMMR Act*.

42. The Plaintiffs have not produced a properly authorized ILPOC or Authority to Pre-Commit Expenditure, either for the full amount of the claim or at all.

43. It follows that the Plaintiffs'claim, if based on an agreement by the 3rd Defendant to pay, is not enforceable either ‘'through the courts, or otherwise.’'

44. It should be stated here that, for the same reasons as set out in each of the preceding paragraphs, the first and second Defendants would equally have no legal basis for enforcing any similar claim by proceedings in the Courts.

45. Finally, even if the Plaintiffs were able to establish in this Court that they

were the rightful recipients of any monies payable by way of damages for the stoppage of the Apalik Project, the issue remains as to whether or not the third, fourth and fifth Defendants have a liability, and the capacity, to make such payment.

46. It is plain from the wording of *the Forestry (2007 Budget Amendment) Act* 2006 that payments from the trust account can only be made for a prescribed purpose. The Plaintiffs'claim is not a prescribed purpose (and nor would be any similar claim by the first and Second Defendants). The third Defendant has very properly and admirably conceded this point. The earlier payments were unlawfully made, and no further payments could lawfully be made to either the Plaintiffs or the first and second Defendants.

47. Further, it was not disputed that there were no longer any monies in the LEDL trust account. The third, fourth and fifth Defendants therefore cannot be ordered to make any payments. All the monies have been transferred to Consolidated Revenue, and the trust account has been closed. It would be futile to make an order for the drawing of cheques on that LEDL account.

48. There is therefore no utility in the declaratory and other orders sought by the Plaintiffs.

49. As the Plaintiffs have no enforceable cause of action in this Court for their claimed entitlement to be paid damages by the third, fourth and fifth Defendants, it follows that they can have no entitlement to an accounting or other relief against the first and second Defendants.

Conclusion

50. The Court therefore orders:

(1) The Consent Orders made on 14 June 2018, are set aside.

(2) The Plaintiffs' application for summary judgment is refused.

(3) The proceedings herein are dismissed.

(4) Each party is to pay its own costs.

Bristle Lawyers: *Lawyers for the First & Second Plaintiff*
Seria Legal Services: *Lawyers for the First & Second Defendant*
Legal Division of PNGFA: *Lawyers for the Third Defendants*
Office of the Solicitor-General: *Lawyers for the Fourth, Fifth & the State Defendants*