SC1985

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA NO. 57 OF 2018

BETWEEN
NIUGINI BUILDING SUPPLIES LIMITED
Appellant

AND:
NATIONAL HOUSING ESTATE LIMITED
Respondent

Waigani: Kandakasi DCJ, Manuhu & Yagi, JJ
2019: 26th February
2020: 31st July

COMPANY LAW – Incorporation of a company under Companies Act – consequence of – separate legal personality from shareholders and directors – incorporating a company by the State with State Ministers holding shares – absence of provisions in the Companies Act for State owned companies to be treated differently from other companies - consequence of – Same as those following other incorporations – Companies Act 1997 ss. 16, 36, 37, 78 and 291

PROPERTY LAW - Transfer of State assets to company incorporated under the Companies Act 1997 – whether assets of the company are properties of the State – whether company is State for the purposes of s. 13 of the Claims By And Against the State Act 1996 and protected against enforcement proceedings – Normal consequences of incorporation of a company under the Companies Act applies

Facts

The Appellant secured a National Court judgment in the sum of K4,879,263.21 against National Housing Corporation (NHC) and the Respondent (NHEL). The NHEL and the NHC failed to satisfy the judgment despite numerous demands and follow ups for them to satisfy the judgment. This caused the Appellant to serve on the NHEL a statutory demand for a total sum of K5,918,746.79, inclusive of interests. The NHEL failed to meet the demand. That led to the

Appellant filing a petition for winding up of NHEL. Upon the NHEL's motion and upon hearing the parties, the National Court dismissed the petition and found it was an abuse of the Court's process. The Court reasoned that, the NHEL was "the State" within the meaning of s. 13 of the *Claims By and Against the State Act* 1996 (CBASA) which prohibits execution or enforcement of judgments against the State. The Court was of the view that two Ministers holding the only issued shares in NHEL means, NHEL and its assets were a property of the State. Aggrieved by that decision, the Appellant lodge an appeal to the Supreme Court claiming the trial judge fell into error in reasoning as he did and failed to note that the NHEL was incorporated only under the *Companies Act* 1997 and was a separate entity from the State. The *Companies Act* was the relevant and applicable Act and not the *CBASA*. According to the relevant provisions of the *Companies Act* and relevant accepted legal provisions, the State as a shareholder through its Ministers has an interest only in the shares and any interest paid and not in the assets of NHEL.

Held:

1. The phrase "the State" has been considered in numerous Supreme and National Court judgments but the leading judgment is the decision of the Supreme Court in SCR No. 1 of 1998*: Reservation Pursuant to Section 15 of the Supreme Court Act* (2001) SC672.

2. The decision in SCR No. 1 of 1998*: Reservation Pursuant to Section 15 of the Supreme Court Act* (supra) and the decision in *National Capital District Commission v. Jim Reima & Ors* (2009) SC 993, settled the question of whether Provincial Governments and Local-level Governments are State for the purposes of s. 13 and 5 of the *CBASA*.

3. Also, the decision in SCR No. 1 of 1998*: Reservation Pursuant to Section 15 of the Supreme Court Act* (supra), made it clear that the protection under s. 13 of the *CBASA* "does not apply to assets and finances of developmental enterprises of provincial governments that have independent corporate statuses and operate commercially. They are subject to the ordinary laws as corporate citizens. However, any profits these developmental enterprises contribute to the provincial budgets become assets belonging to the people and they are also protected from execution processes."

4. In its decision in *Mineral Resources Development Company Ltd. v. Mathew Sisimolu* (2010) SC1090 and *PNG Power Ltd v. Ian Augerea* (2013) SCI245, the Supreme Court developed and applied the correct tests, criteria or factors to take into account for the purposes of considering where a statutory corporation or authority is "the State" within the meaning

of s. 5 of the *CBASA* or a governmental body under s. 255 of the *Constitution*.

5. Applying the relevant test, criteria or factors per *Mineral Resources Development Company Ltd. v. Mathew Sisimolu* (supra) and *PNG Power Ltd v. Ian Augerea* (supra), the Court determined that NHEL is not "the State" for the purposes of s. 13 of the *CBASA* because:

(a) it is not an entity established pursuant to a specific statute but under the *Companies Act* by reason of which the governing and applicable Act is the *Companies Act.*

(b) no specific statutory provision deems its employees as employees in the public service and to whom the *Public Services (Management) Act* 1995 (as amended) applies as to their rights, duties and obligations according;

(c) its Board and its chief executive officer are appointed by its shareholders albeit State Ministers and not directly by the government of the day;

(d) there is no specific statutory obligation placed in the NHEL to give effect to the policies of the government and not to pursue its own corporate will and desire and there is nothing to oblige it to directly account to the people of Papua New Guinea through the NEC except as it may be through the relevant government minister shareholders; and

(e) there is no statutory provision obliging it to provide quality, reliable and affordable housing to the people of Papua New Guinea in addition to what the NHC is already obliged to do, instead of operating as a profit orientated business;

(f) In the absence of any evidence or a legislation establishing the NHEL which amongst others, creates it with a clear statement of its purpose, structure and organization and the kinds of control the NEC and or the State has over its activities, the NHEL was established in addition to the NHC to enable the State to enter the commercial real estate market in association with outside government interest up to at least 30% of the total share in NHEL.

6. Having regard to the provisions of s. 16, 78, 36 and 37 of the *Companies Act* 1997, the State as a shareholder through the two Ministers of State has an interest only in the shares and any dividends that may be declared and

paid, but not the Company (NHEL) and its assets.

7. Applying the foregoing factors and principles, learned trial Judge erred in:

   (a) finding NHEL was "the State" within the meaning of s. 13 of the *CBASA*; and

   (b) in his decision that the winding up petition was an abuse of process.

8. Accordingly, the appeal was upheld with costs and the substantive winding up petition was reinstated and remitted for trial before a different Judge.

Cases Cited

SCR No. 1 of 1998: Reservation Pursuant to Section 15 of the Supreme Court Act (2001) SC672.
PNG Power Ltd v. Ian Augerea (2013) SCI245.
Investment Corporation of Papua New Guinea v. Paul Pora, Minister for Finance and Physical Planning and The Independent State of Papua New Guinea [1993] PNGLR 45.
Post PNG Limited v. Westpac Bank PNG Limited (1999) SC608.
Pato v. Enga Provincial Government [1995] PNGLR 469.
Pupune v. Makarai & Ors (1997) N1647.
Wagambie and Kupo v. General Rockus Lokinap & Ors [1991] PNGLR 145.
MAPS Tuna Ltd v. Manus Provincial Government (2007) SC857.
Mineral Resources Development Company Ltd. v Mathew Sisimolu (2010) SC1090.
Naomi Vicky John v. National Housing Corporation (2005) N2770.
Dan Salmon Kakaraya vs. The Ombudsman Commission & The State (2003) N2478.
John Napi v. Kundiawa General Hospital Board (2006) N3047.
Bernard Uriap v. Simon Tokivung & Ors (2008) N3444.
Okam Sakarius & Ors v. Chris Tep, Projector Manager & Cocoa Coconut Agency (2003) N2355.
Otto Napi v. National Capital District Commission (2004) N2797.
Albert Purame v. Ase Tipurupeke Land Group Inc., MRDC & Secretary for Department of Petroleum & Energy (2005) N2806.
National Capital District Commission v. Jim Reima & Ors (2009) SC 993.
Konze Kara v. Public Curator of PNG (2017) N7161.
Pacific Rim Contractors – Singapore Pty Ltd v. Huala Hire and Contractors Limited (2012) N4710.

Odata Ltd v. Ambusa Copra Oil Mill Ltd & National Provident Fund Board of Trustees (2001) N2106.
TT Angore Noa Hai Investment Ltd v. Kau Buna (2019) N7881.
Eki Investments Limited v Era Dorina Limited; Era Dorina Limited v Eki Investments Limited (2006) N3176

Legislations Cited:

Claims by and Against the State Act 1996
Companies Act 1997
Electricity Commission (Privatization) Act 2002
Electricity Industry Act ((Chp. 78) consolidated to No 10 of 2002
Public Services (Management) Act 1995

Other Material Cited:

World Doing Business Report 2020.

Counsel:

Mr. B. Nutley, for the Appellant
Mr. C. Gagmai, for the Respondent

31st July, 2020

1. **BY THE COURT:** This is an appeal from the National Court against a decision dismissing a winding up petition and finding the petition amounting to an abuse of the process of the Court.

Background to the Appeal

2. The Appellant, Niugini Building Supplies Limited (NBSL) successfully obtained a judgment in the sum of K4,879,263.21 against National Housing Commission (NHC) and National Housing Estates Limited (NHEL) (the Respondents) on 22 October 2014 in proceedings *WS NO. 623 of 2014: Niugini Building Supplies Limited v. National Housing Commission and National Housing Estates Limited* (the judgment). The Respondents have failed to satisfy the judgment for several years and it remained outstanding.

3. The NBSL took steps to have the judgment debt settled through negotiations with the Respondents, especially its primary judgment debtor the NHEL. The NHEL has failed and neglected to satisfy the judgment. That prompted the NBSL to file a Petition for a Winding-Up against NHEL in the National Court.

4. On 7 August 2014, the NBSL presented the Petition for Winding-Up to the National Court. At that point, the total amount owing consolidated with interest per a Creditor's Statutory Demand dated 20 June 2017 was a sum of K5,918,746.79.

5. On 17 September 2017, the petition was moved before Justice Hartshorn seeking an order for winding-up of NHEL. His Honour reserved his decision on the petition. On 19 April 2018 his Honour delivered his decision, refusing the Petition and also found the petition an abuse of the process of the Court.

6. In so deciding, his Honour reasoned:

> *"…s. 13 Claims Act prevents this petition from proceeding as the petition concerns a company that is the property of the State, a company that is deemed to be the State for the purposes of the Claims Act and the appointment of a liquidator or the placing of a company into liquidation which is a process in the nature of execution or attachment, against the property of the State."*

7. His Honour found that a company falls within the definition of property under s. 2 of the *Companies Act*, which defines property as:

> *"property of every kind whether tangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claim of every kind in relation to property however they arise."*

8. His Honour was of the view that under s. 13 (1) of the *Claims By and Against the State Act* 1996 *(CBASA)*, any suit, execution or attachment, or process in the nature of execution or attachment, may not be issued against the property or revenue of the State.

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Grounds of Appeal

9. The grounds of the appeal are firstly that the trial judge erred in fact and in law in finding that NHEL, together with its assets and liabilities, is an incorporeal property owned by the State as a shareholder (through the Minister for Finance and Minister for Housing) under section 2(1) of the *Companies Act* , and is protected under section 13 of the *CBASA*, when:

- section 16 of the *Companies Act* states that a company is a legal entity in its own right separate from its shareholders;

- the Company owns its assets and liabilities;

- the shareholders own the shares in the Company in which they are entitled to dividends, and do not own the assets of the Company;

- An ordinary share in a company under the Companies Act confers on the holder no legal or equitable interest in the assets of the company; and

- liquidation is a proper course under the Companies Act for the liquidator to realise the assets of the Company and discharge the debts of the Company, without altering or transferring the shareholders' right to their shares in the Company.

10. Secondly, his Honour erred in fact and in law in failing to find that NHEL is an entity incorporated under the *Companies Act* and is regulated by the provisions of the *Companies Act* and the Constitution of the Company, by reason of which:

- the Petition for Liquidation was properly brought by the NBSL pursuant to the *Companies Act* for the National Court to place the Company into liquidation: and

- the National Court may appoint a registered liquidator to:

  (a) realise all assets of the Company;
  (b) discharge the debts of the Company, including the debt owed to the Appellant; and
  (c) remit the balance of the funds and/or any remaining assets to the Company (if any), to continue its business operations, or distribute them among the shareholders (Minister for Finance and Minister for Housing as representatives of the State).

11. Thirdly, his Honour erred in fact and in law in failing to properly consider and distinguish the reasoning of the Supreme Court in its decision in SCR No. 1 of 1998*: Reservation Pursuant to Section 15 of the Supreme Court Act* (2001) SC672, per Amet CJ, Los, Sheehan, Salika, Sakora JJ. (as they then were) and *PNG Power Ltd v. Ian Augerea* (2013) SCI245, per Kandakasi J (as he then was), Manuhu J and Kawi J (as he then was) in determining whether the NHEL falls within the definition of the State for purposes of section 13 of the *CBASA* and failed to find:

- that the protection under section 13 of the *CBASA* does not apply to assets and finances of a commercial or developmental enterprise of state governments that have an independent corporate status and operate commercially;

- that applying the protection of section 13 of the *CBASA* in such a circumstance would make the State guilty of promoting discrimination between a state-owned enterprise and a private enterprise, which gives a state-owned enterprise an unfair commercial advantage or benefit;

- as a matter of fact, the purposes of the Company; and

- that under the "purpose test", the Company was established as a private entity purely for profit and commercial purposes, and not for an important public purpose, such that the protection under section 13 of the *CBASA* does not apply.

12. His Honour also erred in fact and in law in finding that the Petition as presented may be considered an abuse of process of the Court when:

    - the Company was incorporated under the *Companies Act* and is trading as a separate legal entity pursuant to section 16 of the *Companies Act*;

    - the Petition was properly filed pursuant to section 291 of the *Companies Act* for:

        - the Company to be placed into liquidation; and
        - a liquidator to be appointed to commence the process of liquidation under the *Companies Act*,

13. It was further pleaded that the trial Judge should have applied and followed *Investment Corporation of Papua New Guinea v. Paul Pora, Minister for Finance and Physical Planning and The Independent State of Papua New Guinea* [1993] PNGLR 45, which found that a share confers on the holder no legal or equitable interest in the assets of the company, the share is a separate piece of property. Given that, s.13 of the *CBASA* is limited to bar execution against only the shares in a Company that are held by Ministers of the State on behalf of the State.

Issues for determination

14. The grounds of appeal present the following issues:

(1) Whether the protection against enforcement of any judgment against the State under s. 13 of the *CBASA* is available to NHEL, a company incorporated under the *Companies Act*?

(2) Whether NHEL is a property of the State within the meaning and for the purposes of s. 13 of the *CBASA*?

(3) Did the learned trial Judge err in failing to distinguish the authoritative decisions in SCR No. 1 of 1998*: Reservation Pursuant to Section 15 of the Supreme Court Act* (supra) and *PNG Power Ltd v. Ian Augerea* (supra) from this case?

(4) Did the learned trial Judge err when he found NBSL's petition for wind up of NHEL as an abuse of process?

(5) Did the learned trial Judge fall into error by not following and applying the decision in *Investment Corporation of Papua New Guinea v. Paul Pora, Minister for Finance and Physical Planning and The Independent State of Papua New Guinea* (supra), which found that a share confers on the holder no legal or equitable interest in the assets of a company?

15. Of these issues, the decisive one is the first issue as to whether NHEL is a property of the State within the meaning and for the purposes of 13 of the *CBASA*? We will thus deal with that issue first. In the process, we will also cover the second to fifth issues.

Whether NHEL a company incorporated under the *Companies Act* is a property of the State within the meaning and for the purposes of s. 13 of the *CBASA*?

16. Section 13 of the *CBASA* provides:

> *"13. **No execution against the State**.*
> *(1) In any suit, execution or attachment, or process in the nature of execution or attachment, may not be issued against the State.*
>
> *(2) Where a judgment is given against the State, the registrar, clerk or other proper officer of the court by which the judgment is given shall issue a certificate in Form 1 to the party in whose favour the judgment is given."*

17. The phrase "the State" has been considered in numerous Supreme and

National Court judgments. We note that as early as 1999, this Court first had before it the question of satisfaction of judgments by State owned enterprises in the matter of *Post PNG Limited v. Westpac Bank PNG Limited* (1999) SC608, per Los, Jalina and Sawong JJ. (as they then were). Post PNG Limited sought a stay of a National Court judgment in a sum of K394,178.00 against it pending a determination of its appeal against that judgment. The Court dismissed the application and reasoned:

> *"... there is no evidence that the Applicant, which is a company owned by the State and which enjoys a statutory monopoly on postal services throughout Papua New Guinea, lacks the financial ability to pay the judgment debt. ... the Respondent is a substantial company and there was nothing from the Appellant to show that if the judgment was paid and the Applicant succeeded on its appeal the Respondent would lack the means to repay the (judgment) debt."*

18. The first Supreme Court decision on the definition of the phrase "the State" is in the matter of *SCR No 1 of 1998; Reservation Pursuant to s.15 of the Supreme Court Act* (supra). There, the National Court referred as a stated case pursuant to s. 15 of the *Supreme Court Act* for the Supreme Court's opinion on the question: "Does the term 'the State' in Section 13(1) of the *Claims By and Against the State Act* 1996 include a 'Provincial Government' as defined in the *Organic Law on Provincial and Local-Level Government*?" That referral was necessitated by differing opinions in the National Court. *Pato v. Enga Provincial Government* [1995] PNGLR 469 (per Kapi DCJ (as he then was) represented one view. That view was, the phrase, "the State" in s. 6 (1) (former provision, now s. 13) of the *CBASA* does not include a "Provincial Government". On the other hand, *Pupune v. Makarai & Ors* (1997) N1647, per Injia J (as he then was) represented the other view that the phrase "the State" in s. 13(1) of the *CBASA* does include a "Provincial Government".

19. The Court discussed the differing views with their respective basis. It then noted that the *Constitution* does not define the phrase "the State". Instead, it defines the name "Papua New Guinea" to mean "the Independent State of Papua New Guinea". The *Constitution* also defines "governmental body" to mean:

> *"(a) the National Government; or*
> *(b) a provincial government body; or*
> *(c) an arm, department, agency or instrumentality of the National Government or a provincial body; or*
> *(d) a body set up by statute or administrative act for governmental or official purposes."*

20. The Court went on to note that, the *CBASA* does not define the phrase "the State". It therefore turned to the *Interpretation Act* and noted that, that Act defines the phrase "the State" to mean "the Independent State of Papua New Guinea." The Court than reasoned:

> *"A provincial government is thus at least a 'governmental body'. Is it a part of 'the State'? Is it a part of the governmental body making up the 'Independent State of Papua New Guinea?' We believe it is and therefore it's assets and finances must be protected from execution in the same way as the assets and finances of the National Government. The State therefore must also include a provincial government."*

21. The Court then adopted with approval, Sheehan J's views on public policy consideration and justification behind the provisions of s 13 in *Wagambie and Kupo v. General Rockus Lokinap & Ors* [1991] PNGLR 145. His Honour expressed the public policy justification in these terms:

> *"Why should this be so? Why is the State exempt form execution process? Essentially it is because the State of PNG is a sovereign nation, endowed with the power of its people and, as the Constitution states, resolute in maintaining its national identity, integrity and self-respect.*
> *While the State can sue and be sued in the courts established under the Constitution it, nonetheless remains a sovereign State representing the whole of this country's people. It is part of the State's integrity to accept the judgements of the Court created under the Constitution. But the dignity of a sovereign nation does not permit or require that it be subject to examination in the courts as to its means or ability to pay judgement debts. The Claims By and Against the State Act confirms that".*

22. In endorsing these views, the Supreme Court stated:

> *"We believe these principles apply equally to a provincial government because it is a part of the governmental body that makes up the government of the Independent State of Papua New Guinea. We agree generally with Injia J's opinion that the total governmental system includes the National, Provincial and Local-Level Governments. In our opinion there are in fact three levels of political governments intended; the National, Provincial and the Local-Level. All three are established by the Constitution. Each is constituted by elected representatives."*

23. The Court then noted that Provincial Governments are established by the

Constitution under s. 187A. It then said it was therefore:

> *"instructive in determining the status of a provincial government to examine the degree of autonomy it has and the nature of control the national government exercises over it, in political, administrative and financial matters."*

24. Accordingly, the Court proceeded to note the following concerning provincial governments:

(1) the provincial assembly or legislature is constituted by all the Members of the National Parliament representing electorates in the Provinces and heads of local level governments in the Province;

(2) the head of the Provincial Government is the Governor who is the National Member of Parliament representing the Provincial Electorate;

(3) whilst an elaborate political and administrative system is established for Provinces, there is a high degree of National Government control through the Minister for Provincial and Local-Level Government, Minister for Finance and Treasury, the National Executive Council and the National Parliament and noted in particular that:

(a) the Governor of a province is constitutionally responsible to the national Minister responsible for provincial and local-level government matters although he is politically responsible to the Provincial Assembly for the overall development and good government of the province;

(b) the National Government controls the Provincial and Local-Level Governments through a very elaborate system of suspension of the Provincial and Local-Level Governments;

(c) the National Government retains the power to appoint Provincial Administrators and District Administrators;

(d) Provincial Governments have limited financial autonomy but the principal sources of Provincial Government funds are provided by the National Government annually;

(e) the Provincial Governments' budgets are subject to the approval of the National Treasurer before it is implemented;

and

(f) the National Government has power to withdraw or withhold powers or funds of Provincial Government or a Local-Level Government for refusal or failures to comply with a direction issued by the National Executive.

25. Having so noted, the Court reiterated the fact that the Provincial and Local-Level Governments' principle source of funding is the various grants from the National Government through the national budget, which were undoubtedly public funds. Being such funds, the Court went on to state that they:

> *"ought and should be protected from execution process in the same way as funds and assets of the National Government. They are funds and assets that belong to the same people that constitute the Independent State of Papua New Guinea, represented by the next political level government."*

26. Ultimately, the Court concluded:

> *"We are of the opinion therefore that a provincial government is a 'governmental body' making up the Independent State of Papua New Guinea for the purposes of the Claims By and Against the State Act. ... The finances administered by a Provincial Government, is for and on behalf of the same people. The National Government administers the National Government funds and assets.*
>
> *In principle therefore the assets and funds administered by the Provincial Government belong to the same people of Papua New Guinea that the Claims By and Against the State Act protects from execution. The term 'State' therefore includes Provincial and Local–Level Governments for the purposes of the Act."*

27. At the same time, the Court specifically and clearly concluded:

> *"It is to be remembered that this protection does not apply to assets and finances of developmental enterprises of provincial governments that have independent corporate statuses and operate commercially. They are subject to the ordinary laws as corporate citizens. However, any profits these developmental enterprises contribute to the provincial budgets become assets belonging to the people and they are also protected from*

execution processes."

28. About six years later, this Court comprising of Hinchliffe J (as he then was), Gavara-Nanu J., & Lenalia J. (as he then was) in *MAPS Tuna Ltd v. Manus Provincial Government* (2007) SC857 adopted and applied the decision in *SCR No 1 of 1998; Reservation Pursuant to s15 of the Supreme Court Act* (supra). That was in answer to the question of whether the requirement for notice under s 5 of the *CBASA* applies to claims against Provincial Governments. The Court answered the question in the affirmative and explained in view of s 9 of the *Constitution* and s.7 of the *Organic Law on Provincial Governments and Local Level Governments* that:

> *"... in a case where the Provincial Government or a Local Level Government is sued, service ought to be effected on a designated officer of that form of government in compliance with s.7 of the Organic Law on Provincial Government and Local Level Government."*

29. In 2010, this Court comprising of Lenalia and Davani JJ, (as they then were) and Kariko J had the occasion to look at the question of whether s 5 of the *CBASA* applied to claims against the Mineral Resources Development Company Ltd (MRDC). That was in the case of *Mineral Resources Development Company Ltd. v. Mathew Sisimolu* (2010) SC1090.

30. In our view, the Court correctly decided that the criteria or the factors the Court took into account in the *SCR No 1 of 1998; Reservation Pursuant to s15 of the Supreme Court Act* (supra) as adopted and applied by the National Court in *Naomi Vicky John v. National Housing Corporation* (2005) N2770 were not applicable. Instead, the Court held that:

> *"...the factors to be taken into account when determining whether an entity is a statutory organization or a State entity, is to revert to the governing legislation which would demonstrate the functions of that organization, whether it is accountable to the State and whether it is a public body."*

31. In taking that view, the Court noted, that was the approach taken by the National Court in a number of cases, namely *Dan Salmon Kakaraya v. The Ombudsman Commission & The State* (2003) N2478, per Kandakasi J (as he then was); *John Napi v. Kundiawa General Hospital Board* (2006) N3047, per Davani J (as she then was); *Bernard Uriap v. Simon Tokivung & Ors* (2008) N3444, per Lenalia J (as he then was); *Okam Sakarius & Ors v. Chris Tep, Projector Manager & Cocoa Coconut Agency* (2003) N2355, per Salika J (as he then was); *Otto Napi v. National Capital District Commission* (2004) N2797,

per David AJ (as he then was); *Albert Purame v. Ase Tipurupeke Land Group Inc., MRDC & Secretary for Department of Petroleum & Energy* (2005) N2806, per Davani J (as she then was).

32. Then speaking specifically on the MRDC, the Court noted that the:

> *"... peculiarities or characteristics are stated in the MRDC's Constitution which of course provided the basis for the Court's Ruling that there cannot be any execution or enforcement upon the property or revenue of the MRDC because it is an instrumentality or entity of the State.*
> *... MRDC is an entity created by statute. It is a corporate entity under the Companies Act. It is created by statute for a specific purpose. It has been held that MRDC is a governmental body as referred to in s.219(1)(a) of the Constitution and a statutory authority as referred to in s.26(1)(a)(ii) of the Constitution. Pursuant to the MRDC's Constitution which sets out its objects and functions, MRDC is set up for the governmental or official purposes and carries out decisions or directions of the National Executive Council. ... Clearly, for all purposes, MRDC comes within the definition of State under s.5 of the CBASA which means that in any action against the MRDC, prior notice of a claim under s.5 of the CBASA is mandatory and must be given."*

33. Thereafter, the Court found the issue it was confronted with was similar to that which was raised in *National Capital District Commission v. Jim Reima & Ors* (2009) SC 993, per Davani J (as she then was), Manuhu & David JJ). It then noted that, the Court there had considered the whole of the NCDC Act and the peculiarities within that Act resulting in a finding that the NCDC is an executive arm of Government, a statutory authority and an entity of the State.

34. Duly noting the decision in *NCDC v. Reima & Ors* (supra) and other cases on point, the Court went on to consider the particular provisions of the *Mineral Resources Development Company Pty Limited (Privatization) Act* 1996 and the MRDC's Constitution, after which the Court concluded:

> *"... Therefore, the MRDC is very much a State entity as its activities are controlled by the State's agencies and representatives whereas a Company is there for its shareholders who more often are individuals.*
> *... These statutory authorities of which the MRDC is one, by or through their enabling legislation, demonstrates that there is government control over these bodies. Therefore, the MRDC is not separate and distinct because of those characteristics."*

35. Later, in *PNG Power Ltd v. Ian Augerea* (supra) the Supreme Court reviewed most of the cases on the meaning of the phrase "the State". That included the decisions in *SCR No 1 of 1998; Reservation Pursuant to s15 of the Supreme Court Act* (supra) and noted in particular what the Court said in the second last paragraph of the judgment. The relevant part as quoted by the decision in the *PNG Power* case was this:

> *"It is to be remembered that this protection does not apply to assets and finances of developmental enterprises of provincial governments that have independent corporate statuses and operate commercially. They are subject to the ordinary laws as corporate citizens. However, any profits these developmental enterprises contribute to the provincial budgets become assets belonging to the people and they are also protected from execution processes…."*

36. The Court in PNG Power, also referred to the decision *in National Capital District Commission v. Jim Reima* and concluded:

> *"Following these two authoritative decisions of the Supreme Court, there is no doubt that, a national government, a provincial and local level government is part of the State because:*
> *(1) They are established by the Constitution;*
> *(2) They are part of our system of government as provided for in our Constitution;*
> *(3) They are constituted by elected representatives; and*
> *(4) For governmental bodies lower than the national government, the national government exercises some control of them politically, administratively, and financial matters."*

37. The Court went on to consider the controversy that exists on the question of whether; authorities, agencies, corporations and other government bodies established by the State and or provincial governments are part of the State. After considering the decisions representative of the differing views it concluded at paragraph 60 of its judgment:

> *"This difference of opinions have come about in our respectful view because of a misunderstanding of what the Supreme Court said in its passing comment in its second last paragraph of its decision in the Reservation Pursuant to Section 15 of the Supreme Court Act, (2001), which we have quoted above. If what the Supreme said in that case is considered in its proper*

context, it is easy to see, how or why entities set up by the National or a provincial government purely for commercial purposes and not to render a particular kind of critical community service, could not be considered as part of the State. The State of Papua New Guinea would be guilty of promoting discrimination between state owned enterprises and a private enterprise which gives the state-owned enterprises an unfair commercial advantage or benefit that is not accorded to private enterprises. A good example of that would be the protection provided under s. 13 of the CBASA and long before that provision comes to play, the requirements for notice under s. 5 of the same Act."

38. Thereafter, the Court went on to warn, merely adopting and applying the tests or factors considered by the Supreme Court in *SCR No 1 of 1998; Reservation Pursuant to s15 of the Supreme Court Act* as did Lay J., in *Naomi Vicky John v. National Housing Corporation* (supra) and Hartshorn J, in *Konze Kara v. Public Curator of PNG* (2017) N7161 can easily misguide and lead to erroneous outcomes. The Court reasoned that entities other than the national government, provincial governments and local level governments established by the State or a provincial government would not easily meet the tests for being "the State". This would be the case despite their being:

"charged with a duty and or responsibility of providing an important and critical service such as the provision of water, electricity, public housing, telecommunications, public transport, public banking, public health, public educational services and or the control over the production, importation and use of narcotics and other drugs, or dissemination of governmental and or public information as in the case of national broadcasting, or medical services."

39. However, the Court also went on to say:

"Given the essential nature of these kinds of services, they could simply not be left to the free market forces in a welfare State as developed in England and spread internationally, including our country. Traditionally, with origins mainly in England, such essential services formed the core function of the State. Later government leadership and thinking changed and they moved to the idea of service specialized organizations which saw the corporatization and privatization of some of these services. All of this was done in the hope of bringing greater efficiency in the management and delivery of these services at affordable prices.

> *It is therefore normal to see such entities charging and receiving nominal fees as opposed to the prevailing commercial rate which are determined by the free market forces."*

40. Turning to our own country, the Court discussed the history of most of the key service areas remaining as key government departments followed by corporatisation and privatisation as in the case of the former Papua New Guinea Banking Corporation, ultimately sold to the Bank South Pacific Ltd. Nevertheless, the Court noted that "most of the other key service areas remain in government owned and controlled entities," which the Court noted was "necessary and important to maintain so the people of Papua New Guinea are well served rather than being driven by profit". Consequently, the Court went on to introduce what it described as an "important and determinative test … to determine whether an entity is part of the State or not". The test it said "is the nature or kind of service and or duties and responsibilities the entity under consideration has or owes to a particular part of the country or the whole country."

41. Going on to explain that, the Court said:

> *"If the kind of service or duties and responsibilities the entity has, falls into one of the traditional critical functions and or duties and responsibilities of the State, and that entity is not operating as a private enterprise purely for profit, with (sic without) all of the features of a private enterprise present, such an entity should easily qualify to be part of the State. Accordingly, we endorse Sawong J.'s view in Sengus Investment Ltd v National Broadcasting Corporation,… that it would be necessary to consider, amongst others, "the corporate structure and purpose of the organization as set out in its enabling legislation" as well as in the way it carries on its business."*

42. Then given the various conflicting National Court decisions on point, the Court went on to comment on some of the decisions. Interestingly, that included a number of decisions in which the NHC was a party. The decisions in question were the decisions in *Noami Vicky John v. National Housing Corporation* (supra), by Lay J and *Anave Megaraka Ona v. National Housing Corporation* (supra) by Sevua J (as he then was) on the one hand. On the other hand, was the decision in *Mt Hagen Urban Local Level Government v. National Housing Corporation* (supra). The first two cases decided the NHC was not part of the State after applying the test in the *SCR No 1 of 1998; Reservation Pursuant to s15 of the Supreme Court Act* and failed to "give any consideration to the fact that the NHC was charged with the duty and responsibility of providing public housing." The Supreme Court was of the view that these two

decisions were wrong at law while the decision in the third case was correct. The Supreme Court observed:

> *"It is notorious fact that the NHC charges only nominal rentals from its tenants which does not compare at all to the kinds of rents charged in the open market place. The NHC depends heavily on the National Government for most of its funding, which also appoints the board members and service to the NHC is deemed service to the State by s.19 of the National Housing Corporation Act 1990, in the case of the managing director and s. 20 (5) and (6) of the Act. These, in our view, qualified the NHC to be an entity which is part of the State."*

43. After considering a number of other decisions dealing with the same question, the Court concluded:

> *"Notwithstanding the differences in opinions as noted above, all of the above authorities and others agree that, all entities established by the National Government or a provincial government or a local level government, with some form of government control and ownership and funding is a governmental body. This should be the test to determine if an entity or a body is a governmental body. To this, we add the purpose for which the entity has been established. If it is for an important public purpose, the kind that traditionally were the function of welfare states governments is (sic as) in the case of telecommunications, electricity, public transport, water and sanitation, health and education, this would render the entity a governmental body. This would be the case even if the entity appears to have private corporate status and structure.*

44. Applying the principles, it discussed and the test it suggested, the Court held, PNG Power was a governmental body for the purposes of s. 225 of the *Constitution*. In arriving at that decision, the Court noted amongst others the following as pertinent factors about PNG Power:

> (1) it is an entity establish pursuant to a statute, namely the *Electricity Commission (Privatization) Act 2002*, and the *Electricity Industry Act* ((Chp. 78) consolidated to No 10 of 2002);
>
> (2) its employees are deemed employees in the public service and to whom the *Public Services (Management) Act 1995* applies as to their rights duties and obligations according to

s.10 (3) – (6) of the *Electricity Commission (Privatization) Act 2002;*

(3) its Board and its chief executive officer are appointed by the government of the day;

(4) it is obliged to give effect to the policies of the government and not to pursue its own corporate will and desire and is accountable to the people of Papua New Guinea through the relevant government minister as its political head; and

(5) it is not established to make profits for the government but rather the need to provide quality, reliable and affordable electricity to the people of Papua New Guinea, which includes natural persons and corporate entities alike, which is a traditional function of a welfare.

The present case

45. In the present case, the relevant evidence is found in the affidavit of Acting Chief Executive Officer of NHEL, Madeline Paulisbo sworn on 06th and filed on 13th September 2017 and other affidavit evidence found in the Appeal Book. From this evidence it is clear that the National Executive Council made a decision for the creation of a special purpose company to take charge of real estate functions and to implement the National Housing Development Projects. NHEL was thus created by incorporation under the *Companies Act* with its own constitution, a copy of which is found at pages 66 – 104 of the Appeal Book. According to company extracts and two shares have been issued and are held by Paul Isikiel and James Marape, who according to Paulisbo's affidavit are respectively the Minster for Housing and Urbanization and Minister for Finance. Clause 4.2.2 of the NHEL's constitution, makes it clear that the shares are held in trust for the NHC and ultimately the State and places a restriction on the sale or transfer of shares except with the approval of the Head of State acting upon advice of the NEC. These shareholders have the power to appoint and remove a five-member board with one of them as an executive director. It is also clear by virtue of clause 4.2.3 of the NHEL's constitution that up to a maximum of 30% a total of the shares in NHEL could be held by outside interests.

46. Following the incorporation of NHEL, all prime properties within the National Capital District were transferred to NHEL. The value of transferred assets in properties is more than K70 million. The Petition, if granted, would have given the NBSL access to these properties.

47. The Respondent's argument is that the shares, assets and finances are assets of the State, wherein corporate entities are established for developmental purposes. The State established the special purpose company, financed it, and provided funds for housing development projects, board and management of the Company are appointed by the State through the shareholder Ministers. Hence, the Board and Management are directly under the control of the State through responsible Ministers as shareholders of the Company who are also members of National Executive Council. Therefore, NHEL is a Government body which qualifies as a State entity.

48. At first sight, the Respondent's argument appears to make sense. On the other hand, what were the reasons for establishing a corporate entity under the *Companies Act* only as opposed to following the PNG Power or the MRDC pathway through legislation? This is the most important question when there is nothing to suggest that upon incorporation the NHEL was to replace or take away the powers and functions of the NHC which was already tasked and was catering for quality and affordable housing in the country. In the absence of any evidence and or submissions to the contrary, we find the factors that led the Supreme Court to find PNG Power was a governmental body do not exist in the case of NHEL in that:

(1) it is not an entity established pursuant to a specific statute but under the *Companies Act*;

(2) no specific statutory provision deems its employees as employees in the public service and to whom the *Public Services (Management) Act* 1995 (as amended) applies as to their rights duties and obligations accordingly;

(3) its Board and its chief executive officer are appointed by its shareholders albeit State Ministers and not directly by the government of the day;

(4) there is no specific statutory obligation placed in the NHEL to give effect to the policies of the government and not to pursue its own corporate will and desire and there is nothing to oblige it to directly account to the people of Papua New Guinea through the relevant government minister as its political head but to its shareholders; and

(5) there is no statutory provision obliging it to provide quality, reliable and affordable housing to the people of Papua New Guinea in addition to what the NHC is already obliged to do, instead of

operating as a profit orientated business.

49. More specifically on the phrase "the State", NHEL also fails to meet the criteria established in *Mineral Resources Development Company Ltd. v Mathew Sisimolu* (supra) and the *PNG Power case* in that, we do not have a governing legislation to revert to, to assist with the factors that need to be taken into account to determine whether NHEL is a State entity. Such a legislative foundation would demonstrate the functions of that organisation, whether as a matter of statute-based law it is directly accountable to the State and whether it is a public body. Given that, we cannot tell if the NHEL has been created by statute for a specific public purpose and in pursuance of which it is required to carry out decisions or directions of the National Executive Council and that its activities are controlled by the State.

50. In the absence of any evidence or a legislation establishing the NHEL which amongst others, creates it with a clear statement of its purpose, structure and organization and the kinds of control the NEC and or the State has over its activities, we are of the view that the NHEL was established in addition to the NHC. As such, it was not to take away the purpose, powers and functions of the NHC in the provision of quality and affordable homes for Papua New Guineans but was to enable the State to enter the commercial real estate market in association with outside government interest up to at least 30% of the total share in NHEL. To achieve that end, the State capitalised the NHEL by transferring and placing under the NHEL's management State owned real estate assets.

51. This is understandable given that the best interests of the State are usually affected by power, politics and how efficient the bureaucracy is. The bureaucracy, which is charged with management responsibilities over State assets and development plans is thus exposed to the political whims of politicians, political parties and the desire to remain in power. In contrast, in the corporate world, the desire to generate profit motivates competition and efficiency. The decision by the State to venture into the commercial arena demonstrates the government's deliberate intention and desire to generate profit in the business environment like any other business entity.

52. Having taken that decision and appropriate action in establishing the NHEL, the State has to be prepared to subject itself and corporate entities such as the NHEL to the requirements of the commercial world. It doesn't auger well for the State and its entities to be allowed to compete in the business environment and then conveniently seek special protection from the *CBASA* or any other legislation for that matter. It is not fair for other companies to be disadvantaged in this way. It is the role of the government to promote and maintain an environment where the marketplace remains competitive, fair, reasonable, efficient and effective for all businesses? Therefore, having

companies with special protection as is argued for by the NHEL could discourage investor confidence in Papua New Guinea and remove her as a place for investment.

53. All countries especially the developing countries are completing for foreign investment, which in most cases are from the same international investors or sources, who are looking for more fair, open and liberal economies to invest in. Investors look for certainty in a return on their investments. That includes the ability to go to court for any non-payment of their debt, secure judgments and have them enforced through wind up petitions and the like. Indeed, the World Bank's World Doing Business report features contract enforcement and resolving insolvency as factors that contribute to a country's ranking out of 190 economies. These features include how easy it is to enforce contracts, judgments and recovery of debts. In its 2020 Report, PNG is ranked 173 out of 190 whilst neighbouring small island countries like Samoa rank 86, Marshall Islands 106, Kiribati 121 and Palau 125. These kinds of ranking would no doubt prevent the inflow of much need foreign or local investors which is very much needed for the growth and health of the country's economy with flow on benefits to the people.

54. Besides, why should the *CBASA* override the *Companies Act*? Neither is subject to the other. NHEL is a creation of the *Companies Act*. There is no provision in the *Companies Act* that excludes a company from the scope of the *Companies Act*. Similarly, there is no provision in the *CBASA* that excludes the application of s. 16 of the *Companies Act* for State enterprises or companies that are incorporated under the *Companies Act* by the State. It is an accepted principle of law that where there is a conflict as to which law to apply in a dispute, the most applicable law is the law of the arena. In this case, clearly, the law of the arena is the *Companies Act*. The promoters and the shareholders of NHEL have made a deliberate choice to place NHEL within the arena of the *Companies Act.*

55. Hence, NHEL as a corporate entity under the *Companies Act* is separate entity from the shareholders. Section 16 of the *Companies Act* provides that a company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the register. The *Companies Act* is comprehensive. It does not depend on the *CBASA* or a specific legislation to give corporate status to companies incorporated under the *Companies Act*, regardless of whether the State or Ministers of State are shareholders. There is a large body of case law that makes the separate legal personality accruing to a company upon incorporation clear: See for examples of cases on point, *Pacific Him Contractors – Singapore Pty Ltd v. Huala Hire and Contractors Limited* (2012) N4710; *Odata Ltd v Ambusa Copra Oil Mill Ltd & National Provident Fund Board of Trustees* (2001) N2106, per Kandakasi J (as he then was); *TT*

Angore Noa Hai Investment Ltd v Kau Buna (2019) N7881, per David J and *Eki Investments Limited v. Era Dorina Limited; Era Dorina Limited v. Eki Investments Limited* (2006) N3176, per Kandakasi J (as he then was).

56. A shareholder of a company incorporated under the *Companies Act* is defined under section 78 of the *Companies Act* as:

> *"(a) a person whose name is entered in the share register as the holder for the time being of one or more shares in the company; or*
>
> *(b) until the person's name is entered in the share register, a person named as a shareholder in an application for the registration of a company at the time of registration of the company; or*
>
> *(c) until the person's name is entered in the share register, a person who is entitled to have that person's name entered in the share register under a registered amalgamation proposal as a shareholder in an amalgamated company."*

57. *Oxford Learners Dictionary* (New 8th Edition) defines a shareholder as owner of shares in a company or business. Under section 36 of the *Companies Act*, a share in a company is a personal property. Relevantly, the rights and powers of a shareholder are prescribed under section 37 as follows:

> *"(1) Subject to Subsection (2), a share in a company confers on the holder–*
>
> *(a) the right to one vote on a poll at a meeting of the company on any resolution, including any resolution to–*
>
> *(i) appoint or remove a director or auditor; or*
>
> *(ii) adopt a constitution; or*
>
> *(iii) alter the company's constitution, where it has one; or*
>
> *(iv) approve a major transaction; or*
>
> *(v) approve an amalgamation of the company under Section 234; or*
>
> *(vi) put the company into liquidation; and*
>
> *(b) the right to an equal share in dividends authorized by the board; and*
>
> *(c) the right to an equal share in the distribution of the surplus assets of the company.*
>
> *"(2) Subject to Section 51, the rights specified in Subsection (1) may be negated, altered, or added to by the constitution of the company."*

58. It is common knowledge that a company's assets are anything of value that is owned by a company. They usually comprise of land, buildings,

machinery, fleets of vehicles as well as items such as tables, chairs, computers and so on. A company's liabilities are the opposite of assets. They include outstanding rental bills, power bills, outstanding invoices from suppliers or service providers, and so on. The financial status of a company usually depends on subtracting its liabilities from its assets. A negative balance will hurt the shareholders. A positive balance is what any shareholder would be interested in. This highlights the distinction between a company and its shareholders, and who owns the assets of a company.

59. In the case of *Investment Corporation of Papua New Guinea v Paul Pora, Minister for Finance and Physical Planning and The Independent State of Papua New Guinea* (supra), the Investment Corporation of Papua New Guinea purchased share capital of Sunset Apartments consisting of 15 residential units. The Articles of Association of Sunset Apartments Pty Ltd which owned Sunset Apartments provided that ownership of particular shares entitled the owner (of such shares to exclusive use of a particular unit and the right to sublease.

60. It was argued by counsel Miss Weigall that the purchase of shares gave the purchaser an indefinitely continuing right to reside in the premises and, thus, had the effect of transferring an interest in property.

61. Consistent with the provisions of ss. 36, 37 and 78 of the *Companies Act*, His Honour Brown J had this to say:

> *"No authority has been advanced to support Miss Weigall's assertion that the agreement effectively transfers interest in property. I cannot agree with her. 'A share confers upon the holder no legal or equitable interest in the assets of the company; it is a separate piece of property'. [per Dixon CH, Kitto and Taylor JJ; Charles v Federal Commissioner of Taxation (1954) 90 CLR 598 at 609)]."*

62. In the present case, the shareholders are two State Ministers (not expressly confirmed in NHEL's constitution) through whom the State has an interest in NHEL as a shareholder. Only, the shares remain the property of the State but not the company (NHEL) or its assets According to the evidence, the assets were transferred to NHEL. Upon registration under the *Companies Act*, NHEL became a creature of the *Companies Act* and is subject to the *Companies Act*. When the assets were transferred to NHEL, they lost their status as State assets. They became NHEL assets. Hence, the NHEL's properties can only be dealt with in accordance with the *Companies Act*, for investment and making of profits or meeting its debts and other liabilities, including any wind up or insolvency action.

63. Despite that legal position, the learned trial Judge came to the decision that NBSL's application for wind up was an abuse of the process of the Court. That was based on the learned trial Judge's decision that the NHEL came within the meaning of the phrase "the State" in s.13 of the *CBASA*. We have instead come to the conclusion that the NHEL having being incorporated under the *Companies Act* and not having any of the features that renders a corporate entity "the State" for the purpose of s. 13 or a governmental body for instances under s. 225 of the *Constitution*, the NHEL was open to the wind up process, in the light of a long outstanding and unsatisfied National Court judgment followed by an unsatisfied statutory demand. Hence, we are of the view that, the learned trial Judge erred in coming to the conclusion that NBSL's wind up petition was an abuse of process.

Decision and orders

64. Having regard to all the foregoing discussions, we answer each of the issues presented in this case in summary as follows:

	Issue	Answer
1	Whether the protection against enforcement of any judgment against the State under s. 13 of the *CBASA* is available to NHEL, a company incorporated under the *Companies Act*?	No. We are of the view that for the purpose of section 13 of the *CBASA*, NHEL upon incorporation under the *Companies Act* took on separate legal personality from the State. The Ministers of State's position as shareholders does not alter the corporate status of NHEL.

2	Whether NHEL is a property of the State within the meaning and for the purposes of s. 13 of the *CBASA*?	No. Upon transfer of the former State assets in real estate properties to NHEL, the State parted with its ownership and interest in those assets and the properties became NHEL's assets or properties. The State's interest, is only in the shares through the State Minister shareholders. Their rights as shareholders are as defined by the *Companies Act*. Therefore, NHEL is not a property of the State and cannot be deemed as the State for the purpose of section 13 of the *CBASA*.
3	Did the learned trial Judge err in failing to distinguish the decisions in SCR No. 1 of 1998*: Reservation Pursuant to Section 15 of the Supreme Court Act*	Yes. The learned trial Judge erred when he failed to find that the factors that led to the Court to determining Provincial Governments and PNG Power
	(supra) and *PNG Power Ltd v. Ian Augerea* (supra) from this case?	qualify as the State for the purposes of section 13 of the *CBASA*, and governmental body for the purposes of s. 225 of the Constitution respectively in the decisions in SCR No. 1 of 1998*: Reservation Pursuant to Section 15 of the Supreme Court Act* (supra) and *PNG Power Ltd v. Ian Augerea* (supra) does not exist in NHEL's case which makes the present case distinguishable from those two cases as well as the decision in *Mineral Resources Development Company Ltd v. Mathew Sisimolu* (supra).

4.	Did the learned trial Judge err when he found NBSL's petition for wind up of NHEL was an abuse of process?	Yes. The learned trial judge erred when he found NBSL's wind up petition was an abuse of process. As a company incorporated under the Companies Act, NHEL was open to such process in the light of a long unsatisfied National Court judgment and followed by an unsatisfied statutory demand.
5.	Did the learned trial Judge fall into error by not following and applying the decision in *Investment Corporation of Papua New Guinea v. Paul Pora, Minister for Finance and Physical Planning and The Independent State of Papua New Guinea* (supra), which found that a share confers on the holder no legal or equitable interest in the assets of a company?	Yes. The learned trial Judge with respect, fell into error by not following and applying the law as represented by the decision in *Investment Corporation of Papua New Guinea v. Paul Pora, Minister for Finance and Physical Planning and The Independent State of Papua New Guinea* (supra), which was consistent with the provisions of ss. 36, 37 and 78 of the *Companies Act*.

65. Ultimately, NBSL has succeeded in all of its grounds of appeal. Accordingly, we uphold each of them and hence the whole of its appeal. Before proceeding to make the formal orders, we suggest, in order that the parties avoid further increased costs that may be associated with liquidation and further delay, NHEL settle within the next 30 days from today the judgment debt and accrued interests which led to the wind-up proceedings from which this appeal has come. Failing that, the wind-up petition will have to be dealt with on its merits given that the learned trial Judge did not deal with the petition after reaching the conclusion that s. 13 of the *CBASA* applied.

66. Based on the foregoing we make the following formal orders:

1. The Appeal is upheld in its entirety;

2. The decision of the National Court made on 9 April 2018 in proceedings MP (Comm) No. 34 of 2017 in dismissing the petition is quashed and set aside;

3. The petition in National Court proceedings MP (Comm) No. 34 of 2017 is re-instated;

4. Unless the NHEL settles the judgment debt within 30 days from today, the petition in National Court proceedings MP (Comm) No. 34 of 2017 shall be listed for rehearing before a Judge other than Hartshorn J.

5. The Respondent shall pay the Appellant's costs of the appeal and costs thrown away in MP No. 34 of 2017, which shall be taxed, if not agreed.

O'Brien Lawyers: *Lawyers for the Appellant*
Gagma Legal Services: *Lawyers for the Respondent*