

(b) Manoburn Earthmoving Ltd

PARTIES

1 For the State

- (a) Solicitor General ("SG") & Attorney General ("AG")
- (b) Posman Kua Aisi Lawyers (instructed to act on behalf of the State) ("PKA")

2. For the Plaintiff

- (a) Manoburn Earthmoving Limited ("Manoburn")

3. Others (if any)

- (a) Department of Works ("DoW")
- (b) Department of Finance ("DoF")
- (c) Oil Palm Industry Corporation ("OPIC")
- (d) Oro Province Supply and Tenders Board ("OPS&TB")

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

4. A claim for K13million for breach of civil works contract to upgrade 12 harvest roads at Oro Province. Almost K5million has been paid by the State with the balance of K3million the subject of an appeal to the Supreme Court.

5. The claim falls within the TOR (a)(1) (i) to (xii),(2),(3),(4),(5),(8),(10) and (12)

DOCUMENTS AND INVESTIGATIONS CONDUCTED AT

6. The documents the subject of review and examination are

397 –

- a. Posman Kua Aisi Lawyers–(For the Office of the Solicitor General/Attorney General)
- b. Vincent Mirupasi Lawyers
- c. Department of Finance
- d. Department of Works

THE BASIC FACTS THAT ARE ALLEGED TO GIVE RISE TO THE CLAIM

7. Manorburn Earthmoving Limited ("MANORBURN") is currently registered with Investment Promotion Authority. It was incorporated as a company on 12th November 1991 and de-registered on 2nd January 1997 for non compliance of statutory obligation. In October 1997, necessary application for reinstatement was made before the National Court and the Court ordered IPA to reinstate the company. The Company provided its updated Annual Returns as required by statute together with relevant documents and payment and the company was restored to the Companies Register on 10th October 1997. (Refer to Folder "10" & "U" of "13B")

8. The Directors and Shareholders of the Company are Mrs. Rose Titipu (234,000 ordinary issued shares as at 31 December 1999) and Mr. Timothy Titipu (Secretary of the Co.) (500,000 ordinary shares as at 12 November 1999)

The records produced by IPA to the Commission indicate that the following equipment and asset were registered as at 17th February 2008. They include:-

- a. IPA Reg. No. 13683 – Toyota Land Cruiser (Fixed Charge and Unsatisfied)
- b. IPA Reg. No. 13684 – Hyundai Hydraulic Excavator(Fixed Charge and Unsatisfied)
- c. IPA Reg. No. 13685 – Hyundai Hydraulic Excavator Eng. (Fixed Charge and Unsatisfied)

398 –

- d. IPA Reg. No. 13686 – Caterpillar D 6 Bulldozer Eng. (Fixed Charge and Unsatisfied)
- e. IPA Reg. No. 13687 – Loader(Fixed Charge and Unsatisfied)
- f. IPA Reg. No. 13688 – Nissan Dump Truck Registration No. LAH- 576 (Fixed Charge and Unsatisfied)
- g. IPA Reg. No. 13689 – Nissan Dump Truck(Fixed Charge and Unsatis Eedf

– The Oro Oil Palm Industry Corporation (OPIC) Program Contractual Claim by Contractor Manoburn Earthmoving Ltd

9. The Oil Palm Industry Corporation ("OPIC") program commenced in 1994 to further develop the Oil Palm Industry in PNG–and the funds were secured by way of a loan from the World Bank.

10. The Department of Works ('DoW') was tasked to carry out the implementation of the Infrastructure Portion of the Program which consisted of

- a. Upgrading of existing harvest roads for all weather access;
- b. Construction of new harvest roads into areas as per OIC plans for new plantations, and
- c. Improve existing Infrastructure facilities (institutional roads, housing, aid post, schools, etc,) for the communities in those areas

The Minor Works Contract

11. Manorburn was engaged by the State/OPIC to upgrade 12 agricultural feeder roads in the Oro Province. The Oro Provincial Government Supply and Tenders Board

a(l)?Refer?to?relevant?documentation?which?includes?Current?and?Historical?Extracts?and?(2)?Note?that?the?equipment?were?on?hire?purchase?and?that?the?principal?of?the?company?had?written?to?the?then?AG?Mr.?Sao?Gabi?to?speed?up?payments?for?

the?daim?as?a?result?of?the?DOR/Default?Judgment?Order?

399 -

("OPGSTB") headed by Mr. M. Derati as Chairman in 1997-1998) and Col. Ken Noga (as Chairman in 1999) approved and awarded the Contract to Manobum in respect of the 12 roads indicated below: -

- ? Contract MWC 36-JA-60A1 /DR17-Construction of Agenahambo Road
- ? Contract MWC 36-YS-1A-60A1/DR 27-Construction of Tombata Road
- ? Contract MWC 36-YS-1A-60A1 jDR 31-Construction of Siai Raad (Section 1),
- ? Contract MWC 36-YS-1A-60A7/DR 32- Construction of Siai Road (section 2).
- ? Contract MWC 36-YS-01/DR 81A-Construction of Serembi/Diko Road-Section 1 (Tender papers indicate closing of bids as at 22 October 1997)
- ? Contract MWC 36-YS-02/DR37- Construction of Kakandetta/Jonita Road. (M. Derari a s Chairman approved I f f J u l y 1998)
- ? Contract MWC 36-YS-01/DR 51-Construction of Foruta Road.
- ? Contract MWC 36-YS-02/DR 52-Construction of Orekita Road. (M. Derari a s Chairman approved I f f 11 J u l y 1998)
- ? Contract MWC 36-YS-03/DR 121A-Construction of Ilimo Road-Section 1. (Ken Noga a s Chairman approved 15 . 03 . 99)
-)? Contract MWC 36 YS-03/DR 121B-Construction of Ilimo Road-Section 2. (Ken Noga a s Chairman approved 15 . 03 . 09)
- ? Contract MWC 36 YS-03/DR 129 & 130-Construction of Danny and Terter Road (Sakita Feeder Road). (Ken Noga a s Chairman approved 15 . 03 . 99)
- ? Contract MWC 36-YS-03/DR 87 & DR 88-Construction of Shirma Bika Road. (Ken Noga a s Chairman approved 15 . 03 . 99)

(Refer to FOLDER "7" & "8" of "13B"- Contracts for Minor Works and Costing's and the approval for the award of the Minor Road Works Contracts ("MRW" Contracts.)

The only documents sighted by the Commission reflect that the Provincial CSTB office had not gone for a public tender thus providing an opportunity for other contractors to bid for the contract for road works.

400 -

13. During the work progress of the construction phase, Manoburn submitted its progress claim to the OPIC Project Office and the Department of Works for payment. The Company had in fact processed a number of invoices which was subject to clearance by the Works Department.

14. The assessment was normally conducted by the appointed superintendent of the project to ensure that the works was done in accordance with the specification provided under the contract. All progress claims would require certification and approval from the Engineer (who is a registered Engineer with the relevant body as required by statute). That certification is then processed through the Department of Works for payment out of funds approved for the project.

15. The Department of Finance has no responsibility to facilitate the payment. In the normal course of business, the claims were rejected due to flaws in the work and the need to rectify such problems was common amongst contractors lacking the capacity to properly carry out the work

before a certificate is issued.

16. The evidence and perusal of documents indicate that Manoburn took the Department of Works and the State to Court over claims representing various heads of damages such as non-payment of agreed amounts and claims for loss of business. Manoburn also claimed that because of non — payment, its business would have prospered and it lost the opportunity to make additional profits. In addition, it has incurred unnecessary expenses because it was not paid on time.

17. Mr. Brian Kimmins, Chairman of the CSTB gave evidence to the Inquiry on 23rd September 2008 (COIFINANCE 25 dated 23rd September 2008 at pages 675 to) and made a specific reference to instances where Contractors were not performing their contracts and the need for CSTB to monitor the performance of Contractors particularly with the issue of 'stand down';

401 -

"A. .. .From my contractual knowledge, there is allowance for interest to be added to a claim that is put in by a contractor or a service provider or supplier when payment is made or in such situations. A stand down one would think should only be applied to instances wh/m there is a land disputes and that sort of thing, but I really think for the sake of not being paid, but that is a really poor reason to have to pay a contractor for stand down time.

A very poor reason. and that is — we hear those complaints are becoming very common by contractors as to whether they have got to stop work because they have not been paid. I don't know if it is the system that is slow or what is actually the cause of the nonpayment as per the terms of the contract. Every contract states that you put a claim in. and most of them are 30 days. Within 30 days we know instances where contractors are waiting three to four months to get payments. Contractors through sheer frustration do stand down until they get paid. So I do not think the stand down clause in the contract is there for the slackness of the agency that is not paying the bills on time, it for other reasons (weather).

Q. In the course of your investigation, we have come across matters where despite the contracts, stating specific amounts, penalties et cetera, when contractors have gone to court, either by a settlement or by a judgment of the court have secured massive amounts in terms of interest on work performance, et cetera, non payment. You aware of that, what is your comment on that?

A. It is just poor performance on the part of the agency involved. If a contractor has to go to that extent — if the contractor has carried out what it is expected to do as per the requirements of the contract? there is no reason why they should not be paid on time. So that really should not be the current system; it should not happen at all.

The Company engaged the services of Kinhill Kramer to assess the engineering aspects of the construction work on the road and RAM Consultants for accounting matters. It did not resort to the dispute/arbitration clause in the

402 -

Standard Minor Works contract for the 12 feeder roads which was the most suitable process to deal with the issues over payment

19. The Commission notes that the engagement of the professional firm formed part of the heads of claim for damages which is totally a matter for Manoburn to incur rather than passing it onto the State. That was also another flaw in Mr. Gelu's acceptance of Manoburn claim for the State to pay for professional services rendered to the Company. This was a private business arrangement.

– The Claim

Letter of Demand dated 6th October 1999 from Shepherds Lawyers Demanding Payment of K804,053.94 before 15th October, 1999.

20. On 8th November 1999 Mrs. Cathy Davani (now Justice Cathy Davani) of Shepherds Lawyers wrote to the Secretary for Works and Implementation (Mr. Alphonse Nigints/Mr. N. Gopave) as a follow up to a series of telephone conversation with the two officers primarily over the demand for settlement of payments due to Manoburn. The deadline for any responses to the letter was 12th November, 1999.

21. On 15th November, 1999 Shepherds Lawyers gave 'formal notice of a claim to be made against the State 'in accordance with Section 5 of the "Claims By and Against the State Act, 1996 ("CBAS Act").

– Chronology based on National Court documents filed in respect of the WS 285 / 2000 proceedings

22. Our review of the large volume of documents provided to the Commission by Posman Kua Aisi Lawyers provide a chronology on the proceedings in court which also included extensive research on the law, submissions on law, court

403 –

23. appearances both in the National Court and the Supreme Court, various exchanges of correspondence between the parties, Department of Works documents, uncontested hearings on the Default Judgment, setting aside of the default judgment and eventually the Deed of Release.

24. Writ of Summons No. 285 of 2000. dated 16th March 2000 was filed in the National Court, Waigani on 17th March 2000. The claim was for breach of contract (Minor Works Contract) over delays in payment for completed work consistent with the terms of the contract, loss of business, accrued interest on monthly repayments to Nambawan Finance (Lease of heavy machinery), Kinhill Kramer expenses for technical and contract assistance particulars prior to trial, RAM Consultants–consultancy expenses, accounting, legal, accommodation, travelling and hire car expenses incurred by plaintiffs representatives in their attempts to resolve the breaches and secure payments.

25. 22nd June 2000, Blake Dawson Waldron Lawyers ("BDW") informs the Acting Solicitor General that the Notice of Intention to Defend filed on 29th March 2000. Our inquiries reveal that the "Defence" was to have been filed on 17 June 2000. BDW gave notice of their intention to apply for default judgment.

26. On 14 July 2000, BDW served application for default judgment on the State which included (1) Affidavit of Catherine Anne Davani in support of default judgment filed 14.07.00; (2) Affidavit of Search; and (3) Notice of Motion to move for orders for entry of default judgment and for damages to be assessed.

27. On 2nd August, 2000, Notice of Motion dated 29th March 2000 was filed by the then acting Solicitor General Ms. Kiele in the National Court seeking orders for the proceedings to be struck out. The Application was supported by the Affidavit of Mr. David Lambu dated 30th March 2000, Mr. Lambu deposes to the fact that;

404-

1. No section 5 notice as required by CBAS Act was served on the Office of the Solicitor General,

2. Cause of action was for alleged breach of a number of contracts the first of which is alleged to have occurred on 24 April 1997 and this proceedings has been filed on 16 March 2000 which is almost three years later. (Statute time barred)

28. Application for Default Judgment was ordered by the National Court on 11 August 2000 and entered by the Registrar on 21st August 2000 in the following terms; (1) default judgment be entered against the defendant and for damages to be assessed; and (2) the defendant (State) pay the costs of this application.

29. On 25 August 2000, BDW informed the then acting Solicitor General, Mr. Lambu of the 'need to settle the matter of damages.'

30. On 2nd November 2000, Mr. Titipu wrote to Mr. Sao Gabi, then Attorney General on the need to settle the claim.

31. On 10th November 2000, Mr. Sao Gabi (then AG) responds to the letter and advises Mr. Titipu to file a Notice of Change of Lawyers and to pursue the claim through his lawyers.

32. On 3rd November 2000, Mr. Titipu under letterhead of Manoburn writes to Mr. Damem as the new AG/Secretary to Department on the settlement of the claim. Between November 2000 and February 2001, the records indicate that Mr. Titipu wrote direct to the Department of Attorney General (S. Gabi/F. Damem/Gelu) Department of Finance (John Edeleni-AS/Administration Services; late Mr. Tarata (then Secretary-DoF)

33. 30th January 2001-Mr. Edeleni wrote to the Secretary and AG requesting clearance on matters raised by Mr. Titipu. (It is noted that an handwritten minute on the letter by Fred Tomo as follows;

405 -

"Mr. Damem,

If the claims of this magnitude is to be settled by one person, the claim must be thoroughly assessed by several buyers. Each must provide their opinion independently. Here is a risk that the Department might be accused of not checking claims well. Pis let us discuss this and put mechanism in place. Fred Tomo 27102/01.

- The Conduct of the then Minister for Justice , Hon. Puri Riung

33. The Commission notes from the records obtained from the Office of the Solicitor General, that on 13th February 2001–Hon. Puri Riung, MP Minister for Justice by issued a Ministerial Directive to Mr. Damem, that he " (2) Issue a new Legal Clearance to the Treasury & Finance Department to pay out this claim without further delay; (3) Do whatever is possible within law to expedite the payment as the Company is desperately in need of Funds to bail out equipment from Nambawan Finance Ltd; and (4) Inform MANOBURN United of the actions your Office is taking." (Refer t o Folder " 2 " o f " 13 B" and Attachment " B")

34. The Commission notes with concern that the directive issued by the Minister relates to an abuse of power, especially matters that concerns a claim against the State and not only that but an issue that is currently active in the National and Supreme Court. The directive is our view an attempt to exert influence over Deed that has been challenged in the National Court by the State. Mr. Damem has in fact instructed PKA Lawyers to deal with the default judgment and the Deed of Release.

(It is to be noted that Hon. Puri Ruing was not called to assist the COI with this aspect of the inquiry due to the completion of the tenure of the Commission)

– Opinion b y J o hn PALEK, Legal Offic e r da t e d February 2001 t o Mr. Zacchary Gelu on t h e Manorburn Earthmoving v The S t a t e – WS No. 285 o f 2000.

406–

35. On 18 February 2001, Mr Palek rendered a legal opinion to Mr. Gelu and recommended settlement of the claim at K8.2million. He relied on documents submitted to SG by Manoburn and based on the actual business loss of the company for a period of three (3) years as a result of the dispute of delay in the payment of progress claim. It is evident that Mr. Palek a recently admitted lawyer was assigned by Mr. Gelu to undertake the assignment and advise on quantum and liability of the State. (See the evidence of Mr. Kawi at page _ of this submission. (Refer to Folder "2" of "13B" and Attachment "D")

36– Our observation of the Opinion rendered by Mr. Palek to Mr. Gelu with respect, disregarded the lack of research into the relevant legislations namely Attorney General Act, Claims by and Against the State Act, Public Finances (Management) Act and the Statute of Frauds and limitations Act, assessment of the technical reports prepared by the Department of Works which was the most important document. The officer concerned also failed to liaise and consult with officers at the DoW in order for the State to defend the proceedings.

37. It is with those concerns that Mr. Palek's involvement and role he played however minor has caused the State Eight million Kina of which Five million was paid in a scheme that was orchestrated by Mr. Gelu to enrich Manoburn. (Mr. Palek was invited to assist the Commission with the matter and he advised of his availability to assist the Commission on or about October 2009)

– Mr. Zacchary Gelu' s r e c ommendation f o r s e t t l ement

38. On 21 February 2001, Mr. Gelu recommended to the Attorney General that the claim should be

settled at K8.6 million. He also referred to the legal opinion rendered by Mr. John Palek in support of his recommendation.

(Refer to Folder "2" of "13B" and Attachment "D")

407 –

– Proceedings for Assessment of damages

39. 27 April 2001: Mr. Moses Murray of Murray and Associates filed in the National Court, the Change of Lawyers document on behalf of Manoburn (WS 285 of 2000).

40. 30 May 2001: Mr. Murray filed a Notice to set down for trial on assessment

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47, of damages. Mr. John Kawi the then Solicitor General endorsed the Notice as Solicitor General (WS 285 of 2000). The endorsement was separately confirmed by Messrs Kawi and Murray on evidence before the Commission.

41. On 29th June 2001, Mr. Francis Damem the then Attorney General engaged Posman Kua Aisi Lauyers to institute proceedings to set aside the Deed of Release. The proceedings dealt with the authority of the Attorney General under the CBASA to settle matters. Mr. Gelu had always contented that being the Solicitor 4 against the State without consulting the Attorney General.

42. He also advised Mr. Gelu that the matter was briefed out to PKA and that he was no longer responsible for the file. On 5 July 2001, PKA advised Murray and Associates that the firm has been instructed by the AG to defend the proceedings with the "possibility of re-opening the case on the judgment on liability and as well

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9. defend all proceedings in respect of quantum.'

43. Whilst ongoing discussions between PKA and Murray and Associates had commenced, Mr. Mirupasi of Mirupasi Lawyers filed Change of Lawyers with the National Court [on behalf of Manoburn (WS 285 of 2000)] on 30 May 2002.

44. 16 July 2002: Mr. Damem advised PKA to continue to act for the State in WS 285 of 2000 after terminating their services on 5th June 2002.

408 –

Notice Motion dated 22nd July 2002 PKA on behalf of the State seeks orders to dismiss the proceedings etc... The Notice is supported by the Affidavit of Mr. Alexander MacDonald, Senior Lawyer with PKA.

31st July 2002: Murray and Associates Lawyers cease to act for Manoburn.

Likewise, prior to the execution of the Deed of Release, Mr. Gelu raises the same issue with the Attorney General on 6th August 2002. Whilst negotiations were on foot between Mr. Kerenga (Managing Partner of Posman Kua Aisi Lawyer) as Lawyer for the State and Lawyers for Manoburn on assessment for damages, the then acting Solicitor General Mr. Zacchary Gelu decided to settle the matter out of Court.

(See Folder "13B" of "13B" and Attachment "E")

A submission made by Mirupasi Lawyers on 'quantum' assessing damages at K12.5 million was quantified and on a without prejudice basis submitted to the then acting Solicitor General Mr. John Kumura. Mr. Kumura advised the plaintiff through Mirupasi Lawyers that the Deed of Release entered into between the State and Manoburn and the letter to Finance clearing it for payment was not binding and that in his view would require being re-negotiated.

Lawyers at the Office of the Solicitor General in consultation with the former Attorney General, Mr. Fred Tomo advised that the State would save millions of Kina in damages, interest and costs. State lawyers were concerned that if they were to go for assessment of damages, the figures would be very high given the date of the filing of the Writ to the eventual settlement including costs. By the terms of the Deed of Release, the State would save the 'interest' and 'cost component' of the claim and possibly K6-7 million in 'general damage'.

409 -

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50. /j On July? 31st? 2002, pending trial for assessment of damages, the former Solicitor General, Zacchary Gelu, without authority of the then Attorney General, Francis Damem, entered into a Deed of Settlement ("Deed") with Manoburn for I K8.6million arising from proceedings WS No.285 of 2000. Deed of Settlement * executed between the State (Gelu) and Mr. Titipu (Vincent Mirupasi signed as witness).

51. Mr. Gelu also cleared the Deed of Release for immediate payment by the Department of Finance.

52. Judgement on liability against the state was entered in August 2000 with damages to be assessed.

- Responses from OPIC

53. The Commission received a response from a Mr. Leo Ruki, current Project Manager by letter dated 14th August 2009 and stated as follows;

"...The Department of Works (DoW) was responsible for construction of these agricultural roads. It is during this period of time that Manoburn Earth Moving was engaged in the construction of roads in the Oro Province. The Managing Director, Mr. Timothy Titipu was heavily involved in the road constructions and progressed well among other local Contractors. The roads that the Contractor constructed, including Manoburn were tractor trailer track roads....

54. Mr. Ruki's assessment of Manoburn's reputation was that OPIC recognized that it had the capacity to handle other projects quite competently and had established itself in Oro Province. OPIC had engaged the company in other projects apart from the 12 roads the subject of our review.

– Technical Reports by Engineers, Department of Works

410

The Commission reviewed three (3) Technical Reports prepared by Consultant Engineers from the Works Department which sets out their inspection of the work and the applicable payment for each scope of work completed by Manoburn. The Reports are as follows:

(1) Infrastructure Project for the Oil Palm Industry in Oro Province– Report on claims by Manoburn Pty Ltd (also known as Manoburn Earthmoving Pty Ltd) in respect of twelve contracts awarded to and executed (or being executed) by Manoburn Pty Ltd

This report was prepared by D.P. WANIGASEKARA–MOHOTI on 16th February 2000 for the then Secretary for Works, Mr. A.J Niggins and submitted to the Solicitor General on 17th April 2001 for assessment of the claim on behalf of the State.

(2) Opinion to the acting Solicitor General dated 17th April 2001 and titled "Brief Comments on Claim by Manoburn Earthmoving through Shepherds Lawyers dated 6th October, 1999.

This report was prepared by S. PANCHACHARAVEL, Project Director (J.B.I.C. Projects). In the report the Director assessed each of the 12 contract performed by Manoburn and the additional claims (including total interest commuted every six months with 20% mark up at K85, 482.66

(3) Report dated 24 th January 2000 titled " Oro Oil Palm Industry Corporation (OPIC) Programme Contractual Claim by Contractor Manoburn Earthmoving Ltd* (Refer to Attachment "G" and Folder "7" of "13B")

The Reports were made available to the Office of the Solicitor General as a result of the letter of demand dated 6th October 1999 from the law firm acting for

411 –

Manoburn that the claim for K804, 053.94 be settled by 15th October, 1999. There is evidence that Mr. Gelu had written to the Department of Works by letter dated 23rd November 2000 seeking their opinion on the 'quantification5 ad demanded by Manorburn'. However Mr. Gelu chose to ignore the expert opinion on the progress claim on each contract and the calculation for payment on each of the disputed claims.

57. Our review of the huge volume of technical documents and report over construction payments between Manoburn and the DoW, the technical advisors have quantified the claim and estimate the progress work at K600, 000.00.
– WS 1343 o f 2002

58. The then Attorney General, Mr. Francis Damem then issued instructions to the Department of Finance to put a stop payment on the settlement by way of the Deed of Release and then filed proceedings in the National Court under WS 1343 of 2002 alleging fraud, breach of section 61 of the Public Finances (Management) Act, breach of section 13(2) of the Attorney General's Act and on the grounds that Mt. Gelu acted ultra vires the powers of the Attorney General.

59. The d e c i s i o n o f t h e Supreme Court i n S t a t e – v – Zacchary Gelu & Manoburn Earthmoving Limited (2003) SC 716 (August 2003) c o n f i r m s t h a t;

"where the State is a party in any litigation before the Courts, the SG may act as an advocate if instructed to do so by the AG in accordance with s.13 (2) of AG Act. Where SG is instructed, he must act in accordance with the instructions of the AG, such as to settle or not to settle a mater" and f u r t h e r

"the AG by virtue of s.5 of the AG Act is the principal officer who represents the interests of the State in terms of legal advice or opinion and where the State is a party before the court. It would follow from this that the AG may issue suits in the name of the State (s4 of CBAS Act) "(pages 12 and 13-14)

412 –

Payout by Department of Finance

60. The Finance Cashbook confirms that about K5, 050, 000.00 has been paid to the Manoburn. The following payments have been made to Manoburn;

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61. The Commission was not able to obtain payment vouchers from Department of Finance to ascertain whether the above eight (8) payments were paid out from either budgeted funds or the Trust Fund Suspense Account # 2. On the 02nd of June 2005 DoF released a cheque No. 812545 of K300, 000 and endorsed as cancelled. The Commission was unable to verify with the Central Bank and Commercial Banks on the cancellation of the cheque and whether or not Cheque

413 -

No. 812544 in the amount of K1, 000,000 dated 03rd of June 2005. Was reissued and cashed.

62. It is a statutory requirement that under Section 61 of the Public Finances (Management) Act 1995 , the Minister responsible for finance will approve contracts above K1, 000,000.00. In this instance, the Solicitor General did not seek the approval of the Minister for

Finance at the time he settled the claim.

DOCUMENTS PRODUCED FOR THE COMMISSION BY VINCENT MIRUPASI
LAWYERS
(Refer to Folder"13A" of "13B")

63. Mr. Mirupasi provided to the Commission a by letter dated 10 July 2009 a chronology on the history of claim and the court proceedings involving the parties.

64. In his letter of 10th July 2009 to the Commission, Mr. Mirupasi confirmed that a total of K4 million on the Deed was paid to his client. The following were payments made to Manoburn (according to their records);

1. K500,000.00 –4th October 2002;
2. K1 million – 27th January 2003 (Deposited with the Central Bank in Treasury Bonds);
3. K500,000.00– 14th February 2003;
4. K1 million – 7th June 2005; and
5. K1 million–30th June 2005

65. With regard to the remaining balance, the firm advised

'We then applied under OS No. 698 of2006 to confirm the Deed of Release for enforcement and for our client to be the balance of K4.6 million still outstanding. The Court on 21st May

414-

2007 held that the Deed of 'Release was current and enforceable and that the outstanding sum- should be paid. This decision is subject to an Appeal under SCA No. 10 of2008. This appeal was also not prosecuted and we filed an application before the Supreme Court for dismissal for want ofprosecution and this was heard on the 3(f_ June 2009 and a decision is pending.

The K1 million with the Central bank was restrained by a Consent Order to hold until completion of the proceedings. After the dismissal of the proceedings under WS 1343 of2002 we applied for the withdrawal of these funds but Messrs Gadens Lawyers acting for the Central Bank asked for specific Orders as the Ombudsman Commission had also issued a Directive not to pay until its investigations were completed. We then issued proceedings under OS No. 503 of 2006 seeking Declaratory and Directive Orders. These Orders were made on the 4th September 2006 and subsequently monies in the sum of K1,266,605.00 (which amount includes interest) was paid to our client on the 8th September2006."

66. On 30th July 2009, Mr. Mirupasi personally appeared at the Commissions hearing with Mr. Timothy Titipu and sought adjournment of our inquiry into the claim for the reason that a Supreme

Court Appeal filed by the State had been argued and a decision was pending.
(Refer to Transcript of proceedings COIFINANCE 119 dated 30th July 2009– Pages 4260–4264)

EVIDENCE RECEIVED AT HEARING OF THE COMMISSION

Mr. John Kawi

Former Solicitor General

(Refer to Transcript of Proceedings COIFINANCE75 dated 25th February 2009, pages 2138 to 2233)

67. The evidence he provided is reproduced below (pages 2187 to 2189)

415 –

" When I resumed in March, this was one of those matters that was brought to my attention and I requested for the file when it was brought to my attention and I immediately noticed the deed of release signed by Gehi for 8.6 million and I was not satisfied. So, I requested Vele Lamo not to pay out this claim until we properly investigated it. I went back to the Department of Works and I saw the deputy Secretary then. Roy Momo, Jr went and we had a meeting on this and they too were surprised that this matter was being settled for 8.6 million and I asked if they could carry out an

investigation. There was a Sri Lankan engineer. He has got one of those very long names which is pretty difficult to mention. I only called him Mr Mohoti. That is probably his first name and this engineer did carry out an investigation. He went to Pror for that purpose. He went across to Oro and he carried out an investigation – well, what he said was an investigation. I had to rely on him as being the person who carried out the investigation and he came back and he gave me a report. This was some time in July or September 2001 – appropriate September 2001. He gave me a report saying that if it was – they looked at all the claims and then their view was that only for stand down of equipments that Works Department issued a stop work order which resulted in the Company allegedly making losses. So he said, "this appears to be the only aspect of that claim" which was quite valid. All the others no. So in his report he said for that he was entitled to some 186,000. We put that to Manoboum, Timothy Titipu was the proprietor of Manoboum and they refused. They refused to accept it so by then it was also during the period of my suspension too so, although my suspension was not long. I was suspended – all these things remained in abeyance. When I came, one of the things I also learned was that representations were being made even to Francis Damem the Attorney General and I advised Damem to brief this matter out which he agreed. So the matter was then briefed out to Kerega Kua of Possman Kua Aisi Lawyers and they were then handling the matter. J

416-

helped them. I did an affidavit for them when they were trying to set aside the matter. So that is my involvement in the Manoburn. / 2 . 25 pm] When I got the file to look at the settlement Gelu did, it was just a deed of release typical in this kind of settlement, just a deed of release and no supporting document. I questioned every lawyer in the office as to who did this settlement and eventually one of our legal officers, one of the those officers we just recruited, when he finished from LTI in 2000. he told he said. "Gelu directed me to do the submission." and I questioned him I said, "when you did the submission? What are the other supporting materials?" He said he had none, except that Gelu told him to make submission for 8.6 million and the submission I am referring to is not one which between lawyers, proper negotiations and submission. This was the letter to Finance requesting 8.6 million and I must say that I was quite surprised myself too when there was no documents on file justifying how you arrived at the amount of 8.6 million. So that was it." (Underlining ours)

Mr. N. Gopave
First Assistant Secretary (Operations)-DoW

68. Mr. Gopave appeared briefly on 30th July 2009 and advised the Commission that he was short served and was not prepared give evidence. He was at one time involved in the project as Head of the Operations and fully aware of the project and the problems associated with it. He gave an undertaking to the Commission to provide a cost on the project based on the work component and to determine whether the payment of K8.6 million was justified. This matter was pending production of the calculated costs which remains pending.

Further Evidence-Witnesses yet to be called

69. Vincent Mirupasi, Principal of Mirupasi Lawyers and Associates

417 -

70..

To be recalled to provide an explanation on the legal costs of K2million paid to his Law Firm for the Manoburn claim. To be further investigated.

Kerenga Kua, Executive Managing Partner of Posman Kua Aisi Lawyers

Counsel for the State and his evidence will be on the instructions to defend the State in all the proceedings to date. He will also assist the inquiry with information that there was a lot of political pressure exerted by the former Minister for Justice, Mr. Puri Riung on the claim by Manoburn. Mr. Kua did not attend the Inquiry due to work commitments. Mr. Kua was unable to provide evidence and is required to assist in any further inquiry on the matter.

71. Timothy Tititpu, Managing Director of Manoburn

He could not give evidence due the application made by his lawyer, Mr. Mirupasi on 30th July 2009

72. Zacchary Gelu | 76.

i'

Former Acting Solicitor General at the time he executed the Deed of Release j between Manoburn and the State. Requested to assist the inquiry and has so far responded by applying for adjournment due to ill-health and stress. (Medical Certificate produced to the Commission) On record, Mr. Gelu was provided with all the relevant documents in so far as the Deed of Release is concerned.

7

7.

Private Practitioner and at the time he was a Legal officer assigned with the Manoburn file. He responded to the request to assist the Commission on the matters concerning his involvement and he has informed the Commission that he would be available in October 2009. He had a full calendar of court commitment

418

78.

COMPLIANCE WITH PROCESS- REQUIREMENTS OF THE CLAIMS BY & AGAINST THE STATE ACT, 1996
- (CB& SAct, 1996)

Section 5 notice was given to the Solicitor General by Shepherd Lawyers on 6th October 1999 and is pleaded at Paragraph 3 of the Statement of Claim under WS 285 of 2000

The Claim: Liability and Assessment

The Company pleads under paragraph 7 of the Statement of Claim (WS 285 of 2000) on the States failure and refusal to certify the interim progress payments under the contracts within a specified time and therefore was entitled to late payments and interest at the current commercial bank rates. The initial claim was for some K481, 739.00 sum representing various damages for late progress claim payments and loss of business.

The amount of K8.6million as out of court settlement on 31 July 2002 was inflated without any proof that the State was responsible for causing financial hardship to the Company as a result of the dispute on the delay in progress payments. The amount as assessed was excessive and fraudulent as it was settled without basis in law.

The State was not responsible for costs incurred by the Company in relation to the providers of service namely Kinhill Kramer and RAM Consultants. That aspect was not covered under the MWC.

Steps taken (not taken) by the Solicitor General in defence of the claim The Solicitor General (Ms. Kiele was acting SG at the time the claim was registered with the SGO) failed to file the NOID and Defence on time and a default judgment entered against the State.

419 –

79. Ms. Kiele, then Solicitor General attempted to file Notice of Motion and Affidavit in Support (David Lambu) to have the Default Judgment set aside with the Notice of Motion and the Affidavit in Support (D. Lambu) dated 30 March, 2000 but filed with the Court on 2nd August, 2000. Default judgment was entered against the State on 11 August 2000. That only means that the Solicitor General was in breach of its duties and responsibilities under the Attorney General's Act

Steps taken (not taken) by the Attorney General in defence of the claim

80. The Attorney General (Francis Damem) was genuinely concerned at the manner in which the Manoburn claim was treated by the Solicitor General. The Commissions view on Mr. Damem, particularly the periods February 2001 to August 2001 where he did the following:-

- (a) Instruct PKA lawyers to defend the proceedings with respect to the quantum.
- (b) Advised Mr. Zacchary Gelu that proceedings involving Manoburn was briefed to PKA Lawyers and that he was not responsible for that matter.
- (c) With the engagement of PKA lawyers, default judgment was set aside.
- (f) Supreme Court settles the issue over whether the SG can act independent of the AG in matters concerning settlements of claims against the State. The AG is authorized by law to settle claim against the State
- (g) Ongoing proceedings to deal with the Deed of release and the balance of the K3million which is outstanding.

Settlement

81. None considered as the acting Solicitor General cleared it without conducting any due diligence on the claim and consulting the Department of Works and –or OPIC.

420 –

82. The matter was to proceed to trial on the assessment of damages which would in the circumstances be appropriate as there was no dispute that work may have been done as claimed by Manoburn. This was verified by the DoW through the Technical Reports and that would have served that purpose.

83. The settlement was far too excessive and without doubt inflated based on other heads of damages which were not tied to the initial claim for the delay in payment on the work performed by Manoburn under Contract.

Pay-out – Department of Finance compliance or otherwise with Public Finances Management Act and related process.

84. DoF had paid by installment based on the Deed of Settlement. The balance of K3 million is the subject of an appeal to the Supreme Court pending a decision.

85. The Department of Works paid an amount of K10, 543.33 to Lawyers acting for the Manoburn and the cheque was returned based on the proceedings and that '

86. Manoburn was seeking damages for breach of contract and that the actions of the DoW the contracts have been frustrated. (Sheperd Lawyers by letter dated 31 March 2000)

FINDINGS

87. The lack of professional and management oversight of the claim was the major contributing factor at the Office of the Solicitor General.

a. The lack of initiative to deal with the letter of demand by the Solicitors of Manoburn on 6th August 1999 proposing to file a claim against the state for breach of contract. At that time the demand was for an amount less than K1 million.

421 –

b. The lack of initiative to consult the Department of Works to obtain the necessary information for

the purpose of making a decision whether to negotiate and settle the demand for payment or defend the proceedings.

c. The lack of initiative to mediate a settlement of the dispute over progress claim on behalf of the State, because there is proof from the technical advisors report confirm that progress claims for work done was quantified at below K1million.

d. The huge turn-over in the position of the Solicitor General (Kiele/Gelu/Kumura) has caused a loss of cohesion in the manner in which this proceeding has dragged on in the courts.

e. The Solicitor General (including the Solicitors for Manoburn) had also overlooked the provisions dealing with Arbitration under the contract which was the appropriate dispute mechanism to mediate the dispute on the delayed payments by the DoW/State.

f. The negligence of the Solicitor General in 1999 in failing to file the Notice of 'Intention to Defend' and the 'Defence' within time, resulting in a default judgment entered against the State.

a. That negligence on the part of the office of Solicitor General has caused the State to incur more expenses with the engagement of PKA Lawyers to institute proceedings on behalf of the state to set aside the default judgment in 2002 including the issue of the AG/SG powers and the Deed of Release.

b. The accumulation of costs and payout on the Deed of Release (now in arrears) has adversely affected the budgetary appropriations.

422 -

The Deed of Release

88. The Commission makes adverse findings against Mr. Gelu's conduct in the settlement of the claim as follows;

a. He had formed a professional view on the matter and had compromised the office of the Solicitor General by accepting the financial difficulties and losses of the business and the prolonged court proceedings (Cash Flow Statement) when in fact

i. Manoburn had also contributed to the problem by the frequent change of lawyers and its instructions (Shepherd Lawyers/Blake Dawson Waldron/Murray and Associates/Mirupasi Lawyers)

ii. Manoburn had refused to accept the cheque of about K10,000.00 and returned to the DoW.

iii. The State was not responsible for the losses suffered by Manoburn and the costs incurred for professional services rendered by Kinhill Kramer, RAM Business Consultants, the costs of profits for the last three years to 31 December 1999 at K750,000.00, net profit for next 3 years at K1,050,000 and existing claim. These were not pleaded by Melbourne in WS 285 of 1999 and not verified.

89. Failed to comply with section 61 of the Public Finances (Management) Act where Ministerial approval is required for expenditure in excess of K300,000 and above. He did not obtain that approval prior to the execution of the DOR.

90. The Solicitor General also failed to comply with NEC Decision No 150/2003 of 25th July 2003 wherein the NEC directed the

423 -

(i.) The Solicitor General in consultation –with the Attorney General were directed to settle any future claims for amounts up to K1,000,000 provided they were satisfied with the claims were genuine ;and

(ii.) All amounts for out of Court settlement in excess of K1,000,000 are to be approved by the NEC prior to any payments being made by the Department of Finance; and

(iii.) Approved that the Attorney General immediately apply to the court for Judicial Review of any questionable claims or out of Court settlements in excess of K500,000

90A. Where claims are pursued in court, once liability and damages are ascertained, the court may be asked to order that a party pay the costs of the other party. The State like any other party in court proceedings may be found liable to pay the costs of the other party or where the State is successful, the Court may order that the other party pay the State's costs. In either case, where there is no agreement as to the amount payable for costs, the avenue available under the National Court Rules is to have the successful party's costs taxed.

Taxation is also available to a client who is entitled to dispute the lawyer's legal fees. As such, unless there is prior agreement as to costs payable, the State is entitled to dispute the legal fees of the law firm briefed by the Attorney General.

The Commission notes the award for legal costs against the State following dismissal for want of proceedings commenced by the State in this matter. Costs were taxed at K2 milljem. The matter warrants further inquiry to ascertain whether the costs were justified;
RECOMENDATIONS"

424-

91. The Office of the Solicitor General through its lawyers (if PKA is still retained as lawyer on

record) to institute proceedings in the National Court to have the deed of release declared null and void.

92. That the State institute proceedings to recover the amount of moneys paid so far and to conduct a review as to what was the reasonable losses incurred by the Company.

PARTIES

(i) For the State

- (a) Department of Works
- (b) Attorney General/Solicitor General
- (c) National Court Registry (Waigani/Mount Hagen)
- (d) Department of Finance

(ii) For the Claimant

- (a) Mrs. Gertrude Arete (widow) Director of the Company)
- (b) Maladinas Lawyers (now practicing as Young and Williams)
- (c) Pato Lawyers (now practicing as Pacific Legal Group)

DOES THE CLAIM FALL WITHIN THE TERMS OF REFERENCE

The Company was paid a total of K 4.1 million by the Department of Finance in satisfaction of the Deed of Release which was executed between the State and Maladinas Lawyers (Lawyers on behalf of the Company) on 26th November 2002.

The applicable TOR are (a) (1) ((i) to (xii), 5 (i) to (vii), 8 and 12.

THE BASIC FACTS THAT ARE ALLEGED TO GIVE RISE TO THE CLAIM

The Company was awarded Contract No. MWC-MR-001/99 Tomba to Tambul Road upgrading project by way of a Certificate of Inexpediency (COI) for a value of K3,878,151.00 on 11th March 1999. The then Secretary for Works, Mr. Micky

426 -

Tamarua approved the engagement of Pioneer Construction on the road works project.

Pioneer Constructions was registered PNG Company that carried on the business of earthmoving and civil engineering construction work. The Company shareholders/directors were Mr. Timothy Arete (now deceased), Gertrude Arete (widow), Shirley Arete (daughter) and Pius Kunji (now based at Tabubil) as the Secretary to the Company. At the time the company was awarded the contract, it was effectively winding up (Refer to Mr. Joel Luma's letter dated 6th May 2009 to the COI and the attached advertisement).

A Deed of Release was entered into between Mr. Zacchary Gelu as the then acting Solicitor General (on behalf of the State) and Maladinas Lawyers (on behalf of the Company) on 26th November 2002. The parties agreed to settle the claim for K3,287,710.00 for unpaid progressive claims for

services rendered by the company and for damages caused by vandals to equipment, site offices and properties belonging to the company left on the work site over a period of two years (from 24th August 1999 to 2001). The company suspended operations at end of October 1999 after a period of 7 months alleging delayed unpaid progressive claims against the Department of Works.

The Department of Finance has paid the claimants K4.109.988.70. Below is a schedule of payments obtained from the payments vouchers sighted from documents received from the Department of Finance.

Schedule of Payments as per Do F Payment Vouchers

No.	Date	Reg.	Vote	Amount Paid (PGKm)	Remarks
1	21.03.00	10038	207-4201-4123- 135	959,988.70	c/Pato Lawyers T/A 56-FD
2	28.11.02	63479	460-31	1,500,000.00	c/Maladinas T/A 74-FD
3	04.04.03	16725	207-4201-4123- 135	100,000.00	c/Maladinas T/A 15-FD 427 -
4	04.04.03	Chq.739374	207-4201-4123- 135		

100,000.00
c/Majadinas T/A
10-FD
5
22.09.03
48494
207-4201-4123- 135
300,000.00
c/Maladinas T/A
25-FD
6
31.10.03
56459
460-31
400,000.00
c/Maladinas T/A
11-FD
7
13.01.04
Chq. 74581
460-31
600,000.00
c/Makdinas T/A
9-FD
?
Total Paid
4,109,988.70
?

DOCUMENTS PRODUCED FOR OUR EXAMINATION AND REVIEW BY THE COMMISSION

Statements and Correspondence of Witnesses

The following documents have been reviewed and the following matters have been noted by the Commission;

i- Mr. G, J. Sheppard

Partner of Young and Williams Lawyers in response to COI request for the file advised the Commission that the files have been destroyed after 7 years. Young and Williams have taken over the practice of Maladinas lawyers. (Letter dated 26th March 2009)

ii. Mr. Joel Luma

Current Secretary for Works responded in writing to COI Letter dated 23rd March 2009 and the Summons dated 29th April 2009 with relevant and useful information on the history of the claim.

Mr. Luma informed the COI that

" • • . this road project was initiated in 1997 under Governor Pais Wing ti and was awarded to COECON Ltd. It was shelved after the 1991 General Elections. In 1999 the second attempt was made to award the project to Pioneer when clearly there was no funding allocation in the 1999 budget"

428-

The relevant information on the letter.-

- A Minute dated 22nd May 2000 by Mr. Mohotti, Technical Adviser, Works Department to Secretary raising concerns over the manner in which the contract was awarded when in fact the project was taken off the Public Investment Programme in 1999 (meaning that there was no funds allocated for the project)
- Mr. Michael Gene's concerns about the actions of Acting FAS (operations) Mr. BK Alois to certify the claim when he had no authority to do so. (letter dated 26 June 2000)
- Application for Certificate of Inexpediency by Mr. Tamarua to the Chairman, CSTB dated 5th March, 1999 seeking its approval citing 1997 election as the reason for delaying the project. No public bids for tender was made by CSTB on this contract.
- An advertisement in the newspaper on the winding up of Pioneer Constructions Ltd as of 5 October 1999. The Contract was awarded on 11th March 1999 by Certificate of Inexpediency when the company had gone into receivership.
- The letter of 8th .September 1999 by Mr. Alois of Works to PNGBC certifying the claim on the four progressive payments to Pioneer was not without authority nor did he have the appropriate section 32 financial delegates to do so.
- Former Minister for Transport, Mr. Vincent Auali's letter of 10th May 1999 to Manager of Pioneer Constructions approving revised schedule of rates.
- Former Works Minister, Mr. Yawe Rayon letter of 12* June 1999 supporting the Transport Minister's call to revise the schedule of prices.

429-

iii. The Office of the Chairman, CSTB was summonsed to produce documents in relation to the tender/contract on 29th April 2009 and have asked for extension to locate the documents which have being archived.

iv. Hitelai Polume-Kiele

Acting Secretary for Justice and Attorney General has been summonsed to produce the SG file in relation to the claim made by Pioneer Constructions Limited and subsequently settlement of the claim by way of the Deed of Release. No response has been received to date and the file has not

been produced.

v. Ian Augerea

Registrar of the National Court has also been summoned to produce the file in relation to the claim lodged by Pioneer, but no response has been received to date.

vi. Mr. Erick Kiso

Assistant Registrar, National Court Mount Hagen has verbally informed the COI that no proceedings have been registered by Pioneer at Mount Hagen. He states that the files are normally registered at Waigani.

vii. Mr. Michael Gene

Former Secretary for Justice and Attorney General was requested by the Commission to assist with information relating to the clearance he gave to the DoF for payment of the claim. His letter of 18 May 2009 states as follows:

" In respect of Pioneer Constructions Uimited matter, the contract progress payments were delayed as the Department of Works did not have sufficient funds to meet the State's contract obligations for the Tomba/ Tambul Road Upgrade Project (. . .) . Mr. B. K Alois. A/ E M (Operations) of the Department of Works confirmed the outstanding

430-

progressive payments to the value of Kl. J 59 . 988 . 30 under his letter of 8 September 1999 .

This matter also appears to be in order and I recommend that no further action is required by the COI You may also seek further clarification from Mr. Pdmbink Pato, now the Principal of Steele's lawyers. »

viii. Mr Ian Sheperd

Partner with Blake Dawson Lawyers informed the Commission by letter dated 19th May 2009 that the firm was briefed by the Solicitor General in 2005 to review the matter. The letter refers

" The works was undertaken with the assistance of funding from Aus AID and an extensive file was in fact commenced under Proceedings WS 1093 of 2005 against Pioneer Constructions limited and Zacchary Gelu personally. In the proceedings . Blake Dawson obtained judgment for damages to be assessed but unfortunately the State has been extremely slow in paying our fees once the Aus AID funding ceased and damages have not yet been assessed . (Our emphasis)

Included in the letter were two files relating to the proceedings WS 1093 of 2005. (Refer to BDW 2 and 3)

WITNESSES WHO GAVE EVIDENCE ON OATH

The following witnesses were gave evidence at the public hearings of the Commission held at the Mount Hagen Council Chambers from 18 May to 22 May 2009.

431-

The hearing of the claim was recorded into proceedings COIFINANCE 42 dated 27th October 2008 at Waigani.

- Opening submissions on the claim by Pioneer Constructions Limited~(Refer to pages 1050 to 1052)

COIFINANCE 101 dated 18th May 2009 at Mount Hagen~(Refer to pages 3172 to 3224)

- Opening submission by the Commission~(Refer to pages 3172 to 3173)
- Evidence of Mr. Etick Kiso, Assistant Registrar~National Court, Mount Hagen~ Confirm that there were no Court Files on Pioneer neither registered nor archived in the Mount Hagen Registry. (Refer to pages 3173- to- 3179)
- Evidence of Mrs. Gertrude Arete, Director of Pioneer Constructions Ltd with the assistance of her lawyer Mr. Waifaf,(refer to pages 3215 to 3224)

o Produced documents

o Produced a statement on the history of the claim made by the Company

o Confirmed that her husband died in 2002

o She confirmed that all the payments were made to Pato Lawyers and Maladinas.

o She was requested by the Commission to follow up with Maladinas (now Young and Williams) on the disbursement of the payments made by Department of Finance based on her information that the company had not received any of the payments. (We take note that

43

2

a request was made by the Commission for the verification of the payments from the Law firms and no further information was produced for our records).

COMPLIANCE WITH PROCESS- REQUIREMENTS OF THE CLAIMS BY & AGAINST THE STATE ACT, 1996
- (CB& SAct, 1996)

No court proceedings instituted by the Company as evidenced by the lack of documents from the firm of lawyers (Maladinas).

No section 5 notice sighted from the documents produced by Mrs. Arete and from the payment vouchers submitted by the Department of Finance.

Steps taken (not taken) by the Solicitor General in defence of the claim There was a lack of initiative on the Solicitor General to carry out due diligence on the claim and the failure to file a section 5 notice The State also did not consult the Department of Works, wherein the information furnished to the Commission by the current Secretary of the Department of Works confirms that the company was winding up when it was awarded the contract (Certificate of Inexpediency).

Steps taken (not taken) by the Attorney General in defence of the claim The Attorney General was not consulted by the acting Solicitor General, when he executed the Deed of Release

Settlement

The settlement was done without consideration of the process under section 5 of the Act The acting Solicitor General also acted independent of the Department of Works when he settled the claim.

Pay-out – Department of Finance compliance or otherwise with Public Finances Management Act and related process.

433-

Despite the fact that the contract was awarded by t h e Department of Works to the Company, the claim was settled by the Department of Finance. This is highly irregular and illegal because the provisions in the Contract provide the venue for payments to be paid out of funds allocated for the project by the Department where progressive payments are approved by engineers from the Department of Works and progressive payments approved for each completed work.

Payments out of the Trust Fund Suspense Account.

There are two payments made out of the Trust Fund Suspense Account#2. Those payments are highly irregular as the managers of the project was the Department of Works and therefore if any payments were to be made, it was considered proper that the Department would pay of funds approved and allocated for that project Any payments made to the claimant by the Department of Finance are considered to be outside the terms and conditions of the contract.

PROCEEDINGS WS 1093 OF 2005 BETWEEN THE STATE -V- PIONEER CONSTRUCTIONS LIMITED & ZACCAHRY GELU

The documents produced by Blake Dawson Lawyers reveal that proceedings were instituted on behalf of the State to set aside the Deed of Settlement. On 17th May 2006, the firm obtained judgment against Pioneer and Gelu and the Deed of Release was set aside. The firm ascertained that at least K1 00, 000 was paid to Pioneer pursuant to the Deed of Release.

Department of Finance payment vouchers confirm that about K4, 109,988.70 have been paid to date. The break-up of payment includes one payment of K959,988.70 paid into Pato Lawyers Trust Account and the balance of K4,050,000.00 paid into Maladinas Lawyers Trust Account. There is a need for further inquiry into the payments made to Pato Lawyers Trust Account and Maladinas Trust Account for the reason that the widow of the claimant has

434-

informed the inquiry at Mount Hagen that they have not received any moneys, the subject of the deed of settlement.

The only aspect of the matter remaining is the enforcement of judgment based on the orders obtained by BDW on behalf of the State.

THE COMMISSIONS OBSERVATIONS ON THE FACTS AND EVIDENCE UNDER REVIEW

The engagement of Pioneer Constructions to undertake the sealing and road works of the Tombe Road is irregular, as the documents produced by the Department of Works indicate that the company was winding up. The contract was also awarded under very suspicious circumstances and the payment of K4million is questionable.

OUR FINDINGS

(Reference is also made to the Statement of Claim by the Lawyers for the State in WS 1093 of 2005 Between the State -v- Pioneer Constructions Ltd and Zacchary Gelu which pleads the matters which are consistent with our findings)

1. Pioneer was awarded the Contract in April 1999 to upgrade Tomba to Tambul Road. The Contract was awarded to Pioneer Constructions for the sum of K3,878,151.00 on 13th April 1999 by Mr. Henry Veratau, then Chairman of Central Supply and Tenders Board ^ The Central Supplies and Tenders Board failed to observe the procurement process under the Public Finances (Management) Act by calling for public tender for the Tomba to Tambul Road upgrade. y The manner in which the contract was awarded to Pioneer i.e. with a Certificate of Expediency is highly suspicious and irregular, because there were more reputable companies capable of providing such services to the State.

435-

2. On 24th August, 1999 Pioneer informed Works that they "will stop work" and wait for outstanding progress claims to be paid in full. (This was done on the basis of differences between the Company and the State over unpaid progress payments.

3. Work was suspended at the end of October 1999. On the 27th July 2000, Pioneer issued another letter of demand to the State.

4. Between 24th August 1999 and sometime in 2001, Pioneer's equipment, site offices and storerooms that were left on site were vandalized. (The company failed to secure all its equipment at the time it suspended its operations)

5. Maladina's lawyers (Mr. Sheppard) in a letter dated 24th October 2002 proposed its claim against the State, outlining the facts alluded to above as the basis of Pioneer's claim and sought a claim for K3, 287, 710.00 (including Idle Time Costs/Equipment Vandalized/Site Office and

Storerooms vandalized

6. Mr. Gelu, then acting Solicitor General having considered the letter, prepared the Deed of Release by actually adopting the content of the letter. On 26th November 2002, Mr. Gelu (on behalf of the State) executed the Deed of Release with Mr. Sheppard of Maladinas (on behalf of the Company)

7. Mr. Zacchary Gelu failed to carry out any due diligence on the basis of the proposal by Maladinas Lawyers to institute proceedings against the State on the purported claim that the State's delay in making progressive payments caused the Company to suspend its operation. The failure to undertake any due diligence is based on the fact that the Solicitor General and the Department of Works who were implementing the minor works contract on behalf of the State.

436-

- > The Arbitration Clause (Clause 11) in dealing with Disputes was never referred to by Pioneer.
- > No section 5 notice under the CBAS Act was given including a request to seek an extension of time to file proceedings in the National Court. This condition precedent was not satisfied by the Company.
- > There were no Court proceedings instituted by the Company.
- > The inclusion of Idle Time Costs/Equipment Vandalized/Site Office and Storerooms vandalized claim was the result of the Company's negligence in securing all the assets of the company when it suspended operations. The State was Only responsible for ensuring that the Company complied with the terms and conditions of the contract and to upgrade the road within 12 months.
- > The failure to conduct proper searches at the Registrar of Companies would have revealed that the company had wound up on or about 5th October 1999. It is noteworthy that Managing Director of the Company suspended operations in October 1999, which also coincides with the advertisement that the company was winding up.
- > He failed to give due regard to the provisions of section 61 of the PFMA where approval for amounts over K300,000.00 are approved by the Minister.
- > He failed to give due regard to the directives of the NEC as per NEC Decision NG 07/2002 at paragraph 10 on the direction that there be no more out of court settlements by any State body or authority including the Attorney General and the Solicitor General without the approval of the NEC acting on the advice from the CACC.
- > He also failed to give due regard to NEC Decision 150 of 2003 on conducting a review of all claims cleared by the AG for payment.

RECOMMENDATIONS

1* The Office of the Solicitor General to consult with Blake Dawson Lawyers and ensure that the National Court Orders dated 17th May. 2006 and 10th July 2006

437-

under WS 1093 of 2005 setting aside the Deed of Release be pursued andjy^ regard be given for the enforcement of the judgment without delay.

2. That Mr Zacchary Gelu not be considered for any future appointments to a public office.

3. That the awarding of minor road works contract by the Department of Works be made subject to the tendering procedures under the Public Finances (Management) Act, 1995

438-

(d) Orosambo Limited

Introduction

Terms of Reference (ToR)

This claim is subject to the ToR of this inquiry in that:-

1) payments made to date stands at K3, 432,168.90 (inclusive of cancelled cheques totaling to K850,000) (per PGAS Cash Book Report – Dept of Finance!) which is in excess of threshold for claims above K 300 . 000 which is the subject of this investigation;

2) payments to date were made between 2003 and 2004 thus fall within the period between 2000 and July 2006 which is the subject of this investigation;

3) manner and conduct of those involved within the various state offices and agencies authorizing and processing this claim appear as serving their own interests (and not the interest of the State) and that these parties may have compromised or subverted the standing protocols, processes, procedures, orders to accept this claim in a fraudulent and illegal manner. Hence, forms the basis of this inquiry's investigation.

Source(s) of where Evidence was collated

For the purpose of this inquiry, files were accessed from the Solicitor General's office (SG), the National Court Registry (NC), Dept of Finance (FD) and other locations/offices deemed necessary to inquire into this claim.

Legislations cited for this claim

439-

To present the findings of the Commission before a hearing on this matter investigated; relevant acts and legislations referred to include (but not limited to):-

1. Claims By and Against the State Act (1996)
2. Public Finance (Management) Act (1996)
3. Attorney General's Act
4. Wills Probate and Administration Act 1966
5. Public Curators Act
6. Companies Act 1997
7. Frauds and Limitations Act 1988

National Executive Council Decisions

1. Decision No.NG07/2002:- 2002 Supplementary Budget and Framework for the 2003 Budget
2. Decision No.150/2003:- Claims By and Against the State and Judgment Debts
3. Decision No.21/2006:- Out of court Settlements – By way of Deeds of Settlement/Release

Facts/Evidence

Background of the Claim

This is an alleged claim for breach of an agreement for construction of road works in Oro Province. The Oro Provincial Government (1st Defendant) and the State (2nd Defendant) were sued by Orosambo Enterprise Limited (P l a i n t i f f) for failing to honour the terms and conditions precedent in the said agreement where the 1st defendant was unable to pay the required monies to the Plaintiff for services rendered since 12 September 1989. The liability and damages to this claim were admitted and assessed by way of default judgement sanctioned in Court on the 17/5/1993 and enforced by a Court Order for the 1st Defendant to settle. The claim has been progressively settled in instalments so far amounting to a total of

440-

K3,432,168.90 90 (inclusive of cancelled cheques totaling to K850,000) being paid out of the Waigani Public Accounts.

Background of the Company – "Orosambo Enterprise limited" suing the Provincial Government and Independent State of PNG

(a) On 25 March 1985, the late Godfrey Orosambo and Jack Bonard Orosambo incorporated a company called Orosambo Enterprise limited ("Company"). The company was registered on 13 August 1985. Late Godfrey and Jack were held five (5) shares each and they were the only shareholders and directors in the company.

(b) The Commission confirms that a "Certificate of Incorporation" – No. C109922 was issued to the Plaintiff.

Agreement or Contract of Service

(a) On the 11th April 1987, by an agreement made in writing the 1st Defendant (Oro Provincial Government) agreed to engage and pay the Plaintiff (Orosambo Enterprise Limited) for maintenance on all the roads throughout the Oro Province and the Plaintiff agreed to provide that service.

(b) Under Clause 2 of the agreement the period of contract was to be for five years commencing 1st May 1987 and ending 31st April 1992.

(c) Under Clause 4 and 5 of the agreement the contract price was stipulated at K300.000 per annum payable at equal monthly instalments. The contract of service is for five (5) years and is valued at KI ,500,000 and that the Public Finance Management Act would apply.

441-

(d) Under Clause 13 of the agreement the contract may be terminated by either party at the expiration of three months after the date on which notice of such termination is served on the other party except that by mutual consent the said period may be reduced or waived.

3. Compliance with Section 5 Notice: Claims By and Against the State Act

(a) This piece of legislation although relevant because the State was initially joined in the proceedings as second Defendant however does not apply given the fact that the proceedings commenced in 1993 prior to the establishment of the Claims By and Against the State Act 1996.

(b) Further, proceedings on this claim was made against the Oro Provincial Government under Section 12 of the Organic Law on the Provincial Government and Section 2 of the Legal Proceedings By and Against the Provincial Government Act 1977.

4. Claim – Cause of Action

Facts of the Matter – Breach of said contract

(a) The Plaintiff is suing the Oro Provincial Government (1st Defendant) and the State (2nd Defendant) under Section 2 of the Claims By and Against the State Act for breach of contract by failing to make payments for services alleged to have been rendered by the Plaintiff under the said contract and claiming for damages suffered in the amount and time prescribed and pleaded in the Statement of Claim.

(b) The said contract was not terminated but specific provisions of the said contract in relation to clauses 4 and 5 were breached. The Oro Provincial

442-

Government did not have the funds available to settle the on-going claims made by the Plaintiff.

(c) Liability: Although the said contract was signed and sealed without the Ministerial approval of the Department responsible for Finance thus bringing the validity of the contract into question; liability had been incurred resulting from breach of the said contract by the 1st Defendant (Oro Provincial Government).

(d) Damages: damages should be claimed for loss suffered due to nonpayment of services rendered, if rendered at all; and in the period under the said contract but subject to assessment.

Court Proceedings – under WS # 53/1993

(a) On the 26/2/1993, Orosambo Enterprise Limited filed a Writ of Summons – WS # 53/1993 along with a Statement of Claim in the National Court through its lawyers, AMNOL Lawyers.

(b) The Statement of Claim contained in the WS # 53/1993 para (9) states that on the 9th October 1989 the Plaintiff was frustrated from continuing to provide the agreed services due to non-payment of any monies by the 1st Defendant.

(c) On the 16/3/1993, the 1st Defendant – Oro Provincial Government filed a Notice of Intention to Defend. The defense was filed within 30 days of the date of service of the WS to 1st Defendant.

(d) On the 6/4/93, the 2nd Defendant – the State filed a Defense stating that each every allegation in the Statement of Claim is denied because it was bad in law and disclosed no cause of action against the State. However, 1st Defendant – Oro Provincial Government may sue and be sued by virtue of

443-

Section 12 of the Organic Law on the Provincial Government and Section 2 of Legal Proceedings By and Against the Provincial Government Act 1977. Further 2nd Defendant states that the Statement of Claim alleges an agreement between Plaintiff and the 1st Defendant for payment of services provided by the Plaintiff at the request of the 1st Defendant.

On the same date (6/4/93), the 2nd Defendant – State filed a Notice of Motion to (1) remove itself as a party in the proceedings and (2) such further orders this Court deems fit.

On the 7/5/1993, the Plaintiff filed a Notice of Motion seeking orders from the Court to (1) strike out NOID of the 1st Defendant, (2) judgement in default of Defence be entered against the 1st Defendant (3) Damages be assessed (4) 1st Defendant pay Plaintiffs costs of the proceedings and (5) such further orders as this Court deems fit.

On the 17/5/1993, Judgement was obtained in the National Court that (1) Notice Of Intention to Defend be struck out (2) Defendant is liable to the Plaintiff for damages (3) orders that damages be assessed (4) Defendant to pay the Plaintiff interests and costs.

On the 13/8/1993, Plaintiff filed an Affidavit in Court stating a meeting that was held on the 18/6/1993 by parties representing the Plaintiff and the 1st Defendant to negotiate the quantum of damages plus ancillary matters following National Court's order for interlocutory judgement to be entered against the Defendant. The Plaintiff refers to a Notice Of Motion and Consent orders dated

9/8/1993 where parties have agreed but the Commission has so far not sighted any evidence in respect of notice of the meeting, signed minutes of the meeting, etc, confirming that the meeting took place and further parties in the meeting did agree to the assessed amount of K1,320,384. (Requested to the Administration of Oro

444-

Provincial Government to provide records on this matter - COI Letter dtd: 9 / 9 / 2008 signed by Nolan Kom - Technical Counsel)

Events at Solicitor General's Office

The office of the Solicitor General filed a motion in Court to withdraw its involvement on this matter as it claimed that it was not a party to the contract which was subsequently breached resulting in this claim.

Solicitor General's office only got involved to procure and process the assessed claim without any intention or appeal to provide advice to Oro Provincial Government to assess the liability and damages arising from the claim.

The Solicitor General's office merely received letters from the Claimant's lawyers and gave clearance notices instructing Dept of Finance to settle the claim.

The Solicitor General's office received and noted letters and correspondences from the various plaintiffs lawyers re: which lawyer's trust account should the payments be made to; how much is outstanding and to be paid; which parties on the Claimant's side were legitimate shareholders/directors and other matters related to who has and does not have interest over the ownership and administration of the claimant's company (Orosambo Enterprise Limited), etc.

Events at Attorney General's Office

(a) There were no participation from the Attorney General's office on this matter as observed from records inspected at the National Court Registry and Solicitor General's offices, respectively.

445-

7. Settlement

(a) From the proceedings under WS # 53/1993, the Settlement was done by way of a Judgement obtained in favour of Orosambo Enterprise Limited

(Plaintiff) in the National Court on the 19/5/1993 after (1st Defendant) Oro Provincial Government failed to file a Defense in the proceedings under WS 53/1993.

(b) In a letter dated 19/2/2003, The then Oro Provincial Administrator – Raphael Yibmaramba wrote to Secretary for Finance – Thaddeus Kambanei to assist the Provincial Government to settle the claim on its behalf raising concern about the garnishee notice served on Oro Provincial Government's bank account and the effect this will have on its operations and the interest that continues to accrue at 8% p.a on the judgement amount without being settled.

(c) In a letter dated 20/2/2003, NINAI Lawyers (Bonny Ninai) representing the Claimant, Orosambo Enterprise Limited wrote to Zacchary Gelu (Solicitor General) officially advising him of the judgement obtained in favour of Orosambo Enterprise Limited against Oro Provincial Government to settle the claim. The letter further asked the Solicitor General to give its legal clearance to Finance Department to settle the claim.

(d) In a letter dated 26/2/2003, The Solicitor General – Zacchary Gelu writes to Department of Finance Secretary — Thaddeus Kambanei giving instructions to settle the claim for the sum of K1,968,751.20. The amount is inclusive of Judgement debt plus interest accrued over 10 years at a rate of 8% p.a. and legal costs.

446-

8, Pay-Outs by Department of Finance

ban?ofPiyateitts?wait?to?Claimant???Oroj«ttb«?Enteirrise?Limited

History of Payments

? A total of 16 instalment payments were made amounting to K3,432,168.90 (inclusive of 2 lots of payments made and later alleged as cancelled worth K850,000) between years 2003 and 2006.

? From these set of payments made:-

^ 10 lots of payments were made in the name of Orosambo Enterprise Limited amounting to K1,520,384 (including cancelled cheques totaling K850,000)

p- 2 sets of payments made out under the name of AMNOL Lawyers for K850,000
y 4 instalment payments paid in the name of SAULEP Lawyers for K1,061,784.90

447-

? 9/16 payments had some evidence provided which confirmed payments were made. From these 9/16 payments, the COI noted that documentation was not complete in each payment voucher details.

Pay-out by Oro Provincial Government

Per Correspondence dated: 19/2/2003 from the then Oro Provincial Administrator – Mr. Raphael Yibmaramba to Mr. Thaddeus Kambanei (Secretary DoF) – para 3: The Provincial Government paid K400,000 in partial satisfaction of the debt.

This payment is not showing on the WPA Cashbook records maintained by DoF. Issue:

Double clipping!

Action; Write to Oro Provincial Government to establish how much monies were paid to Orosambo Enterprise Limited and their lawyers out of the Provincial funds.

Other Proceedings of connected or of relevance

Other proceedings were filed under SCR # 45/1993:-

(a) In about October 1993, PATO Lawyers filed SCR 45/1993 on behalf of Oro Provincial Government, seeking the Supreme Court's Review of the Judgement obtained in WS # 53/1993, in particular the amount of damages that was allegedly agreed to between Oro Provincial Government and Orosambo Enterprise Limited,

448-

(b) On the 8/10/1993, an interim restraining order was obtained to stay the enforcement of the

Judgement that had been obtained by Orosambo Enterprise Limited with the alleged consent of Oro Provincial Government

(c) On the 11/1/1994, the Supreme Court Review was discontinued and the restraining orders lapsed.

Other proceedings were filed under WS # 420/1993:-

(a) On the 20/10/1993, another WS # 420/1993 this time filed by PATO Lawyers acting for Oro Provincial Government seeking orders and declarations that consent orders made in WS # 53/1993 were invalid. PATO Lawyers contested that lawyers representing Orosambo Enterprise Limited under proceedings WS # 53/1993 made misrepresenting remarks and thereby induced Oro Provincial Government to consent to the judgement and orders made in relation to the claim. Further, PATO lawyers argued that:-

i) the claim should have been deemed illegal and void as it did not obtain the approval of the Minister for Finance as required under Section 60 clause 1 of the Public Finance (Management) Act 1986, and

ii) the damages (ie, the judgement debt) claimed were fraudulently calculated because the contractor did not perform the balance of the contract and that the contractor never discounted for overheads not incurred and taxes.

(b) After fresh proceedings were filed under WS # 420/1993, Orosambo Enterprise Limited filed a Notice of Motion seeking orders that WS # 420/1993 be dismissed on the basis that it was an abuse of the Court

449-

process – should have been pleaded in defense to WS # 53/1993 which has been already dealt with.

(c) Accordingly, the Chief Justice heard the Notice of Motion and made a Ruling on the 22nd July 1999 in favour of Orosambo Enterprise Limited to dismiss proceedings under WS # 420/1993.

(d) There was no appeal filed against the ruling/ order. Minutes of the orders were taken out on 23rd May 2000.

Other proceedings were filed under OS # 1347/2001:-

(a) Jack Orosambo, the surviving shareholder in Orosambo Enterprise Limited filed court proceedings under OS # 1347/2001 seeking declarations and orders to restrain other Orosambo parties from holding out and acting in their capacity as shareholders and directors of Orosambo Enterprise Limited.

(b) The matter as of the date of 12th August 2004 was still proceeding in court.

Other proceedings were filed under OS # 357/2004:-

(a) On the 12th August 2004, Decision was made by GABI AJ, for the Court to hear two notices of motions filed by opposing parties under the proceedings OS#357/2004. Basically, Orosambo Enterprise Limited and Jack Bonard Orosambo were seeking declaration and orders that:-

? the estate of Late Godfrey Orosambo's be transferred to the Public Curator's office under Wills Probate and Administration Act 1996 and the Public Curators Act;

-450

? the changes in the company's shareholding and directorship is fraudulent and illegal and in contrast to the relevant provisions of the Companies Act 1997;

? notice of change of lawyers filed by AMNOL Lawyers be struck out

? company forms completed and filed to effect changes in the company's shareholders and directors be of no effect and struck out

? order AMNOL Lawyers to refund monies of K850,000 to be repaid to the Court's trust a/c,

? restrain Department of Finance to make further payments to other parties

? all remaining funds due and payable to be paid into the National Court trust a/c

? AMNOL render to the courts a bill of taxable form for services rendered to the Plaintiff under WS # 53/1993

? AMNOL Lawyers to provide statement of funds held in trust

? further applied for restraining orders to restrain other persons claiming to be the lawful persons representing the interest of Orosambo Enterprise Limited.

? Leave to file a statement of claim for damages against the Defendants

? Cost of these proceedings

On the other hand, the Other parties including AMNOL Lawyers argued that:-

" The whole proceedings under OS # 357/2004 be dismissed as the Plaintiffs do not have any "locus-stand,V to institute and prosecute in these proceedings, the actions is misconceived and that it is an abuse of the process.

? Respondent pay the Applicants cost of these proceedings

(b) Decision was reached by the GABI AJ, where the Court granted orders to declarations made by Plaintiff (Jack Orosambo) and its lawyers, SAULEP

451-

Lawyers. The Defendant's (ie, Other Orosambo parties and AMNOL Lawyers) cross-motion was dismissed.

Recommended Findings

? Breach of relevant Sections of the Public Finances Management Act

The Commission noted that this agreement (contract of service) valued at K1,500,000 was never processed through the Central Supplies Tender Board or the Provincial Supply Tender Board as might be the procedure with tendering and awarding of contracts under Part VII – State Tenders and Contractors of the Public Finances (Management) Act 1986. It appears, that this contract was instead initiated directly by the then Oro Provincial Government and its administration with the contractor.

y This contract does not appear to have been awarded through the Central ' Supply Tenders Board nor the Provincial Supply Tender Board.

In this instance, if the contract was initiated directly by the Provincial Government and its Administration of Oro Province at that time, then was this appropriate by the provisions of the relevant laws/acts such as the Public Finance Management Act 1986 and whether the financial delegated authorities and limits approved at that time were exercised correctly and not abused?

In the view of the Commission, unless proven otherwise, the said contract should have been declared as VOID as the Oro Provincial Government, and its administration did not and still do not have the powers under the Public Finances (Management) Act 1986 to approve and award contracts without following the due process and procedures in consultation with the Minister for Finance and the relevant Supply and Tender Board, established in the same Act.

452-

" Breach of Section 47 A of the Public Finances Management Act

Further, under Section 47 A: Offences (42) of the Public Finances (Management) Act 1986 , " Departmental Head\ Provincial Administrators, head of a public body or other officers who

authorise or permits a breach of procedures relating to the – Calling^ consideration and awarding of tenders; or The execution of a state contract for the purposes of the Public Services (Management) Act 1986 or any contract entered into under that Act, are guilty of serious disciplinary offences

It appears that then Oro Provincial Administrator (Mr Arthur Jawodimbari), Premier for Oro Provincial Government (Mr Dennis Kageni) or other officers including then Provincial Legal officer (Mr Tera Dawai) were not disciplined for being guilty of serious disciplinary offences in relation to breach of procedures.

" Involvement of AMNOL Lawyers

It appears that clause 13 concerning "Termination" of the contract only described that either parties may terminate the contract after 3 months of giving of notice to either party. There are no conditions binding on either parties stated that will arise in the event the contract is terminated, no description of what consequences and liabilities binding on parties effecting the termination of the contract and loss suffered for termination of the said contract.

The Commission is merely highlighting a fact that AMNOL Lawyers had full knowledge of the contract because they had constructed the details of the said contract on behalf of the State and then used their knowledge of this very contract they put together to sue the State.

453-

The question this Commission then asks is, have AMNOL Lawyers conspired with Orosambo Enterprise Limited and certain elements of the Oro Provincial Government to enter into this said contract and then later sue the State for breach of the contract?

Further, was this contract initiated at the time when Oro Provincial Government were short of funds and with this knowledge proceeded to award the said contract with a view to force the State or its Agent to breach the contract for non-payment and suffer a claim against the State?

No defence filed by Oro Provincial Government

The Commission noted in an Affidavit dated 7/5/1993 { NCR Doc # 10) and filed by Paul Korerua of AMNOL Lawyers in the National Court requesting for a summary judgement to be entered into under Order 12 Rule 38 against Oro Provincial Government for defaulting in filing a Defence as required under Order 8 Rule 4.

The question then is asked: Why did Oro Provincial Government file a NOID but did not follow through to file a Defence within the allowable 90 days period and further did not seek any extension to file a Defence.

Further, this Commission noted that a Defence was never filed at all.

Assessment of damages claimed in the Judgement Amount

Damages should be claimed for loss suffered (if any) due to non-payment of invoices for rendering of services in the period under the said contract subject to assessment by the Court.

454-

However, other considerations to take into account relate to whether or not the claims by the Plaintiff for services alleged to have been rendered were actually performed or not. In other words, did the Oro Provincial Government satisfy itself that work was actually done as claimed in the unpaid invoices received from the Plaintiff?

Did the Oro Provincial Government Legal Officer or Lawyers from the Solicitor General's office see the opportunity to initiate a counter-claim if they had satisfied themselves that work may not have been done as claimed in the Plaintiffs invoices to the 1st Defendant?

The Commission noted that "Judgement" dated 19 / 5 / 1993 { NCR - Doc # 11 }, order (3) stipulates that, "the damages be assessed".

The assessment of quantum according to an Affidavit filed and dated 13 / 8 / 1993 (NCR - Doc # 13) in the National Court of one Paul Korera of AMNOL Lawyers as stated in his own words that,

(4) meeting held to negotiate the quantum of damages plus ancillary matters following Judgement entered against Defendant.

(5) terms agreed to by parties are contained in the Notice of Motion and Consent Orders dated 9/8/1993 and filed herein which have been signed by the parties.

The Notice of Motion referred to in the Affidavit was filed by AMNOL Lawyers in the National Court dated 13/8/1993 and not on the 9/8/1993.

That Notice of Motion assess damages at K1,320,384 as judgement debt apart from costs and compound interest rates.

455-

The Order referred to in the Affidavit was filed entered on the 18/8/1993. The Order upholds the details of the NOM above in that damages be assessed at K1,320,384 as the judgement debt amount.

It appears in the view of this Commission that there is no evidence (ie} correspondences, signed minutes of the meeting, signatory of the Defendant approving of the assessment etc) was sighted on the files of the NCR and the SG reviewed to confirm that the Defendant did attend such a meeting and that in that meeting such quantum of assessment (ie, K1,320,384) was agreed to pay for as damages.

It appears that the quantum of value assessed for damages as judgement debt of K1,320,384 and costs of K10,000 were inserted in the NOM and Order by AMNOL Lawyers without any regard to reflect discount for overheads not incurred and taxation.

According to WS # 420/1993, filed by PATO Lawyers acting for the Defendant (Oro Provincial Government) under WS # 53/1993;

para (11),

"The said contract was entered into by a common fundamental mistake of the parties in that both the Plaintiff and the Defendant erroneously believed that the damages sought in the Notice of Motion and ordered were damages actually suffered by the Defendant (Orosambo Enterprise Limited) whereas in truth and fact the damages agreed to had not been suffered by the Defendant (Orosambo Enterprise Limited)".

para (18)

"Further or in the alternative the Plaintiff says that the Defendant made the representations fraudulently either knowing that the same were false, or recklessly and not caring whether they were true or false, in that:

456-

(a) the Defendant must have known that it had not incurred overheads for the balance of the contract period; but in spite of this it made a claim for damages which did not reflect any discount for overheads not incurred".

Recovery of Monies from AMNOL Lawyers

A Notice of Motion (NCR Doc # 30) dated 9/7/2004 was filed in the National Court by Saulep Lawyers among other matters seeking orders from the Court to instruct AMNOL Lawyer to repay to the Court monies received from DoF on behalf of the Plaintiff. These monies paid to AMNOL Lawyers amount to K850,000 in 2 lots of cheques. (Verified to cashbook above in section 8) . These monies were part payment of the settlement of the judgement debt ordered by the Courts to pay the Plaintiff. The monies were not paid to the Plaintiff.

457-

D. Employment with the State

The Commission examined a number of claims for loss of entitlements arising from alleged breach of contract and loss of office. Of those the seven (7) matters listed below were fully investigated:

1. Tau Liu (Provincial Administrator Southern Highlands);
2. Tau Liu (Provincial Administrator Western Province);
3. Isaac Lupari (Department head – Finance);
4. Isaac Lupari (Department head – Defence);
5. Isaac Lupari (Department head – DPM);
6. Isaac Lupari (Department head – Transport & Civil Aviation); and
7. Isidore Kaseng & 24 others (Members of Fly River Provincial Government).

Out of the seven (7) listed matters six (6) were as Departmental head or Provincial Administrator employed under standard government contracts specified in section 28 of the Public Service Management Act (PSMA). The Public Service Commission advised the Commission that "Departmental heads are appointed, suspended and terminated under section 193(1A), 193(1B) and 193(1C) of the Constitution and the procedures are provided for under section 31 A, 31B, 31C, and 31D of the PSMA." In all six (6) matters, payments were made in excess of what was duly

payable.

The claimants in the matter of Isidore Kaseng & 24 others were members of the Fly River Provincial Government at the time when Provincial Governments were abolished by law. Their claims were for the loss of entitlements which they alleged were due and owing for the period of suspension of the Fly River Provincial Government ('FRPG5). Further, they claimed loss of entitlements for the unexpired term of office following abolition of the FRPG. Both claims were heard and refused by the Supreme Court.

458-

The Public Services Commission advised the Commission that there are six (6) main ways in which employment contracts have been breached by Departmental heads terminating senior contract officers and the NEC terminating Departmental heads and provincial Administrators employment contracts:

- Laying of disciplinary charges under section 52 of the PSMA instead of clause 25 of the contract.
» Prematurely terminating the contract
- Departmental heads dismissing a contract officer without seeking and obtaining the approval of the Secretary of DPM as required under standard contract and Public Service General Order 9.24.
- Failure of a Departmental head to conduct a contract renewal review before expiry of the contract as required under General Order 9.
- Failure by Departmental head to determine disciplinary charges within 21 days of the date of reply received by officer — General Order 15.35
- Dismissing contract officer in breach of the principles of natural justice.

According to the PSC, the State has lost a substantial amount of money through unlawful/improper breaches of employment contracts. It lists a number of circumstances in which breach of contracts have occurred. Chief among them are:

- y Lack of or insufficient capacity of Departmental heads and Provincial Administrators to competently handle administrative and personnel matters.
- y Abuse of power. Done in order to replace officers with associates and for personal vendettas.
- y No consultation made with PSC for its mandatory recommendation under section 193 (1Q, (ID) and Sections 31C & D, and section 60 C(c) of PSMA before suspension and or termination of contract is effected.
- y Abuse of process detailed under section 1(3) of the Public Service (Management) Criteria and Procedures for Suspension and Revocation of Appointment of

459-

Departmental Heads Regulation 2003. and Clause 17 of the Standard Terms and Conditions of Employment.

The Commission finds there is immediate need for co-ordination between Public Services Commission, Department of Personnel Management, Solicitor General, State Solicitor, Department of Finance & Departmental Heads (as to instructions, payments etc) to ensure:

- > compliance with Public Services Management Act 1995 & General Orders in administering employment contracts – lack of notice, failure to specify charges, failure to expedite hearings and determinations
- > Gross failure by Solicitor General to seek instructions from Department of Personnel Management ('DPM') and relevant departmental head
- > Gross failure by Solicitor General to seek instructions from DPM and relevant departmental head prior to signing deed of release
- y* Gross failure to apply terms of contract resulting in multiple or excessive payments i.e., unjust enrichment, particularly where the tenure of contracts overlap.

In most matters investigated, the Commission found that there was extensive delay in the finalisation of applications for judicial review of decisions concerning suspension, termination and related employment matters. As a result, the State has been unnecessarily hampered in the effective administration and delivery of services. Apart from that, the affected officers' morale, commitment and performance have deteriorated to unacceptable levels despite being remunerated while on suspension.

Immediate recommendations

- > Claims By and Against Act be amended to provide that on application by the Attorney General, an application for judicial review in respect of employment related matters shall be heard and determined within one (1) month after grant of leave.

460–

- > Public Services (Management) Act 1995, related legislation, instruments and contracts of employment be amended to the following effect:
 - o a serious disciplinary offence is committed where:
 - iii. State line agency named as defendant fails to provide full and proper instructions to Solicitor General
 - iv. State suffers loss as a result of negligence or failure to exercise due care in performance of duties
 - v. Non-compliance with NEC Direction
 - o On a finding of guilt shall –
 - iii. be a ground for termination
 - iv. render the person ineligible for appointment to any public office within next 10 years

461-

(a) Tau Liu - No. 1

A. Does the matter fall within the Terms of Reference?

1. The matter falls within the Terms of Reference of the Inquiry. The Contract of Employment between Tau Liu (P l a i n t i f f) and the National Executive Council (NEC) had been signed on 26 October 1996. The Plaintiff filed the Court proceedings in 1999 and the matter was eventually settled out-of- court by a Deed of Release dated 28 February 2003, pursuant to which a final payment was made in or about 2005.

2. This matter may be covered under the following Terms of Reference: 5, 8, 9 and 12

B. Source of Information and Documentation

3. This brief comprises of facts and findings from the files and records of:

- The Attorney-General's Office
- The Solicitor-General's Office
- The Department of Finance

C. Background: Relevant Facts

The Matter

4. On 24 May 1999, the Plaintiff filed a claim against the State through the NEC for breach of his contract of employment (Contract) alleging that he had been unlawfully suspended and in effect, prematurely terminated from his position as the Administrator of the Southern Highlands Province.

462-

5. The Plaintiff claimed a total of K204,586.55 originally and later amended that to a sum of K227,147.79 being the balance of his contract of employment, and in addition sought interest and costs.

6. On 28 February 2003, Zacchary Gelu, the Acting the Solicitor-General at the time, signed a Deed of Release with the Claimant, settling the claim at K305,410.61. This amount includes K70,170.07, as interest @ 8% for a period of three (3) years.

7. Payments by the Department of Finance.

From the record of payments we have from the Finance Department, it is difficult to work out what payments were for the claim in this matter and what payments were for the claim WS 654/00, as the descriptions are not detailed enough. However as they are, they are records of payments to the Claimant. The record is as follows:

Date

?
?
?
?
?
?
?
?
?

Cheque no

Amount- K

06/02/04

962838

460

3100

0

0

Pmt O/s contract ent

CQ

768421

300,000.00

28/04/04

977289

221

1501

1101

111

Pmt for O/standing C

CQ

776577

111,054.60

14/05/04

980289

207

4201

4123

135

Being pmt for o f s co

CQ

778433

100,000.00

14/05/04

980289

207

4201

4123

135

Being pmt for o/s co

CQ

778433

168,305.89

30/06/04

988448

207

4201

4123

135

Pmt o/s DOR WS#654

CQ

782652

200,000.00

09/12/04

11100

207

4201

2107

135

P/pmt for O/S contra

CQ
797364
83,716.50
03/06/05
1035007
207
4201
2107
135
Final payment-Deed o
CQ
812534
90,000.00
?
?
?
?
?
?
?
?
?
TOTAL
1,053,076.99

In addition to the payments set out above, Claimant has also received from the State an Ex gratia payment of K30,000.00 in this matter. This was paid on 30/03/00 by cheque # 614181. The payment was made as compensation payment, on the direction by the NEC in its meeting No. 06/2000, after it

463-

rescinded its earlier decision, Decision No. 112/99, to appoint the Claimant as the Administrator of Western Province.

The Claimant has given evidence that the payment of K 111, 054.60 was not part of his claims referred to herein but rather his long service entitlements to the State whilst he was the Commissioner to the Public Service Commission. The Commission has confirmed this.

Further the Claimant has also given evidence that he has not received the sum of K168, 305.89, which is shown on the Finance records. Numerous attempts to get the Department to verify this has not been successful.

In light of that, it can be seen that the Claimant has only received a total of K773, 716.50 and not what is shown in the records given by the Department

Chronology

8. On 26 October 1996, the Plaintiff was appointed Administrator of Southern Highlands Province.

He signed a Contract of Employment titled The Contract of Employment for the Administrator of the Southern Highlands Provincial Government (Contract), with the NEC, for a term of four (4) years. The Contract comprised:

- (a) the Employment Agreement and
- (b) the Standard Terms and Conditions for the Employment of Provincial Administrators in the National Public Service (1995) { Terms & Conditions)

9. The Plaintiff served in that position until he was suspended by the Governor, Anderson Agiru on 7 August 1997. It appears from the pleadings that the Plaintiff had initially been suspended on full pay. However, on 6 January

464-

1998, the State had proceeded to remove him from the payroll, effectively suspending him without pay. The Plaintiff was never terminated.

10. By a letter dated 3 May 1999, the Plaintiff, through his lawyers Paul Paraka Lawyers, gave notice of his intention to bring a claim against the State, in accordance with section 5 of the Claims Bj<& Against the State Act 1996. The State received the purported notice on 5 May 1999, and acknowledged receipt of the said notice by a letter dated 10 June 1999, which also enclosed the State's Notice of Intention to Defend. The State did not take issue with the timing or adequacy of the notice.

11. Thereafter, on 24 May 1999, the Plaintiff filed proceedings WS No. 501 of 1999. In his Statement of Claim, he alleged that:

- (i) he had been suspended on 7 August 1997 and
- (ii) removed from the payroll on 6 January 1998 and
- (iii) his suspension was arbitrary and unjustified and amounted to a breach of various clauses in the Contract, including, the NEC's failure to charge him and accord him a fair hearing.

12. Further, in his prayer for relief the Plaintiff claimed damages in the amount of K227,147.79, allegedly, being the value of the balance of the Contract, which had one (1) year nine (9) months and twenty-one (21) days remaining at the time of his suspension. On 25 May 1999, the Plaintiff served the Writ of Summons on the State through the Solicitor-General's office.

13. On 9 June 1999, the State (through the Solicitor-General) filed a Notice of Intention to Defend and following that, a Defence on 4 August 1999.

465-

List of Documents

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DATE
DOCUMENT
COMMENTS ~~

1

26 October 1995

Contract of Employment for the Administrator of Southern Highlands Provincial Government – Mr. Tau Liu

The Contract of Employment comprises of: The Employment Agreement and The 1995 Terms & Conditions.

2

3 May 1999

Letter from Paul Paraka Lawyers to the Solicitor- General in compliance with the CBAS Act. The letter does not specify any dates

3

24 May 1999

Writ of Summons filed by Paul Paraka Lawyers

Claiming the sum of K204,586.55 – essentially the balance of his Contract which still had 1 year 9 months and 21 days left. The Writ on the Solicitor-General's file is stamped as received on 25 May 1999.

4

9 June 1999

Notice of Intention to Defend filed by the Acting Solicitor- General on behalf of the State.

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5

10 June 1999

Letter from the Acting Solicitor- General to the Secretary, Department of Advising of the Plaintiffs claim and seeking instructions as to whether the Plaintiff had definitely been

466-

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Personnel Management suspended and/or terminated.

6

10 June 1999

Letter from the Acting Solicitor-General to Paul Paraka Lawyers

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Acknowledging receipt of s. 5 notice

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and enclosing by way of service, the

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State's Notice of Intention to

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Defend.

7

4 August 1999

Defence filed by the Solicitor-General's office.

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Basically, the Defence adequately condescends to the allegations in the Statement of Claim and states relevantly that:

The Plaintiff had been suspended with full pay, for a disciplinary offence (not specified) which required an investigation to be conducted, and he had been given prior notice of his impending suspension,

A The Plaintiff had absconded from work and therefore was removed from the payroll terms of suspension were not clearly set out,

That there had not been any decision as to the Plaintiffs termination and

4* The National Court had refused the Plaintiffs

application for declarations that he had been unlawfully terminated, in another

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467-

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proceeding – OS NO. 503 of 1998 –for the reason that DPM had yet to receive the Plaintiffs response to the charge and make a decision as to whether he should be terminated.

In effect, the State's position in respect of the Plaintiffs claim was that the proceedings were premature and/or misconceived.

8

30 July 1999

Letter from the Attorney- General to the Acting Secretary DPM

Referring to a letter written by the Plaintiff to the Acting Secretary DPM in respect of his indefinite suspension from office. The letter, also copied to the Plaintiff, contains the Attorney-General's (Michael Gene) opinion and a recommendation for a way forward in the matter.

9

24 August 1999

Letter from the Attorney- General to Philemon Embel, Minister for Public Service.

The letter (also copied to the Plaintiff) provides a further opinion on the matter of the Plaintiffs suspension — this time, with the benefit of further material — and expresses a view that the Plaintiff be reinstated with back pay and the disciplinary process be re-enacted.

468-

10

4 October 1999

Notice of Amendments (to the Writ) filed by Paul Lawyers.

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11

4 October 1999

Writ of Summons (as amended pursuant to Order 8 rule 51 of the National Court Rules) filed by

Paul Paraka Lawyers

The amendments seek to include various other heads of claims, i.e. for CPI considerations, security allowance and Domestic Market Allowance, and an amendment to ' the total sum claimed from K204,586.55 to K227,147.79.

12

7 October 1999

Letter from the Plaintiff to Paul Lawyers

Enclosing a copy of the Attorney- General's further advice to DPM and emphasizing his view that the State had indeed conceded fault /liability in dealing with the issue of his suspension.

13

18 October 1999

Letter from Paul Paraka Lawyers to the Acting Solicitor-General

The Plaintiffs lawyers refer to the opinion of the Attorney-General and seek the State's view as to an out-of-court settlement in light of the Attorney- General's opinion.

14

6 December 1999

Letter from Paul Paraka Lawyers to the Acting Solicitor-General

Following up on the initial proposal for out-of-court settlement.

15

24 January 2000 Letter from Paul Paraka Lawyers to the Acting

Further urging the State to settle the matter out-of-court.

469-

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Solicitor-General

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16

7 February 2000

Letter from the Acting Solicitor- General to Paul Paraka Lawyers

The letter refers to the Attorney^ General's opinion and a subsequent letter from the Plaintiffs lawyers, and insists that the State will continue to defend the Plaintiffs claim.

17

23 March 2000

Letter from Paul Paraka Lawyers to the Acting Solicitor-General

Enclosing Notice to Set Down for Trial for endorsement by the I Solicitor-General

18

4 April 2000

Letter from the Acting Solicitor- General to Paul Paraka Lawyers

Referring to the Notice to Set Down for Trial and advising of instructions being sought from DPM with a view to settling the matter.

19

10 August 2000

Notice of Motion filed by Paul Paraka Lawyers

Seeking orders to list the matter on the Call-over list for allocation of a trial date.

20

10 August 2000

Affidavit of Andrew Kongri filed by Paul Paraka Lawyers

The Affidavit deposes to the fact that the matter had been ready for trial for a while, awaiting the Solicitor-General's endorsement of the Notice to Set Down for Trial, being the reason for the application.

21

26 September

Letter from Paul Paraka

Setting out the Plaintiffs quantum

470-

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2002

Lawyers to Zacchary Gelu — Solicitor-General

submission and proposing settlement at K313,194.84.

22

28 February 2003

Deed of Release prepared by Paul Paraka Lawyers

The Deed was for the full amount claimed by the Plaintiff in his Writ and signed by Zacchary Gelu as the Solicitor-General.

23

4 September 2003

Letter from the Plaintiff to the Attorney-General

Requesting the Attorney-General to authorize payment of the Plaintiffs 2 claims — this and the other claim in WS NO. 654 of 2000.

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Finance Department Cash Book Record and Payment Advice/Vouchers

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D. Findings

Claim – Liability and Quantum

14. In its defence the State raised the argument that a notice of suspension had been sent to the Plaintiffs last known address at care of the Enga Provincial Administration Office in Wabag, and that the Defendant could not make a decision to terminate the Plaintiff as he was yet to respond to the disciplinary charge, as required under the Contract.

15. Notwithstanding that the State had filed a Defence within the required time period, raising valid points for contention that effectively warranted a full trial, there appears to have been a sudden shift of attitude by the state lawyers from actively defending the claim to considering an out-of-court settlement.

471-

(a) Arguable cause of action in law

The Contract

15.1. The Contract was made pursuant to the Public Services (Management) Act 1995 (Act,) and comprised of-

- The Employment Agreement dated 26 October 1995 (Agreement) and
- Standard Terms and Conditions for the Employment of Provincial Administrators in the National Public Service (1995) (Terms & Conditions)

15.2 In both the Agreement and the Terms & Conditions, it was provided that the General Orders issued under the Act would prevail where the Contract, comprising both documents, is silent and in the event of a conflict of interpretation as between the Contract and the General Orders, the Contract would prevail.

Termination

15.3 The Terms and Conditions provides for termination as follows:

- (a) By the Administrator giving to the Governor at least three (3) calendar months' notice, or
- (b) By the NEC terminating the Administrator's appointment in accordance with Clause 17.1 (a), (b), (c), (e) or (f), in which event the Administrator will be entitled to payment in respect of three (3) calendar

. 472

months' notice, together with other emoluments calculated up to the expiration of the notice period, including ex gratia payments under section 12 where applicable, or

- (c) By the NEC terminating the Administrator's appointment under Clause 17.1(d) – for Cause as determined by the Terms & Conditions and (g) –for any breach of the Contract. In the event where the Contract is terminated by the NEC for cause or for breach, the Administrator will not be entitled to any payment in lieu of notice under the Contract.

Suspension and Termination f o r Cause A. Suspension

15.4 The Contract Clause 27 sets out the procedure for disciplinary action against the Administrator in the event of serious disciplinary matters set out under Clause 18.1 (a) to (j) inclusive. Clause 27.1(a) provides for the suspension of the Administrator by the Governor, if he is alleged to have committed a serious offence under clause 18. The Administrator is then required to reply to the charge(s) within seven (7) days of the charges being laid. Thereafter, the Governor is required to consult with the DPM Secretary before making a recommendation for termination to NEC. The NEC decides whether the Administrator's appointment should be terminated, and the decision of the NEC is final. In reaching its decision, the NEC must be guided by advice from the State Solicitor and the Secretary DPM, as well as the Governor's report.

B. Termination

15.5 Clause 12 of the Terms & Conditions provides for termination for reasons other than cause, and Clause 18 provides for termination for cause.

15.6 Clause 18.2 prescribes termination without notice where the Administrator is found guilty of any of the charges set out under Clause 18. According to the documentation on the Solicitor-General's file, the Plaintiff was suspended for cause, and therefore, by operation of Clause 17.2(c), was not entitled to any payment in lieu of notice under the Contract.

16. Be that as it may, it must be noted at this juncture that the Plaintiff had only been suspended and his termination yet to be determined, when he filed these proceedings. The National Court had previously refused to entertain a similar proceeding he had filed in 1998 seeking declarations that he had been unlawfully terminated, on the ground that the Department of Personnel Management had yet to receive his reply to the disciplinary charge that he had been issued.

Wrong form of Action

17. It appears therefore, that on the face of it the Plaintiff had instituted the wrong form of action. It is considered that the appropriate cause of action should have been a judicial review proceeding seeking a writ for mandamus compelling the State to properly deal with his offence in accordance with set disciplinary procedure, and/or a final determination of his employment by termination.

Assessment of Damages – Quantum

18. In view of the above, the issue of damages should not have been considered given that the State had filed a Defence denying liability outright. The Plaintiff would not have been entitled to any relief under the Contract, as the Terms and Conditions Clause... prohibits payment of money in lieu of notice where the employee is terminated for cause.

19. Under the common law and the Employment Act, even where a person is terminated in breach of their contract of employment the most they may be entitled to would be money in lieu of notice. Further, it has been the Court's approach of late that, a claim for the balance of a contract of employment or in effect, penalty clauses are unenforceable.

20. Furthermore, in this case, Clause 17.2(c) of the Terms & Conditions specifically precludes payment in lieu of notice or other emoluments under the Contract, in the event that the employee is terminated for cause. It is therefore considered that the Plaintiffs claim for the balance of the

Contract and the State's entertainment of such a claim in the circumstances was in direct contravention of the Terms & Conditions of the Contract.

Attorney-General & Solicitor-General

21. Under the cover of a letter dated 30 July 1999, the Attorney-General had provided advice to the Acting Secretary, Department of Personnel Management, in respect of the Plaintiffs claim, essentially recommending that the State lift the Plaintiffs suspension and reinstate him with full back pay to avoid payment of a large sum of money by way of compensation, or, the disciplinary process under Clause 27 of the Terms & Conditions be fully complied with and the Plaintiff properly terminated.

475-

22. Thereafter, in a letter dated 24 August 1999, the Attorney-General provided advice to Philemon Embel, Minister for Public Service expressing the following view:

476-

I take note of your acting Secretary's brief to you dated 4th August 1999 in which he presents the Department of Personnel Management's Position on the matter. In my view your Department's view is that the process of dealing with Mr. Liu be continued from where it was left. On the status of the case, I am sure that my Department will do its utmost to defend the interest of the State. However, no case can be finalised without incurring any form of costs to the parties. In this case the state will be made to pay damages and costs because the facts on the substantial issue tend to be in Mr. Liu's favour.

It is apparent .that Mr. Uu was not and has not been dealt with properly and the fact that he has been in suspension for this long In my view is unreasonable. The State may not win the pending case despite our efforts to defend only on one ground that Mr. Uu failed to respond to the charges. There are other substantive issues that would arise. Issues such as the long time it has taken the State to deal with him, failing to serve process effectively, failing to resolve the issue in compliance with the terms of the Employment Contract and the length of time that has taken the Department to take the matter for NEC's deliberation within reasonable time etc. In these circumstances, it is not unreasonable to expect that the State will be held responsible for improper action or inaction. The State must be protected against paying large sums of money for something that ought to have been settled promptly through administrative process. Let alone the embarrassment that your Department may be faced with.

I would maintain that unless the State has properly charged and substantiate the charges by due process, it is in the interest of the State to have the suspension lifted by Cabinet and have him serve his full term. If he is terminated, his termination was so done without properly dealing with the charges under clause 27 of the Contract of Employment. It is your prerogative to recommend

to cabinet the best cause of action taking into accounts the law and the interest of the State.

Under the circumstances, my view is that it would have been cheaper to reinstate Mr. Liu with back pay and reenact the disciplinary procedures to take place. Taking the course

477-

outlined in your Acting Secretary's Brief in my view may be expensive and counter productive.

I trust the interest of all parties will be taken into account when deciding on whether or not Mr. Uu is reinstated.

Please contact me directly should you have further queries on the matter.

Yours sincerely, [.....^g11^]

MICHAEL M. GENE Secretary & Attorney General Cc: Hon. Kilroy Genia, MP
Minister for Justice Cc: Mr. John Kali

A/ Secretary, Department of Personnel Management Cc: Mr.

Tau Liu, Administrator (in suspension) Cc: Mr. Fred Tomo, State Solicitor

MMG: bm

23. Initially, the Plaintiff had used his copy of the Attorney-General's advice in an attempt to negotiate the settlement of his claim. However, in a letter from the Acting Solicitor-General to the Plaintiff's lawyers dated 7 February 2000 Hitelai Polume-Kiele replied describing the Attorney-General's letter to the Secretary, Department of Personnel Management, as purely an expression of his [Attorney-General's] opinion, and as such, not binding on the State. In addition, the Solicitor-General advised the Plaintiff through his lawyers, that the State had filed a Defence and that the matter should be progressed to trial.

478-

In the circumstances, it is considered that the actions of the Attorney-General in his advice to the Minister for Public Service appear to defy the principle duty of a lawyer to his client – in this case, the Attorney-General to the State – in terms of protecting the client's interest; for the following reasons:

(i) the advice favors the Plaintiffs case when indeed the facts support a valid Defence with good prospects of success given that the State's disciplinary procedure had been primarily frustrated by the Plaintiffs inaction in failing to reply to the charges, as required under the Terms & Conditions. It must be noted at this juncture that the Plaintiffs disciplinary charge had something to do with the Plaintiffs abscondment from duties, and

(ii) the Attorney-General had acted improperly in his duty as the principal legal advisor to the State by copying the Plaintiff in on his advice to the Minister thereby compromising the State's position with regards to pursuing its Defence.

Notwithstanding the above, it appears however, that the state had eventually agreed to settle the Plaintiffs claim on the basis of the Attorney-General's advice or opinion. The actions of the Attorney-General are covered under Term of Reference 12 of the Inquiry.

Further and in the alternative, it is considered that in his advice, the Attorney-General should have appropriately addressed the issue of quantum. In this case, the Solicitor-General had signed the Deed of Release agreeing to settle the full amount of the Plaintiffs claim, and it further appears that the Plaintiff may have collected more than the amount settled at from the Department of Finance.

479-

Compliance Issues

(a) Public Finance (Management) Act 1995

28. There is no clearance letter from the Attorney-General or the Solicitor-General to authorize payments to the Plaintiff, which letter is a prerequisite to settlement/payment of any judgment debts, etc (refer to Yer's evidence.)

(b) Claims By & Against the State Act 1996

29. By a letter dated 3 May 1999, the Plaintiff, through his lawyers Paul Paraka Lawyers, gave notice of his intention to bring a claim against the State, in accordance with section 5 of the Claims By & Against the State Act 1996-

- The State received the purported notice on 5 May 1999, and notwithstanding that the notice had been insufficient and given outside of the prescribed six (6) months period, the State acknowledged receipt of the said notice by a letter dated 10 June 1999, which also enclosed the State's Notice of Intention to Defend. Accordingly, there does not appear to be any issue with the requirements in respect of notice under section 5 of the CBAS Act 1996.
- The letter comprising the notice omitted to state the date of the alleged breach,
- The notice was given outside of the six (6) months time period as required under the Claims By & Against the State Act 1996,
- However, the State did not take issue with the timing of the notice.

30. Further, in his Statement of Claim the Plaintiff had omitted to plead that he had given section 5 notice.

480-

(c) Frauds & Limitations Act 1988

31. The Plaintiff had brought his claim within six (6) years as required under section 16 of the Frauds & Limitations Act 1988, hence there is no issue in this respect.

(d) Attorney-General Act 1989

32. It is obvious from the facts, with supporting documentation in this matter, that, both the Attorney General and the Solicitor General in exercising their functions, duties, and responsibilities as set out in the Attorney General Act 1989 have not done so in the best interest of the State.

The Attorney General is the Principal Legal Adviser to the National Executive Council (section 3) and his functions, duties and responsibilities are set out in sections 7, 8, 10, 13, 15 and 16 of the Act.

Essentially, by virtue of these functions, duties and responsibilities, the Attorney General must exercise those in the best interest of the State. Otherwise, he will be in breach, as it is in this case, where the Attorney General, then, Mr. Gene, in his letter of 30th July 1999 to the Minister for Public Service, compromised the State's position by copying his letter to the Claimant, Mr. Liu, who used that to his benefit. Such action is definitely not in the best interest of the State.

The Solicitor General on the other hand has one main role and that is set out in Section 13 of the Act. Section 13(1) states that, the Primary function of the Solicitor General is to appear as an advocate for the State in matters coming before the courts in Papua New Guinea, and in exercising that role, the Solicitor General must do so, on instructions from the Attorney General only (section

13(2)).

In this claim by Tau Liu, a defence, was filed on 04/08/99 by the State through Mrs. Hitelai Polume Kiele, the Solicitor General at the time, the

481-

Claimant filed his proceedings in the best interest of the State, but despite that, Mr. Gelu, who took over from Mrs. Kiele, as the Solicitor General, for reasons not known and without any instructions from the Attorney General, entered into a Deed of Release on 28/02/03, effectively making the State liable to the claim by the Mr. Liu.

Like the Attorney General, the action by the Solicitor General was definitely not in the best interest of the State.

(e) NEC Decisions

33. The Deed of Release was made on 28 February 2003 at which time NEC Decision NG 07/2002 (Decision) was in place. Clauses 10 and 12 of the Decision:

(i) Clause 10 – directed that there be no more out of court settlements by any State body or authority, including the Attorney-General and the Solicitor- General, without the approval of the NEC, acting on advice from the CACC and

(ii) Clause 12 — directed that no public officials, including Ministers and heads of departments and public bodies, are to commit the State to any new contractual obligations through agreements beyond the approved amounts in the 2002 supplementary budget.

34. From the Solicitor-General's records, there does not appear to be any approval sought or obtained from the NEC nor any advice from the CACC to legitimize the Deed of Release by which the Plaintiffs claim was finally settled. Accordingly, it is arguable that the Deed of Release was improper.

E. Recommendations

482-

1. Out of Court Settlements

This was a claim which the State had a valid defence and it was filed in court within time, but for no valid reasons, Mr. Gelu who was the SG then, decided to settle the claim that was defensible.

In light of such conduct Mr. Gelu should never be allowed to hold a high position as that of SG ever

again. His conduct clearly showed that he was not there to protect the interest of the State but perhaps for his own gain. This is clearly negligence on the part of Mr. Gelu.

Therefore to prevent further settlement to the detriment of the State, it is recommended that any State matter that has a defence and which has been filed, no one representing the State should settle the claim unless approval of the Departmental Head of the concerned Department is given after proper advice on the claim was considered.

In the absence of the approval, no settlement should take place.

2. Inclusion of Interest in settlement of Court

It has been noted in this matter and many others settled out of Court that, interest is always included. Whether this is right or not, is something to be cleared and perhaps that could be clarified by amendments to the Judicial Proceedings (Interests on Debts and Damages) Act and the National Court Rules. In the meantime, it should be left to the Courts to be the only Authority to order interest, unless it is payable as of right under Agreement as stated in the Judicial Proceedings (Interests on Debts and Damages) Act.

483-

(b) Tau Liu-No. 2

A. Does the matter fall within the Terms of Reference

1. The matter falls within the Terms of Reference of the Inquiry. Tau Liu (Plaintiff) claims that the National Executive Council (NEC) appointed him Administrator of Western Province on 25 November 1999. The Plaintiff filed Court proceedings in 2000 and the matter was eventually settled out-of-court by a Deed of Release dated 28 February 2003, pursuant to which a final payment was made on 03 June 2005.

2. This matter may be covered under the following Terms of Reference: 2, 5, 8, 9 and 12.

B. Source of Information and Documentation

3. This brief comprises of facts and findings from the files and records of:

- The Attorney-General's Office
- The Solicitor-General's Office

- The Department of Finance

C. Background: Relevant Facts

The Matter

4. The Plaintiff sued the State in proceedings WS No. 654 of 2000 for breach of an alleged contract of employment. He claimed that the NEC had appointed him Provincial Administrator of Western Province, and thereafter, recalled him and revoked his appointment without justification.

484-

5. The Plaintiffs claim against the State was partly settled by way of a default judgment in respect of liability – the State had defaulted in filing its Notice of Intention to Defend and Defence. Thereafter on 28 February 2003, a Deed of Release was negotiated by the Plaintiffs lawyers, Paul Paraka Lawyers, and signed by the Plaintiff and the then Solicitor-General, Zacchary Gelu.

6. The _ Plaintiffs claim was settled in the entire amount claimed in the Statement of Claim as well as interest at the yearly rate of 8% for a period of two (2) years.

Payments by the Department of Finance.

7. From the record of payments we have from the Finance Department, it is difficult to work out what payments were for this claim and what payments were for WS 501/99, as the descriptions are not detailed enough. However as they are, they are records of payments to the Claimant. The record is as follows:

Date

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Cheque no

Amount -K

06/02/04

962838

460

3100

0

0

Pmt O/s contract ent •

CQ

768421

300,000.00

28/04/04

977289

221

1501

1101

111

Pmt for O/standing C

CQ

776577

111,054.60

14/05/04

980289

207

4201

4123

135

Being pmt for o/s co

CQ

778433

100,000.00

14/05/04

980289

207

4201

4123

135

Being pmt for o/s co

CQ

778433

168,305.89

30/06/04

988448

207

4201

4123

135

Pmt o/s DOR WS#654

CQ

782652

200,000.00

09/12/04

11100

207

4201

2107

135

P/pmt for O/S contra

CQ
797364
83,716.50
03/06/05
1035007
207
4201
2107
135
Final payment-Deed
CQ
812534
90,000.00
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TOTAL
1,053,076.99

In addition to the payments set out above, Claimant has also received from the State an Ex gratia payment of K30,000.00 in this matter. This was paid on 30/03/00 by cheque # 614181. The payment was made as compensation payment, on the direction by the NEC in its meeting No. 06/2000, after it
485-

rescinded its earlier decision, Decision No. 112/99, to appoint the Claimant as the Administrator of Western Province.

The Claimant has given evidence that the payment of K 111, 054.60 was not part of his claims referred to herein but rather his long service entitlements to the State whilst he was the Commissioner to the Public Service Commission. The Commission has confirmed this.

Further the Claimant has also given evidence that he has not received the sum of K168, 305.89, which is shown on the Finance records. Numerous attempts to get the Department to verify this has not been successful.

In light of that, it can be seen that the Claimant has only received a total of K773, 716.50 and not what is shown in the records given by the Department

Chronology

8. The Plaintiff claims that on 25 November 1999, the National Executive Council (NEC) appointed him Provincial Administrator of Western Province for a period of four (4) years (Appointment) The Appointment took place during the NEC Meeting No. NG 22/99 and by NEC Decision No. NG 112/99 (Decision) The Decision also included a directive to Bill Kua, the Secretary

responsible for the Department of Personnel Management (DPM) to prepare a Contract of Employment for the Plaintiff to sign.

9. On 30 November 1999, the DPM Secretary wrote to the Plaintiff advising him of the Appointment and that a Contract was being prepared for his execution. In addition, the DPM Secretary instructed the Plaintiff to contact Wesley Malaisa, the Acting Administrator of Western Province and advise him of his travel plans. He also advised that the Western Provincial

486-

Administration had been authorized to pay the Plaintiffs normal salaries. The Secretary also expressed his willingness to accompany the Plaintiff to Western Province to assist him in settling in and to ensure a smooth transition.

10. On 8 December 1999, the Plaintiff commenced work as the Western Provincial Administrator, on the expectation that his Contract was being prepared for execution in due course. However, on 25 December 1999, Robert Igara, the Chief Secretary to the Government at the time, instructed the Plaintiff to stop performance of all responsibilities and functions of the Administrator, return to Port Moresby and report to the Minister for Public Service (Philemon Embel) for redeployment.

In its Meeting No. 06/2000 the NEC directed the Secretary responsible for the Department of Finance & Treasury – Decision No. 26/2000 dated 1 March 2001 — to "immediately appropriate an ex gratia payment of ¥30, 000.00 to the Department of Prime Minister and National Executive Council to pay Tau Tiu, by way of compensation as three (3) months payment on a "quantum merit" basis..."

11. Accordingly on 30 March 2000, the Plaintiff was paid an ex gratia payment of K30,000.00, by way of compensation as three (3) months payment assessed on a quantum merit basis.

12. On 12 June 2000, the Plaintiff filed proceedings WS NO. 654 of 2000 against the State as sole defendant, claiming damages for breach of the employment contract he alleged to have reasonably expected to execute as a result of the representation from the DPM Secretary in his letter of 30 November 1999. In his Statement of Claim the Plaintiff pleaded a liquidated claim for the sum of K388, 517.12, which the Plaintiff had assessed in accordance with the entitlements of a Provincial Administrator prescribed in the Standard Terms & Conditions for the Employment of Provincial

487-

Administrators in the National Public Service (Terms & Conditions,) In addition, the Plaintiff claimed interest and costs.

13. On 26 March 2001, the Acting Solicitor-General John Kawi wrote to the Winnie Kiap, NEC Secretary advising of the Plaintiffs claim and seeking instructions for the purpose of preparing a

Defence on behalf of the State. The NEC Secretary did not respond, and the Acting Solicitor-General wrote to the Chief Secretary to the Government in pursuit of instructions.

14. On 27 July 2001, the Plaintiff obtained Default Judgment on liability against the State, for damages to be assessed. The State had failed to file a Notice of Intention to Defend and a Defence on time:

- The Writ of Summons was served on the State on 21 June 2000,
- The State was required to file its Notice of Intention to Defend by 21 July 2000, and
- its Defence by 21 September 2000.

The State had defaulted by more than one (1) year.

15. Following that, on 28 February 2003, Zacchary Gelu, the Acting the Solicitor-General at the time, counter-signed a Deed of Release settling the Plaintiffs claim in the sum of K468,305.89, including K79,785.55, being 8% interest for a period of two (2) years.

List of Documents

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DATE
DOCUMENT
COMMENTS

1

30 November 1999

Letter from the Secretary, Department of Personnel Management to the Plaintiff.
The letter informs the Plaintiff of his appointment as Administrator for Western Province to replace the Acting Provincial Administrator, Wesley Malaisa.

2

1 February 2000

Letter from the Plaintiffs
Notifying the Solicitor-General of the Plaintiffs

488-

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lawyers, Paul Paraka Lawyers to the Solicitor-General
intention to apply for judicial review in the form of a Writ for Mandamus to compel the State to
gazette his appointment and progress the preparation and signing of the Employment Contract.

3

14 March 2000

Letter from the Acting Solicitor-General to Paul Paraka Lawyers
Acknowledging receipt of the Plaintiffs section 5 notice and advising that a response will be
provided once instructions are confirmed.

4

12 May 2000

Letter from Paul Paraka Lawyers to the Solicitor-General
Providing notice of the Plaintiffs intention to bring a claim against the State, in compliance with
the requirements of section 5 of the Claims By & Against the State Act 1996.

5

12 June 2000

Writ of Summons filed by Paraka Lawyers on behalf of the Plaintiff.

The Statement of Claim alleges breach of the Terms and Conditions of the Standard Contract of Employment for Provincial Administrators (Terms & Conditions ,) and seeks a total of K388,517.12 as assessed in accordance with the different heads of allowance under the Terms & Conditions. The Plaintiff also seeks an order for interest and costs.

6

15 January 2001

Notice of Motion filed by Paul Paraka Lawyers on behalf of the Plaintiff

The motion seeks the entry of default judgment in the sum of K388,517.12 plus interest and costs, as pleaded in the Statement of Claim.

7

15 January 2001

Affidavit of Andrew Kongri sworn 10 January 2001, filed by Paul Paraka Lawyers

The affidavit was filed in support of the Plaintiffs motion for default judgment

8

15 January 2001

Affidavit of Tau Liu sworn 10 January 2001, filed by Paul Paraka Lawyers

The affidavit was filed in support of the application for default judgment

9

15 January 2001

Affidavit of Search sworn by Erick Ontimo on 10 January 2001, filed by Paul Paraka Lawyers

Filed in support of the Plaintiffs motion for default judgment essentially confirming that the State defendant had not filed a Notice of Intention to Defend and a Defence.

10

26 March 2001

Letter from the Acting Solicitor-

General, John Kawi

Advising of the Plaintiffs claim and seeking initial

instructions from the NEC Secretary as to the

489-

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to the NEC Secretary.

NEC's/State's positions as regards the PlainriffiT claim.

11

12 June 2001

Letter from the Acting Solicitor- General John Kawi to the Chief Secretary

The letter makes reference to instructions sought earlier from the Secretary to the National Executive Council (NEC) and the lack of response, and advises of the Plaintiffs impending application for default judgment. In this letter the Acting Solicitor-General also inquires as to the Plaintiffs employment status in the Public Service.

12

17 July 2001

Notice of Motion filed by Paul Paraka Lawyers

The application by the Plaintiff seeks to withdraw the NOM filed 15 January 2001, and the entry of default judgment against the State in the sum of K388,517.12; or alternatively, for damages to be assessed.

13

18 July 2001

Affidavit of Guguna Kila Garo sworn 17 July 2001 and filed by Paul Paraka Lawyers.
The affidavit was filed in support of the application by the Plaintiff seeking default judgment.

14

18 July 2001

Affidavit of Search sworn by Eric Ontimo on 18/07/01 and filed by Paul Paraka Lawyers.
The affidavit supports the Plaintiffs application for default judgment and states basically that the State had not filed a Notice of Intention to Defend nor a Defence as at the date of the affidavit.

15

6 August 2001

Letter from the NEC Secretary to the Acting Solicitor-General

In this letter, Winnie Kiap takes issue with the Acting Solicitor-General's request to the Chief Secretary to "advise or direct" her to respond to an earlier letter from the Acting Solicitor-General dated 26 March 2001 seeking instructions in respect of the Plaintiffs claim.

Kiap also instructs that the Plaintiff- "was neverformally appointed to the position of Provincial Administrator— western Province. NEC Decision No. NG 112/99 appointed Mr Liu as Administrator, but the process for appointment as prescribed by section 73(2) of the Organic baa/ on Provincial and

490-

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21

8 October 2001

Letter from Paul Paraka Lawyers to the Acting Solicitor-General (J. Kawi)

Pursuing draft Notice to Set Down for Trial and the Plaintiff's submission for out-of-court settlement.

22

30 October 2001

Consent Order dated 26/10/01 filed by Paul Paraka Lawyers

Granting the Plaintiff leave to file an Amended Statement of Claim (incorporating claim for compensation for anxiety etc.)

23

30 October 2001

Amended Statement of Claim (Amended pursuant to Consent Order dated 26 October 2001) filed by Paul Paraka Lawyers

The amendments incorporate an additional claim for damages for distress, frustration, anxiety and

hardship.

24

12 November 2001

Letter marked "Without Prejudice" from Solicitor- General Q. Kawi) to Paul Paraka Lawyers
Discussing the applicability (or lack thereof) of the Peter Aigib case relied on by the Plaintiff in his
submission for settlement in respect of his claim for damages for stress and anxiety (distress,
frustration and hardship.)

25

19 November 2001

Letter from Paul Paraka Lawyers to the Acting Solicitor-General
Forwarding Notice to Set Down for Trial for endorsement by the Solicitor-General.

26

28 November 2001

Notice of Motion filed by Paul Paraka Lawyers
Seeking to set the proceedings down for trial for assessment of damages.

27

28 November 2001

Affidavit of Guguna Garo sworn 27/11/01 and filed by Paul Paraka Lawyers
In support of the Plaintiffs application to set the matter down for trial.

28

10 December 2001

Letter from Paul Paraka Lawyers to the Acting Solicitor-General
Enclosing fresh set of Notice to Set Down for Trial for endorsement.

29

13 December 2001

Letter from the Solicitor- General (J. Kawi) to Paul Paraka Lawyers enclosing duly endorsed Notice
to Set Down for Trial

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30

19 February 2002

Letter from Paul Paraka
Pursuing the Plaintiffs submission for an out-of-
492-

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Lawyers to the Solicitor- General
court settlement and outlining the Plaintiffs argument based on the DPM Secretary's
representation.

31

26 February 2002

Notice of Motion filed by Paul Paraka Lawyers
The Plaintiffs application for leave to further amend his Amended Statement of Claim.

32

26 February 2002

Affidavit of Guguna Garo filed by Paul Paraka Lawyers
In support of the Plaintiffs application to further amend his Amended Statement of Claim.

33

14 March 2002

Letter from Paul Paraka Lawyers to the Solicitor- General advising that the Plaintiffs NOM filed 14
February 2002 had been adjourned for hearing on 15 March 2002.

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34

18 March 2002

Letter from Paul Paraka Lawyers to the Registrar National Court

Requesting that the Plaintiffs Notice of Motion filed on 26 February 2002 be set for hearing before a Judge other than Kandakasi J (designated Motions Judge) who had disqualified himself from hearing the Plaintiffs application.

35

10 April 2002

Court Order filed by Paul Paraka Lawyers

Granting the Plaintiff leave to further amend his Amended Statement of Claim and file a Further Amended Statement of Claim within 7 days, and that the State file a Defence to same within 14 days after service of the Further Amended Statement of Claim.

36

12 April 2002

Amended Amended Statement of Claim filed by Paul Paraka Lawyers

The amendments incorporate the Plaintiff's claim that the DPM Secretary had represented to him that he would sign a Contract and be paid at the usual Administrator's rate, hence he had commenced employment as the Administrator of Western Province on the reasonable expectation that his appointment would be finalized and he would sign the Contract.

37

26 April 2002

Letter from Paul Paraka Lawyers to the Solicitor- General

Alerting the State of its omission to file a Defence to the Plaintiff's Amended Amended Statement of Claim within the required period, and enclosing Notice to Set Down for Trial for assessment of 493-

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damages.

The letter also mentions the Plaintiffs submission for an out-of-court settlement.

38

6 May 2002

Notice of Motion filed by Paul Paraka Lawyers

The motion seeks an order that the proceedings be set down for hearing in respect of assessment of damages.

39

6 May 2002

Affidavit of Jerry Kiwai sworn 03/05/02 and filed by Paul Paraka Lawyers

Filed in support of the Plaintiffs application for an order that the proceedings be set down for trial for assessment of damages.

40

14 June 2002

Letter from Paul Paraka Lawyers to the Acting Solicitor-General

Advising the solicitor-General:

of the Plaintiffs intention to rely on the affidavit he swore on 6 September 2002 and that the Plaintiffs lawyers had filed the duly endorsed Notice to Set Down for Trial and would attend the next civil call over to obtain a trial date.

41

14 June 2002

Copy of a letter from Paul Paraka Lawyers to the Registrar, National Court
Requesting the Registrar to list the Plaintiffs claim on the call over listing for the allocation of a
hearing date.

42

2 July 2002

Letter from Acting Solicitor- General John Kumura to Guguna Garo of Paul Paraka Lawyers.
Notifying the Plaintiffs lawyers of the Solicitor- General's intention to cross-examine the Plaintiff
on his affidavit sworn 6 September 2002.

43

25 September 2002

Letter from Paul Paraka Lawyers to Zacchary Gelu (Solicitor-General)

The letter proposes a submission for settlement that includes arguments on the basis of a
representation from the DPM Secretary, and encloses amongst others, a draft Notice of Motion for
judgment in the amount of K400,517.12.

44

25 September 2002

Draft Notice of Motion prepared by Paul Paraka

The draft Notice of Motion seeks an order that the State pay the Plaintiff the sum of K400,517.12

494-

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Lawyers

in full and final settlement of this action. It also annexes a document entitled Instrument of
Consent signed by Hubert Namani of Paul Paraka Lawyers including a slot for the Solicitor-
General's (Gelu) consent and signature.

45

28 February 2003

Deed of Release prepared by Paul Paraka Lawyers and signed by the Plaintiff (Releasor) and
Zacchary Gelu on behalf of the State.

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46

10 July 2003

Letter from Secretary Finance- Thaddeus Kambanei to John Kumura, Acting Solicitor General
Enclosing Court Orders in both proceedings, (WS 501/99 and WS 654/00) and requesting
assessment and clearance on the said orders before payments could be made.

47

4 September 2003

Letter from the Plaintiff to the Secretary for Justice and Attorney- General's Department
Seeking the Attorney General's authorization for payment of his two (2) claims settled by Deed of
Release on 28 February 2003.

48

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Finance Department Cash Book Record and Payment Advice/Vouchers

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D. Findings

17. The Claim – Liability and Quantum

(a) Liability

Liability had been settled by default occasioned by the failure or omission on the part of the NEC Secretary to provide the Solicitor– General with the NEC's instructions particularly in relation to the State's Defence to the Plaintiffs claim, within a reasonable time.

495–

(b) Quantum – Assessment of Damages

The State should have allowed the matter to proceed to trial for assessment of damages. It is considered that a proper trial of the matter would have resulted in the Court upholding the State's position that the Plaintiff had been paid due compensation in the form of the K30, 00.00 ex gratia payment.

In light of the above it is therefore considered that the amount paid by the State in settlement of the Plaintiffs claim is exorbitant, unreasonable and may have been calculated with a view to defraud the State of a large sum of money.

18. Steps taken or not taken by the Attorney–General & Solicitor–General

The Solicitor General

The Solicitor–General had failed to file a Notice of Intention to Defend and a Defence and continued failing to file a Defence, on the various times the Plaintiff amended his Statement of Claim.

The Attorney General

The Attorney General could not have done much at this stage as the matter was in court and it was the duty of the Solicitor General to take steps to defend the claim, which could not take place because of the failure of the Office of the Secretary of NEC to provide instructions required by the Solicitor General.

19. Compliance Issues:

496-

20. (a) Public Finance (Management) Act

There is no clearance letter from the Attorney-General or the Solicitor- General to authorize payments to the Plaintiff, which letter is a prerequisite to settlement/payment of any judgment debts, etc (refer to Yer's evidence.)

(b)) Claims By & Against t h e S t a t e Act 1996

On 01st February 2000, the Plaintiff through his lawyers, Paraka Lawyers, wrote to the Solicitor General and gave notice of their client's intention to make a claim against the State.

In that letter, Mr. Kongri of Paraka Lawyers stated that since bis clients' appointment to the position of Administrator of Western Province, the Legislative Council had not prepared the relevant instrument and also had not arrangedfor its execution and ga^ettal to complete the process of appointment in accordance with the provisions of the Organic Law on Provincial and Local Level Government. Consequently they were instructed to apply for Judicial Review and seek an Order in the nature of Mandamus against the First Legislative Council and the State.

At no time at all or anywhere in the said letter did the Plaintiffs Lawyers state that the claim was for damages for unlawful termination, which turned out to be the allegation raised in the proceedings and eventually settled by the Solicitor General through the Deed of Release dated 28 February 2003.

That being the case, it is obvious that ,the Plaintiff never gave the section 5 notice of his claim as set out in the Court Proceedings

497-

(WS654/00), which is totally different to an application for Judicial Review, which was the basis of their letter of 1st February 2000.

Despite that, the Solicitor General accepted and acknowledged the Plaintiffs Lawyers' letter of the 1st of February 2000 as the letter giving the appropriate notice required by the Claims By and Against the State Act, 1996.

Frauds & Limitations Act 1988

The cause of action arose on or about 25th December 1999, when the Plaintiff was recalled and his appointment revoked by the NEC; and the Plaintiff filed these proceedings in 2000. Therefore, there is no issue as to the validity of the claim under this heading.

Attorney- General Act 1989

Similar to the other claim by Tau Liu in Court Proceedings-WS 501 of 1999, Mr, Gelu, the Solicitor General at the relevant time, without giving much consideration to the validity of the claim, or the fact that, the matter was already been set down for assessment of damages in court, acted to the State's detriment when it signed the Deed of Release, which is an act outside the role and or the function of the Solicitor as stipulated in the Attorney Generals Act 1989.

NEC Decisions

As in the other case (WS 501 of 1999) the Deed of Release was signed on 28 February 2003 at which time NEC Decision NG 07/2002 (Decision) was in place. Clauses 10 and 12 of the Decision:

498-

(i) Clause 10 – directed that there be no more out of court settlements by any State body or authority, including the Attorney-General and the Solicitor-General, without the approval of the NEC, acting on advice from the CACC and

(ii) Clause 12 – directed that no public officials, including Ministers and heads of departments and public bodies, are to commit the State to any new contractual obligations through agreements beyond the approved amounts in the 2002 supplementary budget.

Again, like the other matter, there does not appear to be any approval sought or obtained from the NEC nor any advice from the CACC to legitimize the Deed of Release by which the Plaintiffs claim was finally settled. Accordingly, it is arguable that the Deed of Release was improper.

Recommendations

Amendments to relevant Legislations

Claims By and Against t h e S t a t e Act & Attorney General Act

- Amend both legislations to include specific provision as to:
 1. The type of matters that can only be determined by the Courts
 2. The type of matters that can be settled out of Courts
 3. The Officer who would be authorized to settle claims of Courts

4. The amount, the Officer with the authority to settle can settle on

- In addition include provisions to:

499-

1. Make it compulsory for the State officer handling a claim consider preliminary issues, such as Standing and time limitation.
2. Require the claimant to also give a copy of the section 5 notice to the head of department responsible for the claim.
3. The Departmental Head/his delegate must be required to provide instructions within 30 days to the SG.
4. Make provision for offences/charges to be laid on officers of both SG and the respective Government or Department, who fail to comply with the requirements to give instruction.
5. If a matter is to be settled out of Court, the appropriate Officer/Officer with authority must get written consent of the Departmental Head to settle.

SG must always consult the AG and/or report to the AG for all claims against the State.

If a matter is to be settled out of Court on agreement by parties, such claim must be sanctioned by the Court first.

The Deed of Release must be signed and sealed with the Seal of the State to be endorsed by both the SG and the Action Officer of SG.

Re: Finance, payment must be only made on advice of the SG on production of all necessary documents.

500-

(c) Soiat Williams

PARTIES

For The State:

- (a) Solicitor General and Attorney General
- (b) Department of Personnel Management For the Defendant
- (a) Soiat Williams Others
- (a) Department of Finance
- (b) Ministry of Public Service
- (c) Office of the Prime Minister

DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCES

The matter falls within the Terms of Reference ('TOR3'). The value of this claim is in excess of K300,000.

The applicable terms of reference are TOR a (1), 2, 3, 4 & 5 THE MATTER

Mr. Soiat Williams, former Secretary for Department of Personnel Management claimed damages for the unlawful revocation of his appointment as Departmental Head for Personnel Management on 30 November 2000.

Mr. Williams signed a Contract of Employment as Departmental Head for PS on 28th July 2000 with the Governor General, Sir Silas Atopare, on behalf of the State. Mr. John Kali, Deputy Secretary-DPM signed as witness. The contract was for term of 4 years.

501-

On the 16th of November 2000 (3.5 months in to the term) the Minister for Public Service then Philemon Embel suspended the newly appointed Secretary -Soiat Williams from duties with full pay taking effect on the day of his letter.

On the 17th of November 2000 Soiat Williams responded to the letter by Minister for Public Service in regard to his termination. Letter to Minister is marked as 207-

On 22nd November 2000, Patterson Lawyers acting on instructions of Mr. Williams served on the Office of the Attorney General, notice pursuant section 5 of the Claims by and Against the State Act, 1996

On 23rd November 2000, Patterson Lawyers filed Originating Summons 689 of 2000 in the National Court seeking declaration that

1. the purported suspension of Mr. Williams by the Minister for Public Service on 16th November 2000 was invalid, null and void and of no legal effect; and
2. Mr. Williams was the legal Secretary for DPM

On 18th January 2001, the State through the Office of the then acting Solicitor General, Mr. Gelu filed its Notice of Intention to Defend the claim (Ref 134)

Whilst the matter concerning the proceedings was on going, Mr. Kawi (former SG) in response to Mr. Tsiamili's request for an opinion on the legality concerning the revocation of the employment of Mr. Williams advised as follows;

" prior to a Departmental Head been terminated by the Head of State acting on advise from the National Executive Council, without notice it is imperative that disciplinary procedures under section 27 of the Contract of Employment must be complied with.

502-

From the allegations made by the Plaintiff (Soiat Williams), it appears we have the daunting task of explaining to the Court why the disciplinary procedures under Section 27 of the Contract of Employment were not complied with, prior to the termination of the Plaintiffs Contract of Employment."

By letter dated 15th May 2001, the Office of the Secretary, DPM provided specific advice and instructions to the Attorney General and Solicitor General to defend the allegations under OS proceedings 689 of 2000. The Department advised that Mr. Williams was terminated in the interest of the State and not under the allegations of misconduct because the then Minister for PS had withdrawn the charges.(See 69-DPM)

Records obtained from the Department of Personnel Management indicate that on 29th April 2002 DPM advised Mr. Williams on the final pay out on his contract. Mr Williams acknowledged and accepted the payment of K407, 003.63 (DPM 5) as final clearance and deed of release to acknowledge receipt of final contract terminations benefits. Mr. Williams acknowledged the letter on 2 May 2002 with the notation. "I have signed the letter at the request of its employer."

Despite the letter containing specific advice and instructions from the DPM to defend the claim, the then Acting Solicitor General, Mr. Gelu executed a Deed of Release on behalf of the State with Mr. William for the sum total of K500, 000.00 on 17th February 2003.(Ref 37DOR). This payment is considered to be a double payment of the moneys akeady accepted to be the final payment for the termination of contract.

Compliance with Claims By & Against The S t a t e Act

On the 22nd of November 2000 Patterson Lawyers on behalf of the plaintiff wrote to the Attorney General advising of Soiat Williams, notice pursuant to claim by and against the State.

Action by Solicitor General/Attorney General

503-

The Deed of Release dated 17th February 2003 was highly irregular, illegal and improper

> Prior to executing the said DoR by Zacchary Gelu he failed to take instructions from the employer, acting on behalf of the state, in this case the Acting Secretary for the Department of Personnel Management, who is specifically responsible for the administration of the Departmental Heads Contracts of employment.

> Further, Mr Zacchary Gelu chose to proceed with his own DoR in the absence of any Court Order or instruction for the Secretary for DPM on this matter.

Settlement

On the same day the DoR was signed, a letter was written to Thaddeus Kambanei – Secretary for Finance attention to Mr Boas Hembehi to raise a cheque to settle the claim in the sum of K500,000 and have it made payable to Soiat Williams ,P O Box 3762,Boroko,National Capital District.

According to the information provided to the commission, DPM paid in full final entitlements in the sum K407,003.60 (Cheq No. 22030688). Reference is copy of cheque made to Soiat Williams.

Department of Finance payments

As per the cash book one payment was made, cheque No. 793025 – K52,320.46 on the 19th of October 2004 in relation to this claim during the period covered in the terms of reference and the subsequent years (2007 & 2008). According to Mr Williams this payment was in relation to his vehicle allowance whilst with DPM. No payment was made on the second DoR for K500,000

Department of Personnel Management

504-

The second DoR signed was improper and to make (if any) payment without the consent of the Department of Personnel Management (DPM) who is the only authority on the calculations for Salary & Wages and Public Service Payouts was considered ILLEGAL. Knowingly that the initial DoR was signed between DPM and the plaintiff, was accepted and received in May 2002.

Findings

? On the 02nd of May 2002 a Deed of Release was signed by DPM and Soiat Williams, whereby he (Soiat Williams) accepted final receipt of termination of contract as Secretary in the sum of K407,003.63. Marked as i s t h e i n i t i a l D o R.

? The 2nd DoR of K500.000 signed by Zachery Gelu (former SG) was without the consent of Department of Personnel Management (DPM). By law DPM are the only authorised agents on the calculations for the Salary & Wages and Public Services Pay outs. In this instance DPM did not endorse the principle claim of K500,000 or more. Further, the claim was never brought to the attention of DPM according to information provided and on file.

? The claim had a OS No. 689 of 2000, however, the court was never informed of the second DoR signed between Solicitor General –Zachary Gelu and Soiat Williams.

? The Registrar–Supreme & National Court — Ian V Augerea in a letter on the 23rd March 2007 wrote to Mawa Lawyers advising the OS No 689/2000 was listed for summary determination on the 20th of April, 2007. Marked t h i s l e t t e r a s

? Mr Williams advised the Commission that a full bench Supreme Court has ruled in Mr Williams favour. Copies of Supreme Court ruling have been provided and filed.

? The court's ruling was due to no defence filed by the state for its action.

Recommendation

505–

The Solicitor General to institute proceedings to set aside the Deed of Release dated 17th February 2003 and to recover the full amount of K500, 000.00.

(d) Isaac Lupari * ?

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1. Isaac Lupari v. Department of Finance and the State
2. Isaac Lupari v. Department of Defence and the State
3. Isaac Lupari v. Department of Personal Management and the State
4. Isaac Lupari v. Dept of Transport & Civil Aviation and the State

Mr. Isaac Lupari sued the State for breach of four separate contracts that were entered into as Secretary for the Departments of Finance, Defence, DPM and Transport in that order. He claimed that he had been unlawfully terminated from all those positions after serving short stints in each and claimed the balance of all pay and entitlements for the unexpired period of all four contracts. It will be clear from the evidence gathered so far that Mr. Lupari never suffered any loss of pay and entitlements and was adequately remunerated by the State for the whole time that he claimed for and beyond. In fact up to July 2009 he was still on the Government payroll.

In an analysis done by DPM it was said that ... "The real life period covered by the contracts on which Mr. Lupari was engaged is a 6 year 9 month period from start of first contract 17/ 09/ 97 through to the end of last contract 28/06/04. Compared to the 6 year 9 months period he is in fact making claims for a total 14 year period, by placing the contract periods end to end, when in fact they overlap. Apart from being contrary to public policy and the contractual provisions, the claims are clearly improper because they result in triple and sometimes quadruple payments for the same period of time. Mr. Lupari has received salaries, allowances and benefits continuously from 17/09/97 to the present day. He has lost no remuneration and has been paid a total K1,294,133 for the 4 year period 17/09/97 to 17/04/02".

The above analysis is a succinct statement of what is wrong with Mr. Lupari's claims against the State. Mr. Lupari had been transferred from one department to another and had not uttered a single word in protest until after the last contract of employment as Secretary for Transport and Civil Aviation. Even then he was far from being destitute as
507-

he was still engaged by the Government of PNG in various capacities and paid very well in various Advisory roles.

A. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE?

The matter falls within the following Terms of Reference No 1,2, 3, 5, 8, 9 and 12.

The claim was improper, was for an amount exceeding PGK300,000.00 and was paid out between 2000 and July 2006. It resulted from failure of the Solicitor General to properly defend the State and was settled out of court. Payments were also not made out of lawfully available funds.

B. SOURCES OF INFORMATION AND DOCUMENTATION

This brief comprises of facts and findings from the files and records of: Department of Finance Department of Personnel Management. Department of Prime Minister and NEC Governor General's office.

Mr. Isaac Lupari himself

Newspaper reports and paid advertisements by Mr. Lupari. Letters written by concerned citizens
Evidence of Ms. Margaret Elias (Secretary for DPM) Evidence of Mr. John Kali (Deputy Secretary for DPM)
Evidence of Mr. Ian Augerea (Registrar of National and Supreme Court) Evidence of Ms Winnie Kiap (Secretary for NEC)
Evidence of Mr. Eric Kiso (Assistant Registrar National Court) Evidence of Mr. Billy Bonner (File Manager, Paul Paraka Lawyers)

BACKGROUND: RELEVANT FACTS

508-

THE MATTER

Mr. Lupari first filed four Writs of Summons No. 1788, 1789, 1792 and 1793 of 2001. All four Writs were filed on the 11th of December 2001. The Solicitor General failed to file a Defense and default judgment was entered against the State with damages to be assessed.

In 2002 Mr. Lupari reached an understanding with the newly installed Somare Government that he would be appointed as the new Ambassador representing Papua New Guinea at the European Union based in Brussels. In gratitude Mr. Isaac Lupari agreed to drop all four court actions he had filed. Mr. Lupari instructed his lawyers to discontinue the four court actions and this was done in August 2002.

Having secured the job of European Union Ambassador, Mr. Lupari reneged on the above deal in which he had promised not to pursue his claims against the State. A short five months after he had withdrawn the first lot of claims he instructed his lawyers to file the same court actions again. The four Writs of Summonses were numbered consecutively from 88 to 91 of 2003. The claims were exactly the same as those filed in 2001. The writs were filed on the 13 th of January 2003 by Paul Paraka lawyers —

Less than two months after the second lot of Writs were filed, a Deed of Settlement was signed on the 03rd of March 2003 by Mr. Zachary Gelu acting on behalf of the State. See Certificate of taxation filed on the 04th of March 2003 and Zachary Gelu's endorsement of the Instrument of consent dated 03rd March 2003 (annexure NC-36). Even after the matter was settled, a Notice of Intention to Defend was filed by the Solicitor General on 11th March 2003. A day later on the 12th March 2003, a Notice of Withdrawal was filed by Paul Paraka lawyers.

509-

5. Under the four Deeds the State was made liable to pay amounts allocated as follows;

PGK 949,233.94 for breach of Employment Contract as Finance Secretary.

PGK 949,233.94 for breach of Employment Contract as Defence Secretary

PGK 1,174,494.79 for breach of Employment Contract as DPM
Secretary
PGK 630.498.64 for breach of Employment Contract as Transport

Isaac Lupari began his career in the Public service on the 18th of February 1988 (see clause 6 of employment contract as secretary for Transport). Nine years later in 1997, it appears that he had made it into the top echelons of the civil service. He was appointed Secretary for department of Finance on 17th September 1997 by the Skate government. A contract was signed on the 10th October 1997. He says that he was sacked five months later on the 15th January 1998.

If he was sacked, he was not out of work for very long. In fact he was reappointed on the very same day to the position of Secretary for Defence. No contract of employment was in fact signed by Mr. Lupari. He concedes this in volume two of his reply to the COI and asserts that the contract was a deemed contract and the signing bit was a mere formality. In fact there is a reference made by Peter Tsiamalili that Lupari was acting as Defence Secretary and never signed a contract for the position.

510-

3. One year and three months later on 17th March 2000 he was appointed Secretary for Department of Personnel Management (DPM) by the newly installed Morauta government. Lupari lasted a very short four months as Secretary for DPM.

The last of the contentious senior positions he was appointed to was as Secretary for the department of Transport and civil Aviation for a term of three years (clause 3). He was appointed on the same day as his term as Secretary DPM came to an end on the 29th of June 2000. Mr. Lupari claimed full pay and entitlements for the unexpired term of his contract as Secretary for DPM. Out of Court settlement was reached by signing of the DOR and an amount of PGK 1,174,494.79 was specifically awarded for the alleged breach of this contract. He was actually paid PGK 1 million by Finance on the 17th September 2004 by cheque No. 790468.

The above payment should never have been allowed in the first place by the SG and later approved by Mr. Damem as AG. The terms of the contract of employment as Secretary Transport explicitly declare in the first recital that:-

'THIS AGREEMENT is made to be effective on and from the 29th June 2000 (to vary the agreement entered into on the 17'h day of March 2000 by the parties)". ..

4.1 - The first clause of the agreement reiterated this condition. It also made provision for Mr. Lupari to be paid on the same terms and conditions as in his previous position at DPM, a Central Agency department. Clause 1 reads

...

'This Agreement varies and replaces the Agreement entered into by the Departmental Head on 17th March 2000, provided that the Departmental Head shall continue to enjoy the unchanged terms and conditions of a departmental Head of a Central Agency.'" (emphasis added).

511-

4.2 Further proof that Mr. Lupari's contract as Secretary for DPM was not unlawfully terminated also comes from the Recitals. It shows that when Mr. Lupari signed the contract as Transport Secretary he did so knowing that he would be moved from his position as Secretary DPM to the position of Secretary Transport and Civil Aviation. The Pertinent part states;

'WHEREAS

The State has created the position of Secretary ... Transport... and

and

The Departmental Head is employed on a contract of employment executed by the Head of State effective on and from 17th March 2000, by virtue of his appointment as Secretary for the Department of Personal Management, Head of a Central Agency."

Clause 3 of the Agreement prescribed the period that the contract for Transport Secretary would run for. It stated that the new contract would run from the date Mr. Lupari was appointed as Secretary for Department of Personnel Management, being 17th March-2000 and expire on 16th March 2004, 4 years hence. Effectively this meant that Mr. Lupari's earlier contract was now subsumed under the new contract. In other words the two became one contract and not two separate contracts under which Mr. Lupari could claim for damages, separately.

The Commission is unable to make a conclusive finding as whether Mr. Lupari was unlawfully terminated as Secretary for Transport. There is evidence that shows that Mr. Lupari was not idle after being "sacked". He was employed as a consultant in two positions between 2002 and 2003

512-

before being appointed as Ambassador to the European Union (EU) on the 15th December 2003.

The first of these consultancies was as Project coordinator for the Waigani office development project aimed at refurbishing the condemned Marea Haus better known as the Pineapple building and the Central Government Building. He was engaged on the 30th of July 2002 and paid PGK306,490.00 per annum. The consultancy contract was terminated by the State on 19th March 2003, four months before completion by the Acting Secretary for DPM, Mr. John Kali. Mr. Lupari was paid out for the remainder of his contract term, by now a normal conclusion to Mr. Lupari's

contracts with the State.

He was next appointed as Economic Advisor to the Prime Minister on the 30th September 2002. This appointment was made when Mr. Lupari was still legally contracted to DPM up to March 2003 [refer annexure OD 17]. This meant that he was concurrently employed. But no contract was signed for this later consultancy as Economic Advisor. Despite that he was paid out the full fees for the purported consultancy agreement as Economic Advisor before he was appointed as Ambassador to the EU. It is not known when he was recalled but he was appointed Chief Secretary on the 20th July 2007.

From the documents furnished by the Department of Personnel Management, it is clear that Mr. Lupari was continuously employed by the State between his first appointment as Secretary (17/09/97) right up to the date when his last contract was to expire (28/06/04). Set out below are the various jobs he held during that period:

Finance Secretary Defence Secretary

- 17/09/97 to 15/01/98 - 15/01/98 to 09/12/98

513-

Acting Secretary for Works - 09/12/98 to 18/02/99
Special Advisor to Prime Minister - 19/02/99 to 19/07/99
Special Advisor to Pub. Serv. Minister - 20/07/99 to 17/04/00 DPM Secretary - 17/03/00 to 29/06/00
Transport Secretary - 29/06/00 to 14/04/01
Special Projects officer DPM - 14/04/01 to 14/04/02 Coordinator - Waigani Building project - 30/07/02 to 19/03/03
j) Economic Advisor to Prime Minister - 30/09/02 to 15/12/03
k) Ambassador to European Union - 15/12/03 to ?
l) Chief Secretary to Government - 20/07/07 (still on full pay)

Referring to the above, the only time he was not working in any capacity was between h) and i) for a period of five months. His contract as project coordinator for the Waigani office project was terminated four months before completion and he was paid the balance of his consultancy, but while still serving out that term, he was appointed as Special Advisor to the PM which was also not served to its end although Mr. Lupari received full pay for that final consultancy prior to taking up the Ambassadorial job.

In instructions given to the Solicitor General to defend the claims, the late Mr. Peter Tsiamalili, then DPM Secretary said the following in his letter to the Solicitor General. In his statements of claim, Mr. Lupari has not declared the 6 months severance payment as Special Advisor to the Prime Minister (5 months -

I paid K173,871.00), the 18 months ex-gratia payment on termination as Secretary for Transport (paid K508,723.00).

Mr. Lupari suffered no loss. He has enjoyed full employment moving from one position to another and receiving full payment as head of a

514-

central agency department. He has received an estimated K1,294,133-00 in salaries, allowances and benefits, (para 13)

? Furlough Leave - plaintiff claimed separate amount for furlough leave in each of the writs., thereby compounding his claims fourfold. The total amount claimed K1,027,530 is equivalent to over 10 years of furlough leave which could only be earned with 300 years of continuous service. Money in lieu of furlough leave accrual for 15 years of completed service to date is worth 6 months' salary or K50,000.00 (then).

Paul Paraka Lawyers who acted for Mr Lupari claimed for and were paid K200, 000 as costs for each matter totalling K800,000 for the four matters.

t— ? ?1"?*?

In spite of the matter being settled so soon after Writs were filed for the full amounts claimed in each matter, Paul Paraka Lawyers filed an application for Taxation. The application was filed on the 03rd of March 2003, the same day all four Deeds were signed. There is nothing to indicate that there was disagreement between plaintiff and defendant (State) over costs.

The taxation of costs was dealt with promptly, a day after the application was filed. Mr. Eric Kiso issued a "Certificate of Taxation" stating that ... "the plaintiffs costs have been taxed and allowed at K200,000". Mr. Zachary Gelu had signed an "instrument of consent" on the 03rd of March 2003 the same day that he signed the four Deeds of Settlement.

The way this particular matter was supposedly taxed is peculiar indeed and the Commission finds that it was a charade to legitimise excessive costs. It was done so easily because the taxing officer was so incompetent he did not know what was asked of him and what taxation of costs was all about.

515-

14. EVIDENCE RECEIVED

To date evidence has been received from the following witnesses and Organisations:

- Ms. Margaret Elias - Secretary for DPM. She produced two thick bundles of documents that for the first time revealed the extent of deception carried out by the claimant and his lawyers.

Mr. John Kali - DPM Deputy Secretary.

He was responsible for advising the Secretary for DPM, particularly on matters related to the appointment and termination of departmental heads. In February 2002 as Deputy Secretary for Policy he advised the then Secretary, the late Mr Tsiamalili, that Mr Lupari's claims were unlawful and without merit and that a vigorous defence should be mounted in the courts to defeat the claims, in view of the serious implications for integrity of the contract system and also the Financial consequences of the flow on effect

Mr. Vagi as Acting Secretary for DPM wrote to the Attorney General, Mr Francis Damem and delivered Mr Tsiamalili's draft affidavit, which set out in great detail all the reasons for opposing the claims by Mr. Lupari. That letter to Mr Damem was very clear that he was to mount a vigorous defence against the four claims.

Despite the instructions given to the Attorney General to have Mr Lupari's claims defended Mr. Kali said he learnt later that the claims were all settled out of Court by Mr. Zachary Gelu.

- Mr. Ian Augerea – produced four court files WS 88, 89, 90 and 91 of 2003.

516-

Eric Kiso – Assistant Registrar for Mt. Hagen gave evidence of presiding over taxation of costs in which Mr. Gelu 'consented' to Paul Paraka lawyers claim of K200,000.00 per matter. He said that he approved the costs after he sighted the instrument consenting to the amount signed by Mr. Zachary Gelu. Mr. Kiso was not able to explain satisfactorily the question put to him that if the costs were agreed to then there was no need to go through the process of taxing costs. Mr. Kiso did agree in his evidence that he had very little experience in matters of taxation and had no guidance whatsoever from any officer in the Court system. He said basically that he made up the rules as he went along.

Mr. Zachary Gelu

Mr. Gelu was the Solicitor General at the time Mr. Lupari's four claims were settled. He gave evidence of signing four (4) Deeds of Release for the four (4) claims based only on material provided by Paul Paraka lawyers. The Deeds were signed less than two months after the four claims were filed and on the day he was suspended from office.

Mr. Gelu said that he never consulted the Department of Personnel Management to seek instructions. He said he was satisfied—on the material provided to him by Paul Paraka Lawyers that Mr. Lupari had a valid claim. He denied ever sighting previous instructions from the Department of Personnel Management.

Mr. Gelu also agreed for K200,000.00 to be paid as legal fees for each matter. When asked if he thought the work put in (minimal) justified the costs he said yes.

Mr. Francis Damem

Mr. Francis Damem was the Secretary for Justice Department at the time Mr. Lupari's four claims were settled. He gave evidence on oath and confirmed that the Department of Personnel Management had written to him as Attorney General with instructions to defend the matters. He testified that he had passed this on to the Solicitor General's office. However he refused to accept that he had later signed a letter to Finance requesting payment on all four (4) Deeds of Settlement.

Mr. Damem appeared with Mr. Paul Othas, a lawyer from Paraka lawyers when he gave evidence to the Commission. Mr. Othas did not say much but on at least one occasion handed written material to Mr. Damem while he was still giving evidence in the witness box without first obtaining permission from the Commissioner or consulting the Counsel Assisting. To this day Mr. Othas, has not apologised for his disrespect to the Commission of Inquiry.

Mr. Guguna Garo

Mr. Garo is a senior Associate with Paul Paraka Lawyers. He gave evidence that he drafted and filed the first lot of Writs WS 1788, 1789, 1792 and 1793 of 2003. He emphasised right from the start that after the four claims were withdrawn the file was taken away from him and he had nothing further to do with the four claims until it seems the matters were investigated by the Commission of Inquiry. Throughout his evidence he was evasive about the conclusion of the four claims. When asked by the Commission he denied knowing even that the four claims had been settled for the full amount claimed in the court actions he had drafted. The Commission does not find Mr. Garo's evidence on this aspect to be credible.

As to the merits of the claim itself, Mr. Garo placed great reliance on the case of Peter Aigilo when he was sacked as Commissioner of Police by the newly formed Morauta government. In evidence he avoided

518

commenting directly on whether Mr. Lupari had in fact suffered any loss in pay and entitlements and the resultant stress, illness and embarrassment that Mr. Aigilo had suffered. He did agree in evidence though that for at least one claim based on the contract of employment as Secretary for DPM there was no breach of contract because the contract specifically said that it had been varied. The Commission finds that Mr. Garo would have had full knowledge of the strength of all of Isaac Lupari's four claims from documents provided to draft the four court actions. In spite of his knowledge of the variation clause Mr. Garo still went ahead and filed the claim. This in itself is serious culpable conduct by a lawyer whose first duty is always to the Court. By filing the claim knowing it to be baseless, Mr. Garo deliberately and knowingly misled the court right from the start and this serious breach of duty is not remedied by his contention in evidence that it was up to the State Solicitors office to pick this out and use it to defend the State when the matter went to trial.

- Mr. Billy Bonner

If the evidence of Mr. Bonner is to be believed, then he is the star in settling Mr. Lupari's four claims. It would seem that he was the person who drafted four quantum submissions that so convinced the Solicitor General that Mr. Zachary Gelu agreed to sign four Deeds of Settlement within three days of receiving Billy Bonner's quantum submissions. The fly in the ointment though is the fact that Mr. Billy Bonner was not even a lawyer when he wrote the quantum submissions. Instead he was the file manager in the firm of Paul Paraka Lawyers with no legal qualifications whatsoever when he did such wondrous legal work.

Mr. Billy Bonner testified that his principal Mr. Paul Paraka had given him the four claims and asked him to draft quantum submissions.

519-

Bonner could not explain why Mr. Paraka gave him, a file clerk, the four files worth millions to handle and not to one of the many lawyers that worked in the firm. Mr. Bonner said further that he did not consult any lawyer within the firm to see whether he was doing the right thing.

Of great significance is the admission by Mr. Bonner that with his quantum submissions four draft Deeds of settlement were sent to Mr. Gelu as Solicitor General to consider. The evidence confirms the Paul Paraka Lawyers drafted and in so doing, dictated the terms of the Deeds even before the Solicitor General had received the quantum submissions. This evidence directly contradicts Mr. Zachary Gelu's testimony that it was him who drafted the Deeds in Isaac Lupari's four claims.

Right to the end of his sworn evidence Mr. Billy Bonner was a very evasive witness. He claimed to have a short memory and did not know what happened to the matter after he had sent off the quantum submissions to the State Solicitor's office. When pressed he finally admitted that he was present and had witnessed the signing of the Deed of Settlement by Mr. Zachary Gelu and Mr. Isaac Lupari.

Mr. Isaac Lupari — Through his lawyer Paul Othas of Paraka lawyers handed up a bound volume of documents to GOI on 28th November 2008. Contained among other papers 4 Deeds of Release which could not even be located at the Solicitor General's office. On 06/04/09 under great protestation handed up to COI five separate bound documents in response to Summons No. 327 dated 18th March 2009.

Ms. Winnie Kiap— Former NEC Secretary. Assisted COI in trying to locate contracts of employment entered into by Mr. Lupari.

520-

PAYMENTS BY THE DEPARTMENT OF FINANCE.

According to the extract of payments shown above, taken from Department of Finance Cash Book, two payments made to Lupari was paid out of Trust fund suspense account. He was paid K1 million for breach of contract. The Commission does not know at this stage whether he has since been paid the balance of K2,703,461.31.

D. FINDINGS

(a) Claim – Liability and Quantum

Cause of Action in Law

- There was no termination of employment contract. In two of the contracts i.e., Finance and DPM there was no termination but only variation of contract. Therefore Mr. Lupari did not have a cause of action seeking damages for unlawful termination in those two contracts.

Mr. Lupari did not suffer any loss to entitle him for damages. This is because for the whole time period that he claims for, he was on the Government pay roll earning the same and at times more pay than his usual salary and entitlements. His claim for damages therefore lacks foundation.

- Mr. Isaac Lupari knew full well that his claims amounted to triple and quadruple dipping. Yet he went ahead and instructed his lawyers to file claims against the State in the National Court. Even 521-

knowledge of the law Mr. Lupari would have known that he had suffered no loss and the money received from the claims would be a windfall.

Mr. Guguna Garo of Paul Paraka Lawyers filed the Jbu-r-^lairns"khowing ' that Mr. Lupari had suffered no loss. His Jjcaons--gffiountedrTo willful misleading^of-a-
GQurt-of law and he fadedJn-his-pa-mm&urrr^tEcal'duly as an officer of the Court.

«"?*"— —

Paul Paraka Lawyers drafted the four Deeds of Setdement in Isaac Lupari's four claims against the State. These four Deeds were sent to Zachary Gelu with the Quantum Submissions three days before Mr. Gelu signed the Deeds of Setdement.

Quantum

The total amount claimed is excessive and r.onstitiitesjmjnRt enrichment. On the face of it Mr. Lupari's claims (without special damages, costs and interests) are four times what his entitlements

would normally be.

Attorney-General & Solicitor-General

Zachary Gelu as Solicitor General was recklessly negligent in not seeking instructions from the Department of Personnel Management before signing the four Deeds.

There were detailed instructions on the Solicitor General's file that was ignored by Zachary Gelu when he signed the four Deeds of Settlement less than a month after the four court actions were filed.

- Non compliance with NEC directive NG 07/2002 by both Mr. Zachary Gelu as SG and Mr. Francis Damem as AG.

522-

COMPLIANCE ISSUES

Public Finance (Management) Act 1995

No Ministerial approval sought before DOR for amount far in excess of K100,000.00 prescribed under s.61 PF(M)A.

Some payments were made out of Trust fund suspense account and not from "lawfully available funds".

Claims By & Against the State Act 1996

NEC Decisions

Directive 10 of NEC Decision NG 07/2002 which specifically prohibited any further out of court settlements was ignored by Mr. Zachary Gelu when he signed the DOR on 28th February 2005.

Other Findings

Mr. Lupari was not entitled to the K3,703,461.31, either legally or morally.

Paul Paraka lawyers engaged in deceptive conduct when filing Writs in the order they did.

The Solicitor General's file on Isaac Lupari's four claims against the State only contained 4 Writs filed in 2003. There were no correspondence, Instructions from DPM, Quantum submissions or other documentation.

- Paul Paraka Lawyers did not submit quantum submissions. Purported quantum submissions later produced to the Commission were fabricated after the Col summoned same from Mr. Guguna Garo of Paul Paraka Lawyers.

523-

- Mr. Zachary Gelu signed the four Deeds contrary to clear instructions by DPM to defend claims in court.

If Gelu did not in fact sign the Instructions he failed to seek instructions himself from DPM. When he signed 4 Deeds he was in fact acting on material supplied by Isaac Lupari's lawyers.

Mr. Zachary Gelu signed the four Deeds in haste very soon after the court actions were filed and on the day he was to be suspended from office.

- Paul Paraka lawyers were paid K200,000.00 for each matter totaling K800,000 for doing a minimal amount of work. That work consisted

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only of drafting the four Writs of Summons. There were no appearances

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in Court and no protracted negotiations before agreement was reached to settle the four matters out of Court.

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RECOMMENDATIONS

4s Isaac Lupari is referred to the Fraud Squad for investigations with view to laying criminal charges for fraud.

Isaac Lupari is referred to the Ombudsman Commission for investigations on whether he breached leadership code.

Mr. Guguna Garo be referred to the Police fraud squad for investigations for part he played in lodging fraudulent claim on behalf of Lupari

4s Mr. Guguna Garo is referred to the Lawyers Statutory Committee for further investigations.

& Zachary Gelu is referred to Police fraud squad for conspiring with Paul Paraka Lawyers to facilitate a fraudulent claim.

<4 Billy Bonner is declared as not a fit and proper person to be admitted to practise law.

524-

£ That in future, Deeds of Settlement should not be left to the discretion of one official like the Solicitor General or even the Secretary for Justice. Instead some oversight must be had by having both sign before the Deed can become legally binding on the State.

«\$? Paul Paraka Lawyers be referred to law society for charging excessive fees of K200,000 for doing very little work.

«®i Further to the above, clear directions must be issued stating all necessary steps to be taken before a Deed of Settlement can even be contemplated. The very first and paramount consideration is that instructions are sought and received. If instructions are not forthcoming, the Solicitor General must consult with the Secretary to ascertain the next step.

& A limit to the amount that the Solicitor General can sign on. Any amount over K50,000.00 must go to the National Executive Council for approval.

4» Court action is taken to have the 4 Deeds declared illegal or invalid as based on fraud.

4s That amounts paid under Deeds of Release and Settlement be taxed by Internal Revenue Commission.

Consequential Legislative Reform

Attorney Generals Act to set out requirements needed to be taken before Deeds of Release and Settlement can be entered into. Provision must be made that AG and SG must agree before Deeds are executed. Where either disagrees, matter must be defended in Court.

Public Service (Management) Act, 1995 . Amendments are made t o c l early spell out that where contracts are varied and the officer takes up another job on 525

the same or higher pay and entitlements, he has no further legal right to claim for the balance of his/her old contracts).

(e) Isidore Kaseng

PARTIES:

For the State:

Department of Justice and Attorney General ('DJAG') Department of Finance (T)oF'
Fly River Provincial Government ('FRPG')

Claimants:

(a) Isidore Kaseng, Gonene Kurokuro, Charles Hesaboda, Ambrose Maleveka, Yoto Biaguni, Semai Atowai, Martin Semenabe, Philip Kaseng, Oburo Taruai, Bill Kirokim, Dina Gabo, Damoi Dai'i, Gariga Iakoe, Sali Subam, Aino Keiba, Kukinae Kukane, Banabas Uako, Diglus Fitfot, Nalaba Kanupa, Daniel Atmayok, Mainu Kaworo, Peter Mugudia, Roger Iwanekeile, George Badiam and Vincent Karo ('Claimants').

NATURE OF CLAIM:

The claimants were former elected members of the Fly River Provincial-? Government, which was suspended by the National Executive Council and subsequently abolished by the National

Parliament through enactment of a new organic law on provincial governments.

2. The claimants commenced proceedings (WS No. 1070 of 1998) in the National Court against the Acting Administrator of Department of Western province; Fly River Provincial Government; Secretary, Department of Provincial Affairs and the State ('State parties') seeking damages for loss of entitlements and office, respectively.

526-

c. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

On 18 March 1999, the claimants obtained default judgment against the State except the other defendants, one of whom was the Fly River Provincial Government, which had filed a defence denying liability.

On 21 April 2004, Acting Solicitor General, Francis Kuvi, settled the claim on behalf of the State parties by a consent order. On 30 April 2004 and 7 May 2004, Powes Parkop Lawyers filed separate Certificates of Judgment each in the sum of K20.25 million, totaling K40.5 million.

On 10 April 2005, the National Court, upon application by the State, set aside the consent orders and both Certificates of Judgment.

On 31 July 2007, the Supreme Court dismissed WS No. 1070 of 1998 for not disclosing any cause of action.

No payment has been made by the Department of Finance (DoF).

In the circumstances, this matter falls within Terms of Reference No. 2, 3, 4, 5; 8,10 and 12[^]13 and 14.

D. SOURCES OF INFORMATION AND DOCUMENTATION

1. The brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-

Registry

National Court original file referenced WS No. 1070 of 1998 Supreme Court original file referenced SCA 85 of 2005

Department of Justice & Attorney General -

527-

Solicitor General file

Francis Kuvi, former Acting Solicitor General (iii) Claimants —

(i) Evidence of—

o Gonene Kurokuro o Roger Iwaneke o Robert Hui

The relevant transcripts of proceedings are provided with this Brief.

The critical evidence given by each of these witnesses is discussed where relevant in the course of the findings (F) of this Brief.

CHRONOLOGY OF EVENTS

1992

In 1992, Claimants were elected into office in the Fly River Provincial Government.

On 16 October 1992, National Executive Council suspended Fly River Provincial Government pursuant to Section 187(e) of the Constitution. The reason was for misuse of funds and misconduct. This was in accordance with the old Organic Law on Provincial Governments ('OLPG').

On 16 October 1994, National Executive Council lifted the suspension of Fly River Provincial Government.

On or about 19 July 1995, the State through the National Parliament enacted the new Organic Law on Provincial Governments and Local Level Governments. Consequently, the claimants' respective offices were made redundant and abolished under the old OLPG.

528-

1998

On 29 October 1998, Powes Parkop Lawyers filed a Writ of Summons endorsed with a statement of claim on behalf of the claimants. The claimants sought various declaratory relief together with a liquidated claim totaling K2,148,834.00.

On 10 November 1998, Henaos Lawyers filed a Notice of Intention to Defend on behalf of the Fly River Provincial Government ('FRPG').

On 19 November 1998, Henaos Lawyers filed a Defence on behalf of the FRPG.

On 20 November 1998, Acting Solicitor General filed a Notice of Intention to Defend on behalf of all the defendants ('State parties').

On 4 December 1998, the Provincial Legal Officer, Bubi Gamogab, filed a Notice of Intention to Defend on behalf of the Provincial Administrator, Department of Western Province.

On 18 March 1999, the National Court entered default judgment against all the State parties with damages to be assessed.

2001

On 16 February 2001, on application by the FRPG, the default judgment was varied as being entered against the State only. Hence, no judgment was entered against the three (3) other State parties.

On 21 August 2001, the FRPG through Henaos Lawyers filed an Amended Defence in which the FRPG asserted that the claimants had been overpaid K788,988.58 constituting service leave, leave, loss of office, damages and interest

529

contrary to the Salaries & Remuneration Commission determinations. The FRPG also brought a cross-claim seeking recovery for that amount.

On 16 December 2003, the Deputy Governor of Fly Provincial Government, Hon. John Malom MPA, wrote to Mr John Kumura to settle the claimant's claim at K16,035.00. In the following year on 14 January 2004, the Governor of the FRPG, Hon. Bob Danaya wrote to their then lawyer, Henaos Lawyers, informing them of a termination of their services and the appointment of the Solicitor General as lawyers for the FRPG as well. A copy of this letter was issued to the Acting Solicitor General, John Kumura, and the Provincial Administrator, Nelson Hungrabos.

On 4 February 2004, Hon. Bob Danaya wrote to the FRPG's in-house lawyer, Sinclair Gore, instructing him to liaise with Francis Kuvi of the Solicitor General's Office to settle the claimants' claim "in full and in a manner requested by the claimants". This letter was also copied to Francis Kuvi. In that same letter, Governor Danaya also said, "I endorse the submission by the claimant's lawyers to the office of Solicitor General" without mentioning any specific amount(s).

Following those correspondence, the Court entered judgment by consent in the following terms on 21 April 2004:

1. "That the Defendants settle the Plaintiffs' claim as between the Plaintiffs and the Second and Fourth Defendants.
2. That by consent, interest, costs and CPI adjustments be included for the period 30th June 2003 to the date of agreement.

3. That by consent, the Second and Fourth Defendants facilitates (sic) all documentation necessary to facilitate the immediate settlement of the judgment debt in full.

530-

The judgment debt be paid in full into the Plaintiffs Lawyers Trust Account to enable all the Plaintiffs creditors including legal and consultants costs and fees are satisfied before individual plaintiffs (sic) are paid.
No order as to costs of motion."

No specific amount(s) in damages or otherwise, constituted part of these consent orders. It only endorsed an agreement between the parties to settle the claim.

On 30 April 2004, the claimants' lawyers filed a Certificate of Judgment incorporating a sum of I<20,250,000 as the judgment debt. The certificate was duly endorsed by the Solicitor General.

On 7 May 2004, the claimants' lawyers filed a second Certificate of Judgment which did not specify a liquidated amount and instead annexed to it a schedule which incorporated the sum of K20,250,200 as the judgment debt. The Solicitor general did not endorse this Certificate of Judgment unlike the previous one.

On 22 September 2004, Posman Kua Aisi Lawyers filed a Notice of Change of Lawyers for the State.

On 26 November 2004, the National Court, upon application by all the State parties through Posman Kua Aisi Lawyers, set aside both Certificates of Judgment dated 30 April 2004 and 7 May 2004, respectively. The Court found that both Certificates of Judgment were defective and invalid because neither had a Kina sum judgment or order on which they could stand. The order by consent made 21 April 2004 did not include any specific order for a specific amount of money. Further, the latter Certificate of Judgment did not contain the Solicitor General's endorsement.

2005

531

On 31 January 2005, a Notice of Change of Lawyers was filed by Paul Paraka Lawyers for the Secretary, Department of Provincial Affairs and the State, effective 6 October 2004.

On 30 June 2005, the National Court set aside the Consent Orders dated 21 April 2004; Default Judgment made 18 March 1999; and Order varying Default Judgment made 16 February 2001. Further, the State and another were granted leave to file their Defences within twenty-one (21) days. To the extent the Court found there was a cause of action disclosed, the State parties' application to dismiss the claim was refused.

2007

On 31 July 2007, the Supreme Court upheld the State's appeal from part of the National Court order made 30 June 2005 and dismissed the claim in the National Court (WS 1070 of 1998) for not disclosing any cause of action. The Supreme Court found that the claimants were duly compensated as determined by the Salaries and Remuneration Commission. As to the claim for loss of office, the claimants had been paid six (6) months entitlements for loss of office in accordance with Section 122 of the OLPLLG. With respect to their claim for payment of allowances during the period of suspension, the claimants had received their basic salaries and were not entitled to all other allowances including house or vehicles, which were withdrawn immediately upon suspension.

F. FINDINGS

I. Liability In Issue

(a) Non-compliance with Section 5 – Claims By and Against the State Act 1996

1. The Commission has examined the claimants' lawyers letter dated 12 October 1998 to the Solicitor General giving notice of their intention to make a claim against the FRPG and the State ('Notice of claim5).

532-

The claimants' Notice of claim asserted that their cause of action accrued from October 1998 when they were advised by the FRPG that their entitlements would not be paid.

However, the Commission finds that the Notice of claim did not disclose any cause of action for the reasons found by the Supreme Court. That is, the claimants were duly compensated as determined by the Salaries and Remuneration Commission. As to the claim for loss of office, the claimants had been paid six (6) months entitlements for loss of office in accordance with Section 122 of the OLPLLG. With respect to their claim for payment of allowances during the period of suspension, the claimants had received their basic salaries and were not entitled to all other allowances including house or vehicles, which were withdrawn immediately upon suspension. All this information was available to the claimants, their lawyers and the Solicitor General at the time of giving the Notice of claim.

Therefore, the Commission finds that the Notice of claim was invalid for purposes of Section 5 of the Claims By & Against the State Act 1996 ('Claims Act?').

In the circumstances, the claimants' claim under WS 1070 of 1998 was not enforceable as against the State for want of compliance with Section 5 of the Claims Act.

(b) No merits nor reasonable cause of action disclosed against State

The Commission finds that the statement of claim endorsed to WS 1070 of 1998 did not disclose any cause of action for the reasons found by the Supreme Court. That is, the claimants were duly

compensated as determined by the Salaries and Remuneration Commission. As to the claim for loss of office, the claimants had been paid six (6) months entitlements for loss of office in accordance with Section 122 of the OLPLLG. With respect to their claim for payment of allowances during

533-

the period of suspension, the claimants had received their basic salaries and were not entitled to all other allowances including house or vehicles, which were withdrawn immediately upon suspension. All this information was available to the claimants, their lawyers and the Solicitor General at the time of commencement of those proceedings.

7. In the circumstances, the claimants' claim under WS 1070 of 1998 was not enforceable as against the State for failing to disclose any cause of action.

(c) Cross-claim for recovery of overpayment – K788,988.58

The Commission finds that FRPG's cross-claim against the claimants seeking recovery in the sum of K788,988.58 for over-payment was neither considered nor determined by both National Court and Supreme Courts. This was apart from the fact that the FRPG was not named as an appellant in the appeal nor heard by the Supreme Court at all.

The payments made by the FRPG to the claimants for the period of their suspension consisted of entitlements (service leave, leave, loss of office, damages and interest). These entitlements were all withdrawn by determination of the SRDC upon the suspension of the FRPG.

In the circumstances, the Commission recommends that the State take all steps necessary to pursue the cross-claim pursuant to the Amended Defence filed by FRPG through Henaos Lawyers on 21 August 2001.

II. Assessment of damages

The Commission has found that on 26 November 2004, the National Court, upon application by all the State parties through Posman Kua Aisi Lawyers, set aside both Certificates of Judgment dated 30 April 2004 and 7 May 2004, respectively.

534-

The Court had found that both Certificates of Judgment were defective and invalid because neither had a Kina sum judgment or order on which they could stand. The order by consent made 21 April 2004 did not include any specific order for a specific amount of money. Further, the latter Certificate of Judgment did not contain the Solicitor General's endorsement.

I. Steps taken (or not taken) by Solicitor General in defence of the claim

Although the National Court has set-aside the said Certificates of Judgment and Consent Orders, the Commission finds that there is ample evidence of serious failures on the part of the then Acting Solicitor-General, Mr Francis Kuvi in the performance of his professional duty as lawyer for the State.

a. Processing of claim and Pay-out

There has been no payment in respect of this matter. Further, no payment should be made in respect of this matter in view of the decision of the Supreme Court dismissing the claim in its entirety.

G. RECOMMENDATIONS

The Commission recommends that:

Referral to the Lawyers Statutory Committee

1. Francis Kuvi for dishonourable, improper and unprofessional behaviour in that he failed to conduct due diligence prior giving clearance to the Department of Finance clearing payment based on the said Consent Order and Certificates of Judgment

Referral to the Secretary, Department of Finance

535-

2. Refuse any claim for payment regarding this matter

3. Refer any such claims made to the Attorney General for advice

Referral to the Attorney General

4. Direct Solicitor General to take all steps necessary to pursue the cross-claim

pursuant to the Amended Defence filed by FRPG through Henaos Lawyers on 21 August 2001.

5. Advise the Secretary, Department of Finance to refuse any claim for payment regarding this matter

536-

D. Procurement of Good and Services

The Commission reported on five (5) matters that related to the alleged supply of goods and services to agencies of the State. The claims were pursued either in the National Court or through negotiated settlements with the Solicitor General.

In a number of instances, the procurement processes as prescribed by the Public Finances Management Act 1995 were completely ignored. It has become an obvious trend for the State agencies to enter into ad hoc arrangements in the procurement of goods and services without due regard of the prescribed procurement process.

The Commission finds that there is immediate need for greater co-ordination between Departmental Heads and Department of Finance to ensure –

by compliance with the rules on procurement

^ procurement occurs on there being funding available through budgetary appropriation y claims for payment are not lodged directly at Finance Department where procurement

is by self-accounting departments or agencies of the State

y payments by Finance Department are done in consultation with relevant heads of departments or agencies of the State

the Tenders Boards do not exceed the limits of its financial delegation on contracts awarded

y contracts are only awarded to suppliers with financial capacity, resources and experience

the contract to supply is performed and payment is not based on proforma or dummy invoices

537–

^ there should never be payments in advance claims are authentic

corrupt practices involving senior officers of the State are detected and dealt with decisively.

In defence of claims against the State, the Commission finds there was–

Gross failure by Solicitor General to effectively seek instructions

y Failure by departmental heads to provide instructions to Solicitor General within time, or at all

Despite the comprehensive and widely recognized processes, the Solicitor General and Department of Finance failed to consult the relevant heads of Departments and State agencies when considering the authenticity, price and payment of the claims. This was the trend in all matters investigated. These are all in addition to the other defences identified in each report.

The Commission finds that certain Solicitors General have been grossly negligent in protecting the State's interests.

The Commission recommends the following:

Review composition of tenders board and its operations to ensure compliance with Public Finances (Management) Act 1995

Investigation and prosecution of officers implicated

Investigation and prosecution of officers who have failed to comply with requests (investigations) and recommendations of Auditor General

(a) Pacific Paradise Corporation Ltd

Pacific Paradise Corporation (PPC a company owned by Mr. Tom Rangip, was paid a total K14,850,105.97. PPC claimed that the State had not paid for food it supplied to PNGDF soldiers based at all Military barracks around the country. The company had previously tendered for and was awarded contracts to supply food to the PNGDF in the years 1996 and 1997.

The claim by PPC was among several claims which were being pursued against the State for alleged wrongs done by the PNG Defence Force and Department of Defence. Among those claims was one claiming compensation for the burning (— ----- -- —;— - ----- - ———— ----- ————) down of the Germania club by soldiers in 1993. Other claimants including PPC sought payment for supply of goods and services. In December 1998 the Prime Minister Honourable Mr. Bill Skate, directed the Auditor General and the Attorney General to investigate the various claims. Both officials were directed not to make any settlements until each and every claim was verified as authentic.

Evidence gathered so far by the COI indicate that PPC's claim for the supply of food to the PNGDF was fraudulent in nature based on falsified invoices. Goods claimed as supplied were either not supplied at all or was short supplied. A report done after investigation conducted by the Financial Inspection Services division of the Department of Treasury and Planning (as it was then) summarised its findings as follows:

1. Rules on tender procedures, consideration of tenders and on awarding of contract were not followed.

The Defence Tenders Board exceeded the limits of its financial delegation on contracts awarded between 1996 and 1997.

Twice, PPC was awarded supply contracts although it had no financial capacity, facilities and experience in servicing large volume of transactions

Most payments to PPC appear to have been fraudulent, based on fictitious supplies

Goods covered by K5,390,855.99 outstanding claim under 9 invoices endorsed by James Melegepa appear not to have been supplied

Most payments to PPC were based on proforma or dummy invoices

PPC dealings in supply of foodstuff to PNGDF characterized by advance payments, overs

There are clear suggestions of corrupt practices done in connivance with senior officers of the Department (of Defence) and the Force.

The 1996 board failed to determine that PPC had a managing director Tom Rangip who had been declared insolvent on 27th October 1995 by the National Court.

- An Audit Report compiled by the Auditor General's office in 1999 also found gross irregularities and concluded that: 1. K7,597,782.16 worth of invoices was under dispute

540-

K481,351.55 worth of food arose from 7 containers of food supplied to troops of Bougainville. These goods were not accepted by PNGDF because the order had previously been cancelled, in fact 4 days after it had been made. It was also noted that quantities in the invoice materially differed from details of suspended order.

Only K260,000.00 was confirmed as being due and owing to PPC

The rest of the claims could not be established as in order because of the absence of documentation in respect of ordering, receipting of foods or other corroborative evidence thereof.

After receiving both of the above Reports Mr. Michael Gene the Attorney General then briefed the matter out to Mr. Moses Murray of Murray and Associate Lawyers. In his advice to the Attorney General Mr. Murray advised that the State was liable in relation to several containers of food held at the Port Moresby and Rabaul Wharves. The food was supplied under the 1997 contract and had been sitting at the Wharf until the year 2000 when Mr. Murray advised that even if there was oversupply the State was still liable to pay. In evidence Mr. Gene conceded that after the long

period of time most of the food had gone bad, but the State still had to pay.

Based on the above advise a Deed of Settlement (DOS) for the sum of K5,125,183.00 was signed on 02nd May 2000 by Mr. Michael Gene on behalf of the State. Soon after he executed the Deed Mr. Gene was replaced as Attorney General. His successor Mr. Sao Gabi (now Hon. Justice Gabi) questioned the validity of the claim and fired Mr. Murray as lawyer and instructed Warner Shand Lawyers to instigate recovery action.

541-

When request was made to Finance dept to pay out on the Deed of settlement it refused saying that the claim was partly bogus. To enforce the agreement reached in the Deed, lawyers for PPC filed Writ, WS 862 of 2000 on the 17th July 2000. It claimed the amount that had already been awarded in the DOS of 02nd May.

The Writ was filed on the 18th July 2000. At the same time a Notice of motion was filed seeking to enter Summary judgment. The returnable date was the next day 19th July 2000. Negotiations were entered into and Mr. Toop agreed to forego K656,122.87 which the Finance dept claimed to be fraudulent. On the 09th of August 2000 Mr. Murray who was acting for the State consented to a Court order for the sum of K4,469,060.13.

Mr. Toop still managed to get the K656,122.87. He filed separate motion and on 06th April 2001 "consent default judgment" was obtained for the payment of I- C656,122.87.

Further to the above two payments consent order was endorsed by the National Court on the 11th of September 2002 for the State to pay the interest component on the principal sum of K5,125,138.00. Interest .was awarded in the sum of K2,405,392.27.

On the 10th of August 2000, WS 1032 of 2000 was filed claiming K4,981,580.35 for non-payment of sums owing under various other invoices which were not specifically mentioned in the Deed. This appears to be in breach of the agreement reached in the Deed of Settlement of 02nd May 2000 whereby it was agreed that the State would pay a total of K5,125,183 in full and final settlement of its claims in relation to the claims for food supplied to the PNGDF.

542-

PPC pleaded in WS 1032/00 that it had previously won a tender in 1996 to supply food to various Army barracks throughout PNG. On 19th November 2001 the Solicitor General consented to a court order for K4,981,580.35 to be paid by the State.

Another consent order was obtained on 11 September 2002 for the State to pay Interest of K2,337,995.35 and K150,000.00 in costs.

It seems that Tom Rangip, owner of PPC is not done yet with the State. On the 26th June 2006 Habuka lawyers filed Writ WS 896 of 2006 claiming a total K 25.75 million broken up into the following heads of damages.

K3.25 million for loss of contract with PNGDF for further 5 years K15 million for loss of contract with National Disaster Authority K 7 million for "loss of possible other contracts". WS 896 has not been determined yet. The Director of National Disaster Center (not "Authority") has advised the Commission of Inquiry that the NDC never entered into a contract with PPC to supply food.

This Report was sent to the Attorney General, Mr. Michael Gene who summarized the Audit report in the following terms. "The audit report quite unequivocally raise serious issues on the authenticity of the various invoices because of the following reasons:

Inability of the officers of the PNGDF to provide relevant invoices/documents, Accounting system and record keeping maintained at Murray Barracks were not up to expected standards, In the majority of instances the placements of orders were not in writing. Receipt of stock records maintained in Murray Barracks did not, in many instances, show receipt of goods, and

543-

There was complete lack of compliance and respect for law in the procurement and engagement of suppliers for service."

Mr. Gene concluded that with respect to liability, his advise was that the State was not liable to pay. Mr. Gene did go on to say that ... "I require further and better instruction and documents to formulate a firm view.

Mr. Gene next briefed Mr. Moses Murray of Murray and Associates to handle the matter on behalf of the State. Mr. Murray advised that although there were no legal contracts and in some instances there was over-supply of food, the State was still liable on a Quantum Meriut basis. According to statements provided to the COI by Mr. Murray, Gregory Toop, lawyer for PPC got wind of this advise and called Mr. Murray.

Negotiations were entered into with Toop asking for amounts as high as K18 Million and not less than K12 Million. According to Mr. Toop in a statement he provided to the COI, he wasked for K13 Million because ... "it was as good a figure as any to start with". Finally an amount of K5,125,187.97 was agreed upon and Mr. Murray drafted the Deed which Mr. Gene and Mr. Toop signed on 02nd May 20000.

Cash book extracts show that a sum of K14,850,105.97 has already been paid out to PPC.

544-

(b) Pacific Engineering Ltd – Defence Force

Parties

For the State:

(a) Attorney-General & Solicitor –General

For the Claimant:

(a) Pacific Engineering & Repairs

Others (if any)

Directorate of Supply, PNGDF Secretary, Department of Defence

Department of Finance

Terms of Reference ("TOR")

The applicable reference concerning this claim is TOR 2, 3, and 4.

Documents and investigations conducted at:

The documents the subject of review and examination are File No. SG 151/04 (Office of the Solicitor General/Attorney General) and, Writ of Summons No. 309 of 2004 (National Court Civil Registry)
Attorney-General (AG) Solicitor-General (SG) Department of Finance (FD)

545-

The Matter

This claim relates to unpaid invoices for spare parts, repairs and maintenance of military vehicles and equipment numbering a total of 64 claims in 2003. The unpaid invoices amounted to a total sum of K1, 456,700.00. The Plaintiff Company instructed Warner Shand Lawyers to institute proceedings against the State for the unpaid invoices on 25th March 2004.

Warner Shand lawyers gave section 5 notice pursuant to the Claims By and Against the State Act 1996. In the same letter dated 10th February 2004 extension for time to file a claim was also sought from the Solicitor General. The Solicitor General and the action officer failed to respond to the request for extent time to file a claim against the State.

Following that letter, the Writ of Summons was filed on 25th March 2004 and named the Independent State of PNG as the Defendant. The writ does not name the Secretary, Department of Defence or the Commander of PNGDF. In the Statement of Claim, the Plaintiff claims non payment of repairs and maintenance of defence force vehicles and equipment for the unspecified dates on the invoices for the total amount of K1,456,700.00 plus interest and costs of the proceedings

Despite numerous correspondence to the Solicitor General over the proceedings, the Court made orders pursuant to section 5(2) (c)(ii) of the Claims By and Against the State Act 1996 confirming the section 5 notice and the extension for time to file the claim. That order was made on 26th August, 2004.

The National Court file reveals that the State had not filed any Notice Of Intention to Defend nor any Defence. The Plaintiff obtained default judgment against the State on 25th August 2004. The Court made orders in favor of the Plaintiff for the sum of K1, 456,700.00 and interest on that sum accruing at the rate of 8% per annum from 25th March 2004 until payment.

546-

6 Certificate of Judgment pursuant to subsection 13(2) of the CBASA Act was filed by the Plaintiff on 30th August 2004 basically certifying that the Plaintiff obtained default judgment in the sum of K1 ,456,700.00 and interest plus costs

The Court file notations indicate that at the court hearings relating to applications for default judgment, Mr. Mundua Kua failed to attend the hearings at Court and no explanations were provided.

On 29th November 2004, Paul Paraka Lawyers were instructed to act for the State and provide a review on the proceedings.

With regard to the payments arising out of the judgment order of 18th August 2004, it is important to take note of the concerns raised by the current acting Solicitor General. His concerns were directed to the Secretary of Defence dated 27th February 2008 and one which summarizes the state of affairs concerning the judgment order. The letter reads;

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I advise the Plaintiff in this case obtained a default judgment (copy attached) on the 18th August 2004 in the liquidated sum of K 1 AS 6 . 760 . 00 . Since the date of the order to date, my record shows that no payment has been done on this judgment.

I have noted this mth great concern that if no payments are done on this judgment t date, the interest will accumulate to over K 400 . 000 . 00

I have inquired at the Department of Finance but their records also indicated the same.

Please cause an investigation into this issue and advise as to whether this judgment has already been settled by your Department."

547-

10. Mr. John Liu the Company Secretary, Pacific Engineering & Repairs Ltd confirmed with the Commission that no payments have been made with respect to the default judgment since 25th August, 2004 (Refer to FD"24")

REVIEW OF MATERIALS RELATED TO THE CLAIM

The Commission commenced hearings and the calling of evidence and materials with regard to this claim on 6th October 2008. During that period a number of persons were summonsed and appeared personally or have provided statements and other documents to assist with our inquiry. Based on the evidence and materials that have been provided, the following observations and findings reflect the general evidence that was availed to the Commission for its assessment with respect to the TOR.

NON COMPLIANCE WITH STATUTORY PROCUREMENT PROCESS

The Commissions observation with regard to this claim is the fundamental disregard of the procurement process lawfully provided for under Public Finances (Management) Act

There was a breach of the procurement process by the Papua New Guinea Defence Forces either through 'absolute disregard' or 'the short cut' mentality to procure goods and services. The explanation that the PNGDF provided to the Commission was the urgency to ensure that the vehicles were maintained as a result of the Bougainville Crisis.

The Commission's collective view is that the Bougainville Crisis required the presence of PNGDF personnel, vehicles and equipment on Bougainville. The magnitude of the civil conflict was such that the appropriate course for the PNGDF to take in procuring services was to comply with the procurement process under the Public Finances (Management) Act, 1996. The procurement process provides for value for money, transparency, effective competition, fair and ethical dealing and efficiency and effectiveness as fundamental to good governance, financial discipline and accountability.

21 Refer to Part 11–Procurement–Framework and Principles, Financial Management Manual

548–

Assessment of the Evidence (Sworn Testimony and Documents)

Witnesses

The following persons gave evidence on oath; •

Mr. John Liu
(Corporate Secretary of Pacific Engineering and Repairs Limited)

Assisted the Inquiry by his attendance and informed the Commission that PNGDF had not settled the default judgment. By the same token, the Solicitor General had not issued a Certificate of Judgment which was outstanding for almost 4 years.

(Transcript of Proceedings COIFINANCE 13th October 2008 at pp 879 to 882)

Further to that appearance on 13th October 2008, Mr. Liu provided farther information to the Commission on the status of the payment/settlement of judgment.

"The outstanding were incurred from in or about 1997 to 2002 for repairs/maintenance of motor vehicles and supply of spare parts to the PNGDF. Most of them related to the Bougainville Crisis, and the reason that was given by PNGDF for not settling the debt was that during that period they were having cash flow problems.

It is our understanding that two internal audits and one external audit were carried out to verify

the outstanding debt.

As of today, we still have not received the amount nor the interest payments from the State despite numerous correspondences and meetings with the Department of Defence, Department

549-

of Treasury, Department of Finance, Department of Justice and Attorney General and ourselves(Pacific Engineering and Repairs Ltd). "(My addition) (Refer to Document No. PER "25")

On 19th November 2008, he provided to the COI a bundle of documents under the heading " Outstanding Owing b y PNGDF' which is the break-up of all the invoices relating to the Court Proceedings. Those payments remain outstanding and no paid by the Department of Defence. (Refer to Document No. PER "26")

- Mr. Mundua Kua
(Former Senior Legal Officer-Solicitor General's Office)

Mr. Kua gave evidence that he was assigned with the file concerning the claim against the PNG Defence Force. The Court records indicated that no State Lawyers (especially the action officer assigned with the file) was present at the time default judgment was entered against the State and despite the lack of attention given to the application for default judgment at the Office of the Solicitor General, Mr. Kua was adamant that he had not sighted any of the documents hence his absence at the hearings. Mr. Kua however gave evidence that "lawyers were at fault.. .not appealing or taking any measures to review the summary judgment or default judgment "[as required under section 12 of CBASAct]

He also expressed his views on the procedures involved in the management of files, the legislation dealing with claims against the State and the procurement issue.

He also expressed concern that the court had allowed the application for Section 5 notices and extension of time to be granted despite objections raised by Mr. Kua. He had advised Mr. Kuvi to appeal against the decisions but there

550-

was no action taken. There are also no file notes on this recommendation noted by the Commission on the SG records.

He also denied that he had sighted Mr. Kuvi's memo to him directing him to provide an explanation on why a default judgment was entered for K1.2million against the State. (Transcript of Proceedings COIFINANCE 32 dated 13th October 2008 (pages 879 to 884; and COIFINANCE 60 dated 27th January 2009 at pages 1452 to 1461 especially page 1459 and Document Reference MK"27")

- Mr. Francis Kuvi
(Acting Solicitor General (Suspended)-Solicitor General's Office)

He said in evidence that he had no authority to discipline Mr. Kua and by that time Mr. Kua had not turned to work at the Office until his resignation letter was submitted to the Department sometime in early 2005.

(Transcript of Proceedings COIFINANCE 28th January 2009-pages 1527 to 1530)

STATEMENT AND PRODUCTION OF DOCUMENTS

These are witnesses summonsed and produced statement and documents to assist the Commission in its inquiry into the claim.

> Lieutenant Colonel Joseph Ben DMS

He was the then Director of Transport. PNGDF HQ, and provided by way of a written statement dated 10th October 2008 with the following explanation.

551-

The claims originated from audited outstanding accumulative bills for services rendered to the PNGDF by PER over a number of years.

He confirmed that no legal contract existed between PER and Defence which was a direct contravention and non compliance with PFMA Act 1996

'The said claims are accumulative claims incurred by PNGDF over a period of time, and not a one-offpayment for services rendered. Should, this be the case PNGDF would have followed the public tendering process and procedures as required by law".

The reasons why PNGDF entered into the "open credit facility arrangement with Pacific Engineering

"In early 2003 the Acting Defence Secretary intervened by setting up an audit team to audit all outstanding claims for service rendered to the Defence Organisation (DO). This intervention was to ensure that Finance Department pay genuine claims for services rendered to DO. The creation of the Defence audit team was sanctioned by the then Defence Minister (Mr. Mathew Gubag). It took the audit team approximately eight months to audit hundreds of claims for services rendered by our known clients, inclusive of Pacific Engineering & Repairs Limited. All audited claims were approved and forwarded to the Department of Finance for payment in December 2003.

The audit team discovered that the PNGDF committed Pacific Engineering and Repairs Limited hence has failed to honour its part of the arrangement thus allowing the accumulation of outstanding bills.

The audit team confirmed that the arrangement between the DO and the said client was on an ad-hoc basis, which basically means an open credit facility. All invoices audited did not exceed the amount of K100, 000.00 which requires a formal contract.

552-

During the audit it was discovered that the most services rendered was in support of the PNGDF vehicle fleet of approximately seventy (70) vehicles in Bougainville during the crisis and the maintenance of the Port Moresby unit's vehicles over a period of time.

The audit team identified that there were couple of reasons as to why PNGDF committed Pacific Engineering & Repairs Limited to supply vehicle parts and accessories and or repair of PNGDF vehicles on a credit facility arrangement :

Urgent demands for vehicle parts from the Bougainville Operations during the crisis ; PNGDF did not have the funds at the time of these urgent demands ; Value for Money (as oppose to genuine parts supplied by other motor dealers) ;

Existing understanding with the supplier to supply render services based on priority demands due to DO financial constraints ; and

The willingness by the supplier to render services to PNGDF in credit .

In conclusion, the audit team recommended that Finance Department settle the outstanding bills owed to their clients, inclusive of Pacific Engineering and Repairs Limited. I believe to date Finance Department has not settled the said claim which is now before the Commission of Inquiry.

(Refer to Document No. "OD25")

Findings

553-

From the evidence received by the Commission, the findings are as follows :-

Solicitor General & Attorney General
(Claims by and Against the State Act & Attorney Generals Act)

Section 5 notice given with request for the grant of extension of time to file claim against the State. The Solicitor General failed to respond to the request for extension of time.

The Solicitor General failed to file the 'Notice of Intention to defend' the proceedings including the 'Defence' on time.

The State had sufficient ground to defend and challenge the claim. The claim was out of time by more than 2 years.

PNGDF was not named as the Defendant and therefore the Statement of Claim was defective having named the State as the only defendant. The Statement of Claim related to the unpaid invoices accumulated over a period of 6-12 months against the PNGDF and not the State.

The Solicitor General failed to challenge the application for default judgment on the basis of section 12 of the CBSA Act.

The Solicitor General failed to file an appeal against the order for default judgment on the basis of section 12 of the CBSA Act.

The Solicitor General failed to consult and obtain instructions from the Department of Defence with the view of settling the claim. That failure to settle the payment has now cost the State to settle the liabilities including interest accruing and costs.

Papua New Guinea Defence Force

The PNGDF and Department of Defence ad hoc arrangement with the Pacific Engineering & Repairs Limited on the open credit facility has allowed for the

554-

debts to accumulate over a period of time culminating in a huge liability on the State to settle the debt.

The ad hoc arrangement created a huge burden on the PNGDF Budget given the fact that the arrears have now affected the appropriations for the following years.

The PNGDF failed to comply with the Procurement process under the Public Finances (Management) Act, 1996.

Recommendations

The Solicitor General to take appropriate measures to review and file an appeal to the Supreme Court against the default judgment pursuant to Section 12 (3) of the Claims by and Against the State Act, 1996.

The Department of Defence/PNGDF failed to comply with procurement procedures by calling for public tenders in the procurement of goods and services.

The ad hoc open credit facility arrangement with the Pacific Engineering & Repairs Limited provided an avenue for abuse and was not in the best interest of the State. The crisis on Bougainville Island was in our view sufficient reason for the PNGDF to call for public tender for the provision of a service provider in the maintenance, repairs and spare parts for PNGDF vehicles and equipment.

Mr. Mundua Kua was in our view negligent with regard to the management of the case at the time he was assigned, with the file. The claim involved a substantial amount of KI, 456, 700 and he failed to undertake all necessary research to ensure that the claim was properly tested in court.

Mr. Francis Kuvi as the then acting Solicitor General failed to file an appeal against default judgment despite the lack of explanation from Mr. Kua who absconded from duties after the default judgment was entered by the Court against the State.

555-

? There is a need to ensure that the key positions within the Department of Justice are approved and filled by competent lawyers. The continuous

and long delays in the appointment of Lawyers on acting capacity has created an uncertainty in decision making, discipline, proper instructions and re-organization of the Office to deal with the volume of work.

556-

(c) Pacific Engineering Ltd – Police Department

PARTIES

For the State:

(b) Attorney-General & Solicitor —General

For the Claimant

(b) Pacific Engineering & Repairs

Others (if any)

(a) Office of the Commissioner of Police Terms of Reference

("TOR")

The applicable Terms of Reference are TOR 2, 3, and 4.

Documents and investigations conducted at:

The documents the subject of review and examination are File No. SG 151/04 (Office of the Solicitor General/Attorney General) and, Writ of Summons No. 307 of 2004 (National Court Civil Registry)

Attorney-General (AG) Solicitor-General (SG) Department of Finance

Relevant Facts: •

The Matter

557-

The Claimant claims that between May to December 2002 at the request of the Defendant the Plaintiff carried out repairs and maintenance to vehicles belonging to the Royal PNG Constabulary. The Claimant made numerous representations to the Commissioner for Police demanding payment of the debts. The unpaid invoices between May to December 2002 totaled K2,074,169.64. The claims under this Writ are for the unpaid invoices, interest and costs of the proceedings. (Refer to OD"3" and NC"4")

• Payments by Finance

To verify with Department of Finance as to payments. There is a letter from the acting Solicitor General Mr. Devette who has expressed concern about the payments on the default judgment which has not been settled by the Department [Refer to SG"19"]

Below is a schedule of payments made to Pacific Engineering and Repairs Ltd as derived from the Cash Book for periods 1 January 2000 and 1st July 2006.

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831288 ? 191,292.37

and maintenance conducted between May and December 2002 for the vehicles belonging to the
Royal PNG Constabulary and the Commissioner of Police. They claimed that despite repeated
demands to the Office of the Commissioner of Police, the Police was unable to make the payments
as verbally agreed to between
the Company and the Police. That letter also referred to section 5 notice
559

requirements under the Claims By and Against the State Act, 1996. The letter in part reads;

. In these circumstances we believe our client is able to satisfy the requirements to show cause
pursuant to section 5(2) (c) of the Claims By and Against the State Act, 1996for the principal legal
advisor to extend the period within which to give notice of this claim.

We therefore seekyour approval to treat this correspondence as notice of our clients claim
pursuant to section 5 of the Act and look forward to your confirmation in 30 days." (Refer t o
OD" 3 ")

Attached to that letter was correspondence between the General Manager of the Company and Sam
Inguba, Commissioner of Police including computer generated printout of the invoices issued for
the Company's Spare Parts and Workshop for all jobs conducted on Police Vehicles from May to
December 2002. (Refer to OD"3")

The Writ of Summons No. 307 of 2004 was registered and filed at the Waigani National Court
Registry on 25th March 2004. The party named to this proceeding was the Independent State of
PNG as the Defendant. The Commissioner of Police was not named as a defendant. (Refer to
NC"4").

The Statement of Claim and the pleadings lack substance as it does not relate the complaint to the
State. The omissions noted are:-

a. No reference as to the state's responsibility to be vicariously liable to the complaint made
against the Commissioner of Police for non-payment on the provision of work performed under a

verbal agreement to provide maintenance and spare parts to its vehicle.

560-

The pleading does not disclose what the State has incurred as a result of the failure by its agent namely the Royal Papua New Guinea Constabulary ("RPNGC") to settle the debts.

The relevant parts in the pleadings (See paragraph 2, 3, 4, 5, &6 of WS) relate to the correspondence and matters raised between the Commissioner of Police and the Company.

The request to maintain and service all police vehicles is not supported by any contractual arrangement where State Entity such as the Police Force must comply with the Tender requirements for the procurement of goods and services.

The pleadings also include reference to section 5 notice requirements and the State's failure or refusal to acknowledge the written request to extend time. In fact there is no correspondence or notation sighted to indicate that the State had in fact responded given the nature of the quantum of the claim which is over K1 million.

Warner Shand Lawyers (per Mr. Frizzell) filed Notice Motion on 25th March 2004 seeking orders that "the proceedings are deemed to have been issued upon notice pursuant to section 5(2)(c)(ii) of the Claims By and Against the State Act 1996. There is also a prerequisite that sufficient cause be shown by the Plaintiff that the Principal Legal Adviser i.e. the Attorney General has not given his/her approval to grant further extension to file a claim against the State. Mr. John Liu, Financial Controller for the Claimant Company provided Affidavit in support of the application restating the work done on police vehicles and the demand for payment of the debt.

It is noted that the Solicitor General (Mr. Kuvi as acting Solicitor General) filed its Notice of Intention to Defend the Claim on 13th May 2004. That was done in

561-

accordance with, section 9(a) (i) of the Claims By and Against the State Act, 1996 which requires 60 days after the writ has been served on the State. No further documents titled Defence was sighted as filed by the State in relation to the matters pleaded in the Statement of the Claim.

On 28th July 2004, Mr. Mark Vara, Clerk employed at Warner Shand Lawyers deposed in his Affidavit of Service filed with the Court to the effect that a letter dated 16th July 2004 addressed to

the Solicitor General advising application will be made to enter judgment in default in accordance with National Court Practice Directions. (Refer to NC"8")

A Draft Order filed on 8th September 2004 and ordered by the Motion Court Judge on 18th August 2004 confirmed compliance with section 5(2)(c)(ii) of the CBSA Act. The Order was entered by the Registrar on 26th August 2004. (Refer to NC"9")

Default Judgment was filed by the Plaintiff on 8th September 2004 as ordered by the Court on 25th August, 2004 and entered by the Registrar on 3rd September 2004. The Order related to the failure of the Defendant to file its notice of intention or defence and the judgment in default was ordered in favor of the Plaintiff in the sum of K2,074,169.64 and interest on that sum accruing at the rate of 8% per annum from 25th March 2004 until payment. (Refer to NC"4" & NC"10").

Certificate of Judgment pursuant to subsection 13(2) of the CBSA Act was filed by the Plaintiff on 13th September 2004 basically certifying that the Plaintiff obtained default judgment in the sum of K2,074,169.64 and interest. The Registrars certification also included the following clause:-

the judgment maybe satisfied; or
the State proposes to take further action in this matter and satisfaction of judgment cannot take place.

562 -

15. Pursuant to section 14 of the CBSA Act, Mr. Francis Kuvi, then acting Solicitor General expressed his concern over the Certificate of Judgment to Mr. Mundua Kua, the lawyer having carriage of the matter. Those concerns were expressed to Mr. Kua in an Internal Minute dated 14th September 2004. Mr. Kuvi's Minute states as follows

.. You are the action officer in this matter on behalf of the State.

I will not endorse this Certificate of Judgment for payment until I receive a detailed brief from you explaining how this judgment of more than two (2) million Kina has been allowed to go through by you by not filing both Notice of Intention To Defend and Defence within time.

You must also note that we are still within the 40 days appeal period as of the 25th August 2004 in case there may be grounds for lodging an appeal or applying to set aside this default judgment if it has been obtained by way of ex parte application." (Refer to SG"13").

The same Minute also contains a handwritten note from the Secretary & Attorney- General dated 27th September 2007 with the directive to Mr. Kuvi "Pis get the explanation from Mr. Kua and if it is not satisfactory the officer must be charged. (Signed)." (Refer to SG"13")

It seems that the Minute and direction from the Attorney General & Secretary for Justice [including that of the Solicitor General] to Mr. Kua did not provoke an immediate response from Mr. Kua. Mr. Kua was not concerned about the urgency and the fact that the State was to pay almost K1.5 million for the debt. Mr. Kuvu wrote to Mr. Kua by Minute dated 5th October 2004 and stated;

563-

"I refer to my minute to you dated 14th September 2004 regarding the above matter. You have not responded to that Minute.

You are to provide an explanation as to how a Default Judgment was entered against the State in excess of
¥2 million in this matter.

This is a substantial amount of money and we need to do something about the judgment." (Refer to SG"14")

The records from the SG file indicate that no further action was taken against Mr. Mundua Kua and that he was not charged by the acting Solicitor General for insubordination and professional recklessness as a practicing lawyer in the State Office. However in the interest of the State, the then acting Solicitor General did not take it upon himself as the chief litigation officer of the State to institute an appeal upon review of the Certificate of Judgment in order to properly deal with the issues of liability and quantum with the Plaintiff/Claimant.

The State engaged the services of Paul Paraka Lawyers as evidenced by the Notice of Change of Lawyers acting for the Defendant State filed with the Court on 30th November 2004. Mr. David Dusal of Paraka lawyer wrote to the Commissioner of Police relating to the issue of the debt owed to the Company and invited the Commissioner of Police to comment on the allegations raised in the Plaintiffs Statement of Claim.

On 8th August 2005, Paul Paraka Lawyers through its lawyer Mr. David Dusal provided its brief to the acting Solicitor General outlining its review on the file. The lawyer concluded as follows;
"Upon receiving instructions, we conducted a file search on the 29th of November 2004 and ascertained that the Plaintiffs Application for Default Judgment was granted in favor of the Plaintiff in the sum of K2,074,169.64 per annum from 25th March 2004 until payment

564-

for failure of the Defendant to file Notice of Intention to Defend and Defence. There was no appearance on behalf of the Defendants. Also a Certificate of Judgment Pursuant to Subsection 13(2) of the Claims by and Against the State Act was filed by the Plaintiff on the 13th September 2004.

We have closed our file and have the matter referred back to your office as the matter was concluded prior to us receiving instructions."

The Law firm ceased acting for the Solicitor General on 1st August 2005. It is obvious from the beginning that the matters reviewed by Paul Paraka lawyers was clearly raised by Mr. Kuvi in his memo to Mr. Kua on two separate occasions weeks apart. There was no reason for the brief out to Paul Paraka Lawyers as the worst was already a known fact in the Office when the Certificate of Judgment was served on the Office. The significant findings by Mr. Dusal were that "non appearance on behalf of the Defendant" at the hearings was the factor culminating in the orders made against the State. (Refer to SG"18")

On 5th March 2008, Mr. Neville Devette, acting Solicitor General sought advise from the Commissioner of Police as to the payment of the liquidated sum of K2,074,169.64 and that office record indicated that no payment has been made since 25th August 2004. (Refer to SG"19")

list of Relevant Documents

Ref No. Document (WS 307 of 2004 or SG151/04) NC"1" National Court Writ of Summons File Cover Notations

SG "2" SG 151/04 File Cover Notation

OD "3" Letter from Warner Shand Lawyers to Solicitor General dated 10*

February 2004 re: Notice of Claim against the State Pacific Engineering & Repairs (PER).

565-

Attachments:

Letter to Sam Inguba dated 23 January 2003 from Pi-Na LuLiu, General Manager, PER on outstanding payments of Invoice
Outstanding Invoice for May to December 2002.

NC "4" Writ of Summons

NC "5" Notice of Motion filed 25/03/04-section 5 notice

NC"6" Affidavit of John Liu dated 23rd March 2004 re: outstanding debts

and section 5 notice and correspondence between Commissioner of Police and the company on the debts

NC "7" Notice of Intention to Defend dated 11th March 2004 filed 13th May 2004 by Solicitor General.

NC "8" Affidavit of Service by Mark Vara (Warner Shand) filed on 25th July 2004 re: default judgment and Attachment "A" in relation to the documents served state s ; " Letter from Warner Shand Lawyers to the Solicitor General dated 17th July 2004 advising application will be made to enter judgment in default in accordance with National Court Practice Directions."

NC "9" Draft Order filed 8th September 2004 and signed by his honor Gabrielle AJ on 25th August 2004 in relation to confirmation of section 5 notice

NC "10" Order as per Draft Order of 25th August 2004 and filed in court on 26th August 2004.

NC "11" Default Judgment ordered 25th August 2004 and filed on 8th September 2004.

NC "12" Certificate of Judgment pursuant to Subsection 13(2) of the Claims By and Against the State Act 1996. filed on 13th September 2004.

SG "13" Minute dated 14th September 2004 from Mr. Kuvu (a/SG) to Mundua Kua re: K2, 074, 169.64 Default Judgment–Pacific Engineering & Repairs limited–WS No. 307 of 2004. Attachment:

566–

1. Certificate of Judgment with directions from AG re: brief on the order.

SG "14" Minute dated 05th October 2004 from Mr. Kuvu (a/SG) to Mundua Kua re: K2, 074, 169.64 Default Judgment–Pacific Engineering & Repairs limited–WS No. 307 of 2004

NC "15" Notice of Change of Lawyers filed on 30th November 2004 by Paul Paraka Lawyers re: acting for the State as Defendants lawyers

SG "16" Letter by Mr. David Dusal of Paraka Lawyers to the Commissioner of Police dated 29th November 2004, re: WS 307 of 2004 and payments

SG "17" Letter or brief to SG by Mr. Dusal on 08th August 2005 on review and conclusion on the Judgment Order of 25th August 2004

NC "18" Notice of Ceasing to Act filed by Paraka Lawyers on 1st August 2005.

SG "19" Letter by Mr. Devette to Commissioner of PoEce dated 5th March 2008 re: payments on the Judgment Order of 25th August 2004.

findings

Claim liability and Quantum

The claim for liability is solely the responsibility of the Department of Police with respect to the unpaid invoice. The delay in payment is also caused by the Department of Finance though it very much the fault of Police Force that no valid contract exists to enforce such a claim.

- Claimant

The Plaintiff/Claimant has no valid cause of action against the State as it does not show as to how the State can be held liable for the arrangement that existed between the Department of Police and the Claimant without a lawful contract in existence.

567-

- Attorney-General and Solicitor General

The Office of the Attorney General and Solicitor General failed to file the NOID and defence on time therefore allowing the Claimant with the right to obtain a default judgment. The State had sufficient grounds to deal with the claim in respect of section 5 notice requirements as the claim was well out of time.

Compliance issues

Claim By and Against the State Act, 1996

The claim was out of time but State failed to file defence thereby allowing the claimant to get order of the court as to extension of time to file claim.

NEC Decision 150 of 2003

The claim was in excess of K1 million but no payment has been made to date. There is a high likelihood that contempt proceedings can be instituted by the Claimant to enforce the judgment against the State.

Statute of Frauds and Limitation Act

Not considered as it is not applicable to the matter under review.

Public Finances (Management) Act, 1996

The Department of Police failed to comply with tendering procedures and that no valid contract exists where it involves State Institutions such as the police force in terms of procuring services

such as maintenance and spare parts for vehicles and equipment.

The Commission however notes that despite our requests for further information from the witnesses namely Sam Inguba (former Commissioner of Police); Tom Kulunga, Hodges Ette (Royal PNG Constabulary) were not able to attend the hearings nor provide any further information. The Commission only refers to evidence and documents it has on hand to make certain findings.

568-

THE REVIEW OF FURTHER AND ADDITIONAL INFORMATION

33. The file was opened on 13th October 2008 and the Transcript of Proceedings is attached for ease of reference (See pages 875 to 883 of the Transcript). A review of all the responses either by telephone, personal interviews conducted and correspondences with documents have been collated and filed for reference. The relevance of these materials based on our assessment and review to date reveals that:-

The Pacific Engineering and Repairs Limited have provided services to the Police on a daily basis. Payments by the Police were not forthcoming and thus accumulated into the claim which was ordered by the Court under a default judgment for liquidated sum of K2,074,169.64 and interest plus costs for the proceedings.

The default judgment was properly entered by the National Court in 2004. Confirmed by Paraka Lawyers who reviewed the files and that Mr. Kua was negligent in the discharge of his duties as a lawyer having carriage of the matter on behalf of the State. The Solicitor General at that time, Mr. Kuvi refused to sign a Certificate of Judgment because Mr. Kua did not comply with the direction to furnish a brief to his Office on the default judgment. It is important to note the concerns of the then Solicitor General, Mr. Devette on 5th March 2008 to Mr. Hodges Ette, Principal Legal Officer, Commissioner of Police on the payments though no response was received and recorded. (Refer to Document "SG 19")

Due to our persistence to obtain information and data in relation to the payments by the Police, the Commissioner of Police has furnished to the COI computer printout of payment that have been made to PER to discharge the liability for the 2002 claims. The Commissioner of Police

569-

provided evidence of such payment though it does not include the interest that has accumulated on the default judgment ordered by the Court on August 2004. That was confirmed by Superintendent Orlando A. I vare ^ DPS, Director Transport. The appropriate documentation is on file, and that indicates that some payments have been made to reduce the debt. The Company through Mr. Liu has advised that it does not intend to pursue the claim due to the receipt of

payments, but it has not indemnified the Commissioner of Police on the default judgment which is now outstanding for 4 years.

d) From our reconciliation of the invoices and payments made by RPNGC and based on the records of Pacific Engineering and Repairs Limited a total amount of K1,503,499.86 has been paid to PER. The break of payments received is indicated below. (Refer to the bulk documents supplied by PER to COI on 19th November 2008)

125, 522.75
279, 086.58
A 419, 940.01
A 338, 638.28
A 340.262.24
Kl. 503. 499.86

That outstanding amount is K570,719.78 plus interest that has accumulated since September 2004 and the costs of the proceedings.

Transcript of Proceedings

- COIFINANCE 32 dated 13th October 2008

570-

COIFINANCE 59 dated 26th January 2009 – Mr. Mundua Kua's evidence as to his failure as state counsel on record to attend court hearings and entry of default judgments.

COIFINANCE 61 dated 28th January 2009 – Mr. Francis Gambu Kuvi's evidence on the Minutes he wrote to Mr. Kua requesting an explanation of the default judgment.

Findings

From the evidence received by the Commission, the findings are as follows:-

There was non-compliance with section 5 of the Claims by <& Against the State Act and the State's failure to promptly advise the Claimant that the claim was out of time.

The Statement of Claim under the proceedings disclosed no cause of action against the State but the Commissioner of Police,

The Solicitor General and/ or his officers failed to conduct due diligence on the claim in consultation with the Commissioner of Police.

The Commissioner of Police did not give due regard to the provisions of tendering and

procurement' under the Public Finances (Management) Act, 1996.

Payments made by the Commissioner of Police to the Company amount to K1,503,719.78 with the balance of K570,719.78 remaining and including the interest having accrued to date.

Recommendations

The Solicitor General in consultation with the Office of the Commissioner of Police and the Department of Finance to take necessary action to settle the balance of default judgment (in arrears) and interest accrued to date.

571-

The Commissioner of Police to consider procurement and tendering procedures when engaging service providers at the expense of the State.

Consequential Legislative Reforms

> Public Finances (Management) Act- provisions to deal with offending Departments and State Entities for non compliance and blatant disregard of the government 'procurement and tendering' process.

572-

(d) Pacific Helicopters Ltd

Parties

For the State

(a) Solicitor General & Attorney General

For the Plaintiff

Pacific Helicopters Limited

Pacific Properties & Investment limited Shepherd Aviation Limited

Others (if any)

Department of North Solomons (WS 345 of 1997)

Department of National Disaster & Emergency (WS 346 of 1997) Department of Defence (WS 347 of 1997)

Department of Civil Aviation (WS 1200 of 1997) Department of Village Services (WS 1209 of 1997)

The State (WS 1210 of 1997), (WS 1710 of 2000)

Douglas John Rosser, CEO, CAA (WS 1439 of 2003)

Eric Arni (National Disaster & Emergency) (WS 1302 of 1997)

Terms of Reference

The applicable Terms of Reference to this claim is TOR 2 , 3 and 4

Documents and Investigations conducted at

The documents the subject of review and examination were conducted at

573-

National Court Department of Finance Pacific Helicopters Limited

The Relevant Facts

PACIFIC HELICOPTERS LIMITED operated helicopter services in PNG and is based at Goroka, Eastern Highlands Province. The Company provided its helicopters for charter and hire to various government line agencies of government (Police, Prime Ministers Department, Electoral Commission, Civil Aviation, Department of Village Services and Provincial Affairs, Department of Defence, Department of North Solomon's).

The company instituted several court proceedings between 1996 and 2000 against the State and its line agencies due to the moneys owing for helicopter services provided to the various government agencies amounting to an aggregate of over K5 million. The proceedings are summarized below have been acknowledged and admitted by the State as having no defence at all to the claim.

WS 345 of 1997 of 1995 Pacific Helicopters - v - Department of North Solomons & State
Summary judgment for K1,236,111.85 together with interest at the rate of 8% per annum from the date of filing of the Writ to date of payment of judgment debt in full.
(Judgment entered on 24 July 1998 per Sawong J at Goroka) (Certificate of Judgment entered 26th August, 1998)

WS 346 of 1995 Pacific Helicopters PL - v - National Disaster Surveillance & Emergency Services & State

574-

Claim for providing helicopter charter for use of the NDS&ES from June 1993 to July 1994, the total sum of the unpaid invoices totaling K1,539,626.47.

Summary judgment for K1,539,626.47 together with interest at the rate of 8% per annum from the date of filing of the Writ to date of payment of judgment debt in full.
(Judgment entered on 24 July 1998 per Sawong J at Goroka) (Certificate of Judgment entered 26th August, 1998)

WS 347 of 1995 Pacific Helicopters P/ L - v - Department of Defence & State

Claim for providing helicopter charter for use of the DoD from July 1994 to August 1994, the total sum of the unpaid invoices totaling K10,566.16.

Summary judgment for K10,566.16 together with interest at the rate of 8% per annum from the

date of filing of the Writ to date of payment of judgment debt in full. (Judgment entered on 24 July 1998 per Sawong J at Goroka)
(Certificate of Judgment entered 6th August, 1998)

WS 1200 of 1997 Pacific Helicopters P/ L – v – Sam Geno, Director General for Civil Aviation & State

Claim based on various agreements made between the parties for providing helicopter charter for use of the CAA, August 1994, May 1996 and November 1996

575-

Default judgment for K185,284.24 together with interest at the rate of 8% per annum from 20th November 1997 until full payment of judgment debt in full.
(Judgment entered on 20 October 1999) (Certificate of Judgment entered 7th June 2002)

WS 1209 of 1997 Pacific Helicopters P/ L – v – Colin Travertz, Secretary, Department of Village Services & Provincial Affairs & State

Claim based on various agreements made between the parties for providing helicopter charter for use of the Department of Village Services & Provincial Affairs

Final judgment for K51,045.98 together with interest at the rate of 8% per annum from 28th November 1997 until full payment of the debt. (Judgment entered on 3rd September 1999)
(Certificate of Judgment entered 24th February 2000)

WS 1439 of 2003 Pacific Helicopters Ltd – v – Douglas John Rosser, Director of CAA, CAA of PNG and State.

A claim that PHL entered into an agreement with Turner Aviation of Australia for the purpose of assisting in firefighting operations in Australia for a period of four months. PHL agreed that it would hire to TA its PNG registered Bell 212 helicopter (registration No, P2-PAX) for the sum of AUD\$1,500 per hour for a period of four (4) months. In order for PHL and TA to perform the purpose of the agreement, it was necessary for PHL to have permission from the Australian Civil Aviation Safety Authority (CASA) to operate the said helicopter in Australia. TA applied to CASA on behalf of PHL for permission for PHL to operate the said helicopter in Australia. On 2nd December 2002, CASA did not approve the routine operations of PNG registered aircraft in Australia due to difficulties with

576-

entry certification and the conduct of continuing safety surveillance of PNG registered aircraft by PNG CAA. PHL sued the Director of PNGCAA and the State for its failure or neglect of duty to carry out their duties of inspections and surveillance to the standard required to demonstrate compliance with International Civil Aviation Safety Requirements.

PHL is claiming damages for breach of contract in a sum equivalent at the date of judgment to AUD\$360,000.00 with interest according to statute and costs.

An Order was made by the National Court on 17th December 2003 and entered by the Registrar on 22nd December 2003.

The Order of the Court is as follows:

That PHL be at liberty to enter judgment in the sum of Kina equivalent to AUD360,000.00 at the official BPNG exchange rate as at date of judgment.

That the State pay interest for date of issue of the Writ according to statute.

That the State pay the Plaintiffs costs of an incidental to this application.

The Certificate of judgment was issued by the Registrar on 6th August 2004 for the sum of K1,922,367.41 being the sum awarded to PHL.

WS 1302 of 1997 Pacific Helicopters Ltd – v – Col. Eric Am, OBE as the Director General for National Disaster, Surveillance and Emergency Services and State.

577-

Default judgment entered against the Defendants jointly and severally for the sum of K610,194.37 including legal costs incidental to the proceedings.

CLAIMS BY PACIFIC PROPERTY LIMITED AND SHEPHERD AVIATION LIMITED AS PART OF THE PACIFIC HELICOPTERS GROUP OF COMPANIES

Our examination of the court proceedings related to PHL, two particular matters were also listed as being part of the PHL proceedings. The two matters are discussed below;

(1) WS 1210 of 1997 Pacific Property P/L trading as PBF –v– State

A claim made against the Department of Health and National Judicial Staff Service respectively. The Plaintiff entered into an agreement or various agreements with the government agency at Goroka in April 1995, August, 1995, October 1995, August 1996, September 1996, October, 1996 and November 1996 for provisions of building and maintenance services identified by the Agents.

–The service provided to the Department of Health was to upgrade the STD clinic at Goroka Base Hospital.

–The service provided to NJSS was for the building of Kainantu Court House. The accumulated costs on the unpaid invoices totaled K13,286.58 with interest accrued at the agreed rate of 1.5% at K2,870.72.

It was noted by the Commission that section 5 notice was pleaded in the WS (paragraph 2 of the Statement of Claim).

578–

It was noted on the court documents that Final judgment for K1 6,157.32 together with interest at the rate of 8% per annum from 28th November 1997 until full payment of the judgment debt was entered by the court on 15th July 1999.

Certificate of Taxation dated 18/10/99 and Bill of Costs taxed on 5th October 1999 at K1,914.55– (Certificate of Judgment filed 11th November 1999)

(1) W5T710 of 2000 Pacific Helicopters Ltd –v– State
f (Millennium Robbery incident involving a helicopter)

A claim made against members of the Royal PNG Constabulary (RPNGC) for unlawful damage caused to aircraft owned and operated by PHL, namely an Aerospatiale Ecuriel Helicopter AS 350 BA, Serial Number 1181 bearing registration Mark P2–PHA (the Aircraft). On or about the 17 December 1999, the Aircraft was hijacked by armed criminals. At that time, members of RPNGC were alleged to have intentionally damaged the Aircraft by gunshot, whilst it was in flight without

the consent of the owner.

PHL claimed various heads of damages by claiming that due to the /, negligence of the members of the RPNGC taking reasonable care to avoid causing damage to the aircraft, the unlawful discharge of firearm thus rendering the Aircraft a total loss to the Company.

It was also noted from the court documents that section 5 notice pleaded in the WS (paragraph 2 of the Statement of Claim).

The claim by PHL;

a. sum of USD737,375.00 being damages for loss of the Aircraft."

The sum of K50,500.00 being damages and consequential loss and expense. The sum of AUD12,036.00 being loss paid to BP PNG Ltd and CCR by PHL.

Interest upon all the damages awarded to the PHL at the rate of 8per centum per annum payable on and from the date of the service of the Writ.

Costs

Other orders

Judgment that (1) the State pay PHL US\$1,622,401.82, A\$27,896.04 and K2,803.42 and (2) The Defendant pay the Plaintiffs costs of the proceedings concluded on 3 September 2004, to be agreed or taxed. The judgment endorsed by the Registrar to take effect on 17th December 2004. The Orders made on 17th December 2004 was entered by the Registrar on 31st January 2005.

The Company successfully obtained default judgments on each of the proceedings filed with the National Court. Certificate of Judgment was authorized by the Solicitor General and submitted to the Department of Finance for payments. The Department of Finance commenced payments by installments commencing May 2000 amounting to K4,360,000.00. A payment in excess of K1 million was paid out of Trust Fund Suspense Account No. 2.

CONSOLIDATED PROCEEDINGS UNDER ORIGINATING SUMMONS NO 793 OF 2004

(Refer t o the decision o f Justice Davani in OS 793 o f 2004 Pacifi c Helicopters Limited & Pacifi c Property & I n v e s tment Limited & Shepherd Aviation Limited – v – Thaddeus Kambanei, S e c r e t a r y f o r Department o f Finance and t h e I ndependent S t a t e o f PNG (2007) Unreported 29 th November 2007)

The proceedings were instituted by PHL to enforce outstanding judgment and to deal with the State's failure to pay judgments. The plaintiff .obtained separate

580-

judgments against the defendants for amount in excess of K14 million. The State paid approximately K8.4 million. The sum outstanding on 11 judgments is K8,437,094.44.

The proceedings relate to WS 347 of 1995, WS 346 of 1995, WS 345 of 1995, WS1209 of 1997, WS 1305 of 1997, WS 1200 of 1997, WS 1210 of 1997, WS 1056 of 1999, WS 316 of 2000 and WS 1439 of 2002 where Certificates of Judgments were served upon the Solicitor General.

The Court observes at page of the judgment that "11 judgment debts have been outstanding/or more than 3 years and clearly a very unreasonably long period of time. Interest has continued to run on all outstanding amounts. Section 14(5) of the CEASA recognises the plaintiffs right to apply for Mandamus. The plaintiff is entitled to apply for Mandamus and other appropriate orders, the other appropriate order being for the first defendant to appear and be examined as to budgetary appropriations towards payment of judgment debts, if they have applied and if not, to explain the order in which these monies were applied and when the plaintiff will be paid out."

Her honor (Davani J) draws attention to lack of management and professional oversight by the Office of the AG/SG which has caused the State with the burden of settling huge debts due to the neglect and don't care attitude of the state lawyers. Some aspects of her judgment are relevant to the inquiry.

PAYMENTS BY THE DEPARTMENT OF FINANCE

The State commenced paying the plaintiff in May 2000 by instalment and so far paid K4.360 million by 1 July 2006.

On 16th October 2000, the Managing Director wrote to Sir Mekere Morauta, then Prime Minister and Treasurer seeking his personal intervention in the matter of outstanding debts owed to Pacific Helicopters Limited by a number of

581-

Government departments and institutions. On 5th December 2000, the then Prime Minister and Minister for Treasury, Sir Mekere Morauta, wrote to Secretary, Department of Finance and Treasury in reference to the letter of 16th October 2000 directing the Secretary to settle the claim by end of 2000.

The ministerial direction was seen to be in direct conflict with the roles and responsibilities of the office of the Solicitor General under the CBAAS Act.

Mr. Zacchary Gelu, then acting Solicitor General advised the then Secretary for Finance, Mr. Kambanei by letter dated 5th September 2002 that the Company had successfully secured judgments against the State and its various departments and that the State was indebted to the Company by way of judgments in a total sum of K5,128,024.00 inclusive of costs and interests to date. Copies of all the relevant judgments were attached including a reconciliation of amounts owed less the amounts paid to date.

The letter further stated that the principal sum was K3,411,805.00 and the accrued interest was K1,716,218.00. The total sum K5,128,024.00 less paid K1,218,599.93 on 16* January 2002 left with the balance outstanding at K3,901,817.93 to be paid as of the date of the letter.

The Department of Finance cashbook shows that payments by instalment were made between

2000 and 2006 totalled K9,495,359.02 (inclusive of judgment debts). We refer to Table 1 below;

Table 1

Date	Account	Details	Cheque No.	Payments
19/05/2000	207	4201	2101	135
		Re: Pacific Helicopter		
		617891		
		47,379.92		
30/05/2000	207	4201	2101	135
		SAR-Hire of Helicopter		
		618817		
		25,096.50		
23/11/2000	207	4201	4123	135
		DEF-O/S payment on arr		
		633820		
		701,621.00		
19/12/2000	207	4201	2101	135
		Pmnt of Invoice Nos.		
		636621		
		43,513.95		
		582-		
5/01/2002	207	4201	2101	135

O/S Judgment Debts-

670055

226,205.07

5/01/2002

207

4201

2101

135

Balance of Payment (

670259

1,000,000.00

17/06/2002

207

4201

2101

121

206(VM) hire of Helicopter

688579

44,572.00

17/06/2002

207

4201

2101

121

206(VM)hire of Helicopter

688579

44,472.00

2/07/2002

207

4201

2101

135

Hire to cater for El

690141

2,000,000.00

12/07/2002

207

4201

2101

135

Services rendered due

691216

1,000,000.00

25/09/2002

207

4201

2107

135

C/Order W.S.N0.347 o

697561

500,000.00

23/10/2002

207

4201

2107

135

Part Pay. WSNol305o

700346

201,817.93

29/11/2002

207

4201

2107

135

C/Order

704308

50,000.00

25/01/2003

207

4201

2107

135

Part Payment-Outs. Co

710196

230,000.00

17/02/2003

207

4201

2107

135

Payment for O/S Judgment

712250

80,000.00

30/05/2003

207

4201

2107

135

P/Pynt of Court Judgment

722463

150,000.00

28/07/2003

207

4201

2107

135

Pmnt o/s c/order. In

728499

80,000.00

23/09/2003

207

4201

2107
135
Pmt o/s c/order (par
734229
80,000.00
27/11/2003
207
4201
4123
135
Certificate of Judge
740919
20,000.00
4/02/2004
207
4201
4123
135
Pmt of replacement c
768173
20,000,00
24/06/2004
207
4201
2107
135
Being for o/s judgment
782286
100,000.00
8-12-2004
207
207
1104
144
Charter Helicopter F
797342
47,520.00
26/07/2005
207
4201
2107
135
Payment of O/S Court O
816101
250,000.00
31/08/2005
207
4201
2107
135
Pmt for o/s court or

818849
100,000.00
25/10/2005
207
4201
2107
135
O/S Court Orders cla
822375
200,000.00
26/10/2005
410
3
0
0
O/S Court Order
822397
1,086,017.00
23/12/2005
207
4201
2107
135
O/S C/Order 349/02
827182
100,000.00
3/02/2006
207
4201
2107
135
O/S C/Order claim
830543
300,000.00
23/03/2006
207
4203
1104
144
Pmt hire of helicopter
833348
75,636.00
23/03/2006
207
4203
1104
144
Pmt hire of helicopter
833348
75,636.00
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207
4201
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135
O/S C/Order
833715
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O/S C/Order Pmt
836499
50,000.00
13/06/2006
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O/S C/Order Pmt
838293
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4/07/2006
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O/S C/Order Pmt
839501
236,017.65
10/08/2006
207
4201
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135
Chopper Hire for Hon
841817
29,854.00
?
9,495,359.02?

583-

The payments shown under Table 2 indicate that all successful proceedings between periods 1995-2000 varied from about K1 0,000 to over K1.0 million.

The following payments which are extracted from Table 1 and Table 2 reflect payments for

judgments debts against the State K4,360,057.65 for the period under our review.

Table 2

referred to under which amount to

?

Date

Account

Details

Cheque No.

Payments

1

5/01/2002

207

4201

2101

135

O/S Judgment Debts-

670055

226,205

2

25/09/2002

207

4201

2107

135

C/Order W.S.NO.347 o

697561

500,000

3

23/10/2002

207

4201

2107

135

Part Pay.WS Nol305 o

700346

201,818

4

29/11/2002

207

4201

2107

135

C/Order

704308

50,000

5

25/01/2003

207

4201

2107

135

Part Payment-Outs.Co

710196

230,000

6

17/02/2003

207

4201

2107

135

Pymt for O/S Judgment

712250

80,000

7

30/05/2003

207

4201

2107

135

P/Pymt of Court Judgment

722463

150,000

8

28/07/2003

207

4201

2107

135

Pmnt o/s c/order. In

728499

80,000

9

23/09/2003

207

4201

2107

135

Pmt o/s c/order (par

734229

80,000

10

27/11/2003

207

4201

4123

135

Certificate of Judge

740919

20,000

11

4/02/2004

207

4201

4123

135

Pmt of replacement c

768173

20,000

12

24/06/2004

207

4201

2107

135

Being for o/s judgment

782286

100,000

13

26/07/2005

207

4201

2107

135

Payment of O/S Court O

816101

250,000

14

31/08/2005

207

4201

2107

135

Pmt for o/s court or

818849

100,000

15

25/10/2005

207

4201

2107

135

O/S Court Orders cla

822375

200,000

16

26/10/2005

410
3
0
0
O/S Court Order
822397
1,086,017
17
23/12/2005
207
4201
2107
135
O/S C/Order 349/02
827182
100,000
18
3/02/2006
207
4201
2107
135
O/S C/Order claim
830543
300,000
19
27/03/2006
207
4201
2107
135
O/S C/Order
833715
100,000
20
11/05/2006
207
4201
2107
135
O/S C/Order Pmt
836499
50,000
21
13/06/2006
207
4201
2107
135
O/S C/Order Pmt
838293

200,000
22
4/07/2006
207
4201
2107
135
O/S C/Order Pmt
839501
236,018
?
?
?
?
?
?
?
?
4,360,057.65
584-

The following were noted in respect of Payment No.16 in Table 2 as payments made out of funds not legally available i.e. Trust Funds Suspense Account # 2.

RECONCILIATION OF PAYMENTS-OVERPAYMENTS

The volumes of documents sighted seem to indicate that the Department of Finance and the Office of the Solicitor General had a very difficult task with record keeping and there was a very serious possibility that over payment of the claim was to have exceeded court judgments, interest and costs.

The Commission take notes that the lack of proper accounting of the payments has contributed to massive loss to the State in terms of excessive overpayments and fraudulent misappropriation of state monies. The Department of Finance and the Office of the Solicitor General's lack of coordination over scrutiny of the payments is a major area of concern and requires urgent scrutiny by both offices. The concern was raised by Mr. Kumura (then acting Solicitor General) in 2003 by letter dated 21 October 2003 to then Secretary for Finance, Mr. Kambanei with the advise that "...the claim be reviewed immediately in light of our assessment and that you instruct your personnel to conduct a reconciliation of the payments made to date and provide an updated schedule showing allpayments made to Pacific Helicopters from 1999 to 2003.

In the event that these calculations may not be in agreement\ I would be obliged if your Department does a reconciliation of the payments made to date andforward a copyfor my records.

...I would be grateful indeed if measures are taken to ensure that PAYMENTS made to Pacific Helicopters are checked against the details above to avoid double payments."

The Commission takes notes that "overpayment" of the judgment orders may have been paid out by the Department of Finance. There was a lack of proper accounting and reconciliation on the payments.

585-

INFORMATION PRODUCED FOR EXAMINATION

Documents were produced for examination by way of summons from the following

1. Haf£ Malcolm Smith – Kela, MP, Managing Director (MD) of Pacific Helicopters

The Managing Director, Hon, Malcolm. Smith – Kela, MP produced to the Commission copies of Court Orders and Judgement Debts pertaining to the payments made by DoF, a reconciliation of the payments he received against the Court Orders and a bound volume with a covering brief containing reconciliation showing payments received against the judgement debts.

The Managing Director of Pacific Helicopter confirmed by letter dated 6 October 2008 that payments made by Department of Finance did not clearly state which particular judgment debt was paid and therefore it was difficult to identify which judgments were paid and which judgment remained outstanding.

Significant materials sighted from the documents reveal;

1. –that the total judgment debts was about K14 million and by 2007 K9,1 96,197.40 was outstanding. The outstanding amount included K4,820,564.45 in statutory interest accrued over the 15 years period. Some payments were made over the years but the interests were not paid which are included in the outstanding interests;

586-

–that the MD was unable to perform a reliable reconciliation since judgment debtors paid by DoF over the years were irregular and not made in sums that represent any particular judgement debts; and

–that the DoF had not honoured the Court orders and were reluctant to pay the judgment debts in full. In 2007 the company went to court to enforce the DoF to pay for the outstanding to- date, which was about K8.4 million for 11 judgments. The company successfully obtained the judgments as handed down by Davani J on 29 November 2007 that the judgments be enforced and that the DoF to make every effort to settle the debts. Payments made after that Court order are outside our TOR.

The Registrar produced only one file related to WS 1056 of 1999 which was a claim for K845,534.00. Our review of the files indicated that the court proceedings were in order and default judgment was obtained by PHL.

Documents

Letter from the MD of PHL and current sitting Member for Eastern Highlands Regional to the then Prime Minister, Sir Mekere Morauta (and also Minister for Treasury) requesting to settled out debts arising from court proceedings dated 16 October 2000.(Ref: 3DoF).

The letter by the Prime Minister, Sir Mekere Morauta and also as Treasury Minister requesting his Secretary in a letter dated 5 December 2000 to settle the outstanding judgment debt

587-

3. A letter dated 21 October 2003 by the then acting Solicitor General, Mr. John Kumura to then Finance Secretary, Mr. Thaddeus Kambanei requesting reconciliation on the payments made to PHL.(Ref: DoF 4)

FURTHER AND ADDITIONAL INFORMATION AND MATERIALS REVIEWED

The file was opened on 21st October 2008.

The matter was the subject of hearing on 21st October 2008 (COIFINANCE38 dated 21/10/08) and 26th November 2008 ^ (COIFINANCE43 dated 21/11/08). A review of all the responses either by telephone, personal interviews conducted, correspondence and documentation received have been collated and filed for references. The relevance of these materials based on our assessment and review so far indicate that:-

no documentation has been forthcoming and that renewed requests will be made to Finance on payment aspects and the Supply and Tenders Board for tendering of the use of the Helicopters.

Judgment orders have been obtained for each of the unpaid invoices and that the payments aspects have yet to be verified by the Finance Department.

With respect to the claims for unpaid invoices, is the result of non payment accumulated over a period of time which is of concern where the State Agencies have not complied with appropriate tendering procedures to engage PACHELI to provide air services.

Status of the Inquiry into PHL Claim

588-

No witnesses were called. The Managing Director of the Company provided documentation on the payments received in satisfaction of the judgment

Findings

Evidence of gross abuse of the Trust Fund Suspense Account #2 as an expenditure vote for settling court ordered payments by the Department of Finance. Settlement of claims by Department of Finance made through the Trust Fund Suspense No. 2 Account There is no evidence that the payment of K1 million has been reimbursed to TFS#2 accounts based on the express approval of the Secretary for Finance.

The government Agencies named in the court proceedings instituted by the PHL had committed the State to enormous expenditure in contravention of the procurement process under the PFMA. There was evidence that the government agencies have not observed the procurement provisions in the PFM Act and committed the State to a huge liability, especially the lack of ability of the State to make prompt payments for hire and charter of helicopter from PHL.

Pacific Helicopters Limited had successfully obtained judgments against those debts by default judgments since State failed to defend or had consented to the most of the orders for the debt incurred by the agencies named in the proceedings.

Recommendations'

The Office of the Solicitor General should keep a record of the payments made by the Department of Finance for the purpose of reconciling payments. In effect, it is recommended that the installment payments processed by the Department of Finance be collected by the SG and paid to Claimants.

589-

The Department of Finance maintains a proper register of all payments for the purpose of reconciling the account where the Claimant has a number of claims against government agencies

and the State.

The various government agencies, statutory bodies and instrumentalities are lawfully bound to procure goods and services, through the established tendering process under the PFMA.

The government to take drastic actions against offending state agencies for noncompliance of the tender and procurement process under the PFMA.

P. Consequential Legislative Reforms

Public Finances (Management) Act- Enactment of provisions to deal with offending government Departments, agencies, statutory bodies for non compliance of the procurement and tendering process.

590-

(e) Wilfred Bongali t/a Hela Night Patrol

r.OT File Ref: Matter No. 25 – WILFRED BONGALI & HELA NIGHT PATROL PTY LTD

B. Parties

For the State:

Health Department/ Laloki Hospital Central Supply & Tenders Board (CSTB) Attorney General

For the Claimant:

Wilfred Bongali

Hela Night Patrol Pty Ltd

Others (if any)

(b) Yama Security Services Ltd

B. Matter

Claimant awarded contract to supply security services for one (1) year Laloki Hospital

Claimant alleges unlawful termination of contract State – no breach of contract

No proceedings in Court

Claim settled by Deed of Release for K1 .2Million

Payment of K1 .2 Million by Department of Finance (payment in full)

C- Recommended Findings

No contract as it was not renewed and extended, as such no breach of contract

No lawful basis for settlement

Terms of Reference

Attached herewith are copies of the Terms of Reference. This is a case which falls within the terms of reference of this inquiry. All the terms of reference are relevant and applicable to this case, however, this case falls squarely within Terms of Reference No.s', 1 (xii), 2 and 5 (i) to (vii). Also attached is the list of matters (including this matter) published in the newspaper.

Documents and investigations conducted at:

Attorney-General (AG) Solicitor-General (SG)

Registry of National Court (NC) Department of Finance (Finance) Central Supply & Tenders Board

(CSTB) Department of Health (Health)

Laloki General Hospital (Laloki)

Area Medical Store, Konedobu (AMS) Registry of Companies (Reg/Co.s) PNG Law Society (PNGLS)

Internal Revenue Commission (IRC)

Brief facts/Evidence

1. Wilfred Bongali ("WB") is the owner (sole shareholder/director) of Heila Night Patrol Pty Ltd ("HNPPL"), a security company. State through the

592-

National Supply and Tenders Board ('NSTB5) advertised the tender for provision of security services at Laloki Hospital. HNPPL together with Yama Security Services applied for the tender and where successful. Yama Security Services and HNPPL were awarded a joint contract for provision of security services at Laloki Hospital.

2. There is no evidence of the actual contract on the Solicitor General file. The contract is identified as 'Contract No. G 3947'. The contract was awarded in July 1993 for a period of 12 months commencing on the 12th July 1993 and ending on 31st July 1994. The contract provided an option for renewal for two further periods of 12 months each, if the Board approves the extension.

3. Because there is no evidence of the actual contract on file, we do not know the actual value of the contract. Wilfred Bongali states the contract was valued at K97,090.00 for the first twelve months (i.e. from July 1993 to July 1994). However, the total value of the contract contradicts that of the 1995 to 1996 value, as Mr Bongali claims it was for K51,788.40 (from 31 July 1995 — 31 July 1996, if the contract was renewed and extended). The question is how could it be decreased to K51,788.40 when the previous year was valued at K97,090.00? (Difference of K45,301.60).

Further, the amount (value of the contract) is contradicting his own quantum submission (see letter dated 2 September 1998 from Wilfred Bongali to Dr. Puka Temu – paragraph 8, No. 3 which is marked '1 – SG*').

5. The National Supply and Tenders Board also do not have records of the contract been awarded to HNPPL. Attached hereto and marked "2 – SG" is a letter dated 27 January 1999 from Babaga R. Naime, Secretary to the Board (presumably Secretary to the Tenders Board) addressed to Dr Puka Temu, then Secretary Department of Health.

593-

6. Parts of the said letter reads (quote),

Despite the absence of proper records, I do confirm that Heila Night Patrol P/L was awarded a portion of the above contract being for the Laloki Hospital.

From the only record available, the contract was awarded in 1993 for a three (3) year term of which

the first (1st) twelve (12) months expired on the 31st of July, 1994.

Whilst I have no records on whether or not formal renewal was granted, the contractor claims that the services were continued from July, 1994 until sometime in early 1995.

If the contractor's allegations are correct and despite the fact that no formal renewal was granted the contractor is legally entitled for payment of services rendered.' Underlined my emphasis.

The contract expired on 31st July 1994 as it was not renewed.

This was a "combined contract" and both Yama Security Services and HNPPL were paid for the services they each performed.

Prior to the expiry date of the contract, Mr Pokarup Narakou wrote an Inter Office Memo dated 5th July 1994 to the Assistant Secretary, Mental Health Services recommending renewal of HNPPL contract for a further term. (Copy of the memo is marked, '3 - SG').

9. On 26th January 1995, Mr Paul B. Songo, then Secretary for Health Department wrote to the Chairman of National Supply and Tenders Board advising termination of the said contract (Contract No. G 3947) citing reasons for lack of funds to maintain the contract. The Chairman was advised to inform HNPPL and Yama Security Services. (Marked '4 - SG' herewith is the letter dated 26 January 1995.

594-

On 12 April 1995, Mrs Rossa Pahau, then Acting Assistant Secretary, Mental Health Services wrote to HNPPL and advised that the contract expired on 31 July 1994 and was not renewed for a further twelve (12) months as such was terminated as per letter from Paul B. Songo. The letter also advised HNPPL that its services will no longer be required as of the 21st April 1995 (the letter is marked '5 - SG').

On 19 April 1995, Dr Puka Temu in his capacity as the then First Assistant Secretary again wrote to the Chairman, National Supply and Tenders Board following up on the letter of Paul B. Songo dated 26th January 1995 and again advising the termination of the said contract (letter marked, '6 - SG').

HNPPL disregarded the termination notice of the contract and continued to provide security services resulting in Mr Pokarup Narakou writing a letter to HNPPL on 25 April 1995 to withdraw its security personnel advising they were supposed to leave on 21 April 1995 as per letter by Rossa Pahau (letter marked, '7 - SG').

Again on the 22nd June 1995, Dr Puka Temu wrote to HNPPL to vacate the premises (the letter is marked, '8 - SG'). The content of the letter reads, (quote) :-

.You are advised that as per our previous correspondence, your services were to be withdrawn from the Laloki Psychiatric Hospital in February of 1995. As you have defied these instructions you are advised that your services provided after our deadline will not be awarded.'

After the termination of the contract, it appears HNPPL was retained on a temporary basis to provide security services. See letter dated 12 March 2000 from Pokarup Narakou which is marked '9 - SG'. Note this was on a

595-

temporary basis and the engagement was more or less on a as is needed basis and payments were made directly from Laloki Hospital funds as such all services provided on a temporary basis where paid in full.

On 9th February 1995, (after expiry of the contract and termination), Wilfred Bongali wrote to the chairman acknowledging receipt of letter dated 6* September 1994 from National Supply and Tenders Board ("NSTB") purportedly extending the contract for a further twelve (12) months (marked '10 - SG'). There is no evidence of the letter dated 6th September 2004 from the NSTB which is acknowledged by Wilfred Bongali in his letter. This is despite numerous letters from the Health Department advising the termination of the contract. If the contract was renewed and extended by the National Supply and Tenders Board, then it was done without the authority of the contracting (client) Department (i.e. Health Department).

The truthfulness of the said letter from Wilfred Bongali is questionable for two main reasons.

Firstly, he (Wilfred Bongali) responds to the letter after four (4) months have already passed although he states that he received the letter some months later. There is no evidence from the National Supply and Tenders Board renewing and further extending HNPPL contract for a further twelve months from July 1995 - 1995. See letter by Babaga R Naime marked '2 - SG'.

Secondly, the said letter from Wilfred Bongali (9/2/95) appears to contradict terms of the meeting minutes of the National Supply and Tenders Board - No. 08/95 dated 1 June 1995. Wilfred Bongali's letter is dated 9th February 1995, whilst the meeting minutes is dated 1st June 1995. The meeting minutes indicate that [quote]:-

596-

4.2 Contract No. G3947 - Provision of Combined Security Services Department : Health
Date : 1Cfb May 1995

Companies : (a) Haset Security Services, Boroko
Hella Night Patrol, Boroko Yama Security Services, Boroko Lawa Security Services, Boroko
Subject : Renewal of Contracts for their 01st optional
periods of a further twelve (12) months each.

Decision : Deferred 01 / 06/95

Reason : Client, Department of Health be asked to give their views in regards to the option of renewal.

Meanwhile, Secretary of the Board is to provide a full report on the status of the contracts, refuting client's (D.O.H) allegations that this board had independently gone ahead made decisions without consulting them.

and

Marked with <11 - SG' is the copy of minutes.

19. From the minutes it appears the renewal and extension of the said contract was deferred for the reasons that Department of Health did not provide their views on the continuation of the contract.

20. This is contradictory, as evidence clearly shows that the Health Department have advised both Mr Bongali and the National Supply and Tenders Board ('NSTB') of the termination of the said contract. The NSTB was advised by the Department of Health to advise HNPPL of the termination however, NSTB never advised HNPPL.

597-

On 15 February 1999, Wilfred Bongali wrote to the Solicitor General advising of the alleged unlawful termination of the contract and requesting that the matter be settled for K534,434.36. (Letter marked '12 - SG')

On 11 March 1999, Mr John Kawi, former Solicitor General advised Mt Bongali that they would seek instructions from the Health Department before a formal response is made. (Letter marked '13 - SG').

On 30th March 1999, Bill Oscar Emos Lawyers wrote to Mr John Kawi, then Solicitor General on

behalf of HNPPL requesting that the matter be settled for K534,434.36. The letter states that if the State fails to respond within seven (7) days proceedings will be filed in Court without any further notice (letter marked '14 – SG').

On 9th April 1999, the Solicitor General wrote to the Health Secretary attaching copy of Bill Oscar Emos Lawyers letter seeking instructions (letter marked '15 – SG').

On 16th November 1999, Dr Puka Temu in his capacity as Secretary, Department of Health wrote to the Solicitor General advising that based on the State Solicitors advice (State Solicitors letter not on file), the Health Department paid all its outstanding dues including damages on the principle of quantum meruit. As such HNPPL was paid all its dues and the Health Department was not indebted to HNPPL. The letter also stated that for some unknown reasons, K12,945.60 was paid directly to Wilfred Bongali instead of HNPPL on 19 September 2007 (letter marked '16 – SG').

The said letter states and (quote):-

598–
Hi?ill

Following this review, I have established from the records held by the Department of health that all payments due to Hela Night Patrol Ltd for services rendered have already been paid. According to the Department records the following payments were made to Hela Night Patrol Ltd since 1993 pursuant to the terms of the contract.

- K15,873.00
- K63,989.00
- K65,496.80
- K7,307.00 (up to 29/02/96)
- K12,945.60 (payment date 19.09.97)

A total of K1 65,611.40 was paid to HNPPL (Wilfred Bongali).

On 1 May 2001, the Solicitor General wrote to HNPPL advising that the State did not owe HNPPL but instead HNPPL owed the State for excessive payments. The Solicitor General alleged that HNPPL owed the State K10,803.60 for over payment and threatened recovery action (letter marked '17 – SG').

On 16 May 2001, Wilfred Bongali responds to Solicitor General's letter of 1 May 2001 and advised this time apart from the security contract at Laloki Hospital, HNPPL was also awarded a contract to provide security at Area

/

Medical Store (AMS') Konedobu. Note there was never any mention of the security contract at Konedobu and this was the first time it was mentioned. We are not sure if AMS is covered in the same contract

(Contract No. G3947) as the copy of the contract is not on file. However, there is ample evidence to show the contract was only in relation to provide security services to Laloki Hospital. This time the claim was assessed at K5,570,983.53 from K534.434.36 (initial offer to settle) the previous assessment by Wilfred Bongali (letter marked '18 – SG'). (An increase of about K5,036,549.17 from the initial offer)

599–

It appears Mr Kawi then Solicitor General did a notation on the said letter from Wilfred Bongali to the lawyer having carriage to advise HNPPL that State will not settle the claim and HNPPL was at liberty to pursue the matter in court. The notation is dated 21 May 2001.

The notation states (quote), . . . Advise this person that we will NOT settle. Hi can go to Court if he wants. P Kawi 21/5.'

On 15th August 2001, Dirua Lawyers on behalf of HNPPL wrote to Solicitor General seeking extension of time to give notice pursuant to s. 5 of the Claims By and Against The State Act (letter marked '19 – SG').

On 8th October 2001, Mr Francis Damem, then Secretary and Attorney General wrote to Dirua Lawyers refusing extension of time and at the same time advising that the claim was statute barred (letter marked '20 – SG').

On 31st July 2002, HNPPL filed OS proceedings (OS No. 424/2002) seeking extension of time to give section 5 .Notice. On 11th September 2002, His Honour Justice Kandakasi dismissed the O.S proceedings for want of prosecution. Marked with '21 – SG' is the copy of the Originating Summons and marked with '22 – NC' is the copy of the court endorsement confirming that the O.S proceedings was dismissed for want of prosecution. Following are the documents filed together with the Originating Summons. They are:–

Notice of Motion filed on 31st July 2002 – marked '23 – SG';

Affidavit of Wilfred Bongali filed on 31st July 2002 – marked '24 – SG'; Notice of Appearance by Powes Parkop Lawyers filed – 9th August 2002– marked '25–SG';

600–

Affidavit in Support by Pokarup Narakon filed 7th August 2002 marked '26– NC';

Affidavit of Service by Wilfred Bongali filed 8th August 2002 – marked '27– NC';

Further Affidavit of Wilfred Bongali filed 7th August 2002 – marked '28 – NC';

On 31st October 2002, Peter Pena & Associates on behalf of HNPPL submitted a without prejudice quantum submission to the Solicitor General to settle the claim for K5,263,490.00 (letter marked

'29 – SG').

On 26th November 2002, Mr Zacchary Gelu wrote to Peter Pena & Associates acknowledging letter of 31 October 2002 and making a counter offer on a without prejudice for K346,587.75. (Letter marked '30 – SG) It appears after Mr Kawi left, Mr Gelu succeeded him.

On 12th December 2002, Wilfred Bongali on behalf of HNPPL enters into a Deed of Release with the State to settle the claim for K1.2 million. Mr Gelu signs on behalf of the State. Note that Mr Gelu made a counter offer for K346,587.75, however, settled for K1.2 million.

Note: The original Deed of Release does not have Gelu's signature and the date. However the copy of the Deed of Release has Gelu's signature and the date. (Marked with '31 – SG' and '32 – SG' are copies of Deed of Release which has and does not have Gelu's signature, respectively.

On 17th December 2002, Gelu wrote to Finance Department to pay the claim for K1.2 Million (letter marked '33 – SG').

On 7th April 2004, Mr Andrew Numbasa, First Assistant Secretary – Public Accounts Division from Department of Finance wrote to Mr Francis

601–

Kuvi advising that as per the instructions for stop payment on all deeds of release, the said claim by HNPPL (Wilfred Bongali) was put on halt until further review. Mr Numbasa also stated that whilst this was the case on at other deeds, the Solicitor General gave 'speedy clearance' to some deed of release claims. Mr Numbasa then sought instructions for clearance of Mr Bongali's claim. Mr Numbasa's letter is marked '34 – SG'.

Mr Numbasa's letter may have being prompted by the NEC Decisions numbered NG 07/2002 and 150/2003. More particularly NEC Decision No. 150/2003, paragraph 7 which states :-

7. 'approved that out of court settlement payment of any claims against the State in excess of K1 million must at all times be deferred unless Solicitor General in consultation with the Attorney General furnishes in writing to the Secretary for Finance that in his deliberate judgment, State has no Defence or no reason to challenge the claim or appeal against the amount awarded.'

Marked '35–'and'36–'are copies of NEC Decisions referred above in paragraph 40.

On 17 May 2004, Mr David Lambu a senior legal officer with the Solicitor General's Office wrote a note to Mr Kuvi on the said letter from Mr Numbasa stating (quote):-

Is it in order for payment? Otherwise cancel the deed and renegotiate or proceed to trial How much money is involved in this case? 17105j04 —D Lambu'

Refer to '34–SG'.

43. On 22nd June 2004, Mr Kuvi wrote to the Secretary Department of Finance advising/giving clearance of the payment to Mr Wilfred Bongali and 602-

advising to settle the claim and raise a cheque for K1.2 million payable to Patterson Lawyers as soon as possible to avoid any court action. Marked >37
- SG' is letter dated 22 June 2004.

Finance Department made the following payments:-

1. Chq No. 715394 -
K100,000.00 -
20/03/03
2. Chq No. 716795 -
K100,000.00 -
04/04/03
3. Chq No. 782427 -
K100,000.00 -
25/06/04
4. Chq No. 786252 -
K200,000.00 -
05/08/04
5. Chq No. 796519 -
K200,000.00 -
30/11/04
6. Chq No. 797363 -
K300,000.00 -
09/12/04
7. Chq No. 804829 -
K200,000.00 -
10/03/05

A total of K1.2 million was paid, effectively settling the claim (deed of release) in full. Copies of all the cheques are attached and all marked '38 to 44 - FD'.

Also attached are copies of relevant Financial Forms (FF3 & FF4) in relation to the payments (cheques) referred to above in paragraph 43 & 44.

Requisition for Expenditure (FF3) - K300,000.00 - 04/12/04 - 45 - FD; General Expenses (FF4) - K300,000.00 - 08/12/04 - 46 - FD; Requisition for Expenditure (FF3) - K200,000.00 - 26/11/04 - 47 - FD; General Expenses (FF4) - K200,000.00 - 26/11/04 - 48 - FD; Requisition for Expenditure (FF3) - K200,000.00 - 05/08/04 - 49 - FD; (vf) General Expenses (FF4) - K200,000.00 - 05/08/04 - 50 - FD;

603-

Requisition for Expenditure (FF3) – K1 00,000.00 – 24/06/04 – 51- FD; General Expenses (FF4) – K1 00,000.00 – 24/06/04 – 52 – FD; General Expenses (FF4) – K1 00,000.00 – 04/04/03 – 53 – FD; Requisition for Expenditure (FF3) – K100,000.00 – 54- FD; General Expenses (FF4) – K100,000.00 – 20/03/03 – 55 – FD.

46. It appears some or if not all the cheques were paid to Patterson Lawyers Trust Account. Wilfred Bongali wrote to the Solicitor General advising that all payments should be made directly to him and not Patterson Lawyers. As a result Wilfred Bongali wrote to Mr Kuvi (then Solicitor General) on 4th July 2004 to advise Finance Department not to make any payments to Patterson Lawyers as the firm never act for Mr Wilfred Bongali/HNPPL (see letter marked '56 – SG')

Mr Kuvi's letter reads (quote),

' Re: Wilfred Bongali v . The S t a t e

I make reference to the above matter and my letter to you dated the 22'd of June 2004 regarding the same. Mr Bongali has now approached my office again and claimed that his claim should not be paid c/- Patterson Lawyers Trust Account, as they never acted for him at any stage. I have also perused the file and the said lawyers never acted for Mr Bongali. Mr Bongali, has instead requested that future payments be made directly to himself, c/ – Solicitor General's Office, Department of Attorney General, P.O Box 591, WAIGANI, National Capital District. I trust you will accede to this request.'

Following the letter from the Solicitor General all cheques were then written directly to Wilfred Bongali. Note that this were for .services

604-

rendered by Hela Night Patrol Ltd as such cheques should have being drawn in the name of Hela Night Patrol Ltd.

Evidence of Witnesses

The following persons were called to give evidence. They are:-

Wilfred Bongali (claimant);

Peter Pena, Principal of Peter Pena Lawyers; Zacchary Gelu, lawyer and former Solicitor General;

Mundua Kua, lawyer.

I will address the evidence of each of the above persons.

Evidence — Peter Pena. Principal of Peter Pena Lawyers

Mr Pena basically provided documents under cover letter dated 31st March 2009 essentially advising that his firm was only involved in assisting the claimant negotiate settlement. Mr Pena states that he did not have all necessary documents at the time of drafting the letter to the Solicitor General proposing K5.6 million but the assessment was based on instructions from the claimant.

Mr Pena stated that the proposal to the Solicitor General for K5.6 million was made on a "without prejudice" basis as such the Solicitor General still had the authority to consider the legitimacy of the proposal (or the claim itself). Mr Pena further stated that after the drafting of the letter of proposal to the Solicitor General, the claimant withdrew instructions and as such his firm nor Mr Pena was involved in the drafting and signing of the deed of release.

605-

It is submitted that whilst Mr Pena is deemed to be bound by instructions of his client, he is also duty bound to advise his clients of the propriety and or otherwise of the claim. Mr Pena should have insisted on obtaining copies of all necessary documents before the drafting the offer letter. In essence there was no basis at all for the assessment of K5.6 million.

Evidence – Wilfred Bongali ("claimant")

Mr Bongali provided a written statement dated 20th January 2009 and also appeared on several occasion(s). Essentially, Mr Bongali maintained that his claim was genuine and confirmed that he had a joint contract with Yama Security Services for provision of security services. Mr Bongali confirmed that the claim by Yama Security Services was settled as a result of NEC

.^~d'easroS and as such the same should be done to his claim although his / claim was settled at K1.2 million half the amount settled in Yama Security Services claim.

It is admitted above, there was no basis at all for the settlement.

Evidence — Mundua Kua. lawyer

Mr Mundua Kua was formerly a lawyer with the Solicitor General's Office. He was asked by Mr Gelu to have carriage of the file to provide a response to the letter of offer by Peter Pena. Mr Kua confirmed that he provided a counter offer for the sum of K340,000.00. Asked what the basis for such assessment was, he was not able to provide any legal basis but basically stated that the claim was settled at K1.2 million despite his assessment of the case.

43. He also confirmed that he witnessed the signing of the deed of release. He stated that he was not present during the signing but the deed was only brought to him asking him to sign as a witness. He confirmed that it was a practice in the Solicitor General's Office whereby anybody can sign a deed as witness.

Mr Kua admitted in evidence that if the claim was settled at K346,000.00 he would accept full responsibility otherwise the matter was settled at K1.2 million which he had no knowledge of.

Despite the grave anomalies surrounding this matter, Mr Kua failed to bring up this issues either with the Solicitor General (at that time Mr Gelu) or otherwise with the claimant (or its lawyers). This is confirmed by the fact that Mr Kua without any legal basis at all made an offer for K346,000.00. It is evidenced from the fact that the letter he drafted failed to even state the basis upon which such assessment was made, no mention of case laws etc. Mr Kua failed in his duty as a lawyer to protect the interest of the State.

Evidence – Zacchary Gelu. lawyer and former Solicitor General

Mr Gelu gave evidence admitting that despite lack of section 5 notice, claim being statute barred and no basis at all for the settlement, settled the claim for K1.2 million. When asked if his actions were grossly negligent and was bordering on fraud, stated that it was not fraud, but basically noncompliance with the laws.

Mr Gelu's actions may amount to fraud and unreasonable conduct as a lawyer. Mr Gelu failed to protect the interest of the State and appeared to abuse his powers as the Solicitor General at the material time.

Findings

607-

Firstly, in this case there is no evidence of the actual contract on file as such the exact value of the contract cannot be ascertained. Wilfred Bongali states the contract was valued at K97, 090.00 for the first twelve months (i.e. from July 1993 to July 1994). However, the total value of the contract contradicts that of the 1995 to 1996 value, as Mr Bongali claims it was for K51, 788.40 (from 31 July 1995 – 31 July 1996, if the contract was renewed and extended). The question is how could it be decreased to K51,788.40 when the previous year was valued at K97,090.00? (difference of K45,301.60).

There is no evidence of the contract been renewed and extended. However, there is evidence (as is submitted above) that the contract was terminated after completion of the first 12 months (i.e. from July 1993 – July 1994). Commissioners despite the lack of information in relation to the value of contract for the first 12 months (initial contract period), we submit that the Commission can safely conclude that the contract was valued at K97,090.00. The Commission can also safely find that the contract was terminated after the first 12 month period and was not renewed and extended.

There is also evidence that after termination of the contract, HNPPL was engaged on a temporary basis by the Laloki Hospital. This would mean that after July 2004, all engagements were on temporary basis. However, there is evidence showing that HNPPL was advised in no uncertain terms that HNPPL services will no longer be required as of 21st April 1995. As such services provided after 21st April 1995, cannot be honoured. Further, evidence indicates that payments in relation to the engagement of HNPPL on a temporary basis were fully paid from Laloki Hospital funds. As such HNPPL was not owed any money for its temporary engagement

Secondly, if the contract was valued at K97,090.00 (i.e. for the first 12 months, from July 1993 to July 1994), then HNPPL was fully paid for

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services rendered. Health Department records showed that HNPPL was paid a total of K165,611.40. This would mean the balance of K165,611.40 from K97,090.00 (which is K68,521.40) is payment for services rendered on a temporary basis after expiration of the contract.

There was no basis for the claim as there was no contract. The contract states that the contract

must be renewed after the lapse of the first 12 months, in this case, evidence clearly show the contract was not renewed and extended for a further 12 months, as such, there was never a breach of contract, as the contract was never renewed and extended for a further 12 month. The contract was completed after the first 12 months as the client department (Health Department) refused to renew and extend the contract.

This is a clear case of fraudulent conduct of the lawyers/officers of the Solicitor General who were involved in the facilitating of this payment. The basis of the allegations of fraud are that:-

there was sufficient evidence on file showing that HNPPL was not owed any money at all. Further, if there is a claim for damages for unlawful termination or if HNPPL is still owed by the Health Department for services rendered but were not paid, then the appropriate action was to have the matter dealt with by the court.

HNPPL's (Wilfred Bongali) request seeking extension of time to give notice pursuant to section 5 of the Claims By and Against the State Act by Dirua Lawyers was refused by the then Attorney General. Further, the Attorney General found that the claim was statute barred and therefore cannot be enforced or brought in a court of law. As result, HNPPL (Wilfred Bongali) filed O.S proceedings seeking extension of time to give notice to the State which was dismissed for want of prosecution.

"609

Also, the then Solicitor General, Mr Kawi and the lawyer having carriage M Tuva stated that the claim will not be entertained and if HNPPL (Wilfred Bongali) insisted the matter should go before the court.

Despite the advice or position taken by the Attorney General and the Solicitor General, it appears after Mr Gelu became the Solicitor General, Mr Gelu and Mr Mundua Kua (presumably after the file was transferred from Tuva to Kua), both Messrs Gelu and Kua elected to settle the claim.

Further, following the letter from Peter Pena & Associates proposing to settle the matter for K5,263,490.50, Mr Gelu replied making a counter proposal for K346,587.75. Mr Gelu states in his letter (quote), . . .All in all I am offering to settle your client's claim at K346,587.75.'

Although, Mr Gelu made a counter offer for K346,587.75 and despite the advice and position taken by the Attorney General and Mr Gelu's predecessor (Mr Kawi), a deed of release was entered into and signed on 12 December 2002 settling the claim for K1.2 million. How could Mr Gelu make a counter offer for K346,587.75 and later settle the claim for K1.2 million kina?

The actions of Messrs Gelu and Kua amount to fraud and an act to defraud the State.

Further the Commission, will note that following signing of the deed of release on 12 December 2002 and the letter from Mr Gelu to the Finance Department to settle the claim for K1.2 million pursuant to the deed of release, the first payment was made in 2003 prior to the decision to halt all payments as per NEC decision No. 150/2003 dated 25 July 2003. Following the NEC decision, all payments were put on hold

610-

until further clearance from the Attorney General or his nominee (see Item No. 3, NEC Decision No. 150/2003)

(i) With respect we submit that Mr Kuvi's actions amount to fraud as he acted contrary to the NEC Decision 150/2003, Item 8 – which states (quote) 'approved that the Attorney General immediately apply to the court for Judicial Review of any questionable claims or out of court settlement in excess of K500,000.00

0 In this case, there is ample evidence (documentation) on Solicitor General's file (as referred above) showing that the deed of release should not have been signed and entered into as evidence clearly shows that the State is not indebted to HNPPL (Wilfred Bongali). In this case, as stated (noted) by Mr Lambu to Mr Kuvi, Mr Kuvi could have applied to the court

to set aside the deed of release.

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54. Wilfred Bongali's actions amount to fraud, as how could he allege that he was awarded to provide contract/for the AMS when clearly (evidence) shows that he was only awarded/contract for the Laloki Hospital. Further, how could Mr Bongali claim up to K534,434.36 (initial offer to settle) and then later up to K5, 570, 983. 53 (an increase of about K5,036,549.17 from the initial offer) when the contract was only valued at K97,090.00. Furthermore, there was never any renewal and extending of the contract, as such how could a breach occur as there was never any contract? The contract was completed after the first 12 months as Health Department refused/declined to renew and extend the contract.

Recommendations

1. An investigation must be carried out in relation to the payments to Security Services as they relate to the same contract totalling K3 million.

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611-

Security Services was paid due to an NEC submission allegedly sponsored by the then Minister for Justice. There is evidence of the matter been raised in the Parliament during debate but it is not clear if the matter was pursued further. Newspaper evidence provided by Mr Bongali showed that the former Prime Minister, late Bill Skate when queried of the NEC decision approving payment to Yama Security Services stated that he was not aware of the NEC decision. The matter should be investigated.

2. Mr Gelu and Mr Kua be referred to the Lawyers Statutory Committee for investigation. A further recommendation be made that both Messrs Gelu and Kua should never be employed as heads or otherwise of any Government or Statutory Organizations.

Persons involved in this matter must be referred to appropriate authorities such as the Police Fraud Squad for possible investigation.

The Claims By and Against the State Act, 1996 must be amended to include, that any out of court settlements must be approved by the Attorney General. Section 5 Notice must also be served on the Primary Defendants.

An investigation must be conducted into the reasons why the NSTB failed to act on the advice by the Health Department ("client Department") to terminate the contract. Health Department advised NSTB to terminate the contract, however, NSTB acted without the instructions from the client Department.

Solicitor General to file recovery action. INDEX TO DOCUMENTS

TENDERED AS EVIDENCE

Document Name	Identification
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612-

letter dated 2 September 1998	1 - SG
letter dated 27 January 1999	2- SG
Inter Office Memo dated 5th July 1994	3- SG
letter dated 26 January 1995	4- - SG
letter dated 12 April 1995	5- •S G
letter dated 19 April 1995	6- SG
letter dated 25 April 1995	7- ?SG
letter dated 22nd June 1995	8- SG

letter dated 12 March 2000 9- •S G
 letter dated 9th February 1995 10 - SG
 Meeting Minutes of the CSTB 11 - SG
 letter dated 15 February 1999 12 - SG
 letter dated 11 March 1999 13 - SG
 letter dated 30th March 1999 14 - SG
 letter dated 9th April 1999 15 - SG
 letter dated 16th November 1999 16 - SG
 letter dated 1 May 2001 17 - SG
 letter dated 16 May 2001 18 - SG
 letter dated 15th August 2001 19 - SG
 letter dated 8th October 2001 20 - SG
 Originating Summons 21 - SG
 Court Endorsement 22 - NC
 Notice of Motion filed on 31st July 2002 23 - SG
 Affidavit of Wilfred Bongali filed 31st July 2002 24 - SG
 Notice of Appearance 25 - SG
 Affidavit in Support by Pokarup Narakon 26 - NC
 Affidavit of Service by Wilfred Bongali 27 - NC Further Affidavit of Wilfred Bongali filed 7th
 August 2002 28 - NC letter dated 31st October 2002 29 - SG
 letter dated 26th November 2002 30 - SG

Deed of Release dated 12th December 2002 31 - SG
 Deed of Release dated 12th December 2002 32 - SG
 letter dated 17th December 2002 33 - SG
 letter dated 7th April 2004 34 - SG
 Copies of NEC Decisions (NG 07/2002) 35 -
 Copies of NEC Decisions (NEC 150/ 2003) 36 -
 letter dated 22nd June 2004 37 - SG
 copies of cheques confirming payments 38 — 44 FD
 copies of Financial Forms (FF3 & FF4) 45 - 55 FD
 letter dated 4th July 2004 56 - SG
 COI letter to Central Supply & Tenders Board 57 - COI
 COI letter to Laloki Hospital 58 - COI