

**N6695**

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]

**CR No. 780 OF 2015**

**STATE**

**V**

**EREMAS WARTOTO**

Waigani: Manuhu, J.

2016: 16, 17, 18 & 29 February 1,7,8,9 & 11 March

2017: 29<sup>th</sup> March

***CRIMINAL LAW – Particular offence – Misappropriation – A company awarded repair and maintenance contract by the State – Accused sole director and shareholder – Advance payments made contrary to prescribed procedures – Whether funds used for prescribed purpose – Whether company entitled to receive advance payment – Relevant legal issues.***

**Cases cited:**

*Lawi v The State* [1987] PGSC 12; [1987] PNGLR 183.

*State v Wyborn* [2004] PGNC 3; N2847.

*Wartoto v The State* [2015] PGSC 1; SC141.

**Counsel:**

*P. Huygens, A Kupmain & S. Osembo*, for the State

*J. Haiara & P. Yange*, for the Accused

**29<sup>th</sup> March, 2017**

### **The Indictment**

1. **MANUHU J:** The accused was indicted on two counts of misappropriation pursuant to Section 383A of the *Criminal Code Act 1974* (The Code). The first count is that he dishonestly applied to his own use the sum of K6,791,408.20 the property of the State. The second count is that the accused dishonestly applied to his own use the sum of K1,198,483.80 the property of the State.

2. After presentation of the indictment, defence counsel, Mr. Haiara, made an application under section 558 of the *Criminal Code* for the indictment to be quashed on basis that it was calculated to prejudice or embarrass the accused in that the allegations are based on contract and do not amount to the alleged criminal offences. The Court considered the application and ruled that the application was unmeritorious.

### **Arraignment**

3. The Court proceeded to arraign the accused. The following facts were put to the accused. The Kerevat National High School (“KNHS”) was in a bad state of disrepair in 2008. A team visited the school in 2008 to assess the damages and carry out a scope of the works. This was divided into two main areas, namely the building and the water sewerage systems.

4. In July 2008 the Minister for National Planning and Rural Development provided one million kina to attend to the water sewerage issues. The contract was awarded to Palmal Earth Moving and Construction. The company commenced the work in October 2008.

5. A separate team namely the Regional Management Team attended the school

to conduct a scoping of the work required for the school buildings, water and sewerage systems and the school perimeter. The group was led by Jeff Sanderson.

6. A process was being followed whereby tenders were sought from a number of contractors. However given the urgency to the matter, the Department of National Planning and Monitoring (“DNPM”) requested the Central Supply and Tenders Board (“CSTB”) for a “closed tender” process for the rehabilitation of the school. Given that the work was urgent, the board approved the issuance of a Certificate of Inexpediency (“COI”). No open or public tender was sought. The contract was awarded to Sarakolok West Transport Limited (“SWT”) of which the accused was the sole director and shareholder.

7. At the initial stages of procurement, the use of a “closed tender” process by DNPM and CSTB was irregular because this process is generally not allowed except in cases where there is a declared Natural Disaster, Defence Emergency, Health Emergency or Situation of Civil Unrest. In such cases, a Certificate of inexpediency is required to be issued. A “declared Health Emergency” is not defined in the *Financial Instructions* or the *Public Finance (Management) Act 1995*. In this case, there is no evidence that there was a “declared Health Emergency”, however, the issue of COI was said to be justified because the deteriorating state of the facilities posed a significant risk to the health of the students and school community.

8. In November 2008, the contract was awarded to SWT for the value of K7,989,892.00 which included rehabilitation works to the boys dormitories and ablution blocks, girls dormitories and ablution blocks, sewerage system and water supply system.

9. SWT began work at KNHS in December 2008 and completed work in January 2010. During and after renovation period, numerous complaints were made against the company alleging incomplete and substandard work. As a result, four independent assessments were conducted by various authorities in relation to

the work done by SWT. Each assessment, which was conducted by different individuals of varying expertise indicated incomplete and substandard work by SWT. The reports indicated that no work had been done on the sewerage and water supply system.

10. The sum of K7, 989, 892.00, being the contract price, was paid to SWT in two phases – 85% of the contract price, being K6,791,408.20, was paid, effectively in advance, prior to commencement of work, and 15 %, being K1,198,483. 80, was paid some 10 months after work began at KNHS. The manner of payment of the contract price was highly irregular for the following reasons:

#### PAYMENT OF 85% OF THE CONTRACT PRICE

- (a) A letter (exhibit R2) dated 28 November 2008 bearing the letterhead of CSTB and signature of Mr Kimmins, (the then Chairman of CSTB) addressed to Mr Joseph Lelang, (the then Secretary of DNPM), was faxed from the accused's business address in Cairns on 28 January 2009. On the face of the letter, 85% of the contract price was to be paid in advance to SWT. The reason was that the contract was to be completed before the school reopened for 2009. In order to complete the contract in such a short time frame, materials needed to be imported from overseas. The bulk of the water supply and sewerage system material had to be imported.
- (b) This letter was faxed from facsimile number 074 053855, a number registered under Travel Car Cairns, Australia, one of SWT's companies. On receipt of the letter, 85% of the contract price namely K6,791,408.20 was authorized and funds were paid into ANZ Bank account number 12621572 on or about 29 January 2009. This is an account held in the name of SWT limited. The accused and his wife Louisa Wartoto were the sole signatories of the account. The accused was the person who determined that the money was to be paid into that account.
- (c) The signature of Mr Kimmins on the letter is a forgery;
- (d) Mr Kimmins has no association with Travel Car Cairns;

- (e) CSTB does not have authority to make decisions on funding arrangements;
- (f) As the letter is a forgery no real or proper authority had or could be obtained to release the funds. The money was released based on a forged document which has the design to mislead the illegal and improper release of the funds.
- (g) Even if the letter was a legitimate document and the funds were released in the correct manner after correct protocol and procedures has been followed, the funds released still did not comply with the contract and were not used for the purpose for which the funds were released.
- (h) Advance payment is not normal practice and is only allowed if provided for by the terms of a contract and under certain conditions which have to be met by the contractor. In this instance, the contract expressly forbids any advance payments.
- (i) Even though the contract expressly prohibited any advance payments, if any advance payments were going to be made, the terms of the contract regarding advance payments required the Employer, being the State, to pay advance payment to the Contractor, being SWT, “of the amounts stated in the contract data by the date stated in the contract data against provision by the contractor of an unconditional bank guarantee...” in which case the Contractor would also be required to provide copies of invoices demonstrating that funds were used for the allowed purpose;
- (j) According to bank records and numerous documents obtained from various suppliers and contractors, the advance payment received was never applied for the purpose for which it was provided, namely to allow the accused to place orders for materials to be imported, the bulk of which will be for the water supply and the sewerage system. The funds were not used for the purpose for which the funds were released but rather for personal expenses, repayment of loans, the purchase of new motor vehicles and to fund various other projects which were not related to the rehabilitation project of the Kerevat National High School.
- (i) Work in relation to the water supply and sewerage system was never

done. While there was some pretence that the water supply was going to be attended to, in reality no such work was done. With regards to the water supply, a hole was drilled to between 7 to 10 meters. Thereafter the drilling project was simply abandoned.

#### PAYMENT OF 15% OF CONTRACT PRICE

- (j) The normal practice is that the balance of the Contract Price will usually be paid to the Contractor upon successful completion of works and after a Certificate of Completion is issued by the project manager;
  - (k) The letter upon which the 85% was paid in advance also stipulated that the balance will be paid upon completion.
  - (l) In this case, the 15% balance was paid to SWT even though it had not completed the project and had never been issued a Completion Certificate by the project manager.
  - (m) The 15% was paid as a result of an invoice sent from the accused's company to DNPM in September of 2009.
  - (n) An amount of K1, 198, 483.80 was paid into the Westpac bank, account number 6000017950, of SWT Limited. The accused and his wife were the sole signatories of the account.
11. The prosecution alleged that both of these advance payments were dishonestly applied by the accused.
12. The charges and the brief facts were explained to the accused. However, immediately before the accused was able to plead to the charges, defence counsel made another application under section 566 of the *Code* and submitted that the Court should permit the accused to present his explanation and evidence there and then in respect of the charges. It was clear that counsel misconstrued the provision he had relied upon. The application was again dismissed promptly.

13. The accused eventually pleaded not guilty to the two charges.

### **Brief Preview of Evidence**

14. Most of the evidence were documentary evidence comprising of letters, the contract bank statements, vouchers, invoices, spreadsheets, reports and other official records. Evidence on movements of funds in question are captured in these documentary evidence. The prosecution called an expert witness from Australia to assist the Court to understand the evidence on how funds were expended. The defence also called witnesses to testify on their personal involvement and experience on work done and how much money was spent on the project.

15. It appeared to be a difficult case given the substantial amount of money and the large volume of materials involved. The Court has had ample time to consider the evidence, the submissions, and the case laws that were relied upon, and has opted to keep the judgment as simple as possible and to the point.

### **Undisputed facts**

16. It is not disputed that the accused, was the sole director and shareholder of a company SWT between 2008 and 2010. SWT was awarded a contract number COI 39/2008 in November 2008 by the State for the rehabilitation of KNHS facilities. The contract price was K7, 989, 892.00.

17. The scope of works under the contract to be done by SWT consisted of rehabilitation of the boys' dormitories and ablution blocks, girls' dormitories and ablution blocks, and the school's water supply and sewerage system.

18. A letter under the letterhead of CSTB dated 28 November 2008 was sent to the Secretary DNPM, Mr. Joseph Lelang, advising of an upfront payment of 85% of the contract price to be paid to SWT in order for SWT to import the bulk of the material for the water and sewerage facilities from overseas. The letter indicated that 15% will be paid to the contractor upon completion of the work. In December 2008, SWT moved on site at KNHS and began mobilisation work. The contract price was paid in two phases: eighty-five per cent (85%) advance payment which

amounted to a sum of K6, 791, 408. 20 was paid to SWT on 30 January 2009. Fifteen per cent (15%) which amounted to K1,198,483. 80 was paid to SWT on 14 October 2009, some 10 months later.

19. The K6,791,408.20 was drawn from the Rehabilitation of Education Sector Infrastructure Trust account numbered 100151131 held with Bank South Pacific (“the BSP RESI account”). It was paid via special clearance into an ANZ account numbered 12621572 held in the name of SWT. The signatories to the account were the accused and his wife Louisah Wartoto. The K1,198,483.80 was also drawn from the BSP RESI account. It was paid via special clearance on 14 October 2009 into a Westpac account numbered 6000017950 held in the name of SWT. The signatories to the account were the accused and his wife Louisah Wartoto.

20. It is not disputed that SWT started work at KNHS in December 2008. A hand over take over ceremony was held at the school in January 2010.

### **Disputed facts**

21. Numerous complaints were made regarding the quality of works done by SWT. These complaints were made before and after SWT left the work site. The prosecution tendered documentary evidence to show that independent assessments were carried out on the works done by SWT and according to all the reports, work done by SWT was incomplete and of substandard quality.

22. The prosecution’s case is that the 85% was dishonestly misappropriated well before completion of rehabilitation work on the high school. And the remaining 15% was not paid after completion of the job as stipulated by the contract. It was paid before completion of work. SWT was not entitled to receive the 15% payment before completion of work.

23. The accused does not deny that there were complaints regarding the quality of work done by SWT but he contends that the funds in question were managed under the “fungibility” concept and through that concept, the rehabilitation work



on the high school was completed and funds were expended accordingly through SWT group of companies. It was asserted that SWT did in fact spend additional funds over and above the contract price on the rehabilitation work.

### **Identification of issues of fact**

24. The Court has considered what both counsel have proposed to be the relevant issues. The Court is of the view that in relation to Count One, the main issue is whether the 85% funds were expended on the specified purpose, namely, the Kerevat project. In relation to Count Two, the only issue is whether SWT was entitled to receive the 15% payment at the time the payment was made. The relevant legal issues will be identified and considered in due course after the facts are assessed, weighed and settled.

### **Procedural breaches**

25. The prosecution's allegations in relation to serious breaches of financial procedures, financial practices, terms of the contract, and so on will not be considered against the accused for the following reasons.

26. Firstly, the offence of misappropriation was not provided for under the *Code* originally. Stealing was the only offence then for matters of this nature. The problem was that the prosecution had difficulty dealing with misapplication of funds by persons authorized to hold such funds, especially public officials. This led to the enacting of the misappropriation provision to deal with offences of this nature. When a person is charged for misappropriation, therefore, how he took possession of funds is not the core issue. The core issue is how he dealt with the funds.

27. Secondly, the accused is given the benefit of the doubt in relation to any procedural breach on the basis that those procedural breaches were committed with direct and deliberate involvement of Joseph Lelang and Brian Kimmins. The letters and documents bearing their names and signatures were not forged by the accused. The Court does not accept their evidence suggesting that these documents were forged. There is simply no evidence that the signatures were

forged, and forged by the accused.

28. Joseph Lelang had to be summoned to give evidence. When he appeared, he made an unusual, if not bizarre, application to be excluded from giving evidence which application was dismissed promptly. When he gave evidence, his demeanor was poor. He took so much time to answer questions as if he feared he might incriminate himself.

29. Brian Kimmins did not say he did not sign the letter of 28 November 2008. He merely stated that he could not have signed the letter because he was not authorized to approve the payment. There is a difference between 'I did not sign' and 'I could not have signed'. The latter is less convincing. The Court was not impressed with his answer. There is simply no evidence that the letter, on CSTB letterhead, is a forgery.

30. Joseph Lelang and Brian Kimmins should be thoroughly investigated for their blatant facilitation of procedural breaches in this matter. If warranted, they should also be prosecuted under the appropriate laws.

31. Given their involvement, it is possible the accused did not think he was wrong in his request for the 85% advance payment. However, after the funds were paid into the SWT account, the accused had full control of the funds. How he expended the funds, rightly or wrongly, falls squarely on him. If the funds were expended on the rehabilitation work on the high school, the accused should be acquitted. If he did not apply the funds for the intended purpose, he may be found guilty if all the elements of the offence are proved.

### **The Expert Witness**

32. Mr. Francis Dolan is the expert witness for the prosecution. He was called to explain how the funds were expended and more importantly, whether they were spent on the project. Mr. Dolan has appeared before the Courts in Australia on a number of occasions as an expert witness to give evidence on cases of similar

nature. He has over 20 years of experience in investigative accounting and forensic accounting work in Australia. His Curriculum Vitae is in FDA-8.

33. He has in his affidavit made on 9<sup>th</sup> September 2015 and in his oral testimony explained the methodology of his investigation and the tracing of the funds in question. See FDA -7. In the investigation, the documents he relied on were “bank accounts, banking records, financial records, business records, computer records, seized documents, and other sources in order to trace the funds obtained by SWT.” All of these source materials form part of the evidence for the prosecution, and the defence had copies of all of these documents.

34. I have considered his demeanor and his investigation reports. I consider him to be a very experienced investigator. His investigation, findings and conclusions are supported by source materials, are credible and can be relied upon by the Court. The Court is satisfied that Mr. Dolan possesses the necessary credentials and the Court declares him as an expert witness for the purpose of these proceedings.

**Count One: Whether funds were used for the specified purpose?**

*The prosecution's evidence*

35. The main issue of fact in relation to Count One is whether the 85% payment was expended on rehabilitation work on the high school. On the evidence, the 85% payment, namely K6,791,408.20, was deposited into SWT ANZ Bank Ltd account BSB 018909 account number 12621572 on 29 January 2009. The account statement covering 29 January 2009 to 30 June 2009 is in evidence. From that statement, at the time of deposit, the account was at a negative balance of K154,636.95. After the deposit, there was a credit balance of K6,636,771.25.

36. There were a number of deposits totaling K1,264,056.86 that were made into this account. Thus, the account had a total deposit balance of K8,055,464.20 for the given period.

37. However, by 26 June 2009, that is, within five months, as shown at the end of the bank statement, the account was at a negative balance of K65,590.17. Where did the funds go? The account statement has records of receiving accounts which funds were transferred into. The receiving accounts were tendered by the prosecution into evidence, including transfers to accounts operated by companies owned by the accused. The receiving accounts were then examined. Where vehicles were purchased, the prosecution has tendered into evidence, by consent, the relevant documents from the motor car dealers. Where funds were used to service loans, the relevant documentary proof were admitted into evidence by consent. Where funds were transferred to overseas accounts, the relevant transfer documents were tendered by consent. The expert witness has carried out this enormous exercise tracing the paper trails of all the funds in question. Where there were no records, the expert witness has categorized them as Unknown.

38. Table 1 is a summary of all transactions that occurred between 29 January 2009 and 26 June 2009. There were no deposits into the said account after 26 June 2009.

Table 1.

Classification	Total
Asset-Motor Vehicle Purchases – Boroko Motors	128,000.00
Asset-Motor Vehicle Purchases – Ela Motors	1,177,896.15
Asset-Motor Vehicle Purchases – Kimbe Auto	50,000.00
Asset-Motor Vehicle Purchases – PNG Motors	716,357.14
Asset-Interest in TSL Homes	63,642.36
Business Expenses	433,000.07
Bank fee and charges	6,638.50
Payments to Eremas Wartoto	200,025.00
Payments to John Ilam	17,895.53
Payments to Litia Ilam	429,321.90
Payments to Louisah Wartoto – PNG	153,514.37
Payments to Louisah Wartoto – Transfers to Australia	200,040.00

No details available	25,741.33
Other persons	104,311.28
Queen Emma Lodge Ltd	855,786.46
SWT – Other Accounts – First Investment Finance Loan	590,000.00
SWT-Other Accounts – Credit Corporation Payments	506,149.11
SWT-Other Accounts – Finance Corporation Payments	244,909.56
SWT-Other Accounts Westpac PNG Leases	502,709.11
SWT-Other Accounts-ANZ Loan and Lease Repayments	273,220.03
SWT-ANZ 752 Overdrawn balance	154,636.96
SWT – Transfer to other SWT Accounts	1,123,164.99
Travel Car Australia Transfers	98,504.36
<b>TOTAL</b>	<b>K8,055,464.21</b>

39. It can be seen that there are expenditures that are not related to the Kerevat project. The motor vehicles purchased were for the accused car hire business. A vehicle purchased in Kimbe was not for the Kerevat project. Loan repayments have nothing to do with the Kerevat project. The overdraft balance was automatically debited from the account when the advance payment was deposited. It had nothing to do with the Kerevat project.

40. Below is a list of expenditures, derived from Table 1, that are, even to a lay person, clearly unrelated to the project.

- Asset-Motor Vehicle Purchases – Boroko Motors 128,000.00
- Asset-Motor Vehicle Purchases – Ela Motors 1,177,896.15
- Asset-Motor Vehicle Purchases – Kimbe Auto 50,000.00
- Asset-Motor Vehicle Purchases – PNG Motors 716,357.14
- SWT – Other Accounts – First Investment Finance 590,000.00
- SWT-Other Accounts – Credit Corporation Payments 506,149.11
- SWT-Other Accounts – Finance Corporation Payments 244,909.56

• SWT-Other Accounts Westpac PNG Leases	502,709.11
• SWT-Other Accounts-ANZ Loan and Lease Repayments	273,220.03
• SWT-ANZ 752 Overdraft balance	154,636.96
• <b>TOTAL</b>	<b>K 4,343,878.06</b>

41. There are other items in Table 1 that are not so obvious to a lay person. Documentary evidence pertaining to these transactions were examined and traced by the expert witness. His findings are reflected in the third, fourth and fifth columns of Table 2:

Table 2.

<b>Expenditure</b>	<b>Amount*</b>	<b>Kerevat</b>	<b>Not Kerevat</b>	<b>Unknown</b>
Asset – interest in TSL Homes	63,642.36		63,642.36	
Business Expenses	433,000.07	52,298.00	361,589.00	19,113.07
Bank fees and charges	6,638.50	107.50	6,531.00	
Payments – Eremas Wartoto	200,025.00		200,025.00	
Payments-John Ilam	17,895.53	13,327.00	1,568.00	3,000.53
Payments – Litia Ilam	429,321.90	6,600.90	422,721.00	
Payments – Louisah Wartoto, PNG	153,514.37	42,979.37	110,535.00	
Payments – Louisah Wartoto, Aus	200,040.00		200,040.00	
Payments – Unknown	25,741.33	3,057.00	10,262.00	12,422.33
Payments – Other persons	104,311.28		104,311.28	
Payments – Queen Emma Lodge	855,786.46	58,656.00	684,414.00	112,716.46

Transfer to other accounts	1,123,164. 99		1,115,000. 00	8,164.99
Travel Car Australia	98,504.36		84,802.00	13,702.36
<b>TOTAL</b>	<b>K3,711,58 6.15</b>	<b>K177,02 5.77</b>	<b>K3,365,44 0.64</b>	<b>K169,119 .74</b>

\*From Table 1.

42. This summarizes the transactions that occurred between 30 January 2009 and 26 June 2009 in relation to SWT ANZ Bank Ltd account BSB 018909 account number 12621572, and how those funds were eventually expended. That was the prosecution's evidence on Count One.

*The defence evidence*

43. The accused does not deny the payment of 85% into SWT ANZ Bank Ltd account BSB 018909 account number 12621572 on 29 January 2009. He does not deny that the 85% was not used for the specific purpose. He admitted that the money was used for other purposes. Section 589 of the *Code* provides that an accused person may admit on the trial any fact alleged against him, and the admission is sufficient proof of fact without other evidence. In this case, the admission, with evidence, seals and confirms the prosecution's evidence on how the funds were expended as illustrated in the tables.

44. However, the accused placed reliance on the concept of "fungibility", which he understood to mean that all funds come in then they becomes one. Because of that he said it was very easy to pay out funds to work on the project. Accordingly, the Kerevat project was done through SWTs Kokopo Impress Accounts and the groups consolidated accounts consisting of Queen Emma Lodge, Litia Ilam's account, Louisa Wartoto's Rabaul claim account, Eremas Wartoto's claim account and Kandrian Ltd's account for purchase of materials overseas mainly in China. The total Project cost for KNHS is K9, 885, 047. 00 which is K1,975,000.00 more than the initial contract price because of the variation claim due to late completion caused by State failure to give vacant possession.

45. The accused may have such a unique method of managing the project funds. The evidentiary burden is, however, on him to overcome the prosecution's

evidence by accounting for all the funds he received. It is for him to counter the prosecution's evidence and explain how the 85% funds were managed under the "fungibility" concept. It is for him to produce credible financial reports with supporting source documents to support his explanation. Unfortunately, when he gave evidence he did not produce any such detailed report accounting for the 85% fund.

46. In the context of the "fungibility" concept, Daniel Grant, an accountant by profession who had been engaged by SWT on a Consultancy basis as SWT's external accountant and auditor, gave evidence on how much money was expended on the high school project. His affidavit, including supporting documents, was admitted into evidence.

47. Unfortunately, his affidavit and documents contained errors and, for that reason, he broke down, was confused and failed to answer questions in cross-examination. He was sweating in the air conditioned court room. He eventually explained that he did a rush job on his affidavit. He was asked to give evidence when the trial was already in progress, an indication of lack of preparation on the part of the defence. However, Daniel Grant deserves credit for his honesty in conceding that his documents contained serious errors.

48. The Court does not accept the materials that were tendered through Daniel Grant as they are plagued by errors and are not supported by source materials.

49. In any case, it is clear that the "fungibility" concept cannot be regarded as a prudent accounting system of managing project funds when funds from the 85% payment were being used to purchase assets for other businesses owned by the accused, for instance. And, while State funds were being used to replenish his businesses, there were no corresponding cash balance in his various business bank accounts. No prudent businessman is entitled to use funds held in trust for a specified purpose to replenish his businesses. The concept is not a genuine concept. The rejection of the "fungibility" concept is a decisive blow to the defence case as the defence case revolves around the concept.



### *Completion of work*

50. There are further reasons why the defence evidence on work done should be rejected. Witnesses were called to show that materials were purchased from as far as China, for instance. Evidence on hire of plants and machinery were produced by the defence. Pictures of buildings were also tendered into evidence. These pictures were impressive but the Court could not assess if materials beneath the paintings were quality materials. Former students of the school were called to give evidence that there were no problems with water pressure. Their credibility was seriously undermined as their affidavits were identical, word for word, comma for comma, and paragraph for paragraph.

51. Ideally, the foregoing evidence, together with a proper report by a person qualified to carry out such investigation would be useful for the defence. A report from a qualified witness, a builder, for instance, would have been ideal to effectively challenge and create doubt on the evidence of Elliot Kadir for the prosecution. This point was explained on a number of occasions to defence counsel throughout the hearing, for fairness sake. No such witness was called by the defence.

52. According to Elliot, the East New Britain Provincial Administration appointed the Gazzelle Restoration Authority-PIU to carry out an independent assessment and submit a report on the project. The Gazzelle Restoration Authority Project Manager, Peter Buak, appointed acting Principal Engineer then, Noel Kelly to organize a technical team to carry out the investigation. The team was made up of Elliot, who was Project Architect then, two Unitech one year Industrial Training students Adam Wilson and Esau Talvat, and Hasluck Matalau, who was Senior Technical Officer – Building then with a lot of experience.

53. A copy of the contract was obtained to assess the value of works, what work was done, scope of works, and so on. The team also obtained a copy of the tender document. These documents were perused before the site investigation.

54. The investigation was done on 16 and 17 February 2010. It should be noted that the project was supposedly completed in January 2010. The investigation was done because of numerous complaints against SWT. On 16 February 2010, Noel Kelly, Elliot, Hasluck Matalau, Adam Wilson and Esau Talvat went to the project site and assessed the works done. They “physically inspect works on site against the conformed contract documents, scope of works and Bill of Quantities to assess if works have been completed or not.”(sic.). The sewerage system was inspected by the team on 17 February 2010.

55. His affidavit (Exhibit M) provides a comprehensive analysis of the information collected and the team’s findings. Elliot also stated that SWT “*did maintenance works to the Male & Female Dormitories and Ablution Blocks at a cost of K6,858,292.00 which is totally ridiculous to me as the quality of work done does not represent the amount.*” The team concluded that the project was only 57% complete.

56. I have no reason to disbelieve Elliot. While he may be an inexperienced architect, he was part of a team which had experienced members. The final assessment can be attributed to the team. The Court is satisfied that the evidence given by Elliot is credible and can be relied upon by the Court.

57. Elliot fixed the value of work done at 57% which equates to K40957.15 out of the 85% funds. This means that the Certification of Completion issued by Joseph Lelang dated 5 March 2010, only weeks after the investigation, and any other certification of completion, cannot be relied upon. Similarly, the ceremonial gathering to commemorate the completion of the project does not prove that work on the project was completed.

*Finding of fact*

58. The evidence presented by the prosecution on how funds were expended, supported by the accused own admissions, and his failure to account for the 85% funds under the “fungibility” concept, remains solid. It would not have made any difference if the accused was able to demonstrate, as he claimed, that SWT spent

more than the contract price on the project because the alleged offence had already been committed at the end of June 2009.

59. The Court will, however, give the benefit of the doubt to the accused in relation to funds under Unknown column in Table 2. As a matter of practice, they would be deemed as funds spent on the project. Therefore, funds spent on the project increases to K346,145.51 (5.1%). The remaining amount of K6,445,262.69 (94.9%) was spent on other purposes. The Court finds accordingly.

60. The Court's finding appears to be in conflict with Elliot's 57% estimate. On Elliot's estimate, SWT would have spent more on the project. The only plausible explanation is that SWT continued to spend money on the project until January 2010. SWT must have used funds from other sources to work on the project.

61. However, the State does not have any interest in funds from other sources. It is only interested, rightly so, in the 85% payment which had been depleted by 26 June 2009. Evidence shows that the commission of alleged offence was complete on or around 26 June 2009. What the accused did from July 2009 to January 2010 under the "fungibility" concept does not alter the fact that the State's funds had already been misapplied as of 26 June 2009.

### ***The Legal Issues***

62. There were a number of interconnected legal issues raised. It was submitted that the State did not have an interest in the funds immediately after it was paid on 29 January 2009. On the facts of this case, this argument is shallow and simply does not make sense. Those funds were paid to SWT for a specified purpose. The State had an interest in the achievement of that specified purpose. That interest then confers upon SWT the legal obligation, which was also stipulated in the contract, to apply the funds for the specified purpose only. The State had an interest in the funds and how it was to be spent.

63. SWT was not at liberty to spend the funds on other purposes as it pleased prior to completion of the project. The accused cannot seriously claim honest claim of right for him to use the funds as he pleased. In other words, State did not lose its property or ownership rights and or interest in the 85% payment after it was deposited into the SWT account. The funds remained the property of the State until such time the project was completed.

64. In the matter of *Wartoto v The State* [2015] PGSC 1; SC1411 (27 January 2015), Injia CJ; Sakora, Kirriwom, Kandakasi, Davani, JJ held at paragraph 70 on the issue of ownership of property that:

*“Based on the law as we have stated and discussed above, we would answer the question under consideration in the case before us in these terms. The State has all its interest or property rights in public funds paid to a private contractor for certain public works, until the purpose for which the payments are made is achieved or accomplished.”*

65. It is incredible that defence counsel has raised the issue in spite of the Supreme Court’s pronouncement.

66. Section 383A (3) (d) of the *Code* also states that:

*“...persons to whom the property belongs include the owner, any part owner having a legal or equitable interest in or claim to the property and person who, immediately before the offender’s application of the property, had control of it.”*

67. In the case of *Lawi v The State* [1987] PGSC 12; [1987] PNGLR 183, Kidu CJ Amet Cory JJ held inter-alia that:

*“There cannot be any doubt that the moneys were grants for particular public purposes, with the implied conditions that they be expended on those public purposes. The moneys were most definitely not the appellant’s private property to expend on his own purposes or*

*anybody else's as he desired. The two amounts of money were National Government grants and in my view the National Government had a legal and an equitable proprietary interest in them until they were expended for the purpose for which they were granted."*

68. It was also submitted that SWT, which was awarded the contract, is not the accused. The accused should not be charged at all. SWT should be charged. This submission is baseless. SWT is not a person. It is an entity. It does not talk. It does not bleed. It does not have a head to enable itself to conceive a sinister purpose. The person behind SWT is the accused just like a driver behind the steering wheel of his car. In a motor vehicle accident, the driver gets charged, not the car. A car cannot be sent to jail. A company cannot be sent to jail. SWT cannot be sent to jail. In criminal law, the accused is SWT in person. There is no corporate veil in criminal law. This argument that the accused cannot be charged is unfounded in law. See *State v Wyborn* [2004] PGNC 3; N2847.

69. It was further submitted that the Court can only find the accused guilty on the exact amount pleaded in the indictment. If the Court's finding is short of the amount pleaded, even by one toea, the accused should be acquitted. This is an unhelpful submission especially when counsel was advised in the course of the trial at least twice that the argument is wrong in law. If counsel's argument is indeed law, and thankfully it is not, all convictions since 1975 would have to be recalled and reviewed. And we are likely to experience widespread misuse of funds because it would be so easy to misapply funds and avoid conviction.

70. Property is an element of the offence of misappropriation. A certain amount gets pleaded in the indictment. The prosecution may fail to prove existence of property. In that case, the element of property is absent. The defendant should be acquitted. However, where the prosecution does not prove the exact amount but less, the lesser amount satisfies the element of property.

71. Dishonesty is an element of the offence of misappropriation and has to be considered. The events preceding the payment of the 85% have all been excluded

for reasons the Court has given. Whether the accused was dishonest or not would be apparent from how the funds were expended. The Court has found that K6,445,262.69 was not used on the project. All of these expenditures benefited the accused and his businesses and no one else, not even any charity organization.

72. It is simple. Dishonesty is established if you used and benefited from somebody else's funds without his authority. The State did not pay 85% of the contract prize for the accused to service his loans and purchase assets for his other business operations. The accused should have waited until completion of the project. He was not entitled to use the funds as he pleased while the Kerevat project was still in progress. If this is not dishonesty, what is it?

73. The blatant misapplication of funds with little or no regard for the State and high school in his Province demonstrates dishonesty that extends over and beyond the bounds of a contractual dispute. The level of dishonesty in this case warrants criminal prosecution. The accused is properly before this Court and is properly charged for misappropriation.

74. The Court is satisfied beyond reasonable doubt that the element of dishonesty has been established.

### **The Verdict**

75. The Court is satisfied that the prosecution has established all the elements of the offence of misappropriation. Accordingly, the Court finds the accused guilty for misappropriating K6,445,262.69, the property of the State.

### **Count Two**

76. The facts in relation to Count Two were not disputed. Under the contract, the 15 % was to be paid after completion of the project and after issuance of a

certificate of completion. In this case, the 15% balance was paid to SWT even though it had not completed the works and a completion certificate had not been issued by the project manager.

77. An amount of K1,198,483.80 was paid into the Westpac bank account number 6000017950 of SWT Limited on 14 October 2009, some two to three weeks after the demand for payment was made. The accused and his wife are the sole signatories of the account. The funds were expended by the accused.

78. There were arguments about whether these funds were used on the Kerevat project or not. The Court is of the view that how the funds were used is immaterial because the purpose for the 15% payment is different to the 85% payment. The 15% was for SWT after completion of the project. The crucial issue is timing of the payment. If it was paid before completion, the accused was not entitled to it. If it was paid after completion, the accused was entitled to it.

79. The Court is satisfied that SWT was not entitled to receive the payment in October 2009 when the project had not been completed. However, given the involvement of DNPM in approving the payment when requested, the Court is unable to find beyond reasonable doubt the existence of a criminal intent.

80. The accused is, accordingly, not guilty in relation to the second count of misappropriation.

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Public Prosecutor : *Lawyer for the State*

Haiara's Legal Practice : *Lawyer for the Accused*