SUPREME COURT OF PAPUA NEW GUINEA

Supreme Court Bench Book

A Reference to Decided Cases on Procedural Issues and Miscellaneous Matters in the Supreme Court

Text of decided cases set out under headings of types of application or proceeding And the Supreme Court Rules 1984 — 2010 with case law annotations; including cases on Contempt, Slip Rule applications and Statutory interpretation.

Foreword by the Chief Justice

A large part of the work of the Supreme Court is dealing with procedural applications. Therefore this reference book starts with bringing together the essential statutory and case law citations for the various types of procedural applications, setting out the text of the legislation and appropriate quotations from the cases. In an appropriate case the Court will be able to deliver an extempore judgement quoting from the text of the Bench Book.

For cross referencing ease at that back of the Bench Book the Supreme Court Act and the Supreme Court Rules are set out with short form commentary from the decided cases.

Unfortunately the court cannot always rely on Counsel to refer the court to the appropriate legislation and case citations. This work is aimed at saving judicial time in research, particularly in the types of application which come before the court on a regular basis.

As the number of judges in the National Court has grown, and consequently the number of judges sitting in the Supreme Court jurisdiction has also grown, some issues concerning a consistent and unified application of the law have arisen, on occasion requiring the Constitution of a five judge bench to resolve a conflict of decisions. So while the court remains constituted as it is, and not separated from the National Court, the occasions of conflict between decisions cannot be completely eliminated. However, hopefully at least in the procedural aspects this work will greatly reduce those occasions.

Sir Salamo Injia, KT
Chief Justice
October, 2011

SUPREME COURT BENCH BOOK

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SUPREME COURT BENCH BOOK

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1.1 Appellate Jurisdiction, Original Constitutional Jurisdiction and Review Jurisdiction

The jurisdiction of the Supreme Court falls generally into 3 broad categories, it's statutory appellate jurisdiction given by the *Supreme Court Act*; its original jurisdiction given by the Constitution sections 18 (1) (constitutional interpretation questions are the exclusive jurisdiction of the Supreme Court), 18 (2) (questions of constitutional interpretation referred from the National Court), 19 (questions referred from constitutionally qualified persons), 57 (protection of human rights), and (3) its review jurisdiction 155 (2) (b) (the general power to review all decisions of the National court).

1.2 Whether Powers Given in Appellate, Original Jurisdiction or Review Jurisdiction

When considering the powers given to the Supreme Court it is necessary to identify whether that power is given generally to exercise in all of its jurisdictions, or whether it is given exclusively in the court's appellate jurisdiction or exclusively in its original jurisdiction under the Constitution or in its review jurisdiction. The powers given by the *Supreme Court Act* are given exclusively in the court's appellate jurisdiction. For example it was held in *Viviso Seravo v John Giheno.*(1998) SC539 that the power given in the *Supreme Court Act* for a single judge to make interlocutory orders is a power given exclusively in the appellate jurisdiction of the court, and is not available to a single judge to make interlocutory orders, for example, in the general review jurisdiction of the court under Constitution s155 (2).

1.3 Appellate Jurisdiction

The right to appeal is neither an inherent right of the citizen nor an inherent right of the court, it is a right given by statute: *Avia Aihi v The State (No.1)* [1981] PNGLR 81 and must be exercised strictly in accordance with the terms of the statute giving that right. Particularly the right to appeal must be exercised within the time limit prescribed by the statute. The *Supreme Court Act* prescribes 40 days within which an appeal may be brought (s17 for civil, and s29 for criminal) and the court has no power to extend that time: *Dillingham Corp v Diaz* [1975] PNGLR 262; *Shelley v PNG Aviation Service* [1979] PNGLR 119; *Avia Aihi v The State (No.1)* [1981] PNGLR 81; *Wood v Watking (PNG) Pty Ltd* [1986] PNGLR 88; *State v Colbert* [1988] PNGLR 138; *Jeffrey Balakau v Ombudsman Commission of Papua and New Guinea & Public Prosecutor* [1996] PNGLR 346. Section 17 applies to appeals pursuant to *Supreme Court Rules* Order 10: *Jeffrey Balakau v Ombudsman Commission (supra); Garamut Enterprises Ltd v Steamships Trading Co Ltd* (1999) SC625. While amendments to the existing grounds of appeal already filed may be allowed after the 40 days has expired: O7 r24 & O11 r11, a completely new ground will not be allowed to be added, because to do so would be to

allow an appeal outside the statutory time limit: *Bruce Tsang v Credit Corporation (PNG) Ltd* [1993] PNGLR 112 (civil) and *Dinge Damane v The State* [1991] PNGLR 244 (criminal).

1.4 Original Jurisdiction

The original jurisdiction of the court is conferred by Constitution sections 18 and 19 (interpretation of the Constitution & references). The Supreme Court Rules Orders 3 provides for procedural matters and interlocutory applications

1.5 Review Jurisdiction

The review jurisdiction of the Supreme Court is given by Constitution Section 155(2)(b). Procedural rules are provided by Supreme Court Rules Order 4.

1.6 Section 155 (4) of the Constitution

Constitution Section 155 (4) gives both the National and the Supreme Court unlimited power and jurisdiction to fashion orders to give effect to rights obtained through the application of law and equity: *Application by John Mua Nilkare, Review Pursuant to S155 (4) of the Constitution* [1997] PGSC 20; [1998] PNGLR 472 (15 April 1997). The section is not itself a source of a cause of action.

2. Chapter 2 – OVERVIEW OF THE JURISDICTION OF A SINGLE JUDGE OF THE SUPREME COURT

2.1 Jurisdiction of a Single Judge in the Appellate Jurisdiction under the Supreme Court Act

The Constitution Section 162 (2) provides:

162. *JURISDICTION OF THE SUPREME COURT.*
(1) The jurisdiction of the Supreme Court is as set out in–
(a) Subdivision II.2.C (constitutional interpretation); and
(b) Subdivision III.3.D (enforcement); and
(c) Section 155 (the National Judicial System),
and otherwise as provided by this Constitution or any other law.
(2) ***In such cases as are provided for by or under an Act of the Parliament or the Rules of Court of the Supreme Court, the jurisdiction of the Supreme Court may be exercised by a single Judge of that Court,*** *or by a number of Judges sitting together.*
(3) The jurisdiction of the Supreme Court may be exercised by a Judge or Judges of that Court notwithstanding that it is being exercised at the same time by another such Judge or Judges.
(4) The jurisdiction of the Supreme Court may be exercised either in court or in chambers, as provided by or under an Act of the Parliament or the Rules of Court of the Supreme Court.

Where an appeal is pending before the Supreme Court (that is an the Supreme Court's appellate jurisdiction under the *Supreme Court Act*) a single judge may give (*a*) a direction

not involving the decision on the appeal (this does not include an order which would change the factual situation to be brought before the Supreme Court: : *Wau Ecology Institute v Registrar of Companies)* 2005) SC789; or (*b*) an interim order to prevent prejudice to the claims of the parties (this includes a stay or injunction); or (*c*) an order in any proceedings (other than criminal proceedings) for security for costs; or (*d*) an order dismissing an appeal in any proceedings (other than criminal proceedings) for default in furnishing security; or (*e*) an order admitting an appellant to bail (*Supreme Court Act* s5); to conduct an enquiry into the facts of the matter if directed or authorised to do so by the Supreme Court (s8); or make an order (f) to give leave to appeal; or (*g*) to extend the time within which notice of appeal or of an application for leave to appeal may be given (s10). A single judge may dismiss an application for leave to appeal on the grounds of want of prosecution: *Yakopa v Torato* [2010] PGSC 30; SC 1077. A single judge of the Supreme Court does not have jurisdiction to hear a bail application under *Bail Act* s13(2) if there is no appeal: *Bernard Uriap v State* (2011) SC1108.

2.2 Jurisdiction of a Single Judge in the Original Jurisdiction of the Court

A single judge may (1) give a direction not involving a final decision upon the proceedings, (2) an interim order to prevent prejudice to the claims of the parties, (the power cannot be expanded to include matters of National importance: *Bill Skate and Peter O'Neil v Jeffrey Nape Speaker of the National Parliament* (2004) SC754; it has no application when jurisdiction is given by other legislation and is not the original jurisdiction of the Supreme Court: *Viviso Seravo v John Giheno* (1998) SC539; the discretion is exercised on proper grounds and circumstances: *SC Ref No. 1 of 2010 Reference Pursuant To Section 19 of the Constitution, in the Matter of Constitutional (Amendment) Law 2008 Reference By the Ombudsman Commission (17th of May 2010)*, (3) an order for security for costs, (4) the production of any document or thing necessary to determine the case, (5) orders that persons attend and be examined before a judge of the National Court or an officer of the Supreme Court, (6) the admission of any deposition taken be received, (7) the evidence be received if tendered of any witness who was a competent but not compellable witness. Note that powers (4) to (7) are not powers available to a single judge in the appellate jurisdiction unless ordered by the Supreme Court. . A single judge may hear a human rights application pursuant to Constitution section 57: *Supreme Court Rules* Order 6. A single Judge of the Supreme Court having power to determine a leave application under s 10 (1) (a) of the Supreme Court Act (the Act) has the same power to determine the fate of a leave application based on any grounds provided by or under the SCR. An application to dismiss a leave application under O 7 r 53 (1)(a) which if granted can determine the leave application, comes within the ambit of s 10 (1)(a). The word "appeal" in O 7 r 53 includes a leave application by which "an appeal" is instituted: s 17 of the Act. 'The term " the Court" in O 7 r 53 is to be read subject to the power given to a single Judge of the Supreme Court by s 10 (1)(a) of the Act. In a case where a leave application is dismissed by a single Judge under O 7 r 53, the aggrieved applicant would have recourse to the full Court under s 10 (2) of the Act. The proceedings on the application before the full Court is by way of a hearing *de novo*: *Felix Bakani v Rodney Daipo* (2002) SC 699; *The Independent State of Papua New Guinea v John Tuap* (2004) SC 765.': *Yakopa v Torato [2010] PGSC 30; SC1077 (9 September 2010)*

1.

2.2 Jurisdiction of a Single Judge in the Review Jurisdiction of the Court

The review jurisdiction of the court given under Constitution 155(2) is not the original jurisdiction of the court: SC 539(1998) *Review No. 78/1977; Application for Review Pursuant to s 155(2) (b) of the Constitution; Viviso Seravo and Electoral Commission v John Giheno.*

The only powers currently given to a single judge in the review jurisdiction of the court are those given by the *Supreme Court Rules* of general application to all proceedings Order 11 rule 11 giving a single judge power to direct an amendment of the proceedings or the addition of a party, and the Order 5 rules relating to review of election petition matters. A judge may hear an application for leave: O5 Div.4 r9, give directions: O5 Div.4 Sub.Div.6, hold a prehearing conference and set a date for trial: O5 Div.4 Sub. Div .8, review a taxation (Rule 36), endorser payment out of the security deposit (Rule 37) or approve the refund of a security deposit (Rule 40). A single judge would have jurisdiction to admit an applicant bail pursuant to section 10(1)(c) of the Supreme Court Act if the Supreme Court had jurisdiction pursuant to the *Bail Act*.

The powers given by the *Supreme Court Act* s5 do not apply to the review jurisdiction because those powers are contingent upon "an *appeal pending*". The powers given by the *Supreme Court Rules* O3 r2 do not apply because those powers are contingent upon a matter being pending in *the original jurisdiction* of the court. Amendments to the *Supreme Court Rules* may give further jurisdiction to a single judge in the review jurisdiction and a check should be made for amendment made to the Rules after the publication date of this Book.

3.0 Chapter 3 – INTERLOCUTORY APPLICATIONS

3.1 Application for an Injunction -

An injunction may be obtained in the Supreme Court by application to a single judge or the Court in the appellate jurisdiction or the original jurisdiction. The application is actually one to prevent prejudice to the claims of the parties. Or by application to the Court only in the review jurisdiction by exercise of the Court's inherent power pursuant to Constitution section 155 (2) (b).

3.2 Appellate Jurisdiction¶

In the appellate jurisdiction of the Supreme Court application may be made to the Court or a judge. Power is granted to a single judge to grant an injunction by the *Supreme Court Act* section 5:

*(1) Where **an appeal** is pending before the Supreme Court–*

(a) a direction not involving the decision on the appeal; or
*(b) **an interim order to prevent prejudice to the claims of the parties**; or*
(c) an order in any proceedings (other than criminal proceedings) for security for costs; or
(d) an order dismissing an appeal in any proceedings (other than criminal proceedings) for default in furnishing security; or
(e) an order admitting an appellant to bail,

***may be made by a Judge**.*

3.3 Original Jurisdiction

In the original jurisdiction of the Supreme Court application may be made to the Court or a judge. The application is one to prevent prejudice to the claims of the parties. Power is granted to a single judge to grant an injunction by *Supreme Court Rules* O3 r2:

" ORDER 3—PROCEDURE

Division 1.—Commencement and continuance of proceedings

1. *Proceedings which relate to a matter or question within the **original jurisdiction** shall be entitled "In the Supreme Court of Justice" and shall be commenced and continued in accordance with these Rules.*
2. *Where any proceedings under Rule (1) are pending before the Court—*

(a) a direction not involving a final decision upon the proceedings; or

***(b) an interim order to prevent prejudice to the claims of the parties**; or*

(c) an order for security for costs; or

(d) an order in the nature of orders such as are referred to in Section 8(1)(a), (b), and (c) of the Act—

***may be made by a Judge**.*

3.3.1 Matters to be taken into account

"*The discretion given by SCR, O 3 r 2 (b) is exercised on proper grounds and circumstances. Relevant consideration to be taken into account in exercising this discretion, are :*

(1) The first and most fundamental consideration is the nature of the order sought. If the order sought were to be granted, it must be consistent with the grant of Constitutional power and exercise of those powers by designated persons or authorities under the Constitution;

(2) Seriousness of the case in terms of the questions in the Reference to be determined;

(3) *Prejudice to be suffered by the referrer in the performance of its public functions including the public interest associated with performance of those functions;*

(4) Balance of convenience; and

(5) Preservation of the status quo. "

From the head note to -
SC Ref No. 1 of 2010 Reference Pursuant To Section 19 of the Constitution, in the Matter of Constitutional (Amendment) Law 2008 Reference By the Ombudsman Commission (17th of May 2010). **Approved in *Reference by the Ombudsman Commission; In Re Section 19* [2010] PGSC 43; SC 1027 — See paragraph 6.3.3.**

3.4 Review Jurisdiction

In the review jurisdiction of the Supreme Court a single judge does not have jurisdictional or power to grant an order in the nature of an interlocutory injunction. The Court has power to do so: *"[*5]. Interim *orders of the type that Mr Arore is seeking* (ED. in that case a stay) *can only be made by a full bench of the Supreme Court (constituted by three or more Judges). Such orders cannot be made by a single Judge of the Supreme Court. This was clarified in* ***Viviso Seravo and Electoral Commission v John Giheno*** *(1998) SC555. The Court also confirmed in that case that the jurisdiction for making such orders is available under Section 155(4) of the Constitution. The person seeking the orders bears the onus of satisfying the Supreme Court that the orders being sought are necessary, to do justice in the circumstances of the particular case. There is no need to prove special or exceptional circumstances*." ***David Arore v John Warisan*** (2008) SC947.

3.4.1 An Order interfering with a Constitutional Right of another Arm of Government should not be made except in the most exceptional circumstances

"SHOULD AN ORDER BE MADE TO PREVENT ABOLITION OF THE OFFICE OF CHIEF SECRETARY?

[14]. With this order, very different considerations arise. I agree with the submissions of Mr Emang, for the State, that the making of such an order has significant constitutional implications.

[15]. If the Court were to prevent the Prime Minister or any member of the Executive from initiating any legislative steps to abolish the position of Chief Secretary, it would be tending to interfere in the law making function of the Parliament. It may also undermine the right of any member of the Parliament under Section 111 of the Constitution to introduce bills into the Parliament. This is not the sort of order that the Supreme Court should make, other than in the most exceptional of circumstances, eg if it were proven that the National Executive Council or the Parliament were acting in a way that was clearly unconstitutional. This is not such a case.": *Lupari v Somare* [2008] PGSC 33; SC951 (10 November 2008).

3.5 Application for a Stay

The same jurisdictional sources apply to a stay as apply to an application for an injunction. A single judge or the Court may grant a stay in the appellate jurisdiction (s5 of the Supreme Court Act) (but not the costs of the application: ***PNG Pipes Pty Ltd v Sefa and 3 others*** (1997) SC 524, [1997] PGSC 7) or original jurisdiction of the Court (O3 r2). Only the Court may do so in the review jurisdiction (***Viviso Seravo and Electoral Commission v John Giheno*** *(1998) SC555*). The leading case on the tests to be applied in the case of a stay sought when an appeal is pending **is *McHardy v Prosec Security and Communications Ltd*** [2000] PNGLR 279:

3.5.1 Matters to be taken into consideration in the appeal jurisdiction

"To conclude the test for a successful application for stay should be whether there are "special" or "exceptional circumstances" or that there is a "good reason" or that it is an "appropriate case" is restrictive. We think what is important to articulate are the factors and circumstances that may be relevant or appropriate in differing cases from time to time.

We distil from these precedent cases the kinds of factors and circumstances that the Court will consider, amongst others, in the exercise of the discretion whether or not to grant a stay order. We start with the principal premise that the judgment creditor is entitled to the benefits of the judgment. The others factors include the following:

- *Whether leave to appeal is required and whether it has been obtained;*

- *Whether there has been any delay in making the application;*

- *Possible hardship, inconvenience or prejudice to either party;*

- *The nature of the judgement sought to be stayed;*

- *The financial ability of the applicant;*

- *Preliminary assessment about whether the applicant has an arguable case on the proposed appeal;*

- *Whether on the face of the record of the judgment there may be indicated apparent error of law or procedure;*

- *The overall interest of justice;*

- *Balance of convenience;*

- *Whether damages would be sufficient remedy. "*

McHardy v Prosec Communication Pty Ltd [2000] PGSC 22; SC646 (30 June 2000)

3.5.2 An Undertaking as to Damages is Not Normally Required for a Stay Order

"*We consider that the law is settled that an injunction and a stay order are conceptually different orders. While an undertaking as to damages is in most cases an essential prerequisite to the granting of an injunction, it is not so for the granting of a stay order.": Kalinoe v Paraka [*2010] PGSC 13; SC1024 (30 April 2010).

3.5.3 A Stay Cannot Be Obtained in Respect of an Order for Costs for Which No Relief Has Been Sought in the Notice of Appeal

[10] *"Costs is generally a discretionary matter for the National Court. Leave of the Court is necessary to appeal from an order for costs per se or to use the exact words of s 14 (3)(c), "an order...as to costs only" . It follows that leave to appeal is not necessary in an appeal against a judgment in which judgment for costs is incidental or consequential to the main judgment. The appellant may appeal against the order for costs in the same appeal against the main judgment, without leave, and the Supreme Court can assume jurisdiction to deal with the matter**. It appears this interpretation of s 14 (3) (c) is not supported by any previous decisions of this Court.... [13] It is apparent from a collective reading of Supreme Court Act, s 14 (3) (c), s 17 and s 19 and SCR, O 7 rr 6 – 8 that in order to vest jurisdiction in the Supreme Court to review award of costs on appeal, there must be an appeal against an order for costs that is pending determination to which the application for stay relates**. *The notice of appeal must state the whole or part of the decision on costs appealed from and the grounds of appeal which relate to it. If, in the notice of appeal, the whole or part of the decision on costs is not specified or there are no grounds of notice of appeal relating to that part of the decision on costs, it cannot be said that an appeal against an order for costs is pending. The Court therefore lacks jurisdiction to deal with an application for stay in relation to the order for costs.": National Capital Ltd v Port Moresby Stock Exchange* (2010) SC 1053, [2010] PGSC 6 . Applied and followed: Kawaso v Oil Search (PNG) Ltd PGSC 34; SC 1082.

.3.5.4 National Court functus officio after appeal filed

"*With respect, we are firmly of the opinion that the National Court did not have the power, to make the stay orders. Once the appeal is filed and registered in the Supreme Court, the matter is seized by the Supreme Court; the National Court is dispossessed and devoid of any power over the matter and at that point became "functus officio". Consequently, the stay order purportedly made by the National Court on 27 July 2008 is invalid, null and void ab initio. "*: *SCM No 58 of 2008 Barava Ltd v Giregire Estates Limited* (2008) SC958

3.5.5 Nature of a Stay Order in the Original Jurisdiction

In the original jurisdiction of the court exercising the jurisdiction given by O3 r2 (b) ''*Whether or not an interim order should be made in any case is determined by the words "prejudice to the claims of the parties" and not on any general notion of justice under s 155(4) of the* ***Constitution.*** *We reject the submission based on s 155(4****)": In the Matter of an Application for Judicial Review Pursuant to Constitution Section 155(4); Skate v Nape*** [2004] PGSC 5; SC754 (9 July 2004) and see the citation at paragraph 14.

3.5.6 Matters to be Taken into Account on a O3 r2(b) Application (Original Jurisdiction)

"The discretion given by SCR, O 3 r 2 (b) is exercised on proper grounds and circumstances. Relevant consideration to be taken into account in exercising this discretion, are:
The first and most fundamental consideration is the nature of the order sought. If the order sought were to be granted, it must be consistent with the grant of Constitutional power and exercise of those powers by designated persons or authorities under the Constitution;
Seriousness of the case in terms of the questions in the Reference to be determined;
Prejudice to be suffered by the referrer in the performance of its public functions including the public interest associated with performance of those functions;
Balance of convenience; and Preservation of the status quo. " from the head note *to* -
SC Ref No. 1 of 2010 Reference Pursuant To Section 19 of the Constitution, in the Matter of Constitutional (Amendment) Law 2008 Reference By the Ombudsman Commission (17th of May 2010)

3.5.7 an Application to Set Aside a Stay Must Be Made within a Reasonable Time, the Application Must Clearly State the Basis of Invoking the Supreme Court Jurisdiction

(1) Any party seeking any order from the Supreme Court must clearly specify in its application or any other originating process the basis on which it seeks to invoke the jurisdiction of the Supreme Court.
(2) An applicant for an order to discharge or vary an existing order of the Supreme Court must make its application within a reasonable time after the order it seeks to have discharged or varied was made; and if there appears to have been an inordinate delay in making the application a very good explanation must be available to warrant the Court entertaining the application. From the head note *to Kalinoe v Paraka* [2010] PGSC 13; SC 1024

3.6 Applications for Directions

3.6.1 Appellate Jurisdiction

In the appellate jurisdiction a judge may give "*a direction not involving the decision on the appeal*": *Supreme Court Act* s5(1)(a).

3.6.1.1 Meaning of the words "not involving the decision on the appeal"

"In our opinion the meanings "entail", "include" and "affect in its operations" are the meanings intended by the legislature in using the word "involved" in the provision. What is the "decision on the appeal"? In other jurisdictions, for example in the Supreme Courts Acts of New South Wales and Queensland, Australia, the limitation on the power of a single judge is rendered in slightly different terms as:...(not) "an order or direction involving the determination or decision of the appeal..." In our opinion that provision is directed to the same purpose as s5(1)(a). We believe a comparison of those provisions with the provision under review, shows that the same effect is intended and makes it clear that ***s5(1)(a)*** *is not speaking of the decision "on appeal", that is the decision appealed from, as is assumed in the written submissions for the Appellants, but* ***is referring to the decisions which will have to be made by the Court to determine the issues raised on the appeal****... We agree with Ping PJ in the Hong Kong case cited****, permitting additional evidence is not a matter which can be***

decided by a single judge *exercising jurisdiction under the Supreme court Act s5(1)(a). A single judge should not take further evidence unless by direction of the Court pursuant to O3 r3. Also, in our view a single judge exercising s5 power should not make an order which has the potential effect of changing the fact situation out of which the appeal or application for leave to appeal arises":* ***Wau Ecology Institution v Registrar of Companies*** [2005] PGSC 23; SC794 (12 August 2005).

3.7 Original Jurisdiction

In the **original jurisdiction** of the Court a judge may give "*a direction not involving a final decision upon the proceedings*": *Supreme Court Rules* O3 r2(2)(a).

3.8 Review Jurisdiction

In the **review jurisdiction** the powers of a judge to give direction are limited by the matters set out in *Supreme Court rules* Order 5 Division 4 (election petition reviews) and Supreme Court Rules Order 11 rule 8:

Order 11 Division 5.—Pending proceedings

8. Where proceedings under these rules are pending, the court or a Judge may, subject to the Act, make such orders as are considered necessary for—

(a) the custody or release on bail or otherwise if a person in custody; and

(b) the custody, preservation and production of exhibits or other property; and

(c) the suspension or payment of any fine; and

(d) the suspension or variation of any order relating to restitution of property

3.8.1 Not proper to stay final orders on an election petition

Application to stay orders on election petition — " All we can say now is that it would not be proper to utilise *Constitution* s 155(4) to defeat the clear dictates of *OLNE*, s 220, and in particular s 226. It is the clear intention of s 226 that a person whose election is declared void or unduly elected is final and conclusive, and for all intent and purposes he ceases to be a member of the Parliament until another person is duly elected to fill the existing vacancy created by his departure or the Supreme Court makes an order otherwise".

3.8.2 The test to apply is whether the order is necessary to do Justice in the particular case

"5. Interim orders of the type that Mr Arore is seeking can only be made by a full bench of the Supreme Court (constituted by three or more Judges). Such orders cannot be made by a single Judge of the Supreme Court. This was clarified in *Viviso Seravo and Electoral Commission v John Giheno* (1998) SC555. The Court also confirmed in that case that the jurisdiction for making such orders is available under Section 155(4) of the *Constitution*. The

person seeking the orders bears the onus of satisfying the Supreme Court that the orders being sought are necessary, to do justice in the circumstances of the particular case. There is no need to prove special or exceptional circumstances. ": *David Arore v John Warisan* (2008) SC947.

3.9 Application for Extension of Time to File a Notice of Leave to Appeal or Notice of Appeal As Originating Document

Only a Judge has jurisdiction to extend time to appeal in the civil jurisdiction. The *Supreme Court Act* provides:

> ***"17.*** *TIME FOR APPEALING UNDER DIVISION 2. (ED civil appeals)*
> *Where a person desires to appeal to or to obtain leave to appeal from the Supreme Court, he shall give notice of appeal, or notice of his application for leave to appeal, as the case may be, in the manner prescribed by the Rules of Court within 40 days after the date of the judgement in question,* ***or within such further period as is allowed by a Judge on application made to him within that period of 40 days****."*

> In **the criminal jurisdiction** the Court or a judge may extend the time to appeal. *The Supreme Court Act* provides:
> ***10.*** *POWERS THAT MAY BE EXERCISED BY JUDGE.*
> *(1) Any power of the Supreme Court under this or any other Act–*
> *(a) to give leave to appeal; or*
> *(b)* ***to extend the time within which notice of appeal or of an application for leave to appeal may be given****; or*
> *(c) to admit an appellant to bail,*
> ***may be exercised by a Judge*** *in the same manner as it may be exercised by the Court.*
> *(2) Where a Judge refuses an application in relation to a matter specified in Subsection (1), the appellant may apply to the Supreme Court to have the matter determined by that Court.*

> ***"29.*** *TIME FOR APPEALING UNDER DIVISION 3. (ED criminal appeals)*
> *(1) Subject to Subsection (2), where a person convicted desires to appeal or to obtain leave to appeal to the Supreme Court, he shall give notice of appeal, or notice of his application for leave to appeal, as the case may be, in the manner prescribed by the Rules of Court within 40 days after the date of conviction.*
> *(2)* ***The time within which notice of appeal, or notice of an application for leave to appeal, may be given may be extended at any time by the Supreme Court on application made within 40 days after the date of conviction.***
> *(3) In the case of a conviction involving a sentence of death or of corporal punishment–*
> *(a) the sentence shall not be carried out until after the expiration of 40 days, or such further time as is allowed under this section, after the date of conviction; and*
> *(b) if notice is given in accordance with Subsection (1), the sentence shall not be carried out until after the determination of the appeal, or where an application for leave to appeal is finally refused, of the application."*

> "*The right to extend time is always coupled with the right to appeal. A person has a right to extend time if he has a right to appeal. If he has no right of appeal he has no right to extend time.": Avia Aihi v The State (No. 1)* [1981] PNGLR 81 *per Kapi J.*

3.10 Application for Leave to Appeal - Civil

1. ***14.*** *CIVIL APPEALS TO THE SUPREME COURT.*

(1) Subject to this section, an appeal lies to the Supreme Court from the National Court–

(a) on a question of law; or
(b) on a question of mixed fact and law; or
(c) ***with the leave of the Supreme Court, on a question of fact****.*

(2) An appeal does not lie from an order of the National Court made by consent of the parties.

(3) ***No appeal lies to the Supreme Court without leave of the Supreme Court****–*

(a) from an order allowing an extension of time for appealing or applying for leave to appeal; or
(b) from an interlocutory judgement made or given by the National Court except–

(i) where the liberty of the subject or the custody of infants is concerned; or
(ii) in cases of granting or refusing an injunction or appointing a receiver; or
(iii) in such other cases prescribed by the Rules of Court as are in the nature of final decisions; or

(c) from an order of the National Court as to costs only that by law are left to the discretion of the National Court.

(4) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory judgement".

For the requirements of the form of the notice of appeal see 3.10.7.

3.10.1.1 Section 14(1)(c) What is a Question of fact.

On this issue Lord Denning said:

"On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself, such as an original document. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If and in so far as those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact and the only questions of law which can arise on them are whether there was a proper direction in point of law and whether the conclusion is one which could reasonably be drawn from the primary facts". See ***British Launderers' Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority*** (1949) 1 All E.R. 2111 at pp. 25 and 26. This same passage was referred to by the then Deputy Chief Justice, Prentice, in the case of ***Dillingham Corporation of New Guinea Pty. Ltd. v. Constantino Alfredo Diaz*** (1975)

P.N.G.L.R. 262 at p.270 and Kapi DCJ in ***Wahgi Savings & Loan Society Limited v Bank of South Pacific Limited*** (1980) SC185.

3.10.2 Section 14 (3) (b) Application for Leave - what is to be established?

"However, we are of the opinion that an application for leave pursuant to s 14(3)(b) should establish some grounds for which leave should be granted. We think more along the lines of the principles in respect of application for review under Constitution s 155(2)(b). It is our view that for leave to be granted, an applicant must advance cogent and convincing reasons or exceptional circumstances. There must be clear legal grounds meriting an appeal, and he must have an arguable case. We hold that these principles be the guiding principles in an application pursuant to s 14(3)(b).": Rimbink Pato v Anthony Manjin [1999] PGSC 50; [1999] PNGLR 6 (30 April 1999).

"On the question of leave to appeal from High Court to the Court of Appeal, I prefer the test adopted by the majority in Geogas SA v Trammo Gas Ltd [1991] 2 WLR 794 which is comparable to establishing an arguable case.

In considering an application for leave to appeal, due consideration must be given to the fact that an appellant has had an opportunity of a hearing and determination by the National Court. That no person who has a right to appeal should abuse the right to appeal by wasting the Court's time in bringing cases without any merit. In my view the test should not be any different to application for leave for judicial review where the applicant is required to demonstrate an arguable case only (see Ila Geno & Others v PNG (supra)).

"In the course of preparing my opinion in this matter, the decision of the Supreme Court in *Rimbink Pato v Anthony Manjin & Others*; [1999] PNGLR 6 has been drawn to my attention. The Court formulated a different principle to the one I have adopted. The Court adopted the criteria for leave for judicial review pursuant to s 155(2)(b) of the Constitution (Avia Aihi v The State [1981] PNGLR 81). With respect I am not persuaded that this is the appropriate test that should be applied. The jurisdiction for judicial review under s 155(2)(b) is unique and it has its roots in the circumstances, which are not comparable to application for leave to appeal or application for judicial review under O 16 of the *Rules*. For these reasons I would not follow this decision." (Per Kapi DCJ)

…
Just how this Court will exercise its discretion in granting of leave to appeal or for review varies according to the relevant circumstances. These range from the need to show "exceptional circumstances" in time barred appeal cases starting with *Avia Aihi v State No.3* [1982] PNGLR 92 and *PNG v Albert* [1988] PNGLR 138 to the showing of an arguable case, that is one of "cogent convincing reasons on clear legal grounds" in judicial review *(Moi Avei & Election Commission & Charlies Maino* SCA 584). Of course the judicial review criteria nonetheless relates to substantive decisions effecting parties rights, and even then, remains subject to there being no other remedy open, that is equally effective and convenient.

So to obtain leave to appeal an interlocutory judgment, it is not simply a matter asserting there is an arguable case; that there has been some error. It is not the case that every error

will effect the outcome of the substantive proceedings. What must be shown is, not only that there is patent error, but also that the error effects a party's substantive rights or will prevent the proper determination of the issues. That is, there is error in the interlocutory judgment that goes to jurisdiction ". (Sheehan and Jalina JJ).
Sir Julius Chan v Ombudsman Commission [1999] PGSC 40; [1999] PNGLR 240.

"16. I remind myself of the principles on grant of leave. The grant or refusal of leave to appeal is of course discretionary. The main test is whether the applicant has shown that there is a prima facie case or an arguable case that the decision was wrong and that substantial injustice will be done by leaving the erroneous decision un-revisited or unrevised on appeal. The Court is not determining the merits of the appeal itself. It will suffice if the Court is persuaded that the proposed appeal raises issues of law or mixed fact and law which are fairly arguable and require judicial review: *Matiabe Oberia v Police and the State* (2005) SC 801, *Sir Julius Chan v Ombudsman Commission of Papua New Guinea* [1999] PNGLR 240, *Rimbink Pato v Anthony Manjin* [1999] PNGLR 6, *Baing v PNG Stevedores Pty Ltd* (2000) SC 627, *Boyepe Pere v Emmanuel Ningi* (2003) SC 711, *Breckwoldt v Groyke* [1974] PNGLR 106.
": Ramu Nico Management (MCC) Ltd v Koroma [2009] PGSC 47; SC 1046 per Injia CJ

3.10.3 Summary Judgement for Damages to Be Assessed Is an Interlocutory Judgement

*"In our view, the test to be applied is whether the judgment and order is final in that it "finally disposes of the right of the disputing parties" or "there is no substantive issue(s) afoot that remains to be tried" (**La Jarden Collected Agency Pty Ltd v Richard Hill; Ors Supra*** **(1998)** *SC 597), or "because the order results in the rights of the parties in those proceedings being terminated or extinguished" (**NCDC v PNG Water Ltd & Ors*** **(1999)** *SC624 ... where for instance summary judgment is entered and it is one of summary judgment for damages to be assessed, then the summary judgment cannot be said to be final for the judgment is strictly one on liability only and damages is yet to be assessed, as a matter of course. Unliquidated claims fall into this category. The summary judgment in this type of case is interlocutory."*
National Capital District Commission v Namo Trading Ltd (2001) SC 663; [2001] PGSC 12.

3.10.4 Refusal to Set Aside an Injunction Falls within S 14 (3) (b) (II)

"An interlocutory decision of the National Court that refuses to set aside an order that granted an injunction falls within s. 14 (3) (b) (ii) Supreme Court Act as a purposive approach to the interpretation of that section should be adopted" - from the headnote in ***Ramu Nico Management (MCC) Ltd v Tarsie*** [2010] PGSC 5; SC1056 (9 June 2010).

3.10.5 Section 14 (3) (c) Leave to Appeal from Orders for Costs is only necessary when costs is the only issue on appeal

"Costs is generally a discretionary matter for the National Court. Leave of the Court is necessary to appeal from an order for costs per se or to use the exact words of s 14 (3)(c), "an order...as to costs only" . It follows that leave to appeal is not necessary in an appeal against a judgment in which judgment for costs is incidental or consequential to the main judgment. The appellant may appeal against the order for costs in the same appeal against the main judgment, without leave, and the Supreme Court can assume jurisdiction to deal with the matter.": National Capital Ltd v Port Moresby Stock Exchange (2010) SC1053, [2010] PGSC 6 at [10].

3.10.5 Section 14 (4) Refusal of Unconditional Leave to Appeal

"An application to extend time to file a defence is an application for leave to unconditionally defend. The Court then made an explanatory order which gave a partial right to defend in respect of quantum but not liability. The effect of the orders is to give a conditional right to defend. The unconditional right to defend sought by the Appellants was refused. The facts clearly fit the conditions of s.14(4). The subsection is applicable, the order was not interlocutory, and no leave was required to appeal.": State v Tekwie [2006] PGSC 13; SC843 (21 July 2006) at [13].

3.10.6 Application for Leave to Appeal Must Be Made within 40 Days of the Judgement in Question

Supreme Court Act 17. TIME FOR APPEALING UNDER DIVISION 2.

"***Where a person desires to*** *appeal to or to* ***obtain leave to appeal*** *from the Supreme Court,* ***he shall give*** *notice of appeal, or* ***notice of his application for leave to appeal,*** *as the case may be, in the manner prescribed by the Rules of Court* ***within 40 days after the date of the judgement in question****, or within such further period as is allowed by a Judge on application made to him within that period of 40 days".*

3.10.7 Matters to Be Contained in an Application for Leave to Appeal

Supreme Court Rules "ORDER 7—APPEALS.

Division 1.—Application for leave to appeal

1. Where an appeal from a judgment lies to the court only with leave, an application shall be determined after an oral hearing.

2. An application for leave to appeal shall be made by filing a notice in writing and shall—

(a) be entitled "In the Supreme Court of Justice" and shall also be entitled as between the party as appellant and the party as respondent; and

(b) show that an appeal lies with leave; and

(c) ***state the nature of the case, the questions involved and the reason why leave should be given****; and*

(d) show an address for service of the party giving the notice; and

(e) be in accordance with form 7.

3. Notwithstanding anything contained in sub-rule (1), application may be made before the court that application for leave to appeal be heard concurrently with or

immediately before the hearing of the appeal, and for such consequential orders as may be necessary.

Division 2.—Filing and serving notice of application for leave to appeal

4. The provisions of Rule 10, with the necessary modifications shall apply to an application for leave to appeal and notice of such application.

5. When leave to appeal has been granted, the Supreme Court may treat the notice of application for leave as notice of appeal, but otherwise, a notice of appeal shall be filed within 21 days immediately after the date on which leave is granted or within such time as the Court or Judge may allow.

3.10.8 Application for Leave to Appeal to be in Form 7 NOT incorporated with Form 8

*A notice of appeal cannot and does not include an application for leave to appeal and vice versa. They are different and must be specifically stated; see Forms 7 and 8 in the Rules of the Supreme Court**.: Tsang v Credit Corporation*** [1993] PNGLR 112, [1993] PGSC 18.

*"... In my view, notwithstanding Rule 3, an applicant is not exempt from filing the appropriate application for leave to appeal in accordance with Form 7. Essentially, it is my view that, none of these provisions of the Rules intended that any grounds of appeal involving questions of fact that require leave should be incorporated into the single notice of appeal Form 8 without a separate application for leave being filed in Form 7. It is quite clear, in my view, that the rules intended that **separate application for leave in Form 7 should be filed in respect of proposed grounds involving issues of fact** for which leave of the court was required and separate notice of appeal in Form 8 in respect of grounds of appeal which did not require leave of the court. Order 7 Rules 3 and 5 provided adequately for the incorporation of the grounds of appeal that required leave after leave was granted**."** **per Amet CJ**; "Where a person seeks to appeal only against grounds which require leave to appeal, **leave must be sought by using form 7**. If no leave is sought the appeal will be dismissed for incompetence (see Tsang v Credit Corporation [1993] PNGLR 112."* ***per Kapi DCJ***; Los J concurring with both judgements: ***Yakham and The National Newspaper v Dr Stuart Hamilton Merriam and Carol Merriam; The Independent State of PNG and Michael Nali v Dr Stuart Hamilton Merriam and Carol Merriam*** [1997] PGSC 15; SC533 (27 November 1997).

3.10.8.1 The Requirements of Form 7

"We now return to the question of form 7 in the Rules. We do not consider that the form is inconsistent with O 7 r 2 (c). It is simply inadequate as it does not indicate the three *requirements in the form. The form should be amended to include the three requirements. Until this is done, we would direct that all Applications from now on should set out the three*

requirements under separate headings. The Registrar should ensure that this direction is complied with." Placer (PNG) Ltd v Leivers [2005] PGSC 43; SC781 (4 May 2005)

3.10.8.2 Form 7 - No Provision for Service

"During submissions, counsel for the respondent conceded to the argument by counsel for the applicant that ***there is no provision for service of application for leave to appeal under the Supreme Court Rules.*** *Order 7 r 12 of the Supreme Court Rules regulates service of a notice of appeal, namely, a copy of notice of appeal shall be served on each party without delay. Filing and service of an application for leave to appeal is regulated by O 7 Div 2 r 4 of the Supreme Court Rules:*

"The provisions of Rule 10, with necessary modifications shall apply to an application for leave to appeal and notice of such application."

This provision adopts only the manner of giving notice of appeal for purposes of giving notice of an application for leave to appeal, namely, by filing the application in court. Such procedure has been prescribed pursuant to s 17 of the Supreme Court Act. Order 7 r 4 does not go so far as to adopt O 7 r 12 which deals specifically with service of notice of appeal.": ***Awal v Elema*** [2000] PGSC 26; [2000] PNGLR 288 (29 September 2000).

3.10.9 Seeking Leave When Leave Not Required

*"****It should reasonably follow from this that, where a person has a right of appeal but seeks leave, he should be allowed to proceed with his appeal****. We consider this important because in some cases there may be instances in which it might not be clear as to whether an appeal lies as of right or with leave. In such a case, it would be advisable to seek leave in order to avoid the risk of an appeal being found incompetent for leave not being first sought and obtained: Henzy Yakham & Anor -v- Meriam & Meriam case. In other cases, an appellant may inadvertently seek leave when it is strictly not required. In either of these cases the application for leave must be considered on its merits****. If the Court is satisfied that there is merit in the proposed grounds of appeal or that the appellant should have appealed as of right, the appellant should be granted leave or allowed to proceed to lodge his appeal****. After all, the application does no harm or cause any prejudice to the other side. The only disadvantage any such application could cause to the respondent is costs. That can easily be compensated for by an order for costs. On the other hand, if an appellant is shut out purely on account of seeking leave instead of appealing right away, he might be left to suffer under the judgement he seeks to appeal against. The judgement the appellant wants to appeal against might be wrong in law or in fact or both. Unless that is corrected on appeal, it may continue to represent an error of judgement at the expense or loss of the party seeking to appeal."* ***Boyepe Pere v Emmanuel Ningi*** [2003] PGSC 10; SC711 (30 June 2003) . Applied in *Oia Aba v MVIL* (2005) SC779 and *The State v John Talu Tekwie* (2006) SC843.

3.10.10 Circumstances in Which Leave will not be Given

"...leave to appeal is therefore unlikely to be given in circumstances where the judgment challenged may have little or no bearing on the final determination of the issues between the parties; leave should not be given where by the rules of the court there is obvious recourse for further application on the matter, nor should leave be given where the ruling is within the discretion of the Court and discloses no obvious breach of principle": *Sir Julius*

Chan v The Ombudsman Commission (1998) SC607 (Kapi DCJ, Sheehan and Jalina JJ) at p11 per Sheehan and Jalina JJ., Kapi DCJ dissenting.

3.10.11 What Is to Be Shown When Seeking Leave to Appeal from an Interlocutory Ruling

"*It follows therefore that* ***the Appellant's appeal is against an interlocutory ruling*** *or judgement dismissing his objection to competency of the Respondent's motion for review of the decision by the Registrar which means* ***that before he can be heard on his appeal, he must first obtain leave****. ... To appeal against that ruling,* ***the Appellant must show exceptional circumstances and compelling reasons for leave to be given to him to appeal against that ruling when the issues could just as easily and appropriately be dealt with in the next level at the substantive hearing itself.*****"**: ***Hii Yii Ann v Karingu*** [2003] PGSC 8; SC718 (13 June 2003) .

3.10.12 Effect of Not Seeking Leave When Leave is Required

"The requirement of law is clear. Where no notice is given of application for leave to appeal and ***no leave has, in fact, previously been given, then a proposed ground of appeal on a question or questions of fact would be incompetent****.*

These grounds of appeal raised questions of fact. Counsel for the appellant conceded that Grounds 3A(i) and (ii) were clearly challenging findings of fact. The appellant has not made any application for leave to appeal against these findings of fact.

A notice of appeal, as is expressed in this case, is different in nature to an application for leave to appeal. A notice of appeal cannot be taken as an application for leave to appeal. See Tsang v Credit Corporation (PNG) Ltd (supra). The appellant has not sought leave within the 40 day period and has not applied to extend time in which to file an application for leave to appeal within the 40 days. The appellant is unable to cure the defect on these grounds of appeal. We would dismiss these grounds of appeal for incompetency.": Haiveta, Leader of the Opposition v Wingti, Prime Minister; and Attorney-General; and National Parliament (No 2) [1994] PGSC 7; [1994] PNGLR 189 (18 July 1994)

3.10.13 The Test to be Applied to Determine if a Judgment is Interlocutory or Final

"In our view, the test to be applied is whether the judgment and order is final in that it "finally disposes of the right of the disputing parties" or "there is no substantive issue(s) afoot that remains to be tried" (**La Jarden Collected Agency Pty Ltd v Richard Hill; Ors Supra** SC 597 [1998], or "because the order results in the rights of the parties in those proceedings being terminated or extinguished": (**NCDC v PNG Water Ltd & Ors** SC624 (1999).

The mere fact that a judgment is expressed to be summary is not conclusive of whether that judgment is final or interlocutory. Summary judgment is granted at two levels, summary judgment in respect of liability and damages. It is necessary to consider the nature and

effect of the summary judgment in the light of the whole of the proceedings. In that regard it is also necessary to consider the nature of the Plaintiff's claim(s) and the issue(s) before the Court. If for instance, the gist of the Plaintiff's action is one for damages in say tort or contract, the issues of liability and damages are almost invariably inseparable. In some cases, judgment on liability and quantum of damages may be determined in the same summary judgment, either by consent or in a separate determination funded on the pleadings or the evidence. Liquidated claims fall into this category of cases. There is no question of the finality of this type of summary judgment. In other cases, where for instance summary judgment is entered and it is one of summary judgment for damages to be assessed, then the summary judgment cannot be said to be final for the judgment is strictly one on liability only and damages is yet to be assessed, as a matter of course. Unliquidated claims fall into this category. The summary judgment in this type of case is interlocutory.": SC 663 (2001) **NCDC v Namo Trading Ltd** [2001] PGSC 12.

"The test to be applied when determining whether a judgment is **"interlocutory"** or **"final"** is settled. The Court must first look at the nature of the application and not the order eventually made; and second, the Court must look at whether the judgment finally disposes of the substantive rights of the disputing parties": Rimbik Pato v Sir Julius Chan Unpublished Supreme Court Judgment (1997) SC527 dated 16 July 1997; Provincial Government of North Solomons v Pacific Architecture [1992] PNGLR 145; Shelley v PNG Aviation Services [1979] PNGLR 119.: ***Daniel V Pak Domoi Ltd*** SC 736**,** [2004] PGSC 39.

"Interlocutory judgments are orders, directions, decisions or rulings as above made prior to or during the course of a trial or action but which do not decide the issues between the parties. They may be made either for the purpose of maintaining the status quo, or for purposes of practice and procedure assisting parties to prosecute or defend an action. Generally, they are directives concerning all matters relating to the conduct of the trial but, importantly; do not constitute final orders determining the rights of the parties*.": **Chan v the Ombudsman Commission of Papua New Guinea*** [1999] PNGLR 240, [1999] PGSC 40 per Sheehan and Jalina JJ.

3.10.14.1 Doubt As to Whether the "Nature of the Application" Test Still Appropriate To Identify an Interlocutory Judgement

"*There was a long conflict of opinion notwithstanding the line of authority cited in Shelley v PNG Aviation Services Pty. Limited. In North Solomons Provincial Government v. Pacific Architecture Pty. Limited [1992] PNGLR 145 this Court approved and applied a different line of authority as follows:*

"The Privy Council in Haron bin Mohd Zaid v Central Securities (Holdings) Bhd [1982] 2 All ER 481 sets out some of the conflicts that have arisen in the past in other common law jurisdictions. Their Lordships agreed that the sound and convenient test

is that advanced by Lord Alverstone CJ in Bozson v Altrincham UDC [1903] 1 KB 547, namely:

> *"**Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order"***

Their Lordships noted at page 486 that that test has been approved as a real and practical test by the Malaysian Court of Appeal. We feel that it can be safely adopted here."

This test, which has been applied since that case, is clearly irreconcilable with the test espoused by Shelley v PNG Aviation Services Pty. Limited and, without deciding now, it must be doubted as to whether the latter case is still good law, unless it is confined in the very narrow way it was in North Solomons Provincial Government v Pacific Architecture Pty. Ltd. In that case the Court found that as the order appealed from was an order for leave to enter judgement, it was still interlocutory, the right of the parties not having been finally disposed of until the judgment was entered. However the line of authority upon which Shelley's case is based is clearly not so narrowly framed.

On the test applied in Shelley the decision appealed from in this case is an interlocutory decision, having arisen upon an interlocutory application; and also being a decision to dismiss the action for disclosing no good cause of action, one of the class of cases for which authority is cited in Shelley. On the test in North Solomons Provincial Government v Pacific Architecture Pty. Ltd, the decision appealed from is a final decision, as it finally disposes of the rights of the parties.

To complete our comments, although not necessary for this decision, it is clear that where judgment has been entered, but the action remains on foot with the necessity for the parties to go back to Court to complete the action, such a judgment is interlocutory: SC663 NCDC V Namo Trading Limited Los, Injia and Gavera-Nanu JJ; SC736 Alfred Alan Daniel v Pak Domoi Limited, Kapi DCJ, Injia DCJ and Jalina J; SC696 NCD Water & Sewerage Limited v Sam Tasion, Hinchliffe, Kirrowom and Davani JJ;cf.SC600 Ruma Construction Pty. Limited v Christopher Smith. But there are rare cases where the nature of the claims made in the originating proceeding are so distinct and separate, that final judgment on one is to be regarded as a final judgment, even though the other claims are still to be litigated: SC600 Ruma Construction Pty. Limited v Christopher Smith and see the analysis of this case in SC736 Alfred Alan Daniel v Pak Domoi Limited.": ***Oi Aba V Motor Vehicles Insurance Ltd*** SC 779 (2005), [2005] PGSC 38 .

3.10.15 Judgement Both Final as to Part and Interlocutory as to part

"In the present case, we are of the view that the declaratory orders given by Salika J. were final. They finally disposed of the ownership rights of the parties over the disputed land. The order took immediate effect; it was not dependent on the assessment of damages. No leave to appeal is required for that part of the summary judgment. In relation to the order for damages, this part of the claim was yet to be litigated and determined independently of the declaratory orders. That part of the summary judgment was interlocutory, for which leave to appeal is required": ***Daniel V Pak Domoi Ltd*** SC 736**,** [2004] PGSC 39.

3.10.16 An Order Dismissing an Action for Want of Prosecution Is Not Interlocutory

"In our view, the general principles stated in L.A. Jarden Collector Agency and Ruma Construction are equally applicable to an order dismissing an action for want of prosecution. The fact that there exists procedural provisions in the rules of the Court to allow a plaintiff whose action is dismissed for want of prosecution to institute fresh proceedings does not change the final nature of the order. Applying these principles, we are quite clear that the judgment in the present case is a final judgment for which leave to appeal unders.14(3)(b) of the ***Supreme Court Act*** *is not required*.": ***National Capital District Commission v PNG Water Ltd*** (1999) SC 624, [1999] PGSC 27

3.10.17 An Appeal from a Stay Order Requires Leave Because It Is Not an Injunctive Order

"*We are of the view that a stay order is not an injunctive order for purposes of section 14 (3) (b) (ii) of the Supreme Court Act and leave is required*.": ***Kaupa V Puraituk*** (2008) SC 955, [2008] PGSC 37.

3.10.18 A Single Judge May Deal with an Objection to Competency of an Application for Leave to Appeal

"*In my view, in a case where an objection to competency of a leave application is filed, the competency issues raised in the objection is part and parcel of the primary jurisdiction given to a single Judge by s 10(1)(a) to deal with a leave application. The primary jurisdiction given to a single Judge of the Supreme Court by s 10(1)(a) includes the power to deal with competency issues arising thereto and this includes an objection to competency of a leave application. The single Judge should assume jurisdiction to deal with the competency objection by virtue of s 10(1)(a) and the inherent power or jurisdiction of the Supreme Court constituted by a single Judge which is dealing with the leave application*.": ***Amaiu v Kipalan*** (2009) SC 991, [2009] PGSC 14.

3.10.16 No Appeal or fresh application to the Supreme Court Lies from a Successful Grant of Leave To Appeal in the Supreme Court

"32. We are of the view that, the fact that s. 10 does not set out any corresponding right in a person unsuccessfully defending an application for leave to appeal to apply for a determination of the matter by the Supreme Court confirms the position in our view that, interim applications upon interim applications or appeals upon appeals are not provided for. This is for a good reason. Parties are to take all steps necessary to enable an expedited hearing of the substantive matter and avoid being bogged down in interlocutory applications.": ***Powi v Southern Highlands Provincial Government*** (2006) SC 844, [2006] PGSC 15, followed and applied in *Mary ToRobert v Henry ToRobert* (2011) SC1130.

3.11 Order 10 Applications for Leave to Appeal from Judicial Review of the National Court

Supreme Court Act 14. CIVIL APPEALS TO THE SUPREME COURT.
(1) Subject to this section, **an appeal lies to the Supreme Court from the National Court**–
(*a*) on a question of law; or
(*b*) on a question of mixed fact and law; or
(*c*) **with the leave of the Supreme Court, on a question of fact**.

Supreme Court act 10. POWERS THAT MAY BE EXERCISED BY A JUDGE:
(1) **Any power of the Supreme Court** under this or any other Act–
(*a*) **to give leave to appeal**; or
(*b*) to extend the time within which notice of appeal or of an application for leave to appeal may be given; or
(*c*) to admit an appellant to bail,
may be exercised by a Judge in the same manner as it may be exercised by the Court.

(2) Where a Judge refuses an application in relation to a matter specified in Subsection (1), the appellant may apply to the Supreme Court to have the matter determined by that Court.

Supreme Court Act 17. TIME FOR APPEALING UNDER DIVISION 2.:
Where a person desires to appeal to **or to obtain leave to appeal** from the Supreme Court, **he shall give notice of appeal, or notice of his application for leave to appeal**, as the case may be, in the manner prescribed by the Rules of Court **within 40 days after the date of the judgement in question**, or within such further period as is allowed by a Judge on application made to him within that period of 40 days.

3.11.1 The 40 Day Time Limit Stipulated by Section 17 of the Supreme Court Act Applies to Order 10 Appeals and Applications for Leave to Appeal

"We are satisfied however, that the incorporation and application of other provisions of O 7 of the Rules, which are the Rules of Court referred to in s 17, prescribing the manner in which the notice of appeal is to be given, do affirm our conclusion that the appeal by virtue of the O 16 r 11 and O 10 of the Supreme Court Rules are nevertheless to be in accordance with the requirements of the Act under the appropriate Division.... Nor do we believe that appeals, which have to comply with the requirements of these rules which are authorised by the Act should only be subject to and comply with the substantive enabling provisions of s 17 of the Act for the purposes of filing of the notice of appeal but not the time limit within which such notices of appeal are to be filed.... **The end result, in our view, is that the Supreme Court Act provisions of time limitations within which appeals to the Supreme Court are to be filed, apply to appeals under the Act as well as by notice of motion pursuant to the National Court Rules and O 10 of the Supreme Court Rules**. The notice of motion giving notice of appeal in this case was clearly filed after the 40 days time limit prescribed by s 17 of the Act".: ***Balakau v Ombudsman Commission of Papua New Guinea And the Public Prosecutor*** [1996] PNGLR 346, [1996] PGSC 15.

3.11.2 The 40 Day Time Limit Commences the Day after Publication of the Judgement

"We accept his submission that time commences to run on the day after the date of the decision and not on the day on which the judgment is delivered. That is the ordinary meaning of the words **"within 40 days <u>after</u> the date of the judgment in question."** (our emphasis)." ***Felix Bakani v Rodney Daipo*.**
Where the 40th day for appeal falls on a Sunday an appeal filed on the following Monday is filed within time

"Section 11 of the *Interpretation Act* provides:

"11. Computation of time.
... (3) Where a statutory provision directs or allows an act or proceeding to be done or taken on a certain day, then if that day happens to be a Sunday or public holiday, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the day next following that is not a Sunday or public holiday.

The last day fell on a Sunday and so the appeal was filed on Monday. We agree with counsel for the appellants that the appeal was filed within time. We dismiss this ground of objection.": ***Tony Kila & Ors v Talibe Hegele & Ors***. SC885 (2007) , [2007] PGSC 5.

3.11.3 An Appellant Must Comply with All the Requirements of Order 10 Rules (1), (2) and (3) in Order to Institute a Valid Appeal

"This review jurisdiction of the National Court is available to a person aggrieved by the decisions of statutory administrative or quasi-judicial tribunals. The enabling statutes often contain provisions pronouncing the finality of the decision and preclude appeals. Therefore, the procedural requirements for invoking the review jurisdiction are stringent. The review jurisdiction is very discretionary and is available in special or limited cases, upon leave to review being sought and granted. **Likewise, the procedural requirements of Order 10, in particular Order 10 r 3 are also restrictive and onerous. They are couched in strictly mandatory terms and all those requirements must be complied with by an appellan**t.." ***Felix Bakani v Rodney Daipo* (2002) SC 699.**

3.11.4 Leave Is Required to Appeal from an Order Granting Leave to Proceed

"*But O 16 r 11 of the National Court Rules expressly refers to 'an appeal' under O 10 of the Supreme Court Rules and construed in that context, it is our view that whilst O 16 r 11 of the National Court Rules grants original power, it is directory only in that it is effected through the procedure stipulated in O 10 of the Supreme Court Rules which is the overall regulatory provision. And if one accepts this argument, then it logically follows that both O 16 r 11 of the National Court Rules and O 10 of the Supreme Court Rules are subject to Section 14(3)(b) of the Supreme Court Act": **Garamut Enterprises v Steamships Trading Co Ltd** (1999) SC 625, [1999] PGSC 31.*

"We therefore conclude that Garamut Enterprises v Steamship Trading Co. Limited is the only clear and binding statement of principle on the issue and it holds that leave is required to institute an appeal pursuant to O 16 r 11 of the National Court Rules and O 10 of the Supreme Court Rule against the grant of leave. We re-affirm that finding and apply it in this case.: ***NEC and others v David Nelson*** (2004) SC 766, [2004] PGSC 15 .

3.11.5 An Application for Leave to Appeal pursuant to Order 10 Should Be Made in Form 7

‘‘We have concluded that this is a genuine case where there is no procedure set out in the Rules. Order 10 of Supreme Court Rules is clearly intended to be a complete and exclusive procedure for reviewing applications for judicial review as was found in Sir Julius Chan v Ombudsman Commission and approved in Garamut Enterprises v Steamships Trading Co Limited. However neither that Order nor Form 15 contemplates an application for leave. Neither O. 10 r. 3 nor r.4 important or apply any of provisions of O. 7 Division (1)&(2). This would have been an appropriate situation to make an application pursuant to O. 11 r. 9 which provides:

"Where a person desires to make and take any step in proceedings under these rules and the manner or form of the procedure is not prescribed, the person must apply to a Judge for directions."

In our opinion it is still required following Yakam v Merriam to keep the procedure for making an application for leave separate from the appeal itself. It is therefore not appropriate to require an appellant to make a modification to Form 15 to incorporate the leave application. **The desirable course is to adopt the procedure already set out in O. 7 Divisions 1 and 2.”** : ***National Executive Council v David Nelson*** (2004) SC 766, [2004] PGSC 15.

3.12.1 An application made (for leave to appeal) to a judge under section 10 (1) of the Supreme Court Act and an application to the Court under section 10 (2) must be made within the same the 40 days stipulated by section 17.

“ It seems to us that parties have misunderstood the relationship between S.10 and S.17. Section 10 does not confer the powers enumerated in S.10(1) a-(c). Those powers enumerated in S.10(1)(a) – (c) are given under other provisions of the Act. This is made clear in the opening sentence of S.10(1) which says **"Any power of the Supreme Court under this Act"** relating to (a), (b), or (c). The power to extend the time limit to institute an appeal (or leave to appeal as the case may be) is provided by S.17. Section 10 prescribes the procedure for the exercise of those powers enumerated in s.17 by a single judge of the Supreme Court or a full bench of the Supreme Court where the single judge refuses the application, and nothing more. Therefore, S.10 must be read, subject to or together with S.17. Upon reading S.10 and S.17 together, an application for extension of time to appeal made under both

S.10(1) before a single judge of the Supreme Court and under S.10(2) before the full bench of the Supreme Court must be made within the same 40 days prescribed by S.17**.": Felix *Bakani and the Oil Palm Industry Board v Rodney Daipo*** (2002) SC 699, [2002] PGSC 14. Followed in the *State v John Tuap and others* (2004) SC 675, [2004] PGSC 14 and *Substantive Council of the University of Goroka v Minister for Higher Education* (2008) SC907.

3.12.2 An Application under Section 10 (2) Is a Fresh Application and Not an Appeal from a Decision Made under Section 10 (1)

"That is the correct interpretation of S.10(2). In other words, the full Court does not sit to review the decision of the single judge but to determine the application afresh without any reference to the decision of the single judge. The procedure is similar to a situation where a single judge of the Supreme Court refuses leave to appeal or refuses to grant an application for bail and the applicant is entitled to make a fresh application before the full bench of the Supreme Court." ***.": Felix Bakani and the Oil Palm Industry Board v Rodney Daipo*** (2002) SC 699, [2002] PGSC 14.

"We would only add that, where a single Judge of the Supreme Court refuses an application for leave or any of the other matters prescribed in s.10 (1) of the Act, the applicant must file a fresh application, if he so desires, to the full bench of the Supreme Court. The fresh application should be without reference to the previous application before the single Judge. The fresh application must not be an application to "set aside" or "reinstate" the application that was dealt with earlier by the single Judge. In such a situation, the full Court does not sit to review the decision of the single Judge nor does it have the power to "set aside" or "reinstate" the application that was dealt with by the single Judge. Any application to "reinstate" or "set aside" an application which had been refused by a single Judge previously, would be incompetent. The full bench of the Supreme Court will then have to consider and determine the fresh application de novo**.": *Independent State of Papua New Guinea v John Tuap*** (2004) SC 765, [2004] PGSC 14.

3.12.3 What is to Established in an Application for Directions to File an Objection to Competency

"(2) When deciding whether to give a direction granting leave the Supreme Court should consider whether the application for directions has been filed and served expeditiously, whether it has been prosecuted expeditiously, whether the proposed grounds of objection raise issues that would obviously render the appeal incompetent and the interests of justice. " from the head note to ***Madang Timbers v Kambori*** (2009) SC 992, [2009] PGSC 18.

3.13 Application to Extend Time to File a Notice of Appeal after Grant of Leave to Appeal

Supreme Court Rules Order 7 Division 2.—Filing and serving notice of application for leave to appeal

4. The provisions of Rule 10, with the necessary modifications shall apply to an application for leave to appeal and notice of such application.

*5. When leave to appeal has been granted, the Supreme Court may treat the notice of application for leave as notice of appeal, but otherwise**, a notice of appeal shall be filed within 21 days immediately after the date on which leave is granted or within such time as the Court or Judge may allow.***

3.14 Application for Leave to Review National Court Election Petition Hearing

Constitution section 155 (2) (b) provides:

*"(2) **The Supreme Court**–*

(a) is the final court of appeal; and

*(b) **has an inherent power to review all judicial acts of the National Court**; and*

(c) has such other jurisdiction and powers as are conferred on it by this Constitution or any other law."

The Supreme Court Rules Order 5 Division 4 Sub-division 1. Application for Leave to apply for Review provide that **the application for leave shall be made before a judge.**

"1. A party aggrieved by a decision of the National Court in an election petition brought under Part XVIII of the Organic Law shall file an application in the Supreme Court under Section 155(2)(b) of the Constitution.

2. An application under Section 155(2)(b)of the Constitution in respect of a decision referred to under Rule 1 lies to the Court with leave only.

3. An application for leave shall –

(a) be entitled under Section 155(2)(b) of the Constitution and in the matter of Part XVIII of the Organic Law on National and Local-Level Government Elections; and

(b) be entitled in the name of the person making the application and the name of the respondents; and

(c) state briefly the particulars of the decision of the National Court to be reviewed, the nature of the case, the issues involved and why leave should be given; and

(d) state an address for service of the applicant; and

(e) be signed by the applicant; and

(f) be in accordance with Form 5A; and

(g) be filed in the Supreme Court Registry at Waigani.

4. The application for leave shall be supported by an affidavit of the applicant. The affidavit shall set out the circumstances pertaining to the application and shall have annexed a copy of the election petition and the judgement and order of the National Court.

5. The filing fee for the application for leave shall be K750.00.

6. At the time of filing the application for leave, the applicant shall deposit in the Registrar's Trust Account, the sum of K5,000.00 as security for costs.

7. ***The application for leave shall be made within 14 days*** *of the decision sought to be reviewed or within such time as extended by the Court, upon application made within that 14 days period.*

8. The application for leave and supporting affidavit shall be served personally on the respondents not later than 3 days before the application is made and an affidavit of service shall be filed within that 3 days period.

9. ***The application for leave shall be made before a Judge.***

10. A decision to grant or a refusal to grant leave is final and shall not be subject to further review. "

3.14.1 Principles to Be Applied on an Application for Leave to Review a Final Decision on an Election Petition

"When the principles relevant to election petition reviews developed in various cases including the cases referred to in Herman Leahy case and leave provisions in the Petition Review Rules are distilled into some basic principles or criteria, four main principles emerge, and these are:-

1. Leave for review is required in respect of a final decision made by the National Court under Part XVIII of OLNLLGE: Division 1 rr 1-10, Supreme Court Election Petition Review Rules 2002, as amended, Trawen v Kama (2008) SC 915.

2. The grant or refusal of leave for review is discretionary. It is a judicial discretion and it must be exercised on proper principles and proper grounds: Application of Ludwig Patrick Schulze (1998) SC 572.

3. The three criteria set out for grant of leave in Avia Aihi v The State No.1 [1981] PNGLR 81, do not apply to grant of leave in respect of leave for review of a decision in an election petition matter.

4. The criteria for exercise of discretion on leave for review in an election petition matter are two-fold: -

- First, insofar as the application relates to a point of law, the only criteria to be satisfied are that there is an important point of law to be determined and that it is not without merit: Application by Herman Joseph Leahy (2006) SC 855; Application of Ludwig Patrick Shulze (1998) SC 572.

- Second, insofar as the application relates to facts, there is a gross error clearly apparent or manifested on the face of the evidence before the Court: Kasap v Yama [1988- 89] PNGLR 81, Application of Ludwig Patrick Shulze (1998) SC572, Kelly Kalit v John Pundari [1998] SC 569; or where on the face of the finding of fact, it is considered so outrageous or absurd so as to result in injustice: Application by Ben Semri (2003) SC 723; and such that a review of the findings of fact is warranted.": ***Jurvie V Oveyara*** (2008) SC 935, [2008] PGSC 22 at [9].

3.14.2 The Consequences of Application for Leave Not Being Made within 14 Days

"An application for leave to review a decision on an election petition not filed, served and moved before a judge within 14 days of the decision sought to be reviewed, where extension of time is not granted within that 14 days, is rendered incompetent by the Rules, subject to any application under Rule 5/10/32. 2.... The times imposed by the Rules are tight and where prompt application is made for relief within the mandatory 14 days accompanied by a reasonable explanation, many circumstances will justify an extension of time under Rule 5/1/7 or after that time a dispensation from the requirements of the Rules under Rule 5/10/32: *"*: from the head note in ***Vele v Parkop*** [2008] PGSC 28, (2008) SC945.

3.14.3 What Should Be Shown by an Applicant under Rule 5/10/32 for dispensation with the Requirement of a Rule.

"An applicant under Rule 5/10/32 should explain (1) why a time limit was missed, a Rule not complied with or otherwise why dispensation is required, (2) any delay which has occurred in making the application, (3) that the relief sought by the applicant will not unduly prejudice the other party's case, (4) that the grant of dispensation will enable all of the issues in contention to be promptly brought before the court without further delay": from the headnote in ***Vele v Parkop*** [2008] PGSC 28, (2008) SC945.

3.14.4 Grounds for Dismissal

"The power to dismiss is a discretionary one which may be exercised if the court is satisfied that "an applicant has not done any act required to be done by or under these rules or otherwise has not prosecuted his application with due diligence". In other words, for the court to exercise this discretionary power, the First Respondent, who is supported by the Second Respondent, must show that:

> *a) the Applicant has not done an act required to be done by or under the rules; or*
> *b) the Applicant has not prosecuted his application for review with due diligence."*

: ***Mickey Kaeok V Rimbink Pato*** (2005) SC 877, [2005] PGSC 46

3.14.5 Failure of the Lawyer Not a Good Reason For Delay

"*It has been held on numerous occasions in this jurisdiction that the failure of a person's lawyer is not a good reason for the granting of an extension of time: Peter Dickson Donigi v. Base Resources Ltd [1992] PNGLR 110.*": ***Yawari v Agiru*** (2008) SC 948, [2008] PGSC 31.

3.15 Application for Security

3.15.1 In the Appellate Jurisdiction Application for Security for Costs May Be Made to a Judge

Supreme Court Act 5. *INCIDENTAL DIRECTIONS AND INTERIM ORDERS.*

(1) Where an appeal is pending before the Supreme Court–

(a) a direction not involving the decision on the appeal; or

(b) an interim order to prevent prejudice to the claims of the parties; or

(c) ***an order*** *in any proceedings (other than criminal proceedings****) for security for costs****; or*

(d) an order dismissing an appeal in any proceedings (other than criminal proceedings) for default in furnishing security; or

(e) an order admitting an appellant to bail,

may be made by a Judge.

Supreme Court Act 18. SECURITY FOR APPEAL.

(1) The Supreme Court or a Judge may, **in special circumstances**, order that just security be given for the costs of an appeal or an application for leave to appeal and, if an application is granted, for the prosecution of the appeal.

(2) If any security ordered under Subsection (1) is not given in accordance with the order, the appeal, or the application for leave to appeal, as the case may be, shall be deemed to have been abandoned.

Supreme Court Rules Order 7 rule 23 provides**:**

Division 7.—Security for costs

23. Unless the court otherwise directs no security for costs of an appeal to the court shall be required.

3.15.2 Criteria for Ordering Security for Costs in the APPELLATE Jurisdiction

42. *"Having regard to the National Court Rules and the need to protect the interest of the respondent's costs, we would adopt the circumstances set out in the National Court Rules as coming within the meaning of "special circumstances" upon which the Court may exercise its discretion to order security for costs of an appeal, namely:*

(a) that an appellant is ordinarily resident outside Papua New Guinea;

(b) that there is reason to believe that the appellant will be unable to pay the costs of the respondent if ordered to do so;

(c) that the address of the appellant is not known;

(d) that the appellant has changed address after the appeal is instituted with a view to avoiding the consequences of the appeal.

As we have stated before, this list is not exhaustive. There may be other circumstances which may come within the words "special circumstances".: ***Brinks Pty Ltd & Barry Tan and Lucas V Brinks Inc*** [1996] PNGLR 75, [1996] PGSC 16.

3.15.3 Security for Costs in the ORIGINAL Jurisdiction of the Court

The Supreme Court Rules Order 3 Rule 2 provides:

Order 3—PROCEDURE

Division 1.—Commencement and continuance of proceedings

1. Proceedings which relate to a matter or question within the ***original jurisdiction*** *shall be entitled "In the Supreme Court of Justice" and shall be commenced and continued in accordance with these Rules.*

2. Where any proceedings under Rule (1) are pending before the Court—

(a) a direction not involving a final decision upon the proceedings; or

(b) an interim order to prevent prejudice to the claims of the parties; or

(c) ***an order for security for costs****; or*

(d) an order in the nature of orders such as are referred to in Section 8(1)(a), (b), and (c) of the Act—

may be made by a Judge*.*

3.15.4 Security for Costs in the REVIEW Jurisdiction

The Tests to Be Applied in an Application for Security in the REVIEW Jurisdiction

" It is within the inherent jurisdiction of the Court under s 155(2)(b) of the Constitution to consider whether, or not, to impose security for costs. The question is; how should this discretion be exercised? In determining this, the Court may have regard to the approach for imposing security for costs in other proceedings as a general guide. In the National Court, security for costs may be ordered to protect the interests of a defendant who may be successful in an action. Order 14 r 25 of the National Court Rules sets out the circumstances in which such an order may be made (see Driver v Swanson [1977] PNGLR 30; Reynolds v Walcott & Others [1985] PNGLR 316 where the plaintiff may be resident overseas and there are no assets within the jurisdiction). The relevant considerations for exercising the discretion are set out in Yarlett v New Guinea Motors Ltd [1984] PNGLR 155.... We bear these general principles in mind in considering the question of security for costs pending the determination of a judicial review. However, ***the ultimate test should be; whether, it is in the interest of justice to make or not to make an order for security for costs having regard to all the circumstances of the case (****adopting the words of s 155(4) of the Constitution). This Court adopted the same test in an application for stay pending the determination of a judicial review in Viviso & Electoral Commission v John Giheno (supra). The onus is on the party applying to demonstrate why the discretion should be exercised in his favour." :* ***David Lambu v Peter Ipatas (No.3)*** [1997] PNGLR 207, [1997] PGSC 44.

There is no provision for a single judge in the review jurisdiction of the Supreme Court to hear an application for security for costs.

3.15.5 Application to Dismiss Appeal for Failure to Furnish Security

In the appeal jurisdiction Supreme Court Act s5.provides

"INCIDENTA**L** DIRECTIONS AND INTERIM ORDERS.

(1) Where an appeal is pending before the Supreme Court–

(*a*) a direction not involving the decision on the appeal; or
(*b*) an interim order to prevent prejudice to the claims of the parties; or
(*c*) an order in any proceedings (other than criminal proceedings) for security for costs; or
(*d*) **an order dismissing an appeal in any proceedings (other than criminal proceedings) for default in furnishing security**; or
(*e*) an order admitting an appellant to bail,

may be made by a Judge."

Supreme Court Act s18. SECURITY FOR APPEAL.

(1) The Supreme Court or a Judge may, **in special circumstances**, order that just security be given for the costs of an appeal or an application for leave to appeal and, if an application is granted, for the prosecution of the appeal.

(2) **If any security ordered** under Subsection (1**) is not given** in accordance with the order, **the appeal**, or the application for leave to appeal, as the case may be, **shall be deemed to have been abandoned.**

There are no provisions for a single judge in the original or review jurisdictions of the court to dismiss an appeal for default in furnishing security.

4.0 Chapter 4 – Application for Bail

4.1 Legislative Provisions

The Constitution section 42 (6) and (7) makes the following provisions:

> "(6) A person arrested or detained for an offence (other than treason or wilful murder as defined by an Act of the Parliament) **is entitled to bail at all times** from arrest or detention to acquittal or conviction unless the interests of justice otherwise require.
> (7) Where a person to whom Subsection (6) applies is refused bail–
> (*a*) the court or person refusing bail shall, on request by the person concerned or his representative, state in writing the reason for the refusal; and
> (*b*) the person or his representative may apply to the Supreme Court or the National Court in a summary manner for his release."

Supreme Court Act 5. INCIDENTAL DIRECTIONS AND INTERIM ORDERS.

> (1) Where an appeal is pending before the Supreme Court–
> (*a*) a direction not involving the decision on the appeal; or
> (*b*) an interim order to prevent prejudice to the claims of the parties; or
> (*c*) an order in any proceedings (other than criminal proceedings) for security for costs; or
> (*d*) an order dismissing an appeal in any proceedings (other than criminal proceedings) for default in furnishing security; or
> (*e*) **an order admitting an appellant to bail,**
> **may be made by a Judge.**

Supreme Court Act 10. Powers That May Be Exercised by Judge.

> (1) **Any power of the Supreme Court under this or any other Act**–
> (*a*) to give leave to appeal; or
> (*b*) to extend the time within which notice of appeal or of an application for leave to appeal may be given; or
> (*c*) **to admit an appellant to bail,**
> **may be exercised by a Judge in the same manner as it may be exercised by the Court**.
> (2) Where a Judge refuses an application in relation to a matter specified in Subsection (1), the appellant may apply to the Supreme Court to have the matter determined by that Court.

The Bail Act Section 9 provides:

Bail Act 9. Bail Not to Be Refused except on Certain Grounds.

> (1) Where a bail authority is considering the question of granting or refusing bail under this Part, it shall not refuse bail unless satisfied on reasonable grounds as to one or more of the following considerations:–

(*a*) that the person in custody is unlikely to appear at his trial if granted bail;
(*b*) that the offence with which the person has been charged was committed whilst the person was on bail;
(*c*) that the alleged act or any of the alleged acts constituting the offence in respect of which the person is in custody consists or consist of–

(i) a serious assault; or
(ii) a threat of violence to another person; or
(iii) having or possessing a firearm, imitation firearm, other offensive weapon or explosive;

(*d*) that the person is likely to commit an indictable offence if he is not in custody;
(*e*) it is necessary for the person's own protection for him to be in custody;
(*f*) that the person is likely to interfere with witnesses or the person who instituted the proceedings;
(*g*) that the alleged offence involves property of substantial value that has not been recovered and the person if released would make efforts to conceal or otherwise deal with the property;
(*h*) that there are, in progress or pending, extradition proceedings made under the Extradition Act 1975 against the person in custody;
(*i*) that the alleged offence involves the possession, importation or exportation of a narcotic drug other than for the personal medical use under prescription only of the person in custody;
(*j)* that the alleged offence is one of breach of parole.

(2) In considering a matter under this section a court is not bound to apply the technical rules of evidence but may act on such information as is available to it.

4.2 Considerations in wilful murder cases

"*As pointed out earlier, a person charged with wilful murder can only be granted bail by the National Court or the Supreme Court. The Act does not make any specific provisions with regard to the considerations that should be applicable when bail applications in wilful murder cases are determined by the National Court and the Supreme Court. It is therefore clear that the considerations set out in s. 9(1) apply and since s. 42(6) does not apply to wilful murder cases, what I said earlier about the "interests of justice" are not relevant to such cases. I agree with my brothers Kapi and Andrew that in wilful murder (and treason) cases, only those considerations set out in s. 9(1) of the Act are relevant and no others including "exceptional circumstances". I agree with Andrew J for the reasons he gives in his judgment that in wilful murder cases bail authorities have discretions*.": **per Kidu CJ**; "*The exercise of the discretion to grant bail should be used readily unless any one of the matters under s. 9 is established. The Act treats each consideration as equal. One is not to be considered as less serious than the other for the purposes of refusing bail . That is the effect of s. 9. However, s. 9(1) provides for refusal of bail on "one or more" of these considerations. This envisages a case where objection to bail may be taken on more than one of these considerations. I am of the opinion that when one of these considerations is established, the court should exercise its discretion to refuse bail .*" **per Kapi DCJ**; " *That the grant or refusal of bail is discretionary may also be discerned from the other provisions of the Bail Act. By s. 13 one can make successive applications from a magistrate, to the National Court and to the Supreme Court. By s. 9 it is not mandatory that bail be refused if one of the conditions therein is proved because it may be refused for "one or more" of those considerations. If it was automatically refused for one of those reasons there would be no necessity to provide for its refusal for*

more than one.[In my judgment the use of the word "shall" in s. 9(1) of the Act shows that it can be seen that the bail authority must refuse bail if one or more of the conditions are proved unless the applicant shows cause why his detention in custody is not justified. Such an exercise is always discretionary." **per Andrew J; *Keating v The State*** [1983] PNGLR 133

4.3 Bail after Lodging an Appeal

Bail Act 11. *BAIL AFTER LODGING APPEAL.*
Where a person lodges an appeal against his conviction or sentence or both–
(a) the court which convicted him; or
(b) a court of equal jurisdiction; or
(c) a court of higher jurisdiction,
may, in its discretion, on application by or on behalf of the appellant, grant bail pending the hearing of the appeal.

4.4 Bail during the Hearing of an Appeal

Bail Act 12. *BAIL DURING HEARING OF APPEAL.*
Where a court hearing an appeal adjourns proceedings, it may, in its discretion, grant bail to the appellant on application by or on behalf of the appellant.

4.5 Other Considerations on a Bail Application

4.5.1 Severity of Sentence Is Not Exceptional Circumstances for Bail Pending Appeal

"*This Court is also of the view that when an appeal is against the severity of sentence, that should not be an exceptional circumstance for granting bail after conviction and pending appeal.": .*" ***Mataio v the State*** (2007) SC 865, [2007] PGSC 22 at [38].

4.5.2 No Constitutional Right to Bail after Conviction Pending Appeal

"*We stress that the constitutional presumption of innocence and right to bail are not available after a conviction. There is no longer a constitutional right to bail after a conviction. We must therefore emphasise that, once a person charged with an indictable offence has been convicted, his constitutional right to bail no longer exists. As the authorities have shown, if he desires bail after his conviction and following an appeal, he must demonstrate to the Court that there are exceptional circumstances warranting his release on bail .*" ***Mataio v the State*** (2007) SC 865, [2007] PGSC 22 at [26].

4.6 Application for Bail to the Supreme Court Pursuant to Section 13 of the Bail Act –

*Bail Act **s13.*** FURTHER APPLICATION MAY BE MADE AFTER REFUSAL.

(1) Where a person is refused bail by a Magistrate he is entitled to apply for bail, immediately if he so desires, to a Judge of the National Court.

(2) Where a person is refused bail by a Judge of the National Court he is entitled to apply for bail, immediately if he so desires, to the Supreme Court.

(3) Where an application is made under Subsection (1) or (2), the applicant shall produce a copy of the reasons given under Section 16.

(4) An application may be made under Subsection (1) or (2) whether or not bail was refused–

(a) under this Act (including this section) or under any other law; or
(b) on an application.

4.6.1 Nature of the Application of the Supreme Court Pursuant to Bail Act Section 13

"*The application for bail to this court is an original application and is not an appeal from the National Court which refused bail (s. 13 of the Bail Act). The fact that a different court has previously decided that bail should be refused and has presumably found that one or more of the considerations in s. 9 of the Act exist, does not absolve this court from considering whether the accused is entitled to bail . The findings of the National Court will be treated like any other findings of a court. This court may have to consider whether any circumstances have altered or whether there were any circumstances not brought to the attention of the court, and the starting point will invariably be the finding when last considered by the court*. ": ***Keating v The State*** [1983] PNGLR 133 Per Andrew J. If there is no appeal a single judge of the Supreme Court has no jurisdiction to hear an application under s13(2) of the *Bail Act*: ***Bernard Uriap v The State*** (2011) SC1108.

4.6.2 Prospects of Success on Appeal Not a Consideration on Bail Application

"*[21]... With respect, we are of the opinion that the Court should never be allowed to look at the evidence at this stage of the appeal because it is not the function of the Court to consider the evidence at this stage. To say that the applicant has a good chance of success in his appeal is tantamount to determining the merits of the appeal and this, in our view, is not desirable. [36]... What is being motivated by this kind of submission is that the Court which hears the bail application is also asked to consider the prospect of success of the appeal. This is not the function of the Court dealing with the bail application. We whole-heartedly agree with Lockhard, J that it is not desirable for a Court hearing a bail application to look into the success of an appeal as in doing so, the Court is looking at the merits of the appeal at this stage. We think that this should never be the practice and procedure in this jurisdiction.... [56] We consider that it is wrong and undesirable for a Court hearing a bail application after conviction, to be weighing up the prospects of success by considering the grounds of appeal. It is for the appropriate Court to determine the success or failure of an appeal or the grounds.... [58] For these reasons, we hold that the prospect of success of an appeal is not an exceptional circumstance per se*..": ." ***Mataio v the State*** (2007) SC 865, [2007] PGSC 22.

4.6.3 The Distinction between a Re-Hearing in the Supreme Court Based on Change of Circumstances and a Fresh Application

[6] "We stress this point because we consider an application for bail to the Supreme Court based on change of circumstances is different to a "fresh" application for bail to the Supreme Court. They are different because the principles governing their application are different. In an application for bail based on change of circumstances, an Applicant is required to establish that circumstances have changed since the last application for bail was refused and the onus is on the Applicant. He must demonstrate that the grounds upon which the National Court had refused bail have changed or no longer exists. Further, the circumstances must be relevant to the earlier application for ***bail.*** *Only then will the Supreme Court grant* ***bail.***

[7.] In the case of a fresh application for bail , the Court may "rehear" the application for bail . This means that first, an Applicant may raise the same grounds relied upon in the last application for bail before the Supreme Court for consideration. In other words, an Applicant is not required to establish that circumstances have changed since the last application for bail was refused. Secondly, the Applicant is entitled to raise any new grounds to support the application for bail ." See The State -v- Paul Tarccisius Tohian [1990] PNGLR 173.: ***Karo v The State*** (2009) SC 998, [2009] PGSC 19 at [6]-[7].

5.0 chapter 5 – APPEAL JURISDICTION

5.1 NOTICE OF APPEAL — REQUIREMENTS

5.1.1 Supreme Court Act s14

14. CIVIL APPEALS TO THE SUPREME COURT.
(1) Subject to this section, an appeal lies to the Supreme Court from the National Court–
(*a*) on a question of law; or
(*b*) on a question of mixed fact and law; or
(*c*) with the leave of the Supreme Court, on a question of fact.
(2) An appeal does not lie from an order of the National Court made by consent of the parties.
(3) No appeal lies to the Supreme Court without leave of the Supreme Court–
(*a*) from an order allowing an extension of time for appealing or applying for leave to appeal; or
(*b*) from an interlocutory judgement made or given by the National Court except–
(i) where the liberty of the subject or the custody of infants is concerned; or
(ii) in cases of granting or refusing an injunction or appointing a receiver; or
(iii) in such other cases prescribed by the Rules of Court as are in the nature of final decisions; or
(*c*) from an order of the National Court as to costs only that by law are left to the discretion of the National Court.
(4) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory judgement.

5.1.2 Supreme Court Rules O7 r 6-9

Division 3.—Notice of appeal
6. An appeal shall be instituted by a notice of appeal.
7. The notice of appeal and all subsequent proceedings shall be entitled "In the Supreme Court of Justice" and shall be entitled as between the party as appellant and the party as respondent.
8. The notice of appeal shall—
(a) state that an appeal lies without leave or that leave has been granted and or annex the appropriate order to the notice of appeal; and
(b) state whether the whole or part only and what part of the judgment is appealed from; and
(c) state briefly but specifically the grounds relied upon in support of the appeal; and
(d) state what judgment the appellant seeks in lieu of that appealed from; and
(e) be in accordance with form 8; and
(f) be signed by the appellant or his lawyer; and
(g) be filed in the registry.
9. Without affecting the specific provisions of Rule 8, it is not sufficient to allege that a judgment is against the evidence or the weight of the evidence or that it is wrong in law, and the notice must specify with particularity the grounds relied on to demonstrate that it is against the evidence and the weight of the evidence and the specific reasons why it is alleged to be wrong in law.

5.1.3 Case law on requirements Of Notice of Appeal

5.1.3.1 There are three requirements to be stated in a notice of appeal

Rule 8 There are three requirements to be stated in a notice of appeal pursuant to Rule 8(c) and Rule 9 – (1) The grounds relied upon to support the appeal must be stated succinctly but specifically; (2) If it is alleged that the judgment is against the evidence or the weight of the evidence, it is not sufficient for a ground to be drafted in those terms only. Instead the notice must specify with particularity the ground relied on to demonstrate that it is against the evidence or the weight of the evidence; (3) If it is alleged that the judgment is wrong in law it is not sufficient for a ground to be

drafted in those terms only. Instead the notice must specify with particularity the ground relied on to demonstrate the specific reason why the judgment is alleged to be wrong in law: *Ipili Porgera Investments Limited v Bank South Pacific Limited SCA 15 of 2006, decision of 27th June 2007.*

"*In Ipili Porgera Investments Ltd v Bank South Pacific Ltd* SCA No 15 of 2006, 27.06.07 the Supreme Court indicated that there are three requirements arising from Order 7, Rules 8(c) and 9 of the

Supreme Court Rules.
Rule 8(c) states:

The notice of appeal shall ... state briefly but specifically the grounds relied upon in support of the appeal.

Rule 9 states:

Without affecting the specific provisions of Rule 8, it is not sufficient to allege that a judgment is against the evidence or the weight of the evidence or that it is wrong in law, and the notice must specify with particularity the grounds relied on to demonstrate that it is against the evidence and the weight of the evidence and the specific reasons why it is alleged to be wrong in law.

The three requirements are:

1. The ground relied on in support of the appeal must be stated briefly, but specifically.

2. If it is alleged that a judgment is against the evidence or the weight of the evidence, it is not sufficient for a ground of appeal to be drafted in those terms only. Instead the notice must specify with particularity the ground relied on to demonstrate that it is against the evidence or the weight of the evidence.

3. If it is alleged that the judgment is wrong in law, it is not sufficient for a ground of appeal to be drafted in those terms only. Instead the notice must specify with particularity the ground relied on to demonstrate the specific reasons why the judgment is alleged to be wrong in law.

The Supreme Court explained in Haiveta v Wingti (No 2) [1994] PNGLR 189 that these requirements exist for two reasons:

- the respondent must be informed of the basis of the appeal so they can prepare their arguments; and

- the court must be informed of the issues to be determined.

If the notice of appeal fails to meet those requirements, the Supreme Court has discretion to strike out the offending ground(s) of appeal. Examples of cases where it did that are Haiveta v Wingti (No 2) [1994] PNGLR 189, Henao v Coyle (2000) SC655 and NCD Water and Sewerage Ltd v Tasion (2002) SC696. Alternatively, the Court could dismiss the entire appeal as incompetent. If, for example, all of

the grounds set out in a notice of appeal were defective in that they failed to comply with the requirements of Order 7, Rules 8(c) and 9, the natural conclusion to draw would be that the appeal is incompetent. ": *Pacific Equities and Investments Ltd v Goledu* [2009] PGSC 4; SC 962.

5.1.3.2 A notice of appeal is not required to state that the appeal raises a question of fact, mixed fact & law or law:

"6. Clearly, there is no requirement that an appellant should state in the notice of appeal that the ground of the appeal raises a question of fact, law or mixed fact and law. However, some practitioners indicate whether the ground of appeal raise questions of fact, law or mixed fact and law in their notice of appeal. Here, the grounds of appeal are sufficiently clear and precise. Accordingly, we dismiss this ground. ": *The City Administrator v Yambaran Pausa Saka Ben Ltd* (2009) sc965 at [6].

5.1.3.3 A notice of appeal should not prospectively contain grounds requiring leave before leave is obtained.

Yakham v Merriam [1998] PNGLR 555 at 562.

5.1.3.4 The third alternative in par. 2 of Form 8 that leave is to be sought at the hearing of the appeal is without legal basis and must be deleted:

Yakham v Merriam [1998] PNGLR 555 at 562.

5.1.3.5 Stating the proposed grounds of appeal will not invalidate the application for leave:

"25. An application for leave to appeal only has to state the nature of the case, the questions involved and the reason that leave should be given (Gigmai Awal v Salamo Elema [2000] PNGLR 288, Placer (PNG) Ltd v Anthony Harold Leivers (2007) SC894). The proposed grounds of appeal do not have to be included; but, if they are included, that will not render the application incompetent ". Turia v Nelson [2008] PGSC 32; SC949 (6 November 2008)

5.1.3.6 Requirement for Particulars

"The basis for the second ground of objection in relation to these grounds of appeal is found in ***O 7 r 9*** *of the Rules. There are two reasons for this rule. The first is, if an appellant alleges an error in law, he must specify the basis for this allegation in order to inform the respondent(s) the basis of the appeal so that they can prepare for proper arguments on appeal. The second reason is to inform the Court of the issues in law that would be argued by both parties on appeal.* ***If a ground of appeal does not give these particulars in accordance with O 7 r 9 of the Rules, the grounds would be incompetent*** *unless the appellant makes an application for leave to amend the grounds of appeal in order to comply with the requirements of the Rules."* ***Haiveta, Leader of the Opposition v Wingti, Prime Minister; and Attorney-General; and National Parliament (No 2)*** [1994] PGSC 7; [1994] PNGLR 189 (18 July 1994)

5.1.3.7 Practice direction 1/94 requirements

"13. The *Supreme Court Rules* prescribes the form of a notice of appeal. Order 7 Rule 8(e) specifically provides that a notice of appeal shall be in accordance with Form 8. Form 8 has been modified by Practice Direction SC 1/94 which was issued on 28 November 1994. The modification in the form pursuant to the Practice Direction is not in dispute. In fact this Practice Direction introduced and incorporated the following information or matters into the prescribed Form 8 –

- National Court File Number;
- Name of Judge in the National Court;
- Whether a transcript is required.

": *State v Manorburn Earthmoving Ltd* (2008) SC933 at [13].

5.1.3.8 An Order 7 Rule 5 application to extend time to file a notice of appeal after leave is granted can be made outside the 21 days, relevant matters being the failure to filed within 21 days and the length and reason for the delay

" 16. The absence of time limit in O 7 r 5 however does not preclude this Court from determining the present application or for future applications, based on a construction of that provision. As with the construction of other laws, SCR, O 7 r 5 is a subordinate legislation that should be fairly or liberally construed to achieve its purpose. SCR, O7 r 5 is intended to facilitate the filing of an appeal after grant of leave to appeal. In my view, a fair and liberal construction of the expression " *or within such time as allowed by a judge or the Court may allow*" in SCR, O7 r 5 allows an application for extension of time to be made at any time either within or after the 21 days. The applicant's failure to file the appeal within the 21 days and any delay in bringing the application for extension of time are matters to be taken into account in the exercise of the Court's discretion whether or not to grant the extension sought by the applicant." *Small Business Development Corporation* v *Totamu* [2010] PGSC 44; SC 1054.

5.2 APPLICATION TO ADMIT FRESH EVIDENCE ON APPEAL

5.2.1 Fresh Evidence on Appeal

"6. APPEAL TO BE BY WAY OF REHEARING.

(1) An appeal to the Supreme Court shall be by way of rehearing on the evidence given in the court the decision of which is appealed against, subject to the right of the Supreme Court–

(*a*) **to allow fresh evidence to be adduced where it is satisfied that the justice of the case warrants it**; and
(*b*) to draw inferences of fact.

(2) For the purposes of hearing and determining an appeal, the Supreme Court has all the powers, authority and jurisdiction of a Judge exercising the jurisdiction of the National Court."

5.2.2 Section 8 Supplemental Powers of the Supreme Court Act:

"SUPPLEMENTAL POWERS OF SUPREME COURT.

(1) For the purposes of this Act, the Supreme Court may, if it thinks it necessary or expedient in the interests of justice to do so–

(*a*) order the production of any document, exhibit or other thing connected with the proceedings the production of which appears to it necessary for the determination of the case; and
(*b*) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether or not they were called at the trial, or order any such person to be examined on oath before–

(i) a Judge of the National Court; or
(ii) an officer of the Supreme Court; or
(iii) a magistrate of a court of summary jurisdiction; or
(iv) any other person appointed by the Court for the purpose,

and may admit as evidence any deposition so taken; and

(*c*) **receive the evidence**, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant consents, of the husband or wife of the appellant in cases where the evidence of the husband or wife could not have been given at the trial except with that consent; and
(*d*) where any question arising on the appeal involves prolonged examination of documents or accounts or any scientific or local investigation that cannot, in the opinion of the Court, conveniently be conducted before the Court–order the reference of the question for inquiry and report, in accordance with Part IV., by a referee appointed by the Court and act on the report of the referee so far as it thinks fit to adopt it; and

(*e*) exercise in relation to the proceedings of the Court any other powers that may for the time being be exercised by the National Court on appeals or applications; and
(*f*) issue any warrants necessary for enforcing the orders or sentences of the Court.

(2) The Supreme Court shall not increase a sentence in a criminal proceeding by reason of, or in consideration of, any evidence given under Subsection (1)."

5.2.3 Section 8 Of the Supreme Court Act Is a Machinery Provision to Implement the Powers Granted under Section 6

"To construe s 8 as a separate grant of power exceeding the limitations of s 6 would render it incongruous with the s 6 limitations. The two provisions would be quite incompatible; they would not be complimentary. They would be inconsistent with one another. For instance, I cannot consider it to be the intention of the legislature that all witnesses who have given evidence in the trial be permitted simply to repeat the same evidence all over again in the appeal. This must surely refer to a witness in the earlier trial who is now in possession of "fresh evidence" as judicially interpreted, and in any event, if the justice of the case warrants" its admission.,I cannot conceive it to have been the legislatures intention that, while s 6 was intentionally and for good reasons limited, an all- inclusive separate head of power quite inconsistent with it should also be enacted... I am of the opinion that s 8 is a machinery provision, for the purpose, inter alia, of implementing the powers granted under s 6. It is not a separate overriding grant of power in derogation of s 6." Per Amet J (dissenting) in Ted Abiari v the state (No. 1) [1990] PNGLR 250, [1990] PGSC 5. This statement of the relationship between section 6 and 8 was approved by a 5 judge bench (Kidu CJ, Hinchcliffe, Sheehan, Brown and Jalina JJ in the case of ***Kuri v The State (No.2)*** **(1991)** SC 414, [1991] PGSC 3.

"*Accordingly, the decision in Kuri's case not only laid to rest the majority decision in Abiari's case, it confirmed the joint three-member decision in Peng's case, which was delivered some eight years prior to Abiari's case. The result is that* ***it is now clear beyond argument that s 8 of the Supreme Court Act is not a separate basis for fresh evidence but is merely a machinery provision which is supplemental to s 6 of that Act****. Any submission or judgment to the contrary effect is wrong in law. [By reason of the provisions of s 6(1)(a) of the Supreme Court Act and the decisions in Peng's case and Kuri's case, it may now be said that two requirements must be satisfied: that there is " fresh evidence " and "that the justice of the case warrants it".* ***Per Ellis J. Pari and Kaupa v The State*** **[1993] PNGLR 173, [1993] PGSC 15 .**

The *Supreme Court Rules* provide." : "Division 20.—Further evidence on appeal
57. This Division applies to any application to the court to receive evidence in a proceeding on an appeal additional to the evidence in the National Court.
58. This Division applies unless the court otherwise directs.
59. **Application shall be made at the hearing of the appeal**.

60. The application shall be—
(a) by notice stating the nature of the evidence sought to be called; and
(b) supported by an affidavit stating the grounds of the application.
61. Any evidence necessary to establish the grounds of the application, and the evidence which the applicant wants the court to receive shall be by affidavit.
62. The applicant shall file the Rule 60 notice and any affidavit not later than 21 days before the hearing of the appeal.
63. **The evidence of any other party to the appeal shall, unless the court or a Judge otherwise orders, be given by affidavit filed not later than 14 days before the hearing of the appeal.**
64. A party to the appeal shall, not later than the time limited for him to file an Affidavit under this rule—
(a) lodge as many copies of the affidavit as the Registrar may direct; and
(b) serve a copy of the affidavit on each other party to the appeal."

5.2.4 A Party Proposing to Rebut Fresh Evidence Sought to Be Called Should File an Affidavit in Reply

Per Kapi DCJ "The Rules provide for an application to call additional evidence in the Supreme Court. [Under the Supreme Court Rules (Ch No 37) an applicant must give notice of the nature of the evidence sought to be called (O 7, r 60(a)) supported by affidavits stating the grounds of appeal (O 7, r 60(b)). This notice must be given 21 days before the hearing date (O 7, r 62). The appellant had complied with these provisions and gave notice and copy of the supporting affidavits in plenty of time. The rules envisage that the other parties to the appeal may give evidence in rebuttal by affidavit to be filed no later than 14 days before the hearing of the appeal (O 7, r 63)....[The reason for the notice and supporting affidavits is important. This informs the other party as well as the court as to the nature of evidence to be called so that the other party may not be caught by surprise. That of course is not the only reason but seems to me to be the obvious one. There is hardly any good reason for dispensing with this requirement in this case under O 7, r 63. The State knew the nature of evidence to be called by the appellant and there was no excuse for not filing affidavits in rebuttal." Per Los J "[I now give my own reasons for refusing to grant the application to adjourn. I had no doubt in my mind that when the appellant was granted leave to call the proposed fresh evidence, the State automatically acquired a right to call any evidence of rebuttal. In this respect, the State had ample time to get ready with the witnesses so that at the end of the appellant's fresh evidence the State should have been in a position to call evidence if that was the course the State decided to take. Or at least it should have been in a position to produce an affidavit. But to wait until the appellant had completed the fresh evidence and then make an application to adjourn so that the State would organise to bring the witnesses to give rebuttal evidence, let alone sign their affidavits, is not a way to make use of the State's right. This would be merely delaying the appeal. Any matter that comes on before the Court such as this appeal must reach its finality. The party who brings the proceedings must have a result whatever it may be. Comparative to an individual like the appellant, the State always has resources at its disposal.": ***Abiari v The State*** [1990] PNGLR 432, [1990] PGSC 6.

5.2.5 The Nature of Fresh Evidence

Per Kapi DCJ: "The nature of what is fresh evidence has now been settled by the Supreme Court in this jurisdiction. Fresh evidence pursuant to s 6(1)(a) of the Supreme Court Act Ch 37 means evidence which has come to light since the hearing or trial, or evidence which has come to the knowledge of the party applying since that hearing or trial and which could not by reasonable means have come to his knowledge before that time. Such evidence may be admitted on appeal if the court considers that "it is satisfied that the justice of the case warrants it". See Peng v The State [1982] PNGLR 331 and Abiari v The State [1990] PNGLR 250 **per Kapi DCJ**; "... it may now be said that two requirements must be satisfied: that there is " fresh evidence " and "that the justice of the case warrants it". **Per Ellis J.** ***Pari and Kaupa v The State*** **[1993] PNGLR 173, [1993] PGSC 15.**

"The law on " fresh evidence " is very clear. In James Pari & Anor v. The State[1993] PNGLR 173, [1993] PGSC 15 the Supreme Court spoke of two basic requirements or test for the admission of fresh evidence . These are from the head note to the judgment:

"Firstly, there must be fresh evidence within the meaning of s. 6(1) (a) of the Supreme Court Act Ch 37, which means evidence which has come to light since the hearing or trial, or evidence which has come to the knowledge of the party applying since that hearing or trial and which could not by reasonable means have come to his knowledge before that time. Secondly, the court must be satisfied that the justice of the case warrants admission of the evidence.": ***Rawson Construction Ltd v the State*** (2005) SC 777, [2005] PGSC 39.

5.2.6 Claims to Perjury and the Course to Be Taken Where Such Fresh Evidence Is Rejected

> *"What follows from this? I consider that the proper approach to a claim by a witness that he or she committed perjury at the trial is set out by the High Court in Davies and Cody v R [1937] HCA 27; (1937) 57 CLR 170 at 183:*
>
> *"A declaration by a witness that he has committed perjury cannot possibly be accepted as a ground in itself for setting aside the result of a trial in which the witness has given evidence. If the contrary were held, the whole administration of both civil and criminal justice would be undermined. The subsequent discovery that some evidence (as in this case) is said by the witness who gave it to be false, or is actually proved to be false, cannot, as a general rule, be allowed as a ground in itself for setting aside a verdict or judgment. But if the verdict is open to objection upon a ground affected by such evidence, the case is different. It would not be wise to attempt to frame a universal rule even for such cases."*
>
> *I would adopt this as a proper principle to apply in this jurisdiction. The exception to the rule is:*
>
> *"But if the verdict is open to objection upon a ground affected by such evidence, the case is different. It would not be wise to attempt to frame a universal rule even for such cases ..."*
>
> *(Kapi DCJ continuing) "If the fresh evidence of a witness is not believed (as in this case by the majority), the proper approach to the determination of the appeal is carefully analysed by Bray CJ in R v Poulter (1978) 19 SASR 370 at 377:*

"But is that the end of the question? In Flowers's case the Court of Appeal in England seems to have thought that it was. They found themselves in a position where they could say that the changed evidence of the witness before them was untrue and accordingly they rejected it and dealt with the appeal as if it had never been given.

There may be cases where this is the proper course. It is not, however, the state of mind in which I find myself. I am satisfied that Mrs Baker is an unreliable witness, but I am quite unable from the material before me to form any opinion whether her evidence at the trial is true or whether her evidence before us is true or whether neither version is true."

*The learned Chief Justice then analyses the judgment of the High Court in Davies and Cody v R [1937] HCA 27; (1937) 57 CLR 170, from which he reached the above proposition**." per Kapi DCJ**;*

*"Having heard the evidence which is said to constitute fresh evidence , what should the court's approach be ? Guidance is to be found in the decision in R v Flower [1966] 1 QB 146, which involved a similar situation to that raised in the present case, namely an allegation that a State witness had given false evidence by reason of police pressure. The judgment of the court, delivered by Widgery J, is worth quoting in full on this issue: ""When this Court gives leave to call fresh evidence which appears at the time of the application for leave to be credible, it is still the duty of the court to consider and assess the reliability of that evidence when the witness appears and is cross-examined, and this is particularly true where evidence is called in rebuttal before this court. I also quote from the High Court of Australia's decision in Craig v R [1933] HCA 41; (1933) 49 CLR 429 at 439:"A Court of Criminal Appeal has thrown upon it some responsibility of examining the probitive value of the fresh evidence . It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable man to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced... I do not propose to judicially open such a "door" which would have the obvious consequence of severely undermining the administration of justice in this country. Davies and Cody v R [1937] HCA 27; (1937) 57 CLR 170 was a joint five-member decision of the High Court of Australia, which ordered a new trial on the basis of an inadequate instruction by the trial judge to the jury. As the appeal involved a claim by a State witness that he perjured himself during the course of the trial, it is relevant for present purposes. On that issue, the High Court indicated, in a passage quoted by Bray CJ in Poulter's case:"A declaration by a witness that he has committed perjury cannot be possibly be accepted as a ground in itself for setting aside the result of a trial in which the witness has given evidence. If a contrary were held, the whole administration of both civil and criminal justice would be undermined. The subsequent discovery that some evidence (as in this case) is said by the witness who gave it to be false, or is actually proved to be false, cannot, as a general rule be allowed as a ground in itself for setting aside a verdict or a judgment." (ibid at p 183-4)." **Per Ellis J**,*

"Because I now find her to be unreliable, in this appeal, I need not necessarily disbelieve her evidence on trial. Her reasons for having recanted must be looked at. Her reasons smack of bad faith. She was examined at the trial about continuing allegations of police beatings and threats. They were, in effect, admitted by her to be false. It does not take much thought to realise that a witness, ill-treated, is hardly likely to be favorable for the State's purposes. But

*the State, at its own cost, has provided a "safe house" for this woman. To attempt to blackmail police into payments to witnesses to avoid the possibility of appeals would be contrary to the proper administration of justice, just as any police attempt to corrupt witnesses by bribery would be. [I am not satisfied on the basis of her story here, that there was any attempt before trial to bribe her to give fabricated evidence. No circumstances have been recounted. Rather, she made a bald assertion of a promise. Consequently, I consider her fresh evidence**,** if it may be so called, should be disallowed. This Court should be very wary of admitting evidence on appeal in circumstances involving some supposed prerogative resting with this Court (where such evidence is not strictly " fresh evidence) unless the bona fides of the witness are established, and such later evidence is capable of being supported by an innocent explanation.": Per Brown J.:* ***Pari and Kaupa v The State*** [1993] PNGLR 173, [1993] PGSC 15 (appeal dismissed).

5.2.6.1 Evidence is not fresh simply because a party's new lawyer failed to enquire with the previous lawyer

"Is the evidence, the subject of this application fresh? The affidavit of Paul Ousi was made after the ruling appealed from, but the annexures to it were made some years before hand. Those annexures were in the possession of the former lawyers for the appellants. In our view they were discoverable with reasonable diligence. A lawyer faced with an application to dismiss proceedings for failing to comply with s. 5 of the *Claims by and Against the State Act* should check that he has evidence to prove compliance with each element of the section. If he finds he has not, and the matter was previously conducted by another firm then he would make enquiries with that firm, before, not after, the hearing of the application. The appellants were aware of the existence of the letter referred to above as annexure "d". It was referred to and annexed to the affidavit of Maike Zimike sworn 21st May 2001 and filed in support of the Appellants application for default judgement. Evidence that the letter had been personally served on one of the authorised persons was an essential condition precedent to the cause of action for default judgement. When preparing that application was the occasion when reasonable diligence should have been exercised to obtain proof of personal service."*John Bokin & Ors v The State & 2 Ors* (2005) SC817

5.2.6.2 A single judge may not admit fresh evidence in an appeal

*"*In our opinion the meanings "entail", "include" and "affect in its operations" are the meanings intended by the legislature in using the word "involved" in the provision. What is the "decision on the appeal"? In other jurisdictions, for example in the Supreme Courts Acts of New South Wales[5] and Queensland[6], Australia, the limitation on the power of a single judge is rendered in slightly different terms as:

...(not) "an order or direction involving the determination or decision of the appeal..."

In our opinion that provision is directed to the same purpose as s5(1)(a). We believe a comparison of those provisions with the provision under review, shows that the same effect is intended and makes it clear that s5(1)(a) is not speaking of the decision "on appeal", that is the decision appealed from,

as is assumed in the written submissions for the Appellants, but is referring to the decisions which will have to be made by the Court to determine the issues raised on the appeal.

…

Under the *Supreme Court (Full Court) Act* the equivalent provision was held by a single judge to include the power to order the appellant to amend a Notice of Appeal in certain specific particulars. In what was then another Commonwealth jurisdiction and applying an identical provision, a single judge of the Permanent Court of Hong Kong held that the power did not extend to an application to adduce further evidence because this involves the "*decision on the appeal.* That is, on the hearing of the appeal proper, the decision in the ordinary course of events will be based on the evidence before the court below. If further evidence is allowed before the appeal is heard, it changes the basis on which the court will make its decision, and in that way "involves the decision on the appeal"; therefore such an application cannot be heard by a single judge.

…

We agree with Ping PJ in the Hong Kong case cited, permitting additional evidence is not a matter which can be decided by a single judge exercising jurisdiction under the *Supreme court Act* s5(1)(a). A single judge should not take further evidence unless by direction of the Court pursuant to O3 r3. Also, in our view a single judge exercising s5 power should not make an order which has the potential effect of changing the fact situation out of which the appeal or application for leave to appeal arises. *" Wau Ecology Institute & Ors v Registrar of Companies & Ors* (2005) SC 794

5.2.7 Fresh Evidence in a Criminal Appeal

5.2.7.1 fresh evidence might be admitted in a criminal appeal if the Justice of the case requires

"*Busina Tabe v The State* (1983) PNGLR 10 was not a "fresh evidence" case and nor was it a case where s 8 was applied. The presiding Judge (Kaputin J) allowed the evidence to be adduced on the basis that an irregularity in the conduct of the trial had occurred. He said at p 13: "*However, I will of course allow the material in question on the basis that an irregularity in the conduct of the trial has occurred*". Busina Tabe was convicted of stealing K4,500.00, the property of PNGBC and/or the Mendi Local Government Council. In fact evidence existed, known by both the prosecution and defence, that the K4,500.00 was really a book transfer and that Tabe never stole the money. It was on this basis the evidence was allowed to be called so that the actual miscarriage which had occurred was rectified. *Busina Tabe v The State (supra)* is, therefore, authority for the proposition that although evidence is not "fresh" the Court will allow it to be adduced to do justice." *Kuri v The State (No.2)* (1991) SC 414, [1991] PGSC 3

5.3 Application to Amend Notice of Appeal

5.3.1 Jurisdiction to Amend a Notice of Appeal

"5. INCIDENTAL DIRECTIONS AND INTERIM ORDERS.

(1) Where an appeal is pending before the Supreme Court–

(*a*) **a direction not involving the decision on the appeal;** or
(*b*) an interim order to prevent prejudice to the claims of the parties; or
(*c*) an order in any proceedings (other than criminal proceedings) for security for costs; or
(*d*) an order dismissing an appeal in any proceedings (other than criminal proceedings) for default in furnishing security; or
(*e*) an order admitting an appellant to bail,

may be made by a Judge."

In the Appellate Jurisdiction of the Court Supreme Court Act
Order 7 Division 8. Rule 24 provides: —

"Amendment by supplementary notice

24. A notice of appeal may, before the date of appointment to settle under Rule 42 be amended without leave by filing a supplementary notice.

Supreme Court Rules — Rules of General Application (Applicable in the Appellate, Original and Review Jurisdictions) Order 11 11 provides:

Division 8.—Adding parties and amendment

11. **The court or a Judge may order** that any person be added as a party to proceedings under these rules **or that the proceedings be amended** and may impose such conditions as appear just, and give all consequential directions.

"O7 r 24 enables an appellant to amend a notice of appeal without leave before the date of the settlement of the index to the appeal book. However, this relates only to appeals to the Supreme Court as of right. It does not apply to any application to obtain leave. The power to amend such an application would come under O 11 r 11. We will come back to this rule later. Under O 7 r 24, any appellant may amend the notice of appeal without the leave of the court. Such an amendment must relate to an appeal as distinct from the right to apply to obtain leave to appeal. As we have pointed out before, they are two separate issues. A close examination of the supplementary notice of appeal shows that no amendments were made to the appeal. The appellant has introduced an entirely new matter, namely, an application to obtain leave to appeal. The appellant would have been able to raise such a matter in this manner if the supplementary notice of appeal was filed within the 40-days limit required by s 17 of the Supreme Court Act. Strictly speaking, this would not be an amendment to the notice of appeal but an institution of a new matter, namely, an application for leave to appeal. A notice of appeal cannot and does not include an application for leave to appeal and vice versa. They are different and must be specifically stated; see Forms 7 and

*8 in the Rules of the Supreme Court**.: Tsang v Credit Corporation*** [1993] PNGLR 112, [1993] PGSC 18.

5.3.2 Amendment in the original jurisdiction

In the original jurisdiction of the court Supreme Court Rules Order 3 Rule 2 provides:

PART 2—ORIGINAL JURISDICTION

—PROCEDURE

Division 1.—Commencement and continuance ofproceedings

1. Proceedings which relate to a matter or question within the original jurisdiction shall be entitled "In the Supreme Court of Justice" and shall be commenced and continued in accordance with these Rules.

2. Where any proceedings under Rule (1) are pending before the Court—

(a) **a direction not involving a final decision upon the proceedings**; or

(b) an interim order to prevent prejudice to the claims of the parties; or

(c) an order for security for costs; or

(d) an order in the nature of orders such as are referred to in Section 8(1)(a), (b), and (c) of the Act—

may be made by a Judge.

5.4 OBJECTION TO COMPETENCY

Supreme Court Rules Order 7 Division 5.—Objection to competency of appeal

"14. A respondent who objects to the competency of an appeal or of an application for leave to appeal shall, within 14 days after service on him of the notice of appeal—

(a) file an objection in accordance with form 9; and

(b) serve a copy of the objection on the appellant.

15. Any party may file affidavits.

16. An objection of which notice has been given shall be determined by the court at or before the hearing of the appeal or of the application for leave to appeal as the court thinks proper.

17. Upon the hearing of the application the burden of establishing the competency of the appeal is on the applicant.

18. If notice of objection is not given and the appeal or the notice of application for leave to appeal is dismissed as incompetent, the respondent shall not receive any costs of the appeal unless the court on special grounds orders otherwise."

5.4.1 There Is No Power to Extend the Period of 14 Days to File and Serve an Objection and No Right in a litigant to Raise Objections outside the Time Allowed

"*I am being asked for directions which will result in the respondent being able to file a notice of objection to competency outside the period of fourteen days allowed by the Rules from the date on which the notice of appeal was served on the respondent: see Supreme Court Rules, O 7, r 14...In effect I am being asked to extend the time required to do an act under the Rules. Unfortunately there is no general provision in the Rules allowing the Court to extend on such terms as it thinks fit the time required to do an act. There is a waiver of rules provision in O 11, r 10, but that is limited to preparation of documents or appeal books."* : ***State v Kubor Earthmoving (PNG) Ltd*** [1985] PNGLR 448.

(Per Kidu CJ Woods, Hinchcliffe and Sheehan JJ) " Rule 14 above is explicit. The objection in this instance was made two months after the notices of appeal were served on the respondents. Our brother Woods, sitting as a single Judge of this Court, dealt with this very question in Independent State of Papua New Guinea v Kubor Earthmoving (PNG) Pty Ltd [1985] PNGLR 448. We agree, with respect, with his Honour and as the ruling is short (and explicit) we quote it in toto here... We are of the opinion that r 18 gives no right to any respondent who fails to comply with r 14 to nevertheless raise questions of incompetency of an appeal". (And per Kapi

*DCJ) " In essence, whether the court can raise the competency of an appeal at any stage of the appeal and whether the parties may be granted leave to address the court on this issue, is in the discretion of the court.***" *Patterson Lowa & Ors v Wapala Akipe & Ors* [**1991] PNGLR 265; [1992] PNGLR 399.

5.4.2 Nature of an Objection to Competency

(Per Kearney DCJ) "The Society riposted that it was too late for the Bank to object to competency. It is true that the Bank failed to comply with Rule 23 of the Supreme Court Rules 1977. However, I think the better view is that failure to comply with Rule 23, and to take objection at a hearing, while it puts a respondent very much at risk as to costs - because, if successful, he has unnecessarily put the appellant to the expense of preparing for the hearing - does not go further than that. An objection to competency is really an objection to the jurisdiction of a Court to entertain the point, and objections to jurisdiction may be made at any time. ***Wahgi Savings and Loan Society v Bank South Pacific Ltd*** (1980) SC 185, [1980] PGSC 4.

"I, therefore, respectfully adopt the law on this subject as expressed in the learned text cited by counsel for the appellant (ED. Halsbury's Laws of Australia, Volume 20 Part VIII paras. 325 – 12050), and that is:

An appellate court, in the exercise of the inherent power to control its own proceedings, may strike out a Notice of Appeal where plainly there is no right of appeal. Other circumstances where this can be done include where the notice does not state any reasonable ground of appeal or is otherwise frivolous or vexatious or an abuse of process, where the notice is served out of time, or where the notice is otherwise irregular.

An objection to competency must raise serious threshold issues concerning legality or viability, or otherwise, of a particular process. In relation to appeals, objection(s) can legitimately be taken to non-compliance with statutory time limits because the right to appeal must be exercised "according to law". Indeed, if there is no statutory right to appeal, an objection based on competency can be taken to the institution of a purported appeal. And if the law's requirements are not complied with, then it is not competent to purport to exercise the statutory right." SC 717 (2003) ***PNG Forest Authority v Securamax Securities Pty Ltd*** (2003) SC 717, [2003] PGSC 17 per Sakora J.

5.4.3 An objection to competency may be raised at any time before judgment at the discretion of the court

" *The court may consider the issue of competence earlier where notice of objection is raised (Part 3 Order 7, Division 5, Rule 14 of the Supreme Court Rules) or at any time before judgement (see Part 3 Order 7, Division 5, Rule 18 Supreme Court Rules*) (see also the *Honourable Patterson Lowa and others* v *Wapula Akipe And Others* (1991) SC 430), *Bruce Tsang v Credit Corporation (PNG) Ltd* PNGLR 112: ***Chief Inspector Robert Kalasim v Tangane Koglwa*** (2006) SC 828.

"Competency of an appeal may arise on several grounds. If an appellant was not a party to the proceedings in the Court below or was not a party aggrieved by a decision of Court below, he has no standing to institute an appeal.

An appeal may be incompetent if it does not comply with the Supreme Court Act Ch 37 (hereafter referred to as the Act) and the Supreme Court Rules (hereafter referred to as the Rules), which regulate appeals to the Supreme Court. The respondents have objected vigorously to the amended notice of appeal in both form and substance, pursuant to O 7 Div 5 of the Rules.

The issue of competence of an appeal remains open, and the Court may of its own discretion address it at any time before judgment. See Lowa v Akipe [1991] PNGLR 265 and Tsang v Credit Corporation (PNG) Ltd [1993] PNGLR 112".: ***Christopher Haiveta Leader of the Opposition v Pius Wingti, Prime Minister; And Attorney General, And National Parliament (No.2)*** *[1994] PNGLR 189, [1994] PGSC 7.*

5.4.4 A Notice of Objection Should Specifically Refer to Its Jurisdictional Basis and If It Alleges Want of Form in the Notice of Appeal It Should Refer to the Rules Governing How a Notice of Appeal Must Be Set out

"*The notice of objection should have expressly referred to Order 7, Rule 14 of the Supreme Court Rules as its jurisdictional basis. It should have also referred to Order 7, Rules 8(c) and 9 of the Supreme Court Rules, they being the provisions of the Rules that specify how the grounds of an appeal must be set out in a notice of appeal.*

These deficiencies in the notice of objection mean that it is itself incompetent and provide a sufficient reason to dismiss the objection": ***Pacific Equities and Investments Ltd v Goledu*** (2009) SC 962, [2009] PGSC 4.

5.4.5 A single judge of the Supreme Court has jurisdiction to deal with an objection to the competency of a leave application filed under O7 Div.5.

"In my view, in a case where an objection to competency of a leave application is filed, the competency issues raised in the objection is part and parcel of the primary jurisdiction given to a single Judge by s 10(1)(a) to deal with a leave application. The primary jurisdiction given to a single Judge of the Supreme Court by s 10(1)(a) includes the power to deal with competency issues arising thereto and this includes an objection to competency of a leave application. The single Judge should assume jurisdiction to deal with the competency objection by virtue of s 10(1)(a) and the inherent power or jurisdiction of the Supreme Court constituted by a single Judge which is dealing with the leave application...[22] Finally it goes without saying that if the competency objection is upheld and the leave application is dismissed, the appellant has recourse to the Supreme Court under s 10(2) of the Act": ***Amaiu v Kipalan*** (2009) SC991, [2009] PGSC 14 at [18].

5.4.6 Grounds on Which an Objection to Competency Might Be Founded

"A proper ground of objection to competency is one that draws the Court's attention to a question of jurisdiction (Waghi Savings and Loan Society Ltd v Bank of South Pacific Ltd (1980) SC185). For example, where the objection is based on one or more of the following grounds, the objection will, normally, properly be before the Supreme Court:

• That the application for leave to appeal was not filed as a separate document, in cases where some of the grounds of appeal require leave and some do not (Yakham & The National v Merriam & Merriam (1997) SC533).
• That the application for leave does not adequately state the nature of the case, the questions involved and the reason that leave should be given, as required by Order 7, Rule 2(c) of the Supreme Court Rules (Gigmai Awal v Salamo Elema [2000] PNGLR 288, Placer (PNG) Ltd v Anthony Harold Leivers (2007) SC894).
• That the application for leave was, without leave, filed outside the 40-day period allowed by Section 17 of the Supreme Court Act (The State v John Tuap (2004) SC675).
• That the application for leave refers to questions of law or fact not raised in the National Court (Chief Inspector Robert Kalasim v Tangane Koglwa (2006) SC882).
*• That the applicant for leave does not have a sufficient interest in the subject matter of the National Court decision that it wishes to appeal against (Porgera Joint Venture v Joshua Siapu Yako (2008) SC691).": **).": Turia v Nelson*** (2008) SC 949, [2008] PGSC 32 at [7].

5.4.7 Grounds on Which an Objection to Competency Cannot Be Founded

" *Examples of grounds of objection that would not properly be before the Court are:*

• That the application for leave has been filed unnecessarily, ie where the objecting party points out that leave to appeal was not actually required. It is now settled law that an unnecessary application for leave to appeal is not necessarily incompetent (Boyepe Pere v Emmanuel Ningi (2003) SC711, Oio Aba v MVIL (2005) SC779, The State v John Talu Tekwie (2006) SC843; note that Paul Bari v John Raim (2004) SC768, decided oppositely to Boyepe Pere).
• That the application for leave to appeal was not served on the respondent (see Gigmai Awal v Salamo Elema [2000] PNGLR 288, where the Supreme Court pointed out that the Rules do not require an application for leave to appeal to be served on other parties).
*• That the proposed grounds of appeal referred to in the application for leave to appeal, lack merit (The State v John Talu Tekwie (2006) SC843**).": Turia v Nelson*** (2008) SC 949, [2008] PGSC 32 at [9].

5.4.8 An Objection to Competency in Order 10 Appeals

"[3]... In Ken Mondiai v Wawoi Guavi Timber Company Ltd (2007) SC886 the Supreme Court held that objections to competency should not be filed in Order 10 appeals as there is no equivalent in Order 10 to Order 7, Rule 14, which is the provision which expressly allows for objections to competency of Order 7 appeals. [9] . Certainly, it appears that the absence of provisions for objections to competency against Order 10 appeals is deliberate. This means that unless the Court directs that an objection be made or grants leave for making an objection, avenue available to an applicant under s.185 of the Constitution, or O.11 r.9 of the SCR, which we will discuss further below, it should be refused. That is how we interpret the Supreme Court's decision in Ken Mondiai v Wawoi Guavi Timber Company Ltd (2007) *SC886*. We are of the view that the Supreme Court was not suggesting that there could never be an objection to the

competency of an Order 10 appeal. ... [13] Order 11, Rule 9 is the provision under which the respondents are applying for directions... [14] We find that the respondents have done the right thing by applying for a direction that they be granted leave to file and serve a notice of objection to competency. They have applied to the Court for a direction under Order 11, Rule 9 of the Supreme Court Rules. They could have applied to a single Judge for such a direction. Or they could have applied to the Court under Section 185 of the Constitution. Any of those three avenues of approach is acceptable." : **Madang Timbers v Kambori** (2009) SC 992, [2009] PGSC 18.

5.4.9 A party may file only one objection, amendment must be made within the original 14 days

"10. However, we pose the question whether the filing of the two notices of objection is permitted by the *Supreme Court Rules*. Rule 14 (a) provides in no uncertain terms that a respondent challenging the competency of an appeal apart from compliance with the time stipulation must file "an objection" in accordance with form 9. In our view, the literal, unambiguous and plain meaning of the phrase "an objection" is that it refers to only one objection. There may be more than one ground for the objection to competency, but only one objection can be filed by way of a notice in accordance with form 9. It follows therefore that the filing of two notices of objection is not permitted by the *Supreme Court Rules*.

11. If an applicant wishes to amend a notice of objection to competency, then the amended notice must be filed within the prescribed time under O.7 r.14 of the *Supreme Court Rules*. But that is not the case here. What is before the Court are two separate notices of objection to competency filed within the prescribed time with each notice setting out different grounds of objection to competency. As O.7 r.14 only permits one notice of objection to be filed, this Court can only entertain the notice filed first in time, namely, the notice filed on 29 July 2009. The notice of objection filed on 3 August 2009 is struck out for abuse of process.": Kou v Kaupa [2010] PGSC 18; SC 1021

5.5 Application to Dismiss for Want of Prosecution

"Supreme Court rules Order 7 Division 19.—Time, and want of prosecution (appeals)

53. Where an appellant has not done any act required to be done by or under these rules or otherwise has not prosecuted his appeal with due diligence, the court may—

(a) order that the appeal be dismissed for want of prosecution; or

(b) fix a time peremptorily for the doing of the act and at the same time order that upon non compliance, the appeal shall stand dismissed for want of

prosecution, or subsequently, and in the event of non compliance, order that it be so dismissed; or

(c) make any other order that may seem just.

54. The respondent may make application for an order under Rule 53 and the court may, after notice has been given to the appellant by the Registrar, make orders on reference from the Registrar.

55. An application for an order under Rule 53 shall—

(a) be in accordance with form 11; and

(b) be supported by affidavit.

56. An order under Rule 53 sub-rule (b) may be varied at any time before the appeal stands dismissed for want of prosecution, and in special circumstances may be varied or revoked after that time."

5.5.1 Examples of How the Discretion of the Court Is Exercised under O7 r53

The first case considers rule 25 of the Supreme Court Rules 1977 which combined the effect of the 1984 Rule 48 and Rule 53 and gave a power similar to Rule 53:

"1) Where an appeal has not been set down as prescribed the power to dismiss for want of prosecution remains discretionary.

(2) The discretion is to be exercised having regard to all the circumstances of the case including, inter alia,

(a) the length of and reasons for delay on the appellant's part;

(b) the extent to which, having regard to any delay, evidence likely to be adduced may lose its cogency;

(c) the availability of a transcript, and

(d) any negotiations between the parties."

From the headnote to ***Burns Philp (PNG) Ltd v George*** [1983] PNGLR 55, [1983] PGSC 9.

"We consider, that though an exercise of discretion is available to a court, (the rule provides three alternate courses), its exercise should not avail an appellant in circumstances where there is absence of excuse... Some relevant considerations when exercising this discretion are dealt with by this Court in Burns Philp (New Guinea) Ltd v George [1983] PNGLR 55, where the court said, at 56:

"None of this is to say that r 25 will be regarded lightly. It is a rule of court and any appeal which does not meet its requirements is at risk of being dismissed."

The matters to which the Court had regard in that case were different to those dealt with here, ***for primarily the absence of explanation is fatal to a respondent to an application for dismissal where an explanation could quite properly be expected.***

We consider that to do otherwise than to dismiss in the absence of explanation would result in a failure to pay sufficient regard to the clear mandate in r 53() to dismiss for want of prosecution.": ***General Accident Fire and Life v Ilimo Farm*** [1990] PNGLR 331,

> *"In our judgement, periods of* ***7 to 14 days in effecting service*** *in the city or town where the registry is located and where the appeal has been instituted, is* ***unacceptable delay*** *and in default of O 7 r 12. Additionally the* ***failure to attend*** *at the appointed time for* ***the settlement of the appeal book*** *is also in default of the requirement of the rules. Both of these factors are therefore clear indications of lack of diligence in the prosecution of the appeals. These two factors alone are, in our view, sufficient to warrant the orders that the appeals be dismissed for want of prosecution. An additional factor that also demonstrates lack of due diligence in the prosecution of these appeals is the* ***lack of explanation*** *for non attendance at the appointed time to settle the appeal book, as might be professionally expected of the lawyer for the appellant. Fourthly,* ***no further steps*** *had been taken by the appellant* ***to prosecute the appeal*** *inspite of the foregoing factors."* ***Yema Gaiapa developers Pty Ltd v Hardy Lee***: (1995) SC 484, [1995] PGSC 5.

"In the present case the respondent has submitted that the appellants have failed to prosecute the appeal with due diligence. He relies on the following factors:

- *failure to attend the appointment for the settlement of the index to the appeal book****.***
- *failure to make a genuine effort to obtain the transcript of the trial in order to prepare the appeal book.*
- *failure to respond to correspondence by the lawyer for the respondent regarding the readiness of the appeal.*
- *the delay from the time of filing to the hearing of these application is about 8 months.*

Counsel for the appellants sought to explain that the delay has been caused by two main factors: (1) that when the appellants lost their papers, the Deputy Registrar failed to make another copy of the transcript available to the appellants; and (2) that the lawyer who had the carriage of this matter was simply too busy with other matters.... We have concluded that the lawyers for the appellants have not done enough to obtain the transcript from the Registry or from the lawyers for the respondent. Regarding the explanation that the lawyer handling this matter for the appellants was very busy, we simply cannot accept this as a reasonable explanation." ***Attorney General v Papua New Guinea Law Society*** (1997) SC 530, [1997] PGSC 13.

"*... once a case of delay or want of prosecution is established, the onus then shifts to a respondent to an application to dismiss (the appellant) to satisfactorily explain the delay. If there is a failure in that obligation or there is no reasonable explanation*

provided, an application to dismiss may be granted.... The power to dismiss an appeal on an application such as this is a discretionary one. That discretion, is usually exercised where there is a case of undue delay on the part of an appellant to prosecute his appeal without any satisfactory explanation for such a delay: ***Donigi v Papua New Guinea Banking Corporation*** (2001) SC 691, [2001] PGSC 1 .

"*These authorities make it very clear that, an applicant in an application to dismiss an appeal for want of prosecution has the burden to show a case of delay. Once that burden is discharged, the burden then shifts to the respondent to such an application to provide a reasonable explanation for the delay and indicate his preparedness to proceed to a hearing of the appeal.*": ***Juali v The State*** (2001) SC 667, [2001] PGSC 17.

5.5.2 That a lawyer cannot be present because he is appearing before another judge may be an adequate explanation

... "But one thing clearly needed was for counsel to explain why the motion to strike out the appeal for want of prosecution could not be heard. Mr. Aisa had a time conflict. He was caught between 2 cases. He did have an explanation. And he gave it through the Respondent's lawyer. It was not his fault that the 2 matters were set down for hearing at the same time. He was to appear before Salika J on the same day on a more substantive hearing. The date of the motion was set by the respondent's lawyer. [Mr. Aisa could not be at 2 places at the same time. Indeed he protested and asked his professional colleague to see his dilemma. So on the material before us, it was not true that the appellant or their lawyer did not bother as the judge had criticised. In the circumstances the trial judge should have listed the matter on a different date.": ***Joe Chan and PNG Arts v Mattias Yambunpe*** (1997) SC 537.

5.5.3 The Nature and Circumstances of the Case Can Be Taken into Account

*" Fourthly, it is relevant to the exercise of the discretion to dismiss proceedings to consider the nature and circumstances of the case and the consequences of dismissal. " : **Boni v Tolukuma Gold Mines Ltd*** (2009) SC 1005, [2009] PGSC 25.

5.5.4 If dismissal will not finally dispose of the proceedings between the parties it may be a factor favouring dismissal

"[25] In deciding how to exercise its discretion we consider that it would be appropriate for the court to consider the consequences of dismissal.

*[26]. In this case, dismissal of the appeal will not finally determine the interests of the parties, including the State's interests. The State will still be arguing against the respondents' claim in the National Court. This helps tip the scales in favour of dismissal of the appeal. This is an unexceptional case.": **State v Turu*** (2008) SC 904, [2008] PGSC 1.

5.5.5 A General Summary of the Law at 2005

"A number of Supreme Court decisions have considered the rule and we state the general propositions from those cases as follows:

An appeal might be struck out if it is not set down as required by the rules.

(1) Where an appeal has not been set down as prescribed the power to dismiss for want of prosecution remains discretionary.
(2) The discretion is to be exercised having regard to all the circumstances of the case including, inter alia,

(a) the length of and reasons for delay on the appellant's part;

(b) the extent to which, having regard to any delay, evidence likely to be adduced may lose its cogency;

(c) the availability of a transcript, and

(d) any negotiations between the parties.

(3) Matters relevant to the want of due diligence include failure to promptly serve the Notice of Appeal, failure to attend on settlement of the appeal book, failure to explain non attendance, failure to respond to correspondence and failure to provide any explanation for dilatory conduct where an explanation could properly be expected. The absence of explanation is fatal to a respondent to an application for dismissal where an explanation could quite properly be expected.

(4) The discretionary powers under O7 r 53(a) should not be exercised in favour of the respondent where no explanation for want of due diligence is made. That a lawyer cannot be present because he is appearing before another judge may be an adequate explanation. 7 months delay in applying for the transcript of evidence to be prepared requires a proper explanation and the absence of one may result in the appeal being dismissed. [The Court must consider the whole of the circumstances in which an application for dismissal on the grounds of want of prosecution is brought, in particular events that have taken place since the application was filed. The application to dismiss itself should be prosecuted with due diligence. Where an appellant has not done what the Rules require in the time required, but has made good its omissions before the application to dismiss is heard, the application may not be successful.[An application pursuant to O7 r53 should be made in form 11 and not in an Objection to Competency. [The general rules that the power of the Court to dismiss an action for want of prosecution should be exercised only where (a) the plaintiff's default had been intentional and contumelious or (b) where there had been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant, apply principally before a trial. Once a judgement has been obtained public interest requires finality to the litigation. The risk to a fair trial is only relevant where

evidence is to be called.": ***PNG Nambawan Trophy Ltd V Dynasty Holdings Ltd*** (2005) SC 811, [2005] PGSC 7.

5.5.6 A complex history and genuine difficulties may excuse delay

" 23. We consider that, given the background to this appeal (including the decision of the Lawyers Statutory Committee and the appeals against that decision, in 2002), the protracted disagreement between the parties over the contents of the index book, and the complications caused by the delay in obtaining a ruling on the stay application, provide a satisfactory explanation, at this stage, for the delay in prosecuting the appeal. The application for dismissal will be refused. ": *The lawyers statutory committee And Canisius Karingu* (2008) SC932

5.5.7 Responding to multiple interlocutory applications and delay by the respondent may excuse delay

"33. We are of the view that the Appellants are not guilty of not prosecuting the appeal with due diligence. They have explained to our satisfaction that the appeal was not prosecuted for some time because they were distracted from preparing for the substantive appeal by at least five different interlocutory applications that came before the Supreme Court at various times prior to this application.

…

38. In the present case, the Appellants have submitted the Appeal Books to the Respondent's lawyers and they have certified them. The Appeal Books have been filed on 05th May 2009. Hence, in our view, this signifies that the parties are ready for the substantive appeal. The Appellants have made good their omission before the application for want of prosecution is heard and they must be allowed to argue the substantive appeal.": *Yer, Secretary for Department of Finance v Yama* [2009] PGSC 13; SC990

5.5.8 Delay in seeking appointment with the Registrar

the Supreme Court ordered that the appellant " within seven days seek an appointment with the Registrar to settle the appeal book index, failing which the appeal will stand dismissed for want of prosecution ". The appellant sent a letter to the Registrar within seven days seeking an appointment that the letter was not received within the seven days. HELD the order had not been complied with and that the appeal stood dismissed by the self executing order: *Royale Thompson & Ors v Canisius Karingu* (2008) SC 954.

5.5.9 Special circumstances under O 7 r 56

5.5.9.1 Criteria

"14. What is the effect of the definition we have just given to the phrase "special circumstances" for the purposes of O.7 r.56? In our view, where an appellant fails to come within the first part of that provision, he or she must demonstrate to the

satisfaction of the Court that something unusual, extraordinary or something out of the ordinary prevented him or her from doing what was required under a self-executing or conditional order for dismissal under O. 7 r.53 (b). We are of the view that, by the use of the word "special" the draftsman intended to exclude the kind of factors such as a lawyer's or the party's own negligence, that usually or ordinarily contribute to an appellant not prosecuting his or her appeal with due diligence or failing to meet any deadlines set either by law or by an order of the Court. This is for a good reason, a diligent appellant will be aware of the usual eventualities or factors that often contribute to delays in diligent prosecution of appeals and meeting of deadlines. Such an appellant would have to take all the steps necessary to ensure that such eventualities or factors do not arise and plan for and take the appropriate steps without delay if all or any of those things occur.

15. It is difficult to state with precision what could amount to an unusual, extraordinary or something out of the ordinary circumstance. This is because no two cases are the same. Instead, each case is different and the circumstances that might contribute to an appellant not taking the steps required of him or her would differ and may very much be at variance with each other. Nevertheless, it is possible to state some general principles that could assist in the determination of the question whether a circumstance is unusual, extraordinary or something out of the ordinary to warrant a variation of a self-executing or conditional order. This could be best met in terms of requirements an appellant coming under the second part of O.7 r. 56 must meet.

16. First, we consider it necessary that an appellant should provide a reasonable explanation for allowing the time period stipulated to expire. This the appellant must do by demonstrating by appropriate evidence that he or she took all of the steps required or he or she could possibly take. Not only that, he or she must demonstrate that despite the steps taken to meet the deadline, he or she could not meet the deadline. That must be attributable to something beyond the appellant's control such as, the sudden death of his lawyer or a destruction of his file or something he or she relied on to assist with a meeting of the conditions or duties and obligations imposed upon him or her by the Court order.

17. Secondly, the appellant must also establish by appropriate evidence that, the circumstance relied on is something that arose prior to the expiry of the time period stipulated in the order and that fact substantially prevented the appellant from doing what was required of him or her within the set deadline. This is necessary because, a fact or circumstances arising after the expiry of the deadline stipulated for the required act could not have prevented the appellant from meeting the deadline prior to its expiry.

18. Finally, the appellant must demonstrate also by appropriate evidence that, he or she is making the application without any unnecessary and undue delay. If there is delay in the making of the application, the appellant must provide a reasonable explanation for the delay. Further, the appellant must demonstrate by appropriate

evidence that, he or she is now prepared to take the remaining steps and that; his or her appeal will definitely be prosecuted without further unnecessary delay.

19. We consider each of these requirements important and necessary. As such, an appellant coming under the second part of O.7 r.56 must meet all of these requirements before there can be variation of the orders made under r .53 (b)".: *Dr Alan Kulunga v Western Highlands Provincial Government & Ors* (2006) SC859.

"Where the court has imposed a self executing order requiring the appellant to take action by a specified time, an appointment required from the Registry should be obtained by prompt personal attendance, not by writing letters. An appeal which is directed to be ready for a particular sittings should be ready for the call-over preceding that sittings":*SCA114 of 2005 National Housing Commission v Mt Hagen Local Level Government* unreported Supreme Court judgement 8th May 2009.

5.6 Slip rule Applications

Section 7 Slip Rule Applications. The court should only consider such applications where there has been a mistake which could be said to be little short of extraordinary and which affects an unsuccessful party. The public interest in the finality of litigation must preclude all but the clearest slip error as a ground to reopen: *Wallbank v Papua and New Guinea* [1994] PNGLR 78 at 101 and 103. Principles adopted in *The Election Of Governor General (No.3)* (2004) SC 752 at pp 17-18: (1) there is a substantial interest in the finality of litigation; (2) on the other hand any injustice should be corrected; (3) the court must have proceeded on a misapprehension of the fact or law; (4) the misapprehension must not be of the applicants making; (5) the purpose is not to allow rehashing of arguments already raised; (6) the purpose is not to allow new arguments that could have been put to the court below. The Court has an inherent jurisdiction to correct an error in its own order: *Dick Mune v Paul Poto* (1996) SC508. And see a survey of the history of the slip rule and examination of the principles in *James Marabe v Tom Tomape (No.2)* (2007) SC856 at [46-85] where the court held that, in addition to the establish principles, it must be satisfied that it made a clear and manifest, not an arguable, error of law or fact, on a critical issue, before setting aside its previous decision (at [84]). A slip rule application is to correct a glaring error or mistake in a judgment or order of the Court. Such a mistake would be either clerical, an accidental omission in a judgment or order or would be a misapprehension of fact or law. The application cannot be made under Constitution section 155 (2) (b). The application must be made before the same judge or judges who heard or determined the review or appeal. The very nature of a slip rule application precludes the necessity for leave.: Trawen v Kama (2010) SC 1063, [2010] PGSC 15.

“10. The principles governing slip rule applications were considered in *Marabe (supra)* and in our view have been consistently applied by this Court. Those principles are conveniently set out in *Kakaraya (supra)* and include consideration of the following principles:

"(1) There is a substantial public interest in the finality of litigation.

(2) On the other hand, any injustice should be corrected.

(3) The Court must have proceeded on a misapprehension of fact or law.

(4) The misapprehension must not be of the applicant's making.

(5) The purpose is not to allow rehashing of arguments already raised.

(6) The purpose is not to allow new arguments that could have been put to the Court below." consistently applied

11. The Court in *Marabe* (supra) added a further principle that:

"The Court must, before setting aside its previous decision, be satisfied that it made a clear and manifest, not an arguable, error of law or fact on a critical issue."

…

16. What is the primary right of a party to a proceeding that has been adjudicated upon by the Supreme Court? There is no right of appeal or review from the Supreme Court - there is no primary right to be enforced. Hence, in our view s 155(4) *Constitution* does not provide the opportunity for a slip rule application to be made to the Supreme Court to reopen one of its decisions.

Whether a slip rule application should be made before the Supreme Court (Court) constituted by the same judges which heard and determined the appeal or review. If not, under what circumstances should a slip rule application be made before a Supreme Court constituted by different judge(s)

17. A slip rule application must be made before the same Supreme Court constituted by the same judge or judges who heard and determined the appeal or review. The very nature of a slip rule application is based on the premise that the particular judge or judges have made an accidental slip or mistake and that it should be for that judge or those judges to correct the slip.

18. If the particular judge or judges are unavailable, then it is for the Chief Justice pursuant to his administrative responsibility under s 169 (3) *Constitution*, to appoint another or other judges to sit on a slip rule application.

Whether leave to apply for a review of the decision of the Supreme Court under the slip rule principle should be separately sought and obtained

19. A slip rule application is in respect of an accidental slip or mistake. Its very nature precludes the necessity for leave. A requirement for leave in such circumstances would lead to unnecessary delay and duplication. Additionally, the same bench or Judge before whom the 'slip' is made will be familiar with the background of the matter, so an application for leave would serve no useful purpose as the application should only identify the slip and address the seven (7) principles referred to above, nothing more.": Trawen v Kama (2010) SC 1063, [2010] PGSC 15 and see also Yawari v Agiru [2010] PGSC 25; SC 1074

5.7 Contempt Proceedings

Extracts from the case of ***Public Prosecutor v Rooney (No 2)*** [1979] PGSC 23; [1979] PNGLR 448
Raine DCJ Saldhana, Kearney, Wilson, & Greville-Smith JJ

5.7.1 The English Common Law of Contempt Can Be Applied in Papua New Guinea

SALDHANA J: "… I see nothing in the English law on 'contempt' that is inconsistent with a constitutional law or statute or custom and nothing that makes it inapplicable or inappropriate to the circumstances of the country at the present time. I am of the view therefore that the law applicable in the proceedings before us is the English law on contempt of court. The statement of the law of England is set out in *Halsbury's Laws of England* (4th ed., vol. 9), at pp. 7, 8, and 21, in the following terms (omitting irrelevant parts):

"CONDUCT AMOUNTING TO CONTEMPT . In general terms, words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice are punishable as criminal contempts of court. The commonest examples of such contempts are: (1) publications which are intended or likely to prejudice the fair trial or conduct of criminal or civil proceedings; (2) publications which prejudge issues in pending proceedings; (3) publications which scandalise, or otherwise lower the authority of, the court;"

" 'TENDING' OR 'INTENDED' TO PREJUDICE. For a publication to amount to a contempt , it is not necessary that it should be shown actually to prejudice a fair trial or the conduct of the proceedings. The true test appears to be whether the publication is likely or tends to prejudice the trial or conduct of the action ..."

"SCANDALISING THE COURT. Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court ..."

5.7.2 Intention Not Relevant so Long As the Contempt Had a Tendency to Interfere with the Course of Justice

"There is ample authority for the proposition that in order to be guilty of contempt of court regarding proceedings which are sub judice it is not necessary that there should be an intention to commit contempt of court. It is sufficient if the statements and comments made had a tendency to interfere with the course of justice or had a tendency to prejudice or embarrass the fair trial of the proceedings."

5.7.3 Sub judice comments which actually prejudice a fair trial are contempt, otherwise they are only contempt if there is a real risk of actual prejudice

"…The law of **contempt** exists to protect the administration of justice. That particular aspect of **contempt** law, known as the sub judice rule, exists to prevent any real risk of prejudice to a fair trial, which could arise if the prerequisites to a fair trial were impaired, in this case by a publication. The law draws a distinction between a publication which is intended to prejudice a fair trial and that which objectively viewed, quite apart from intention, prejudices a fair trial. The former always amounts to a serious **contempt**, even if there is no real risk of prejudice, as, for example, in the case of a letter to a judge. As to the latter, it amounts to a **contempt** only if there is a real risk of actual prejudice, a threat so substantial as to require the court to intervene."

5.7.4 The Independence of the Judiciary Is Demonstrated by a Judge Refusing to Submit to Any External Pressure

WILSON J: "… The essence of independence is that the judge, in the discharge of his functions, reaches his decisions because his analysis, legal knowledge and understanding, his training, his system of values as has been discovered by him in the jurisdiction where he is serving, and no-one else's, lead him to particular conclusions. That independence is demonstrated in the judge's refusal to submit to any external pressures to reach conclusions different from those which, in his evaluation of the law and interpretation of the material before him, appear to be the right ones. It is also demonstrated when in an appropriate case the protective sanctions are applied. It is not being suggested that the judge should insulate himself from his community. He must be sensitive to social trends, be prepared to listen to informed criticism of his decisions, particularly on the interpretation of the law, and above all to adopt a critical approach towards his own functions and responsibilities in times of social change.
Judicial independence at its heart derives from the judge's own determination to be free to make up his own mind in the end. The purpose of such independence in Papua New Guinea is to entrust to suitably equipped individuals in whom general confidence lies the resolution of conflicts according to standards embodied in the Constitution and the rules of law. Such confidence derives from the assurance that those individuals are not responsible to any of the parties interested in the outcome of the decision.

CONTEMPT OF COURT BY INTERFERENCE WITH THE DUE COURSE OF JUSTICE
It is, therefore, very important to the due administration of justice that a judge should be able to decide every case entirely free from outside interference. Any act which jeopardizes that freedom will generally amount to contempt"…

Much time was taken up during the hearing of this case with discussion as to the meaning of such notions as "real and definite tendency to prejudice or embarrass", "a tendency, as a matter of practical reality, to interfere", and "a real and definite tendency to prejudice or embarrass", which are incorporated in the amended notice of motion and further discussion as to the meaning of related notions including "real risk" and "serious risk".

Such questions, as it seems to me, need only be determined when no intention is proved. When no intention is proved, the inherent tendency necessarily must be determined in order to see whether the published statement constitutes **contempt**. It is self-evident that a deliberate attempt to influence the judges of the Supreme Court in a case that is pending and thereby to interfere with the due course of justice has "a real and definite tendency to prejudice or embarrass those pending proceedings", has "the tendency, as a matter of practical reality, to interfere with the due course of justice in those proceedings", and "creates a real and definite tendency to prejudice or embarrass the fair trial of those proceedings"; the "risk" must be said to be "real" and "serious"; it is something more than a "remote possibility"; the **contempt** is "real and substantial".

… Punishment is inflicted for **contempt** of court involving the depreciation of the court not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but for the purpose of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief that will occur if the authority of the court is undermined or impaired.

Punishment is inflicted for **contempt** of court involving an attempt to interfere with the due course of justice, not only for the purpose of protecting the court as a whole and the individual judges, both present and future, from pressures of this kind but also for the purpose of preserving the right of

every litigant to have his case determined free from outside interference by an independent and impartial court."

… In so far as imprisonment will operate so as to achieve a measure of such protection the courts are entitled to be protected against all forms of interference or pressure and this is a fortiori in the case of deliberate interference or pressure from a person as influential as the Minister responsible under the Constitution for the national justice administration. I consider that the imprisonment of the Minister is necessary in order to impress on other like-minded persons and to reassure the community at large that such behaviour will not be tolerated. This is a case where the desire (and need) to protect society should override the interests of the individual concerned.

5.7.5 A Private Citizen Has the Right to Bring Criminal Proceedings Including Proceedings for Contempt

"GREVILLE-SMITH J:… Mr. Okuk withdrew his motion after Mr. Egan the Public Prosecutor also instituted proceedings for **contempt** and undertook to the court to continue with such proceedings with all due despatch. On the occasion of the undertaking and the withdrawal, Mr. Egan ventured the opinion that Mr. Okuk had no "locus standi", no right to be heard.
I, also, would have some doubt as to Mr. Okuk's right in law to move as Leader of the Opposition or in such a representative capacity. However I would have no doubt of his right to move as a private citizen.
Almost one hundred years ago Sir James Fitzgerald Stephen K.C.S.I., D.C.L., was able to say as follows in his *History of the Criminal Law of England,* (1883, vol. I, ch. XIV), at p. 496:
"On the other hand, no stronger or more effectual guarantee can be provided for the due observance of the law of the land, by all persons under all circumstances, than is given by the power, conceded to every one by the English system, of testing the legality of any conduct of which he disapproves, either on private or on public grounds, by a criminal prosecution. Many such prosecutions, both in our days and in earlier times, have given a legal vent to feelings in every way entitled to respect, and have decided peaceably, and in an authentic manner, many questions of great constitutional importance."
The authorities (see for instance *Cole* v. *Coulton*, per Cockburn C.J. (1952) 116 J.P. 332., *Duchesne* v. *Finch*1912) 28 T.L.R. 440, at p. 441., *Snodgrass* v. *Topping*, per Lord Goddard C.J. 1952) 116 J.P. 332., *Greenwood* v. *Leary*[1919] V.L.R. 114, and *Sankey* v. *Whitlam*, per Gibbs J. [1978] HCA 43; (1978) 53 A.L.J.R. 11, at p. 13; [1978] HCA 43; 21 A.L.R. 505, at p. 508) to this day amply bear out the foregoing statement and the right referred to therein extends to motions for committal for criminal contempt (see *R.* v. *Fletcher*; *Ex parte Kisch*, per Evatt J. [1935] HCA 1; (1935) 52 C.L.R. 248, at p. 258, *R.* v. *Dunbabin; Ex parte Williams*, per Rich J. [1935] HCA 34; (1935) 53 C.L.R. 434, at p. 445.The law as so stated has by virtue of the provisions of Sch. 2.2 of the Constitution, become part of the law of Papua New Guinea, although it has to some extent been confined by statute in ways not relevant to present consideration.

Section 177 of the Constitution provides that one of the functions of the Public Prosecutor is "... to control the exercise and performance of the prosecution function ..."

In my opinion this refers to the well recognized and established governmental prosecution function only, and does not impinge upon the common law right hereinbefore referred to. Such common law right, as I have already indicated is, and it should be, part of the law of this country. What an invaluable safeguard it might prove on occasions can well be appreciated from the events out of which these present proceedings have arisen, even though under the provisions of s. 176(3)(a) of the

Constitution the Public Prosecutor is not subject to direction or control by any person or authority. In such fundamental matters at least, the people of Papua New Guinea should have more than one string to their bow. (Wilson J generally agreed with the statement).

5.7.6 The sentence should send a message to others that similar offences will meet a severe punishment

GREVILLE-SMITH J: I have had the advantage of reading in draft the judgment prepared by my brother Wilson and I agree generally with his conclusions concerning penalty, and also with his reasons. In addition I have derived assistance from consideration of the judgment of the New Zealand Court of Appeal in *R.* v. *Radich* (1952) 116 J.P. 332.in which that court stated inter alia as follows:

"We should say at once that this last argument omits one of the main purposes of punishment, which is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. *If a Court is weakly merciful*, *and does not impose a sentence commensurate with the seriousness of the crime*, *it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences*." (The emphasis is mine.)"

Extracts from the Case of ***Bishop V Bishop Bros Engineering Pty Ltd*** [1988] PGSC 8; [1988-89] PNGLR 533 Woods, Barnett and Konilio J J

5.7.8 Even a Civil Contempt Must Be Personally Served and Proven beyond Reasonable Doubt

BARNETT J: "Civil contempt occurs when a person disobeys, or interferes with the execution of, a court order. The charge must be brought by the other party to the dispute and cannot be initiated by the court itself. Nevertheless, it is seen as an offence against the administration of justice and the common law has evolved rules to ensure that justice is done, and seen to be done, in such cases where, to an extent, the court itself (more accurately the system of justice which it administers) is the aggrieved party. Thus there are special rules to ensure that the contemnor has been properly served with the court order and the contempt must be proved to the standard applicable in criminal cases — beyond reasonable doubt. The penalty upon conviction for civil contempt can include a fine or imprisonment. In these respects the offence of civil contempt most of the characteristics and consequences of a criminal offence (without the normal safeguard that it must be defined by law)."

5.7.9 Persons Charged with Contempt, Civil or Criminal Are Entitled to the Full Protection of the Law

"The very purpose of s 37 is to ensure that "every person has the right to the full protection of the law and ... to ensure that that right is fully available, especially to persons ... charged with offences". As far as persons charged with civil contempt are concerned, they are in need of the same full protection of the law as is granted by s 37 to those charged with criminal offences, as they are liable to the same serious penalties of fine and imprisonment. Section 37 expressly deprives persons charged with "the offence commonly known as contempt" of the protection that the offence must

be defined, and the penalty must be prescribed, by law. In my view, however, as far as is possible, all the other s 37 rights to protection of the law are intended to be available to persons charged with all categories of contempt bearing a penal sanction. To hold that the archaic and dwindling distinctions between "criminal", "quasi criminal" and "civil" contempt could justify withholding the full protection of the law from persons facing penal charges would be to permit an outmoded legal technicality to deprive a person of a fundamental right to protection of the law in cases where the court itself could be considered as an aggrieved party…

5.7.10 An adjournment should be normally granted to a defendant who has not had sufficient notice of the charge

"….In addition to the constitutional aspect raised by s 37, in the final analysis, the failure to grant an adjournment and proceeding to conviction and sentence in the appellant's absence despite the objection of his lawyer, also amounts to a denial of natural justice. The effect of a denial of natural justice is to render the decision void: S D Hotop, *Principles of Australian Administrative Law*, 6th ed (1985) at 215. When exercising its discretion not to grant an adjournment, it must be exercised so as not to work an injustice on a party (*Walker v Walker* [1967] 1 All ER 412 at 414). Even though a speedy trial was justified in this case, which involved allegations of a continuing contempt and economic loss to the respondent, care should still be taken not to work an injustice if that is possible. An adjournment should normally be granted to a defendant who has not had sufficient notice of the charge (*Pritchard v Jeva Singh* [1915] HCA 55; (1915) 20 CLR 570) or when he has had insufficient time to prepare his case.

Here it was a case of substituted service of an ex parte order in Lae, two and a half days before the return date for a hearing in Waigani. Admittedly the appellant chose to continue with his pre-planned trip to Singapore rather than dropping everything to attend the hearing. In mitigation of this, however, it must be remembered that the first return date (on 17 March) was a normal motions day when it would not normally be expected that the trial would proceed. To grant the two-day adjournment sought would not have significantly compounded the problems caused by a continuing contempt nor would it have substantially added to the respondents' economic loss (and on this aspect it should be noted that on 15 March the hearing date for the substantive issue between these parties was adjourned *by consent* to 31 March)...."

5.7.11 To Be Convicted of Contempt of Disobeying a Court Order That Order Must Be Clear and Unambiguous

"… . There is one final problem facing the respondent. Before a person can be convicted for the contempt of disobeying a court order, that order must be clear and unambiguous: *Halsbury's Laws of England* (4th ed), vol 9, par 66; *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87; *P A Thomas & Co v Mould* [1968] 1 All ER 963; Miller, *Contempt of Court,* 2nd ed, at 423-424...."

5.7.12 There Must Be Proof beyond Reasonable Doubt That the Charge Has Been Properly Served

"...To sustain an action for contempt of a court order there must be proof beyond reasonable doubt that it has been properly served "upon the alleged contemnor": *Halsbury's Laws of England* (4th ed), vol 9, par 66; *Ronson Products Ltd v Ronson Furniture Ltd* [1966] 2 All ER 381; *Biba Ltd v Stratford Investments Ltd* [1972] 3 All ER 1041; *Husson v Husson* [1962] 3 All ER 1056, and refer Miller, *Contempt of Court*, 2nd ed, at 422."
KONILIO J: "… I concur with the decision of Barnett J…"

Extracts from ***Kwimberi of Paulist Doa Lawyers v Independent State of Papua New Guinea*** [1998] PGSC 9; SC 545

INJIA J (Woods and Hinchliffe JJ concurring): In this country, there are no statutory provisions which define contempt of court and prescribe the procedure to be followed in dealing with contempt of Court.

(c) National Court Rules - 1983
The National Court Rules 1983 under O.14 r. 37 - 50 provides the procedure for dealing with contempt however, it does not define the term contempt of Court.

Order 14 r. 37 - 50 of the National Court Rules 1987 provides "a comprehensive statement of the procedure to be followed in cases involving contempt of Court (O. 14 r. 38) and in other situations where the contempt complained of is in connection with proceedings in the Court (O. 14 r. 42).": Robinson v The State [1986] PNGLR 307 at 309. These rules are promulgated by the National Court judges pursuant to S. 8 of the National Court Act (Ch. No. 38), and S. 184 (rules of the Court) of the Constitution. It should be borne in mind at the outset that these rules are designed to guide and assist the Court and the parties to reach a fair, orderly and expeditious disposition of contempt matters before the Court. The rules are intended to be applied flexibly. Non-compliance with any of the rules do not render any proceedings void, unless the Court otherwise orders: See National Court Rules O. 2 r. 8.

5.7.13 The National Court rules provide for summary proceedings and proceedings on a motion

Under Order 14, there are two types of procedures. First, under Sub-division "B" O. 14 r. 38 40, (contempt in the face or hearing of the Court), there is a summary procedure for dealing with contemnors. Where it appears to the Court "on its own view, that a person is guilty of contempt of Court, committed in the face of the Court or in the hearing of the Court, the Court may" issue oral orders directing the contemnor to be brought before the Court or issue a warrant for his arrest (r. 38). When the contemnor is brought before the Court, the Court informs the contemnor of the charge orally, requires him to make his statement in defence, hears him and determines the matter of the charge and make such order as to punishment (r. 39). The Court may direct the contemnor to be kept in custody pending the Court's determination of the charge (r. 40).

The second type of procedure is under Sub-division "C" Order 14 r. 41 - 42 where the contempt committed is "in connexion with proceedings in the Court": Proceedings are commenced by motion if in relation to contempt in connexion with proceedings in Court or by originating summons if the contempt is not "in connection with proceedings in Court": O. 14 r. 42. A statement of charge is prepared together with a notice of motion: O. 14 r. 43. Evidence may be given by affidavit or otherwise as ordered by the Court: O. 14 r. 44. The documents are served on the contemnor personally: O. 14 r. 45. The Court may direct the Registrar to commence proceedings under this Sub-division by motion or by originating summons: O. 14 r. 47. The court may also refer the matter to the Public Prosecutor for prosecution: Robinson v PNG [1986] PNGLR 307.

The procedure under the National Court Rules O. 14 r. 37-50 reflect practice developed in the common law over centuries. These rules however, do not define contempt of Court. The definition of contempt is to be found in common law cases decided in England and those cases decided here.

(d) Meaning of Contempt of Court Generally

The meaning of the term Contempt of Court is to be found in cases decided here and at common law. A contempt of Court is an act or omission, committed in the face of the Court or outside Court, which is intended to or calculated to or likely to interfere or obstruct the fair or due administration of justice: Metta v State [1992] PNGLR 176 at 184; Poka v Papua New Guinea [1988] PNGLR 218 at 219; SCR No 3 of 1984; Ex-parte Callick and Koroma [1985] PNGLR 67 at 75; Re Passingan Taru [1982] PNGLR 292 at 295; Re Rooney (No 2) [1979] PNGLR 448 at 473 Also see Halsbury's Laws of England (4th ed. Vol. 9) para. 7. It is punishable as criminal contempt : Poka v Papua New Guinea, supra, at 220. A "conduct amounts to contempt where it presents a real risk, as opposed to a mere possibility, of interference with the due administration of justice": Re Rooney (No 2), supra, at 467; SCR No. 3 of 1984, supra, at 73, 77. The purpose of contempt powers is to preserve and protect the general community interest, not the Court's own dignity, in suppressing unjustifiable interference in the authority of the Courts of the land: Attorney-General v Times Newspapers Ltd [1974] AC 273 at 302 adopted in Metta v The State, supra, at 184. The standard of proof of criminal contempt is proof beyond reasonable doubt: Bishop v Bishop Bros [1988-89] PNGLR 533.

(e) Practice and procedure for dealing with Contempt of Court

(i) Generally

The general rule is that a contempt of Court is punishable by the Court before or against whom it is committed. The law on contempt in the common law has developed along this principle. Consistent with this practice, our own National Court Rules do not prevent the Court itself from dealing with it, whether the contempt is committed in the face of the Court or outside of the Court: SCR No 3 of 1984, supra, at 69-70 The State v Mark Tava: Re Awaita [1985] PNGLR 179 at 180-181. But there are certain underlying principles of natural justice which the Court must observe. Among them is the "principle that no one shall be liable to penalty or punishment without a fair hearing and the principle that he shall suffer no conviction at the hands of another who is his prosecutor and his judge; and the principle that he shall not be judged by one in whom there is reasonable apprehension of bias": per Laskin J in McKeown v The Queen (1971) 16 DLR (3rd) 390 at 398 adopted in SCR No 3 of 1984, supra, at 70.

(ii) Summary procedure: Contempt committed in the face of the Court or hearing of the Court

The summary procedure under O. 14 r. 38-39 applies to contempt committed "in the face of the Court" (or "within the hearing of the Court", which is one of many instances thereof). The phrase "in the face of the Court" has never been defined in the cases decided here. A useful definition is given by Lord Denning MR in Balog v Crown Court at St Albans [1974] 3 ALL ER 283 at 287 where the learned Master says:
"...what is meant by 'committed in the face of the Court'...has never been defined. Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts of which a judge of his own motion could punish a man on the spot. So ' contempt in the face of the Court' is the same thing as ' contempt which the Court can punish of its own motion'. It really means ' contempt in the cognisance of the Court'."

Also in the past cases which have been decided in this country, there is no clear statement as to what kind of contempt may be summarily dealt with. Again in Balog v Crown Court at St Albans, Lord Denning says (at 287-288):
"Gathering the experience of the past - then whatever expression is used, a judge...could always punish summarily of his own motion for contempt of Court whenever there was gross interference with the Court of justice in a case that was being tried, or about to be tried, or just over - no matter

whether the judge saw it with his own eyes or was reported to him by officers of the Court, or by others - whenever it was urgent and imperative to act at once...In all other cases, he should not take it on himself to move. He should leave it to the Attorney-General or to the party aggrieved to make a motion in accordance with the rules in RSC Ord. 52. The reason is so that he should not appear to be both prosecutor and judge; for that is a role which does not become him well.
...This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the judge to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately - so as to maintain the authority of the Court - to prevent disorder - to enable witnesses to be free from fear and jurors from being improperly influenced and the like. It is of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt: See R v Gray by Lord Russel of Killowon CJ. But properly exercised, it is a power of the utmost value and importance which should not be curtailed."

Lord Denning then goes on to set out three specific instances of " contempt in the face of the Court" under the categories of "In the sight of the Court", "within the courtroom but not seen by the judge" and "At some distances from the Court". Lawton CJ in the above case expounds on the above principle and gives specific illustrations of the kinds of contempt which may be dealt with summarily. At p. 295, His Honour says:

"In my judgment this summary and draconian jurisdiction should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified and without disturbance and with a fair chance of a just verdict or judgment. Contempts which are not likely to disturb the trial or affect the verdict or judgment can be dealt with my motion to commit under RSC Ord. 52, or even by indictment.

The exercise of judicial discretion in this way can be illustrated by reference to the kinds of **contempt** which are most frequently witnessed by or reported to judges: witnesses and jurors duly summoned to attend who refuse to attend Court; witnesses duly sworn who refuse to answer proper questions; persons in court who interrupt the proceedings by insulting the judge, shouting or otherwise making a disturbance, persons in Court who assault or attempt to assault or threaten the judge or any officers of the Court whose presence is necessary; persons in or out of Court who threaten those about to give evidence or who have given evidence; persons in or out of Court who threaten or bribe or attempt to bribe jurors or interference with their coming to Court, persons out of Court who publish comments about a trial going on by revealing a Defendant's criminal record when the rules of evidence exclude it. Contempt of these kinds may well justify the use of the summary jurisdiction, but everything will depend on the circumstances." (my emphasis).

It is to be noted from the above passage that the categories of such contempt "in the face of the Court" are never closed. It all depends on the circumstances of each case. As it was proven in the subsequent case of Weston v Central Criminal Court's Administrator [1977] QB 32, Lord Denning MR (at 43), expanded these instances to include a lawyer who fails to attend Court in relation to a criminal case which had been set down for trial. Lord Denning said (at p. 43):
"But the question arises: Was his breach of duty a contempt of Court such as to be punishable summarily? I have no doubt that if a solicitor deliberately fails to attend - with intent to hinder or delay the hearing, and doing so - he would be guilty of contempt of Court. He would be interfering with the course of justice."

(iii) Lawyers' failure to attend Court
In this country, so too has it never been doubted that a lawyer's failure to attend in Court in a case in which he is acting, is contempt "in the face of the Court", which may be dealt with summarily under

O. 14 r. 37-40. Examples include Re Paul Luben & David Poka Unreported National Court judgment number N612 (1987) which summary procedure was not questioned by the Supreme Court in Poka v Papua New Guinea, supra, see Woods J at p. 222; The State v Mark Taua; Re Awaita; (supra), The State v Raymond Tupundu N1536 (1996); The State v Lucas Sosorua N1494 (1996); and The State v Foxy Kia Kala; Corney Wiyam N1192 (1994).

(iv) Disqualification of judge before whom contempt is committed

There is no doubt that a judge before whom the alleged contempt is committed "in the face of the Court" can summarily deal with the contempt himself. However, in certain situations, it may become desirable for him to disqualify himself and refer the matter to another judge to dealt with it or to the Public Prosecutor for prosecution under O. 14 r. 42. The test is one of whether the contemptuous behaviour is one of personal affront to, scandalous of or criticism of to the judge concerned; or whether it goes against the system of administration of justice: Re Mark Taua, per Woods J at p. 181.

If the contempt is a personal affront to the judge, etc; he should disqualify himself: If it goes to public confidence in the judicial system, then the judge before whom the contempt is committed is entitled to deal to with it: see McDermott J, in SCR No 3 of 1984, supra, at p. 69: Hence, a lawyer's failure to attend Court on a fixed date may amount to " contempt in the face of the Court" which may be summarily dealt with by the judge before whom the contempt is committed because it interferes with the administration of justice generally. For instance in Robinson v The State [1986] PNGLR 307, the contemnor, a defence lawyer, called the judge and the prosecutor - "bastards trying to put up bail". These words were uttered inside the Courtroom after the Court adjourned and after the judge retired to his chamber. The judge's associate and the prosecutor who heard these words reported the matter to the judge in his chambers. The next morning, the judge summarily tried the contemnor. He put the allegations to the contemnor as reported to him and sought an explanation. The contemnor denied the allegation and refused to address on sentence. The judge convicted him and fined him K100.00 and made an order for him not to appear before any Court until the fine was paid.
On appeal, the Supreme Court said, at p. 309:

"The rules of the National Court contain a comprehensive statement of the procedure to be followed in cases involving contempt of Court (O. 14 r. 38) and in other situations where the contempt complained of is in connection with proceedings in the Court (O. 14 r. 42).
The correct procedure in a case as this one would be by notice of motion or originating summons with supporting evidence by way of affidavit (O. 14 r. 44), and see the State v Mark Taua, Re Contempt Proceedings [1985] PNGLR 179. The State Prosecutor would be a competent person to initiate such proceedings.

If the correct procedure had been adopted, the matter would, in our view, need to be listed before another judge, due to events which took place in the judge's chambers."
Although the Supreme Court did not fully elaborate why it preferred the formal procedure under O. 14 r. 41 - 42, and disapproved the summary procedure under O .14 r. 37 - 38, the reason could have been because the contempt was not committed in the face of the judge (Court) or within the hearing of the judge (Court) and the judge was relying on information put to him by his associate and the prosecutor. In these circumstances, it became desirable to institute separate proceedings under Sub-division "B" of Order 14 such as by Originating Summons or Notice of Motion supported by affidavits from these two witnesses. Also because the words allegedly uttered by the contemnor were scandalous of the judge in person it became necessary to bring the Contempt charge before another judge by way of Notice of Motion or Originating Summons supported by affidavits.

The summary procedure to be adopted in dealing with contempt committed in the face of the court when a lawyer fails to attend a fixture of a criminal trial under O. 14 r. 37-40 is comprehensive: see Robinson at 309. There is no room to invoke the ordinary criminal procedure. In my view, the rules of practice and procedure in ordinary criminal cases, as technical and rigid as they are, are never intended to apply to contempt proceedings. The overriding principle however, is the principle of fairness as provided for in Constitution, S. 59. It is the duty to act fairly and be seen to be acting fairly. The procedure set out in O. 14 r. 39 is intended to ensure fairness in the summary procedure. This summary procedure however, gives the Court the immediate and ultimate power to decide the fate of the contemnor. To some extent, it works to the detriment of the contemnor in that he may be deprived of his personal liberty without first being heard e.g. arrest upon oral order. The summary procedure has some associated risks such as perceived bias of the judge, the judge's perception of contempt with committed before hearing the contemnor, arrest of the contemnor on an oral order before hearing the contemnor, absence of any formal documentation of the contempt charge, etc. But that is a procedure which the Court of necessity must possess. But then again, the overriding principle is one of fairness. In order to ensure fairness, if a judge opts to employ facets of the procedure under O. 14 r. 41-50, such as by motion or originating summons through the Registrar, in order to afford the contemnor adequate time and opportunity to respond to the charge of contempt , then there can be no argument of irregularity in the contempt procedure working to the detriment of the contemnor. In any case, the use of such combined procedure would not void the summary proceeding: Order 1 r. 8. But then again, "...this summary power for punishing for contempt should be used sparingly and only in serious cases...its usefulness depends on the wisdom and restraint with which it is exercised": per Lord Goddard in *Parasharam Detaram Shandasani v King Emperor* WALA, 16 November 1951 quoted in Poka (at 221).

Extracts from ***Poka v The State*** [1988] PGSC 27; [1988-89] PNGLR 218 Bredmeyer, Woods and Corey JJ:

5.7.14 To Be Contempt Absence from a Trial by Counsel Must Be Deliberate and Intentional

"WOODS J: However, should such behaviour be held to be contempt where it was not deliberate behaviour of the lawyer. Lord Denning MR, in *Weston v Central Criminal Court Court's Administrator* [1977] QB 32 at 43, emphasised the need for deliberate behaviour in such cases of contempt . Thus even though the appellant's absence did mean a serious delay in the administration of justice where this absence was a matter of unfortunate circumstances and not a deliberate act it should not be held to be contempt ."

Extracts from ***Sikani v Luga*** [2005] PGSC 9; SC 807:

5.7.15 Where There Is an Appeal from Both Conviction and Sentence Leave to Appeal against the Sentence Is Not Required Because It Is in a Sanction and Not a Sentence

AMET & LOS JJ (Sevua J dissenting): The appellant contends to the contrary on two basis. Firstly, leave is not required because conviction and sentence for contempt is exempted from the requirement of sections 22 of the *Supreme Court Act*. Secondly as the appeal against conviction is already before the court and it cannot be separated, the appeal court must deal with both issues as one.

We deal here with the first part of the issue. There is no issue on what section 29 says as to the

period within which an appeal or leave to appeal may be lodged or sought. But the issue raised by the respondent is whether a leave is needed as condition precedent to an appeal from finding of guilt, conviction and sentence for contempt . The appellant argues on the other hand that leave requirement under section 22 does not apply to an appeal from finding against and imposition of a penalty. That is because a penalty imposed on a contemnor is a sanction and not a criminal punishment as such. We accept this argument. But for more reason that in this case the thrust and the base of the appeal is that whether the appellant committed any acts of contempt at all. That question has now dragged the whole issue of finding of 'guilt' and 'punishment' before the Supreme Court.

5.7.16 In Some Circumstances It Is Best That an Allegation of Contempt Is Heard by Another Judge

Extracts from ***Robinson v The State*** [1986] PNGLR 307 at 309 Kapi Amet Wilson JJ:

"The rules of the National Court contain a comprehensive statement of the procedure to be followed in cases involving contempt of court (O 14 r 38) and in other situations where the contempt complained of is in connection with proceedings in the court (O 14 r 42).

The correct procedure in a case such as this one would be by notice of motion or originating summons with supporting evidence by way of affidavit (O 14 r 44), and see *The State v Mark Taua, Re Awaita* - Contempt Proceedings [1985] PNGLR 179. The State Prosecutor would be a competent person to initiate such proceedings. If the correct procedure had been adopted, the matter would, in our view, need to be listed before another judge, due to the events which took place in the Judge's chambers." [Although the court was not specifically say so, the events referred to as taking place in chambers was apparently the receipt by the judge of an allegation made by the Public Prosecutor and the judges Associate in the absence of the defendant and his counsel that counsel for the defendant had referred to the judge and the Public prosecutor as "bastards".]

5.7.17 Bail Pending Appeal from Conviction for Contempt

Extracts from ***Usurup v Liriope*** PGSC 44; SC 1040 Injia CJ:

"[10]…Finally, in the particularly circumstances of this case where the applicant admitted the charge of contempt and the actions constituting the contempt resulted in the dismissal of the respondent, renders the breach of a serious nature. The interest of justice in those circumstances demands that the enforcement of the punishment should not be interrupted pending appeal. In the circumstances, the application is refused with costs to the respondent. A *Certificate of Refusal of Bail* will be issued forthwith."

5.7.17.1 Exceptional Circumstances Must Be demonstrated for bail

"[8.] The Court obviously must start from the premise that the applicant in this case must show exceptional circumstances. In considering the matters relied upon as constituting exceptional circumstances, the Court must consider an additional matter of principle that is relevant to persons who are convicted and punished for contempt. The Court must consider the interest of justice as one of its primary considerations. In fact this is one of the considerations that is relevant to be considered whilst considering the matters enumerated in s 7 of the *Bail Act*. The Court must have proper regard to the demands of justice - that breach of its orders is a direct attack on or affront to the very foundation of justice administration and those who disregard or violate orders of the Court should be punished appropriately and once punished, the enforcement of the punishment should not be easily interrupted unless there are clear grounds constituting exceptional circumstances for doing so. The main focus of the parties and the Court should then be on expediting the appeal

process and the Court should take the necessary steps to afford an early opportunity for the appeal to be heard and determined expeditiously….

5.7.17.2 Change of Occupation since the Contempt Not Relevant

"[9.] In the present case, in my view, none of the circumstances relied upon by the applicant amount to exceptional circumstances. Matters such as the importance of the position occupied by the applicant and difficulties experienced by his or her employer in carrying out functions under his area of responsibility, difficulties experienced by members of his family, the chances of success in the appeal, the likely delay in the prosecution of his appeal and so on have either been considered to be irrelevant or not constituting special circumstances in previous cases. I am not prepared to depart from the position taken in these other cases. Many of those cases have been cited by both counsel."

5.7.17.3 The Distinction between Civil and Criminal Contempt Is Not Relevant

"The distinction sought to be made by the applicant's counsel on the seriousness of the contempt in terms of disobedience to an order in a civil case as compared with a criminal case is not a relevant distinction. An order of the Court whether it arises from a civil case or criminal case remains an order for all intended purposes."

5.7.17.4 Where the Appellant Admits the Contempt and the Actions Constituting It Enforcement of the Punishment Should Not Be Interrupted Pending the Appeal

"[10.] Further, the fact that the breach of the order occurred whilst he was the CEO of Modilon General Hospital and has now changed jobs is not a material consideration. The availability of Guarantors with sufficient surety also does not constitute exceptional circumstances. …Finally, in the particularly circumstances of this case where the applicant admitted the charge of contempt and the actions constituting the contempt resulted in the dismissal of the respondent, renders the breach of a serious nature. The interest of justice in those circumstances demands that the enforcement of the punishment should not be interrupted pending appeal. In the circumstances, the application is refused with costs to the respondent. A *Certificate of Refusal of Bail* will be issued forthwith."

5.7.18 Contempt or mandamus Lies against the Solicitor General or the Departmental Head for Financial Matters If There Is a Failure to Issue a Certificate or Pay the Judgement from Funds Lawfully Available.

Excerpts from ***Pansat Communications V Vele*** [1999] PGSC 48; [1999] PNGLR 221, Kapi DCJ, Hinchcliffe and Sheehan JJ

"However, s 13 has to be read with s 14 of the *Act*. Section 14 requires the Solicitor-General and the Departmental Head responsible for financial matters to comply with certain requirements in relation to a judgment given against the State. The first is that the Solicitor-General should endorse a Certificate of Judgment within 60 days of service upon him of the Certificate (s 14(2)). The second is that when such Certificate is served upon the responsible Departmental Head for finance matters, he shall satisfy the judgment out of moneys legally available within a reasonable time (s 14(3)). Payment in satisfaction of the judgment may be made by way of instalments (s 14(4)).

Subsection 14(5) specifically prohibits any action for mandamus or contempt of court proceedings against the Solicitor-General or the responsible Departmental Head in respect of the satisfaction of a judgment other than for failure to observe the requirements set out in s 14(2), (3) and (4) of the *Act*.

This prohibition is no different in effect to the prohibition under s 13(1) of the *Act* except that the prohibition here is specifically against an action for mandamus or contempt of court proceedings.

However, there is an express exception to this prohibition in the latter part of s 14(5). This effectively means that an action for an order for mandamus or contempt of court to enforce the requirements set out in s 14(2) and (3) of the *Act* may be brought against the appropriate officer. Where there is a failure by the Solicitor-General or the Departmental Head responsible for financial matters to comply with the requirements under s 14(2) and (3) of the *Act*, an action for mandamus or contempt of court may be brought against them to ensure compliance"

5.8 Statutory Interpretation

5.8.1 Clear words should be construed in the context of the Act

Independent State of Papua and New Guinea v Downer Construction Ltd [2009] PGSC 51; SC 979 per Gavara Nanu J:"41. The words needing construction, including the word *"claim"* should be construed in the context of the scheme of the *Act.* There is abundant authority in support of this view, in a case where the intention of the legislature for a particular legislation under construction is quite plain from its wordings or language, as is the case here. See, *Ted Abiari v. The State (No.1)* [1990] PNGLR 250; *Mai Kuri v. The State (No. 2)* [1991] PNGLR 311; *Bank of England v. Vagliano Brothers* [1891] AC 107; *Brennan v. R* [1936] HCA 24; (1936) 55 CLR 253; *R v. Hare* [1910] 29 NZLR 641; *R v. Martyr* [1962] QD R 398 and *Ward v. R* [1972] WAR 36. 66. Bearing in mind these different approaches to statutory interpretation , Wilson J, in *PLAR No. 1 of 1980* [1980] PNGLR 326 said:

"... there is no place in a developing country where the courts, as well as the Law Reform Commission, are given special responsibilities in the process of development, for the narrow interpretation of statutes without adequate regard to the social purpose of particular legislation. Development is difficult to achieve if courts adopt too conservative an approach to the interpretation of statutes. There has been a tendency in our National Judicial System, less evident in some recent decisions of the courts but still perceptible, to over-emphasize the literal meaning of a provision at the expense of the meaning to be derived from other possible contexts; the latter including the application of the "mischief" rule, the recognition of the general legislative purpose, as well as the obligations laid down under the Constitution such as, for example, the obligation upon the courts in interpreting the law to give 'paramount consideration to the dispensation of justice'..."

5.8.2 Interpretation must not be legislation drafting; Parliament's intention must be divined

Singorom v Kalaut [1985] PGSC 23; [1985] PNGLR 238 (9 August 1985) per Kidu CJ.:"Whatever the rules or maxims of statutory interpretation say, one thing must not be lost sight of and that is that a clear parliamentary intention in legislation cannot be ignored or overruled by the courts. The courts cannot and must not frustrate clear parliamentary intention in any legislation so long as such legislation is constitutionally valid. For Parliament is empowered by the Constitution, s 100, to exercise the legislative power of the people and not the courts. In fact Parliament's legislative power, subject to the Constitution, is unfettered (the Constitution, s 109 (1)), and laws made by Parliament 'shall receive such fair, large and liberal construction and interpretation as will best ensure that attainment of the object of the law according to its true intent, meaning and spirit' (s 109 (4)). I have said the above to emphasise that a court cannot go beyond its powers by using maxims of interpretation or rules of interpretation to over-ride clear and explicit parliamentary intent in legislation. This is not saying that I support 'the strict literal and grammatical construction of the words, heedless of the consequences' approach to statutory interpretation : see *PLAR No 1 of 1980* [1980] PNGLR 326."

5.8.3 Acts organised in Parts indicate that the clauses in a part relate to a particular subject matter

Independent State of Papua and New Guinea v Downer Construction Ltd [2009] PGSC 51; SC 979

Per Kandakasi J: [78]. "…. As Holroyd J said *in Re The Commercial Bank of Australia Ltd, (1893) 19 VLR 333 at 375* such headings have the purpose of indicating:

"... *certain groups of clauses as relating to a particular object …. The object is to prima facie to enable everybody who reads to discriminate as to what clauses relate to such and such a particular subject matter. It must be perfectly clear that a clause introduced into a part of an Act relating to one subject matter is meant to relate to other subject matters in another part of the Act before we can hold that it does so."*

5.8.4 It is a presumption that the same word used in different sections of an Act carries the same meaning

Independent State of Papua and New Guinea v Downer Construction Ltd [2009] PGSC 51; SC 979
Per Lay J : [163]. It is a presumption of general statutory construction that where the Parliament has used a word in different sections of a statute it intends to convey the same meaning with that word; unless the context requires a different interpretation. This method of interpretation has been applied to the Constitution: *Reference by Western Highlands Provincial Government* (1995) SC486. It is not a rule which compels the same meaning to be adopted in respect of every instance of the use of a word. Lord McDermott in the House of Lords in *Madras Electric Supply Corporation Ltd v Boarland* [1955] AC 667 at 685 made the following comments:
"The presumption that the same word is used in the same sense throughout the same enactment acknowledges the virtues of an orderly and consistent use of language, but it must yield to the requirements of the context, and it is perhaps at its weakest when the word in question is of the kind that readily draws its precise import, its range of meaning from its immediate setting or the nature of the subject with regard to which it is employed".

5.8.5 The Constitution and Acts of Parliament must be given their fair and liberal meaning

Special reference pursuant to Constitution section 19; special reference by Morobe provincial government [2009] PGSC 9; SC 693 per Kandakasi J:."I start with schedule 1.5 of the Constitution itself, which provides:

"(1) Each Constitutional Law is intended to be read as a whole.
(2) All provisions of, and all words, expressions and propositions in, a Constitutional Law shall be given their fair and liberal meaning."

Going by this expressed dictation in the Constitution, it is now an accepted principle of both constitutional and other statutory interpretation , that provisions of the Constitution and all Acts of Parliament must be given their fair and liberal meaning. This is so as to give effect to the intent of Parliament behind the provisions in question. There is a long line of case authority on that. Examples of these are the cases of *The State v Independent Tribunal; Ex parte Sasakila* [1976] PNGLR 491 at 506, 507, per Kearney J; *Constitutional Reference No 1 of 1977* [1977] PNGLR 362 at 373, 374, per Prentice DCJ (as he then was) and *Canisius Karingu v. Papua New Guinea Law Society* (unreported judgement delivered on 9/11/10) SC674 for a recent reference to this principle."

5.8.6 …Where the conjunctive 'and' is used all matters listed must all exist

Special Reference Pursuant to Constitution Section 19; Special Reference by Morobe Provincial Government [2002] PGSC 9; SC693 (27 September 2002) per Amet CJ: "I note that the conjunctive "and" is used instead of "or" in subsection 2 of section 86. It is settled law that, wherever the conjunctive "and" is used, all the matters or factors listed must all exist, or if it is a requirement, all of them must be met. For examples of authorities on this see: *SCR No.5 of 1987 In the Matter of the State v. Songke Mai & Gai Avi Reference under s. 18 of the Constitution* [1988] PNGLR 56 at p.84 per Los J; *Sir Julius Chan v. The Ombudsman Commission of Papua New Guinea* (25/06/99) SC607 per Sheehan, and Jalina, JJ. and *Rosa Angitai v. The State* [1983] PNGLR 185 at p.190 per Kaputin, and Gajewicz JJ."

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5.8.7 In interpretation of a constitutional law other common law principles are persuasive only and should be applied only if no PNG constitutional or statutory aids to interpretation are available.

Supreme Court Reference by the Western Highlands Provincial Executive [1995] PGSC 6; SC 486 per Amet CJ:
"My own view is that, in any question relating to the interpretation or application of any provision of a constitutional law, the primary aids to interpretation must be found in the Constitution itself. Reference to English and Australian Common Law principles of statutory interpretation may be referred to as persuasive guide only and adopted applied and enforced as part of the underlying law if no constitutional or statutory principles or aids to interpretation are available and only if they are applicable or appropriate to the circumstances of the country and not inconsistent with any custom pursuant to schedule 2.2 of the Constitution."
....

5.8.8 Constitution s24 materials are irrelevant to interpretation of subsequent constitutional amendments and constitutional laws but similar relevant documents may be referred to

Supreme Court Reference by the Western Highlands Provincial Executive [1995] PGSC 6; SC 486 Kapi DCJ: "The s. 24 materials were relevant to the interpretation or application of provisions of the Constitution as adopted by the Constituent Assembly, but in logic would not have any meaningful relevance to the historical basis for any subsequent amendments to the Constitution. For the reasons I have given earlier it is eminently sensible to refer to any reports and documents or papers tabled for the purposes of or in connection with debates and the relevant reading speeches that preceded the enactment of the amending law."

5.8.9 The function of the Court is to discover the intent of the legislature

Supreme Court Reference by the Western Highlands Provincial Executive [1995] PGSC 6; SC 486Per Kapi DCJ:" It is settled law that the function of the courts in construing legislation is to discover the intent and the purposes of the legislature and give effect to them. The intent and the purposes of the legislature are expressed in the words used in legislation. The role of the court is to interpret those words. In doing this the courts have developed different rules of construction. One of these rules is the "literal approach". That is to say giving words their ordinary and natural meaning. This

rule of construction is merely common sense and judicial experience applied to the task of giving meaning to words used by the draftsman within the context in which the words are used.

This rule of construction does not always apply in every situation. There may be cases where the words used in legislation do not have a natural and ordinary meaning or the words are ambiguous. The courts have developed the "purposive approach" to resolve this difficulty (see for example PLAR No 1 of 1980 [1980] PNGLR 326.)."

5.8.10 The Court should apply the meaning intended by Parliament even if it is not the 'plain meaning'

Kearney J *The State v The Independent Tribunal; Ex Parte Sasakila* [1976] PNGLR 491 at 506 to 507 :

"The process of statutory interpretation is essentially intuitive and subjective, in the absence of rules consistently applied. The Act is a Constitutional Law and thus subject to the general principles of interpretation set out in Constitution ss. 10, 25 (3) and Basic Social Obligation (a), and 158 (2); and to the more specific canons in Constitution ss. 24, 109 (4) when read with 12, and Sch 1.5. In my opinion these provisions amount to a direction to the court that in carrying out its functions under Constitution s. 18 (1) the words actually used in the Act to have to be strictly adhered to but are to be construed with the assistance of the materials referred to in Constitution s. 24, so as best to attain what Parliament intended. When Constitution ss. 109 (4) and 158 (2) are themselves interpreted with the aid of s. 24, this view is fortified: there are several references in Ch 8 of the Report of the Constitutional Planning Committee which point against the Court taking a "narrowly legalistic" or "literal" approach, and thus sacrificing the "spirit for the letter of the Constitution". The "dynamic character" of the Constitution is emphasized; in interpreting the law, the judges are urged to use "judicial ingenuity" in appropriate cases, to do justice. One consequence of this approach to interpretation is that the Court should not fail to give a provision the effect it considers the Parliament intended, by applying a literal or "plain meaning" test nor should it attribute to the legislature an intention to produce a capricious or unjust result. The search throughout is for the intention of Parliament, a process which remains, formally at least, one of interpretation and not of legislation, and one in which the best guide remains the provisions of the Act itself."

5.8.11 If two provisions can stand together the Court may not adopt a gloss which excludes one or the other

Hedura Transport Pty Ltd v Gairo Vegoli (1977) N99 Frost CJ : "... but if on a fair interpretation of the words used it can be seen that the two sections can stand together, then the fact that exclusion would have been reasonable or even the fact that an exclusion might have been expected cannot, in my opinion, justify adoption of a gloss on the words used to bring about such a result". Applied in *New Britain Oil Palm Ltd v Sukuramu* [2008] PGSC 29; SC946 (30 October 2008) at [21].

5.8.12 a Decision of the Supreme Court Affecting the Status of the Law Applies to All Matters Not Finalised at the Date of the Decision

JA Construction v Wanega [2010] PGSC 24; SC 1069.

"14 The decision on the retrospective operation of judgments in *Polem's case* was made following a consideration of the decision of the Supreme Court of Ireland in *A v Governor of Arbour Hill Prison* [2006] IESC 45 and the decision of the English Court of Appeal in *Brennan v Bolt Burden* [2004] EWCA Civ 1017. The Irish judgment related to a criminal case and did no more than confirm that judgments do not affect the outcome of cases that have been previously finalised. However, that case did confirm, as indicated in the passage quoted at paragraphs 49 and 50 in *Polem's case,* that judgments do effect cases not finally determined at the date of that judgment. *Brennan's case* involved the

validity of a settlement reached prior to a judgment which overturned a previous court decision on which that settlement was based. Not surprisingly, the pre-judgment settlement was not affected by that judgment since the case had been finalised. Like those two cases, *Polem's case* raised the question of whether the decision in *State v Manoburn Earthmoving Ltd* (2003) SC716 applied retrospectively to a deed of settlement.

15 Hence, the decision in *Polem's case* relates to situations where proceedings have been finalised prior to a judgment that changes the law. The position is different in relation to cases that have not been commenced or which, like this case, have not been finalised when a judgment is delivered that affects the issues in such a case. That view accords with the passage from *Halsbury's*, quoted above. When a judgment is delivered that may be seen to change the law, the position thereafter does not depend on whether cases were *commenced* before or after that judgment but whether cases were *finalised* before or after that judgment. In other words, the law does not produce differing results depending on whether cases were commenced before or after the judgment in question: the law produces the same result for all cases finalised after the judgment in question*.": JA Construction v Wanega* [2010] PGSC 24; SC 1069.

6.0 ORIGINAL JURISDICTION

6.1 Direction by the Court for a Single Judge to Find Facts

Supreme Court Rules PART 2—ORIGINAL JURISDICTION

ORDER 3—PROCEDURE

Division 1.—Commencement and continuance of proceedings
1. Proceedings which relate to a matter or question within the original jurisdiction shall be entitled "In the Supreme Court of Justice" and shall be commenced and continued in accordance with these Rules.

2. Where any proceedings under Rule (1) are pending before the Court—
(a) a direction not involving a final decision upon the proceedings; or
(b) an interim order to prevent prejudice to the claims of the parties; or
(c) an order for security for costs; or
(d) an order in the nature of orders such as are referred to in Section 8(1)(a), (b), and (c) of the Act—
may be made by a Judge.

3. **Upon the direction of the Court**, either on the application of a party to the proceedings or of its own motion, **a single Judge may take evidence** upon any issue of the fact for the determination of the proceedings and state those facts as found by him, and the Court may act upon such statement of facts so far as it thinks fit to adopt it.

" [9.] It appears to us that Order 3 Rule 3 *Supreme Court Rules* was drafted with the knowledge that a court consisting of more than one Judge would face similar impediments to the taking and consideration of evidence in its original authority, to those that led the United States Supreme Court

to adopt the practice that it has in appointing a Special Master.

[10.] We are of the view that if this Court directs a single Judge to take evidence pursuant to Order 3 Rule 3, although the wording of the Rule permits a Judge of this Court that gives the direction to be so directed, the Judge to be directed, who shall be a Supreme Court Judge, should be someone other than any of the Judges constituting the Court that gives the direction.

[11.] This will avoid issues of prejudice of the Judge so directed for amongst others, forming a view of the proceedings before the Supreme Court hears argument by having a more detailed knowledge of the proceedings by virtue of taking the evidence and making factual findings.

[12.] It also ensures that each of the Judges constituting the Court equally hear the proceedings. This would not be the case if one of the Judges had already taken evidence and made factual findings.": *Application of Francis Gem* [2000] PGSC 23; SC 1065.

6.2 Constitution Section 18 Referrals to Interpret the Constitution

6.2.1 Supreme Court Rules Order 4

ORDER 4—REFERENCES UNDER THE CONSTITUTION
Division 1.—Form of reference
1. A reference under *Constitution* Section 18 or a special reference under *Constitution* Section 19 shall be instituted by a reference and shall—
(a) be entitled under the Section of the *Constitution* by which it is made together with the year and number of the reference; and...
2. A reference under *Constitution* Section 18 shall state—
(a) the question to be referred and such facts as are admitted or found by the Judge of the National Court and are necessary for the proper consideration of the question; and
(b) if the facts referred to in sub-rule (a) cannot be conveniently and shortly stated, the findings of the Judge of the National Court shall be annexed to the reference; and
(c) where a question involves the pleadings before the court or tribunal from which it is referred, then so much of the pleadings shall be set out in the reference as raise the question.
Division 2.—Provisions applicable to reference made pursuant to Constitution section 18(2)
4. Where a court or tribunal making a reference consists of a magistrate or some other officer, but not a Judge of the National Court, Rules 6, 7, 8, following apply as if the description of his office were substituted for the words "Judge of the National Court".
5. Where a Judge of the National Court proposes to make a reference under *Constitution* Section 18(2), he may give such directions as he considers proper for the drafting of the reference and for the preparation of the documents for the court including copies for use by the court and the parties at the hearing.
6. The original reference shall be signed by the Judge of the National Court by whom the reference is made or in his absence another Judge of the National Court and shall be transmitted to the Registrar.
7. The Judge by whom the reference is made or, in his absence, another Judge of the National Court may, upon the application of a party or of his own motion, upon notice to the parties, amend the reference at any time before argument.

6.2.2 A reference under section 18(2) disputed facts should be found in the National Court

Rule 2(b We do not consider that s. 18(2) allows hypothetical questions to be referred by lower tribunals to the Supreme Court. This situation is within the ambit, as we have stated, of s. 19. We are of the opinion that a question which is referred to the Supreme Court must arise out of a factual situation established by the lower court or tribunal. We refer to *S.C.R. No.* 5 *of* 1982; *Re petition of Hugo Berghauser* [1982] P.N.G.L.R. 379. This was a case referred by the National Court to the Supreme Court relating to certain constitutional questions which arose during the course of hearing of an election petition. The question referred related to the age of a candidate for election. In that case, there had been no finding of facts by the National Court as to whether the man involved had in fact been under the age of twenty-five or more than the age of twenty-five. In that case, the matter was sent back to the National Court for findings of fact to be made and if necessary to refer the question back to the Supreme Court: *SCR No.3 of 1982; Re s57, s155(4) of the Constitution* [1982] PNGLR 405 at 407 and *SCR No.5 of 1982; Hugo Berghuser v Joseph Aoae* [1982] PNGLR 379 and *SCR No. 1 of 1982; Re Philip Bouraga* [1982] PNGLR 178.

6.2.3 A reference under s18 of the Constitution should not be made on assumed facts

Supreme Court Reference No.5 of 1982 [1982] PNGLR 379 (SC), the trial judge must deal with the facts which give rise to the constitutional issue: *Patterson Lowa & Ors v Wapule Akipe & Ors* [1991] PNGLR 265; [1992] PNGLR 399 .

6.2 .4 Section 18 of the Constitution gives no right to a citizen to bring a question of constitutional interpretation directly to the Supreme Court by way of a reference.

" The ***Constitution*** prescribes a procedure known as "reference" whereby a matter of interpretation or an application of a constitutional law may be referred to the Supreme Court for determination. The Constitution prescribes two types of "reference" for seeking the opinion of the Supreme Court on issues of interpretation or an application of a constitutional law. The first is set out in s 18 (2) of the ***Constitution***. This provision envisages a proceeding before a court or a tribunal. If a question of interpretation or application of a constitutional law arises, the court or the tribunal may stay its proceedings and refer the questions involving the interpretation and application of a constitutional law to the Supreme Court for determination (***The Somare Case***). In the present case, a court or a tribunal has not referred the constitutional issues. Therefore, it cannot come within s 18 (2).

Second, an authority prescribed under s 19 of the ***Constitution*** may make special reference on any question relating to the interpretation or application of any provision of a constitutional law, including any question as to the validity of a law or a proposed law. The Provincial Executive of the Madang Provincial Government could have filed a special reference under s 19 (3) (eb) of the Constitution. The Governor is not authorized to make a reference under s 19.

Section 18(1) grants the exclusive and original jurisdiction of interpreting and applying constitutional laws to the Supreme Court. It does not deal with the procedure for invoking that jurisdiction. That is the subject of s 18(2) and s 19 of the Constitution. There is no provision for a reference under s 18(1).

The original jurisdiction of the Supreme Court under s 18(1) may also be invoked directly by instituting appropriate cause of action in law. As we have already pointed out, a party may seek declaratory orders by originating summons (Kaseng v Namaliu [1995] PNGLR 481, The Honourable John Momis & The Bougainville Provincial Government in Suspension v. The National Executive Council & The Right Honourable Bill Skate, Prime Minister (SC O.S. 1 of 1999) (Unreported judgment

of the Supreme Court dated 26 November 1999, SC626)). We invited the parties to do this at the outset but failed to take up the invitation."

In the Matter of Section 18(1) of the Constitution and in the Matter of Jim Kas, Governor of Madang Province [2001] PGSC 15; SC670 (28 June 2001 applied in *Re reference by Mondiai* [2010] PGSC 39; SC 1087 and there held that to the extent that SCR Order 4 permitted otherwise it was unconstitutional.

6.3 CONSTITUTION SECTION 19 REFERENCES

6.3.1 Supreme Court ORDER 4—References under the Constitution

Division 1.—Form of reference

1. A reference under *Constitution* Section 18 or a special reference under *Constitution* Section 19 shall be instituted by a reference and shall—

(a) be entitled under the Section of the *Constitution* by which it is made together with the year and number of the reference; and

(b) and with—

(i) the name of the person, or authority making the special reference under Section 19; or

(ii) with the title or proceedings if the reference is under Section 18(2); and

(c) state the name of the person, court, tribunal or authority making the reference; and

(d) be in accordance with forms 1, 2, or 3 whichever is applicable; and

(e) be signed by the person, court, tribunal, authority or proper officer on behalf of the authority as required by law, making the reference; and

(f) be filed in the registry.

3. A special reference under *Constitution* Section 19 shall—

(a) state the question, the subject of the reference; and

(b) state the circumstances in which it arises; and

(c) if appropriate, have annexed a copy of the law or proposed law the validity of which is questioned; and

(d) specify the relevant provisions of the Constitutional Law.

Division 3.—Provisions applicable to reference made pursuant to Constitution section 19

8. On the day the reference or special reference is filed, the Registrar shall make an appointment with a Judge to make directions in relation to—

(a) the form and contents of the question to be decided by the court; and

(b) the contents of the reference book; and

(c) the provision of counsel; and

(d) the setting down of the question for hearing; and

(e) such other matters as the Judge considers proper.

9. The referor may withdraw or amend the reference or special reference—

(a) if no party has intervened;

(i) without leave before hearing, or

(ii) with leave after commencement of hearing but before the court has given its opinion; or

(b) if a party has intervened, with leave of the court or of a Judge.

10. Where leave is granted under Rule 10, it shall be on such conditions as the court or a Judge thinks fit.

11. Notice of withdrawal or amendment or an application for leave shall

(a) be in accordance with form 15 or 6 whichever is applicable;
(b) where leave is sought, be supported by affidavit;
(c) be filed in the registry; and
(d) be served on all parties to the proceedings and given to such persons as the court or a Judge directs.

6.3.2 Reference to be signed by designated officer

Rule 1 (e) The requirement *of this rule (for the reference to be signed by designated officers) also applies to applications under Constitution Section 19: Central Provincial Government v NCDC [1987] PNGLR 249. The requirement for signing by specified officers goes to the validity of the application. The Rule is a valid one and is not fulfilled by signature of the lawyer for the Provincial Government. Signature by an unauthorised person cannot be cured by a direction of the Court to get the reference properly signed. : In the Matter of Section 19 of the Constitution – Reference by Fly River Provincial Government Executive (Ref. No. 3 of 2006 (2007) SC917). : The Supreme Court Rules do not provide procedure for commencing proceedings in the original jurisdiction of the Supreme Court. Ad hoc directions can be given pursuant to Section 185 of the Constitution: Isadore Kaseng v Rabbie Namaliu, and the Independent State of Papua New Guinea (No.1) [1995] PNGLR 481.*

Also see commentary to Section 15 of the Supreme Court Act.

6.3.3 Interim Relief May Be Granted Pursuant to O3 r2(b) — considerations

"[17.] The second type of reference is a special reference brought under s 19 by an authority prescribed in Subsection (3). The jurisdiction given to the Supreme Court by s 19 does not include jurisdiction to grant interim relief in a special reference. However, s 19 (4) provides for an Act of the Parliament or the Rules of the Supreme Court to" *make provision in respect of matters relating to the jurisdiction of the Supreme Court under this section*" including those specific matters set out in (a) to (c) (inclusive).

[18.] *The Supreme Court Act* (Ch. 37) is silent on the Court's jurisdiction to grant interim relief in a reference under s 19: cf s 5 (1) which provides for interim relief in an appeal.

[19.] The *Supreme Court Rules* 1984, Part 2, Order O 3 (1) and (2) provide for the Court's jurisdiction to grant interim relief in matters within the original jurisdiction of the Supreme Court. Order 3 rule 1 and rule 2 state as follows:...

[20.] Part 2 of the *Supreme Court Rules* 1984, in our view, quite conveniently and appropriately so, gives the Supreme Court jurisdiction to grant interim relief in matters which come within the "Original Jurisdiction" of the Supreme Court. SCR, Part 2 (Orders 3 and 4) appropriately provides for reference under s 18 and s19 as coming within the original jurisdiction of the Supreme Court. SCR, Order 3 completes the provisions of *Constitution*, *Subdivision C* in conferring on the Supreme Court jurisdiction to grant interim relief in matters which come within the original or exclusive jurisdiction of the Court.
…
[26.] SCR, O 3 r 2 (b) of course gives this Court a judicial discretion which is to be exercised on proper grounds and circumstances. ... We restate those considerations for purpose of an application for interim relief in a Reference under s 19, as follows:

(1) The nature of the order sought. If the order sought were to be granted, it must be consistent with the grant of Constitutional power and exercise of those powers by designated persons or authorities under the *Constitution*;

(2) Seriousness of the case in terms of the questions in the Reference to be determined;

(3) Prejudice to be suffered by the referrer in the performance of its public functions; including the public interest associated with performance of those functions;

(4) Balance of convenience; and

(5) Preservation of the status quo.
:" *Reference by the Ombudsman Commission; Re Section 19 of the Constitution* [2010] PGSC 43; SC 1027.

For **Leave to Intervene** see *Commentary* to Order 4 in Supreme Court Rules.

7. Chapter 7 – REVIEW JURISDICTION

7.1 Generally

Constitution section 155 (2) (b)

"**155.** THE NATIONAL JUDICIAL SYSTEM.

...

(2) The Supreme Court–

(*a*) is the final court of appeal; and
(*b*) has an inherent power to review all judicial acts of the National Court; and
(*c*) has such other jurisdiction and powers as are conferred on it by this Constitution or any other law.

"

" there are three categories of cases where jurisdiction has been exercised under section 155 (2) (b) — (1) where parties allow a statutory right of appeal to expire; (2) where a right of appeal is prohibited or limited by law; (3) where there is no other way of going to the Supreme Court ": *Application of Herman Leahy* (2006) SC855 at [57].

7.1.2 the criteria to be satisfied when the applicant does not exercise a right of appeal

"(1) The applicants had a right of appeal or at least a right to seek leave to appeal against the decision of the National Court, which was not invoked. Thus three criteria had to be satisfied for leave under Section 155(2)(b) to be granted:

(a) it is in the interests of justice to grant leave; and

(b) there are:

(i) cogent and convincing reasons and

(ii) exceptional circumstances, e.g. some substantial injustice is manifest or the case is of special gravity; and

(c) there are clear legal grounds meriting a review of the decision (*Avia Aihi v The State No.1* [1981] PNGLR 81 applied).

(2) In deciding whether there are cogent and convincing reasons, the following matters are relevant:

(a) the reasons for not filing an appeal within time; and
(b) the merits of the case sought to be argued."

From the head note in *In Re Application by John Maddison* [2009] PGSC 12; SC 984 (27 July 2009)

7.1.3 Criteria to be satisfied where there is no right of appeal

"(a) there is an important point of law to be determined; and

(b) it is not without merit. (*Supreme Court Review No 5 of 1987 Re Central Banking (Foreign Exchange & Gold) Regulations (Chapter No 138)* [1987] PNGLR 433;" *Re Leahy* (2006) SC855, applied in *Application by Leahy* [2009] PGSC 17; SC 994 (27 October 2009)

7.1.4 The review jurisdiction cannot be invoked where there is still a concurrent right to make an application for leave to appeal or to appeal

"The authorities show that where the law provides for review or appeal to the Supreme Court, the discretionary power of the Court under s 155 (2) (b) cannot be invoked without first exhausting the avenues provided for by law. In *Application by Jeffrey Balakau* (Amet CJ, Kapi DCJ Los J) (Unreported judgment of the Supreme Court dated 25th October 1996, SC 529) the Court stated this principle in no uncertain terms. That was a case in which the applicant filed his appeal well outside the 40 days and was found to be incompetent. On application for judicial review under s 155 (2) (b), the Court said:

"……
We would add though that this interest or right to invoke this power, whilst it exists concurrently, cannot be invoked concurrently with the right of appeal procedures enabled under subordinate statutes such as the Supreme Court Act. It is a reserve supervisory power, that is available to the Court, to be invoked in the discretion of the Court upon good grounds being established.

As with other discretionary jurisdictions, the applicant ought first to have pursued his rights of appeal or review under appropriate primary legislation, and only when those avenues have been fully exhausted might he seek to invoke this reserve jurisdiction of the Court.

It would not be appropriate or permissible to seek to invoke this jurisdiction without first having pursued the rights of appeal or review under the relevant legislation."

In the present case, the applicant seeks to invoke the discretionary power of the Court without first invoking the right to appeal under the *Supreme Court Act*. This is a deliberate choice by the applicant and his lawyers. He cannot invoke the discretionary power under s 155 (2) (b). This is a clear abuse of the process of the court and I would dismiss it.": *Review pursuant to Constitution section 155 (2) (b) and 155 (4) application by Anderson Agiru* [2002] PGSC 23; SC686.

7.1.5 Failure of a lawyer to file a notice of appeal is not a ground justifying leave for review

"6. In *Peter Dickson Donigi v Base Resources* Ltd (1992) PNGLR 110 the court said:

"For the purposes of this case, it can be stated that this case supports the proposition the negligence of a lawyer in failing to file a notice of appeal or failing to protect the right of appeal does not amount to an exceptional circumstance to warrant an exercise of jurisdiction to review. Secondly, notwithstanding that there has been a failure by the lawyer to protect the interest of the applicant, the Court should consider whether the merits of a review provide any cogent and convincing reasons and exceptional circumstances in favour of granting leave to review. These considerations may outweigh the failure to lodge the notice of appeal within time".

"[7.] The first ground of the application can be shortly disposed of, the lawyer had a responsibility to file the appeal within the time-limited by Section 17 of the Supreme Court Act and did not do so. That does not amount to a competent ground to apply for review.": *Application by Stephen Mark* [2008] PGSC 16; SC925

7.1.6 An appeal dismissed for want of prosecution cannot be re-agitated as a Constitution section 155 (2) (b) application

"However, we refer to TST Holdings Ltd (supra) and cite with support and approval what the Supreme Court said in that case. At p.3 of the judgment, the Court, comprising of the most senior members of the judiciary said:
"The first issue in this application therefore is whether the Supreme Court can review its own earlier decision, in the same matter, pursuant to s.155 (4), where that earlier decision was made pursuant to an appeal under the Supreme Court Act, and that decision was dispositive of the appeal.

The appeal was dismissed for want of prosecution, pursuant to the Rules of the Supreme Court. <u>That, in our opinion is the end of that appeal</u>. It is a final decision and not merely an interlocutory one that could be restored in any way." (our emphasis).

In the criminal context of a s.155 (2) (a) and s.155 (4) Constitution applications, the Supreme Court had another occasion to consider a similar issue in the *Application by Wili Kili Goiya, [1991] PNGLR 170*. The Court held that:
(a) s.155 (2) (a) of the Constitution prohibits any further or other right of appeal.
(b) s.155 (4) of the Constitution does not permit a differently constituted Supreme Court to review that determination.

We agree wholeheartedly with those principles of law and apply adopt and apply them in the present case.

The Court in TST Holdings also cited Isidore Kaseng (No. 2) (supra), where another similar issue was considered. The facts are not relevant here, but the decision of the Court is. The Court held that the application was incompetent and an abuse of the process.

Given the persuasive nature of those decisions, we have no valid reason to depart from the law as established in this jurisdiction by those cases. We therefore uphold the position in law that where a Supreme Court has previously dismissed a case, a differently constituted Supreme Court has no jurisdiction to review the decision of that Supreme Court. That is trite law."
PNG Water Board v Gabriel Kama (2005) SC821

7.2 Election Petitions

See 3.14 for text of cited cases.

7.2.1 A single judge of the Supreme Court has no power to make interim orders in judicial review

"The inherent jurisdiction under s. 155 (2) (b) is specifically granted to the Supreme Court and there is no other provision either in the Constitution or any other law which stipulates that this jurisdiction may be exercised by a single judge of the Supreme Court."
Review No. 78/1977; application for review pursuant to s155 (2) (b) of the Constitution; Viviso Seravo and Electoral Commission v John Giheno (1998) SC539.

BUT NOW SEE *Election Petition Review Rules* Order 4 Subdiv.4

7.2.2 A full bench of the Supreme Court has jurisdiction under Section 155 (4) of the Constitution to grant a stay of the National court orders on an election petition

"Jurisdiction to hear an application for stay pending the determination of a judicial review comes within the inherent jurisdiction of the Supreme Court under s. 155 (2) (b) of the Constitution (see *Dick Mune v Paul Poto*, Unreported Judgement of the Supreme Court dated 23rd April 1996, SC499)... We would adopt the following as the proper principles for stay. An applicant has the onus of showing why the discretion should be exercised in his favour. Whether a stay should be granted is within the absolute discretion of the Court. We do not consider that the requirement of "special" or "exceptional circumstances" should be introduced here. No such requirement is expressed or is implied by the terms of s. 155 (2) (b). To introduce such a requirement would be tantamount to limiting the exercise of discretion of the Court to particular circumstances only. We are quite content to adopt the relevant words of s. 155 (4) set out earlier. It would be sufficient for an applicant to show or demonstrate that a stay is necessary to do justice in the circumstances of a particular case. What is justice cannot be defined. That is to be determined in the circumstances of a particular case.

In exercising its discretion the Court should consider and balance the competing rights of each of the parties. : *Viviso Seravo & Electoral Commission v John Giheno* (1998) SC555 followed in *Wauni Wasia Ranyeta b Masket Iangelio and David Lambu v Peter Ipatas (No. 3)* [1999] PNGLR 207. But now see Order 5 Subdivision 4 (Election Petitiona) which gives a single judge jurisdiction to grant leave for review.

7.2.3 Criteria for Leave to Review a Final Decision of the National Court on an Election Petition

Order 5 Div 4/2

"[9]…When the principles relevant to election petition reviews developed in various cases including the cases referred to in *Herman Leahy* case and leave provisions in the *Petition Review Rules* are distilled into some basic principles or criteria, four main principles emerge, and these are:-

1. Leave for review is required in respect of a final decision made by the National Court under Part XVIII of *OLNLLGE*: Division 1 rr 1-10, Supreme Court Election Petition Review Rules 2002, as amended, *Trawen v Kama* (2008) SC 915.

2. The grant or refusal of leave for review is discretionary. It is a judicial discretion and it must be exercised on proper principles and proper grounds: *Application of Ludwig Patrick Schulze* (1998) SC 572.

3. The three criteria set out for grant of leave in *Avia Aihi v The State No.1* [1981] PNGLR 81, do not apply to grant of leave in respect of leave for review of a decision in an election petition matter.

4. The criteria for exercise of discretion on leave for review in an election petition matter are two-fold: -

- First, insofar as the application relates to a point of law, the only criteria to be satisfied are that there is an important point of law to be determined and that it is not without merit: *Application by Herman Joseph Leahy* (2006) SC 855; *Application of Ludwig Patrick Shulze* (1998) SC 572.

- Second, insofar as the application relates to facts, there is a gross error clearly apparent or manifested on the face of the evidence before the Court: *Kasap v Yama* [1988- 89] PNGLR 81, *Application of Ludwig Patrick Shulze* (1998) SC572, *Kelly Kalit v John Pundari* [1998] SC 569; or where on the face of the finding of fact, it is considered so outrageous or absurd so as to result in injustice: *Application by Ben Semri* (2003) SC 723; and such that a review of the findings of fact is warranted.":

Jurvie v Oveyara [2008] PGSC 22. 1, (2008) SC935.

7.2.4 The test to apply to an application for interim orders is whether the order is necessary to do Justice in the particular case:

"5. Interim orders of the type that Mr Arore is seeking can only be made by a full bench of the Supreme Court (constituted by three or more Judges). Such orders cannot be made by a single Judge of the Supreme Court. This was clarified in *Viviso Seravo and Electoral Commission v John Giheno* (1998) SC555. The Court also confirmed in that case that the jurisdiction for making such orders is

available under Section 155(4) of the *Constitution*. The person seeking the orders bears the onus of satisfying the Supreme Court that the orders being sought are necessary, to do justice in the circumstances of the particular case. There is no need to prove special or exceptional circumstances."

David Arore v John Warisan (2008) SC947

7.2.5 Strictness of the rules implementing short time restrictions (election petitions)

" An application for leave to review a decision on an election petition not filed, served and moved before a judge within 14 days of the decision sought to be reviewed, where extension of time is not granted within that 14 days, is rendered incompetent by the Rules, subject to any application under Rule 5/10/32. 2. The purpose of the Election Petition Review Rules is: a) not to treat an election petition review as an ordinary matter but as a special matter requiring the applicant's constant and detailed attention; b) to closely manage the review process; c) to reduce to the minimum the time between the various steps in the review. 3. The times imposed by the Rules are tight and where prompt application is made for relief within the mandatory 14 days accompanied by a reasonable explanation, many circumstances will justify an extension of time under Rule 5/1/7 or after that time a dispensation from the requirements of the Rules under Rule 5/10/32; 4. An applicant under Rule 5/10/32 should explain (1) why a time limit was missed, a Rule not complied with or otherwise why dispensation is required, (2) any delay which has occurred in making the application, (3) that the relief sought by the applicant will not unduly prejudice the other party's case, (4) that the grant of dispensation will enable all of the issues in contention to be promptly brought before the court without further delay": *Vele v Parkop* (2008) SC945, and .

7.2.6 Dismissal for Failure to Comply with Times

Failure to apply for dispensation from *Election Petition Review Rules* with which the applicant has not complied may result in the review being dismissed: *Yawari v Agiru* [2008] PGSC 31, SC 948.

7.2.7 A Failure to Give Reasons Means There Are No Good Reasons; Where a Judge Undertakes to Give Written Reasons They Should Be Available within a Short Time of the Trial

"[11.] In *Mission Asiki v Manasupe Zurenoc and the State,* (2005) unreported, SC797 the Supreme Court held, the first respondent's failure to give reasons means there was no good reasons. The Court also stated that, the failure to give reasons amounted to an error of law and a denial of natural justice.

[12.] We approve and apply the statement by Amet CJ in *Godfrey Niggints v Henry Tokam & 2 Ors* (supra) in the present review as a sound principle of law to guide the Appellate Courts in dealing with appeals and reviews that are without or lacking reasons or sufficient reasons for decision. The applicants as well as the respondents are entitled to the trial judge's reasons for decision. Having the right to appeal against or review of a decision of the National Court necessarily comes with it, the right to be informed orally or in writing, the reasons for decision. A pronouncement by the court falling short of given reasons will inevitably lead to a conclusion that the court or a decision making authority has no good reason for the decision made. That itself may be a ground to uphold the appeal or review because of error of law or denial of natural justice: *Mission Asiki v Manasupe Zurenoc and the State.*

...

[14.] With respect, where the trial judge undertakes to publish his reasons, the judgment ought to be made available to the parties at the end of the proceeding or soon thereafter. The parties are

entitled to it, more so for the parties in an appeal or judicial review application. The written reasons for decision will assist them to consider whether to proceed with or to defend the appeal or review. It will also assist the Appellate Court when it deliberates the grounds of appeal or review. So, the reasons for decision whether oral or published are an integral part of the appeal and review process. Besides, providing the published reasons is essential for completion and completeness of the decision making process by a public official."
Amet v Yama [2010] PGSC 46; SC 1064

8.1 The Supreme Court Act With Commentary

INDEPENDENT STATE OF PAPUA NEW GUINEA.

Chapter 37.

Supreme Court Act **1975**.

ARRANGEMENT OF SECTIONS.

38. Seal of the Court.
39. Registrar and Officers.
40. Powers of the Registrar.
41. Rules of Court.
42. Practice and Procedure.

INDEPENDENT STATE OF PAPUA NEW GUINEA.

AN ACT

entitled

***Supreme Court Act* 1975,**

Being an Act to implement Subdivision VI.5.C (the Supreme Court of Justice) of the Constitution by making further provision in relation to the Supreme Court of Justice.

PART I. – PRELIMINARY.

1. INTERPRETATION.

(1) In this Act, unless the contrary intention appears–

"appeal" includes the reservation of a case, a point in a case or a question of law for the consideration of the Supreme Court under Section 15 or 21;
"appellant" includes a person who wishes to appeal under this Act;
"charge" includes an indictment and an information;
"defendant" includes a person against whom relief is sought in a matter or who is required to attend the proceeding in a matter as a party to the proceedings and, in relation to a criminal proceeding, includes the accused person;
"Judge" means a Judge of the Supreme Court;
"judgement" includes a finding, decree, order, rule, conviction, verdict and sentence, a decree, order or rule nisi, and a refusal to make a finding, decree, order or rule;
"matter" or "proceeding" includes any proceedings in the Supreme Court or the National Court whether or not between parties, and also any incidental proceedings in any proceedings;
"party" includes, in relation to criminal proceedings, a prosecutor and a defendant;
"plaintiff" includes a person seeking relief against another person by any form of proceedings in the Supreme Court or the National Court and, in relation to criminal proceedings, includes the prosecutor;
"the Registrar" means the Registrar of the Supreme Court;
"the Rules of Court" means the Rules of Court of the Supreme Court.

(2) For the purposes of this Act, where a person is acquitted on the ground of unsoundness of mind which was not set up by him, he shall be deemed to have been convicted, and any order to keep him in custody shall be deemed to be a sentence.

PART II. – THE SUPREME COURT.

2. JUDGE SITTING ON APPEAL FROM HIS OWN JUDGEMENT.

(1) Subject to Subsection (2), a Judge shall not sit as a member of the Supreme Court if he has previously adjudicated (whether on appeal or otherwise) on the merits of the case.

(2) A Judge is not precluded from sitting as a member of the Supreme Court in cases where he has given an interlocutory judgement only, or any other judgement not going to the merits of the case.

3. CONTINUATION OF APPEAL NOTWITHSTANDING ABSENCE OF JUDGE.

(1) Where in the course of an appeal before the Supreme Court and at any time before the delivery of the judgement, a Judge hearing the appeal is unable, through illness or any other cause, to attend the proceedings or otherwise to exercise his functions as a Judge–

(*a*) the hearing of the appeal shall, subject to Subsection (2), continue; and
(*b*) the judgement shall be given by the remaining Judges; and
(*c*) the Court shall be deemed to be duly constituted.

(2) Where–

(*a*) either party does not agree to the remaining Judges continuing to hear the appeal; or
(*b*) in any case, there is only one Judge remaining able to hear the appeal,

the appeal shall be reheard.

Commentary:

Section 3 Where a 7 judge bench delivered a decision in which the parties subsequently applied for further questions to be answered, on the second hearing the court was constituted by the same bench with another judge **replacing a judge who had retired** in the interval: *SCR No.3 of 2000; Re Sitting Days of Parliament and Regulatory Powers of Parliament* (2002) SC722.

A party seeking to **disqualify a judge** from sitting should not write to the Chief Justice or the Judge. The application should be made in open court in a transparent manner by motion supported by affidavits. A lawyer's first duty is to the court and it is no excuse for a breach of this rule of practice that the lawyer was acting on his client's instructions. A prior relationship as lawyer and client does not generally disqualify the lawyer on becoming a judge, from determining a matter involving a former client: *Peter Yama and others v Bank South Pacific Ltd & anor; Smugglers Inn & Anor v Christopher Burt & ors* (2008) SC921, Sakora, Gabi and Hartshorn J. J.

PART III. – APPEALS TO THE SUPREME COURT.

Division 1.

General.

4. RIGHT OF APPEAL FROM NATIONAL COURT.

(1) An appeal in accordance with this Act lies to the Supreme Court from a judgement of the National Court.

(2) An appeal lies in any civil or criminal proceedings, to the Supreme Court from a Judge of the National Court sitting on appeal–

(*a*) on a question of law; or
(*b*) on a question of mixed fact and law; or
(*c*) with the leave of the Supreme Court, on a question of fact.

Commentary:

Section 4 (2) (b) & (c) Leave is required to argue any question of fact: *Opai Kunangel v State* [1985] PNGLR 144 (overruled on other grounds by *Yakham v Merriam* [1998] PNGLR 555. As to what are questions of law, mixed fact and law or questions of fact alone, see: *Dillingham Corporation of New Guinea Pty Ltd v Constantino Alfredo Diaz* [1975] PNGLR 262 at 269 and *Sidi Adevu v MVIT* [1994] PNGLR 57. And see commentary to s14.

5. INCIDENTAL DIRECTIONS AND INTERIM ORDERS.

(1) Where an appeal is pending before the Supreme Court–

(*a*) a direction not involving the decision on the appeal; or
(*b*) an interim order to prevent prejudice to the claims of the parties; or
(*c*) an order in any proceedings (other than criminal proceedings) for security for costs; or
(*d*) an order dismissing an appeal in any proceedings (other than criminal proceedings) for default in furnishing security; or
(*e*) an order admitting an appellant to bail,

may be made by a Judge.

(2) A direction or order made under Subsection (1) shall be deemed to be a direction or order of the Supreme Court.

(3) A direction or order made under Subsection (1) may be discharged or varied by the Supreme Court.

Commentary:

Section 5. This section does not give a single judge power to order that additional evidence be admitted on the appeal or to make any order which changes the fact situation to be brought

before the Supreme Court: *Wau Ecology Institute v Registrar of Companies*(2005) SC794. An order will not be made restraining a future event which the applicant would have no right to prevent: *Lupari v Somare* (2008) SC951. The considerations on granting a stay see section 19.

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6. APPEAL TO BE BY WAY OF REHEARING.

(1) An appeal to the Supreme Court shall be by way of rehearing on the evidence given in the court the decision of which is appealed against, subject to the right of the Supreme Court–

(*a*) to allow fresh evidence to be adduced where it is satisfied that the justice of the case warrants it; and
(*b*) to draw inferences of fact.

(2) For the purposes of hearing and determining an appeal, the Supreme Court has all the powers, authority and jurisdiction of a Judge exercising the jurisdiction of the National Court.

Commentary:

Section 6. Evidence can be admitted as 'fresh' if it has become available since the trial or has come to the knowledge of the party applying since the trial and could not by reasonable means have come to his knowledge before that time: *Abiari v State* [1990] PNGLR 250. Evidence can be admitted as 'fresh' if it is 'fresh' in the judicial sense and it is relevant, admissible according to the rules of evidence and by it a reasonable man would be given cause to doubt: *John Peng v* [1982] PNGLR 331. A single judge may not admit fresh evidence in an appeal: *Wau Ecology Institute & Ors v Registrar of Companies & Ors*(2005) SC794. Hearsay evidence will not be admitted. Evidence is not fresh simply because a party's new lawyer failed to enquire with the previous lawyer concerning an important document: SC817 (2005) *John Bokin & Ors v The State & 2 Ors.* Where evidence is admitted with leave, there is a right by the opposing party to call rebutting evidence: *Ted Abiari v The State (No. 2)* [1990] PNGLR 432.

Section 6(2) The Supreme Court may substitute a finding on evidence before the trial judge: *John Etape v MVIT* [1994] PNGLR 596. The court can revisit the evidence before the trial judge and make findings of fact which may or may not be the same as those by the trial judge where a trial judge has misconstrued the evidence, has put lesser or greater emphasis on evidence or has overlooked evidence: *Titus Makalminja v The State* (2004) SC 726.

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7. JUDGEMENTS OF THE SUPREME COURT.

(1) Subject to Subsection (2), a judgement of the Supreme Court shall be in accordance with the opinion of the majority of the Judges present.

(2) If in an appeal the opinions of the Judges are divided in such a way that there is no majority opinion, the judgement appealed against stands.

Commentary:

Section 7 Slip Rule Applications. The court should only consider such applications where there has been a mistake which could be said to be little short of extraordinary and which affects an unsuccessful party. The public interest in the finality of litigation must preclude all but the clearest slip error as a ground to reopen: *Wallbank v Papua and New Guinea* [1994] PNGLR 78 at 101 and 103. Principles adopted in *The Election Of Governor General (No.3)* (2004) SC 752 at pp 17-18: (1) there is a substantial interest in the finality of litigation; (2) on the other hand any injustice should be corrected; (3) the court must have proceeded on a misapprehension of the fact or law; (4) the misapprehension must not be of the applicants making; (5) the purpose is not to allow rehashing of arguments already raised; (6) the purpose is not to allow new arguments that could have been put to the court below. The Court has an inherent jurisdiction to correct an error in its own order: *Dick Mune v Paul Poto* (1996) SC508. And see a survey of the history of the slip rule and examination of the principles in *James Marabe v Tom Tomape (No.2)* (2007) SC856 at [46-85] where the court held that, in addition to the establish principles, it must be satisfied that it made a clear and manifest, not an arguable, error of law or fact, on a critical issue, before setting aside its previous decision (at [84]). A slip rule application is to correct a glaring error or mistake in a judgment or order of the Court. Such a mistake would be either clerical, an accidental omission in a judgment or order or would be a misapprehension of fact or law. The application cannot be made under Constitution section 155 (2) (b). The application must be made before the same judge or judges who heard or determined the review or appeal. The very nature of a slip rule application precludes the necessity for leave.: *Trawen v Kama* (2010) SC 1063, [2010] PGSC 15.

A judgement of the Supreme Court which alters the status of the law affects all matters and cases not finalised at the date of the decision: JA Construction v Wanega [2010] PGSC 24; SC 1069.

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8. SUPPLEMENTAL POWERS OF SUPREME COURT.

(1) For the purposes of this Act, the Supreme Court may, if it thinks it necessary or expedient in the interests of justice to do so–

(*a*) order the production of any document, exhibit or other thing connected with the proceedings the production of which appears to it necessary for the determination of the case; and
(*b*) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether or not they were called at the trial, or order any such person to be examined on oath before–

(i) a Judge of the National Court; or
(ii) an officer of the Supreme Court; or
(iii) a magistrate of a court of summary jurisdiction; or
(iv) any other person appointed by the Court for the purpose,

and may admit as evidence any deposition so taken; and

(*c*) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant consents, of the husband or wife of the appellant in cases where the evidence of the husband or wife could not have been given at the trial except with that consent; and
(*d*) where any question arising on the appeal involves prolonged examination of documents or accounts or any scientific or local investigation that cannot, in the opinion of the Court, conveniently be conducted before the Court–order the reference of the question for inquiry and report, in accordance with Part IV., by a referee appointed by the Court and act on the report of the referee so far as it thinks fit to adopt it; and
(*e*) exercise in relation to the proceedings of the Court any other powers that may for the time being be exercised by the National Court on appeals or applications; and
(*f*) issue any warrants necessary for enforcing the orders or sentences of the Court.

(2) The Supreme Court shall not increase a sentence in a criminal proceeding by reason of, or in consideration of, any evidence given under Subsection (1).

Commentary:

Section 8(1) Gives the court an independent discretion to admit evidence which is not fresh if it thinks it necessary or expedient in the interests of justice to do so: *Abiari v State* [1990] PNGLR 331; overruled by *Kuri v The State (No. 2)* (1991) SC 414 [1991] PGSC 3, a five judge bench, which held that section 8 is a machinery provision, not additional jurisdiction, and the evidence must comply with the requirements of Section 6.

Section 8 (1) (e) The powers of the National Court under *National Court Rules* O 22 in relation to costs may be exercised by the Supreme Court pursuant to this provision: *Don Polye v Jimpson Sauk Papaki & ors* [2000] PNGLR 166 . Followed in *Public Curator v Bank of South Pacific Ltd* (2006) SC 832 and *William Moses v Otto Benal Magiten*(2006) SC875. An intervenor who successfully applies to strike out an application under s19 of the *Constitution* is entitled to its costs: *In the matter of s19 of the Constitution: Ruling on Costs* (2007) SC218. Costs on a solicitor client basis may be awarded even if not sought in the first instance, if the conduct of the other party warrants such an order: *PNG Aviation Services Pty Ltd. V Karri* [2009] PGSC 24; SC1002. Now see the Supreme Court Costs Rules Order 13.

9. ATTENDANCE OF APPELLANT IN CUSTODY.

Except with the consent of the appellant, the hearing of an appeal to the Supreme Court shall not take place in the absence in custody of the appellant unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the Court orders him to be removed and the hearing of the appeal to continue in his absence.

Commentary:

Section 9 Where the appellants had specifically instructed their lawyer that they wished to be present at the appeal and the appellants were not in court, the matter should be adjourned to enable the appellants to be in court: *Kambere Yao and anor v The State* (1990) SC 380.

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10. POWERS THAT MAY BE EXERCISED BY JUDGE.

(1) Any power of the Supreme Court under this or any other Act–

(*a*) to give leave to appeal; or
(*b*) to extend the time within which notice of appeal or of an application for leave to appeal may be given; or
(*c*) to admit an appellant to bail,

may be exercised by a Judge in the same manner as it may be exercised by the Court.

10 (2) Where a Judge refuses an application in relation to a matter specified in Subsection (1), the appellant may apply to the Supreme Court to have the matter determined by that Court.

Commentary:

Section 10(1)(a) See the commentary to O7 r4 on leave applications. This subsection is a source of jurisdiction for a single judge of the Supreme Court if the Supreme Court has jurisdiction under the Supreme Court Act or another Act in accordance with the opening words of the section: *Felix Bakani v Rodney Dapto* (2002) SC699. For considerations on granting a stay see section 19.

Section 10 (2) where a single judge refuses an application, the application to the Court under this subsection is not an appeal, it is a fresh application, which must be made within the same 40 days after the decision from which the appeal is brought: *Felix Bakani v Rodney Daipo* (2002) SC 699. The application should not be one to reinstate or set aside the previously refused application: *The Independent State of Papua New Guinea v John Tuap* (2004) SC 765. This

section does not give the respondent on a successful application for leave to appeal a right to go to the full bench: *Powi V Southern Highlands Provincial Government* (2006) SC 844, [2006] PGSC 15. Followed and applied in *ToRobert v ToRobert* (2011) SC1130.

11. FRIVOLOUS OR VEXATIOUS APPEALS.

(1) Notwithstanding this Act, where the Registrar is of the opinion that a notice of appeal, or a notice of an application for leave to appeal, does not show any substantial ground of appeal, the Registrar may refer the appeal to the Supreme Court for summary determination.

(2) Where the Registrar refers a notice of appeal, or notice of an application for leave to appeal, to the Supreme Court under Subsection (1), and the Court is satisfied that the appeal–

(*a*) is frivolous or vexatious; and
(*b*) can be determined without a full hearing,

it may, notwithstanding anything in this Act or any other law, dismiss the appeal summarily without calling on any person to attend the hearing.

12. JUDGEMENTS BY LESS THAN THE FULL NUMBER OF JUDGES.

(1) When any cause or matter, after being fully heard before the Supreme Court, is ordered to stand for judgement, it is not necessary that all the Judges before whom it was heard be present together in Court to declare their opinions on it, but the opinion of any of them–

(*a*) may be reduced to writing; and
(*b*) may be read or handed down to the parties or their counsel by any other Judge at any subsequent sitting of the Supreme Court at which judgement in the cause or matter is appointed to be delivered.

(2) In a case referred to in Subsection (1), the question shall be decided in the same manner, and the judgement of the Court has the same force and effect, as if the Judge whose opinion is so read or handed down had been present in Court and had declared his opinion in person.

Division 2.

Additional Provisions Relating to Appeals in Civil Cases.

13. APPLICATION OF DIVISION 2.

This Division applies to and in relation to proceedings other than criminal proceedings.

14. CIVIL APPEALS TO THE SUPREME COURT.

(1) Subject to this section, an appeal lies to the Supreme Court from the National Court–

(*a*) on a question of law; or
(*b*) on a question of mixed fact and law; or
(*c*) with the leave of the Supreme Court, on a question of fact.

Commentary:

Section 14(1)(c) Question of fact. On this question Lord Denning said:

"On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself, such as an original document. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If and in so far as those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact and the only questions of law which can arise on them are whether there was a proper direction in point of law and whether the conclusion is one which could reasonably be drawn from the primary facts".

See *British Launderers' Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority* (1949) 1 All E.R. 2111 at pp. 25 and 26. This same passage was referred to by the then Deputy Chief Justice, Prentice, in the case of *Dillingham Corporation of New Guinea Pty. Ltd. v. Constantino Alfredo Diaz* (1975) P.N.G.L.R. 262 at p.270 and Kapi DCJ in *Wahgi Savings & Loan Society Limited v Bank of South Pacific Limited* (1980) SC185. Where leave has not been obtained a ground of appeal challenging a finding of fact is incompetent: *Haiveta v Wingti (No.2)* [1994] PNGLR 189. Where grounds of appeal involve questions of fact a Form 7 Application for Leave to Appeal must be filed in respect of those grounds and a Form 8 notice of appeal filed for those grounds involving questions of law or mixed fact and law. A notice of appeal should not contain questions of fact before leave is obtained : *Yakham v Merriam* [1998] 555.

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(2) An appeal does not lie from an order of the National Court made by consent of the parties.

S14 (3) No appeal lies to the Supreme Court without leave of the Supreme Court–

(*a*) from an order allowing an extension of time for appealing or applying for leave to appeal; or
(*b*) from an interlocutory judgement made or given by the National Court except–

(i) where the liberty of the subject or the custody of infants is concerned; or

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Commentary:

Section 14(3)(a) This section does not grant a right of appeal it only applies a condition where a right of appeal exists: *ToRobert v ToRobert* (2011) SC1130.

Section 14 (3) (b) See notes to the *Supreme Court Rules* O7 r4 for notes on leave applications. The cases are not entirely consistent on the meaning of "*interlocutory judgment".* One line of authority has held that the test is to look at the nature of the application from which the ruling or judgment arises, the leading case being *Shelley v PNG Aviation Services Pty Ltd* [1979] PNGLR 119. Another line of authority holds that the test is, what is the effect of the order made, does it finally determine the issue between the parties? If it does the order is not interlocutory. The leading case for that proposition is *Provincial Government of North Solomons v Pacific Architecture Pty Ltd* [1992] PNGLR 145, followed, for example, in *Philip Takori & ors v Simon Yagari & ors* (2007) SC 905. Some subsequent cases have simply applied both tests (see for example *National Capital District Commission v PNG Waterboard Ltd & ors*) (1999) SC624, but as is pointed out in *Oi Aba v MVIL* (2005) SC779 applying both tests can sometimes lead to opposite results. *Oi Aba v MVIL (supra)* doubts that *Shelley v PNG Aviation Services Pty Ltd (supra)* is still good law. Summary judgment for damages to be assessed is an interlocutory judgment: *Merriam v The State* [2000] PNGLR 10 , *NCDC v Namo Trading Ltd; NCD Water and Sewerage Ltd v Sam Tasion* (2002) SC 696; *cf. Ruma Construction Pty Ltd v Christopher Smith* [1999] PNGLR 201. There is some discussion as to whether the decision in *Ruma Construction Pty Ltd v Christopher Smith (supra)* should be confined to its own facts, in *Alfred Allen Daniel v Pak Domoi Ltd (infra).* An order dismissing an action for want of prosecution is not an interlocutory order, nor is an ex parte order for default judgment, neither requiring leave to appeal: *National Capital District Commission v PNG Water Ltd & JCK RTA Consulting Group (PNG) Ltd* (1999) SC 624. Where part of a claim was finally disposed of by declaratory orders and the other part of the claim was subject to an order for assessment of damages no leave was required to appeal from the declaratory orders but leave was required to appeal from the interlocutory judgment for damages to be assessed: *Alfred Alan Daniel v Pak Domoi Ltd* (2004) SC 736.

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(ii) in cases of granting or refusing an injunction or appointing a receiver; or

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Commentary:

A stay order is not an injunctive order for purposes of section **14 (3) (b) (ii**) of the *Supreme Court Act* and leave is required: *Vincent Kaupa and anor v Simon Puraituk and anor* [2008] PGSC 37; (2008) SC955. An interlocutory decision of the National Court **refusing** to set aside an order that granted an injunction falls within s. 14 (3) (b) (ii), leave is not required: *Ramu Nico Management (MCC) Ltd v Tarsie* [2010] PGSC 5; SC1056 (9 June 2010):

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(iii) in such other cases prescribed by the Rules of Court as are in the nature of final decisions; or

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Commentary:

Section 14 (3) (b) (iii) can have no application until rules of Court are made: *Oi Aba v MVIL (supra).*

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(*c*) from an order of the National Court as to costs only that by law are left to the discretion of the National Court.

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Commentary:

Section 14(3)(c) Leave to appeal against a costs order is not necessary in an appeal against a judgment in which judgment for costs is incidental or consequential to the main judgment: *National Capital Ltd v Port Moresby Stock Exchange* [2010] PGSC 6; SC1053 (21 May 2010).

(4) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory judgement.

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Commentary:

Section 14 (4) An order granting conditional leave to defend is an order refusing unconditional leave to defend: *The State v John Talu Tekwie* (2006) SC843.

15. CASES OR POINTS OF LAW RESERVED FOR SUPREME COURT.

(1) A Judge or Judges of the National Court sitting in the exercise of any jurisdiction other than criminal jurisdiction–

(*a*) may reserve any case or any point in a case for the consideration of the Supreme Court; or
(*b*) may direct any case or point in a case to be argued before the Supreme Court,

and the Supreme Court may hear and determine any such case or point so reserved or directed to be argued.

(2) Except where the contrary intention expressly appears in a law, the powers conferred by Subsection (1) may be exercised in relation to any appeal or matter that comes before a Judge or the National Court under any law by which a Judge or that Court is designated as the Judge, Court, arbitrator or person appointed to hear and determine the appeal or matter, notwithstanding that the determination of the Judge or of the Court is expressed to be final or without appeal.

Commentary:

Section 15 (1) (a). The power of a National Court judge to refer a question to the Supreme Court is to be exercised "where the reservation of any point will advance litigation or effectively dispose of the matter": Carter v Korobosea Developments Pty Ltd [1986] PNGLR 157 at 158. *"Where there is an important point of law which is determinative of the application and in which there is a difference of opinion on the point among two or more judges of the National Court, it is highly desirable for reasons which are obvious, that the next judge before whom the same point arises for determination should reserve the point for the Supreme Court*.":Steven Pupune v Ubum Makarai (1998) N1777. The question referred should determine the matter or advance the litigation. A judge considering referring a question to the Supreme Court should first find the facts from which the question arises: *The State v John Rumet Kaputin* [1979] PNGLR 532; *Carter v Korobosea Developments Pty. Ltd* [1986] PNGLR 157. For references under Constitution s18 see Order 4 rule 2. The Supreme Court cannot assume jurisdiction except in cases where there is a clear conflict and the National Court is left with no guidance whatsoever and the Court is left with no option but to make a reference: *Lupari v Somare* (2008) SC930 at [31].

16. DECISION, ETC., ON APPEAL.

On the hearing of an appeal, the Supreme Court shall inquire into the matter and may–

(*a*) adjourn the hearing from time to time; or
(*b*) affirm, reverse or modify the judgement; or
(*c*) give such judgement as ought to have been given in the first instance; or
(*d*) remit the case in whole or in part for further hearing; or
(*e*) order a new trial.

Commentary:

Section 16 (c) The court may give such judgment as ought to have been given in the first instance, although not relief sought on the appeal, if all parties have had full opportunity to be heard before it on the merits of the pleaded cause of action in the National Court: *Papua Club Inc v Nusaum Holdings Ltd* (2005) SC812 followed and applied in *C.L.Toulik & anor v Fincorp Ltd & anor* (2006) SC876. A party is not precluded from **first raising a point of law on appeal**, it is a matter for the discretion of the court, not a right. Special or exceptional circumstances must be established. The court is more disposed to allow a new argument in criminal appeals than in civil appeals: *Papua Club Inc v Nusaum Holdings Ltd* (2006) SC812 at [86-91] *Ltd* and dissenting from that view *"The MVIT v James Pupune [1993] PNGLR 370 line of cases is to be preferred... an appeal court should not determine issues not first raised in the trial court, except with the consent of the parties or with special leave of the court in very exceptional circumstances such as want of jurisdiction"*: *Chief Collector of Taxes v Bougainville Copper Ltd* (2007)SC853. On appeal

the Supreme Court can consider and grant judicial review in the same manner as the National Court: *Mision Asiki v Provincial Administrator & Ors* (2005) SC797.

17. TIME FOR APPEALING UNDER DIVISION 2.

Where a person desires to appeal to or to obtain leave to appeal from the Supreme Court, he shall give notice of appeal, or notice of his application for leave to appeal, as the case may be, in the manner prescribed by the Rules of Court within 40 days after the date of the judgement in question, or within such further period as is allowed by a Judge on application made to him within that period of 40 days.

Commentary:

Section 17 This section operates so as to provide a right of appeal to any person whose interests are affected by, or who is aggrieved by the order of the court and who might have been joined as a party to the proceedings: *Kitogara Holdings Pty. Limited v National Capital District Commission & Ors* [1988-89] PNGLR 346. This includes a person who was not a party to the proceedings in the National Court but whose rights are directly affected by the decision: *SC 798 Yanto & ors v Piu & ors*. Where an appeal is not filed in 40 days there is no power in the Supreme Court to hear such a matter under the *Supreme Court Act*: *Dillingham Corp v Diaz* [1975] PNGLR 262; *Shelley v PNG Aviation Service* [1979] PNGLR 119; *Avia Aihi v The State (No.1)* [1981] PNGLR 281; *Wood v Watking (PNG) Pty Ltd* [1986] PNGLR 88; *State v Colbert* [1988] PNGLR 138; *Jeffrey Balakau v Ombudsman Commission of Papua and New Guinea & Public Prosecutor* [1996] PNGLR 346. Section 17 applies to appeals pursuant to *Supreme Court Rules* Order 10: *Jeffrey Balakau v Ombudsman Commission (supra);* SC625 (1999) *Garamut Enterprises Ltd v Steamships Trading Co Ltd*. The 40 days runs in the vacation period in respect of both a Notice of Appeal and An Application for Leave to Appeal: *New Zealand Insurance Co. Ltd v Chief Collector of Taxes* [1988-89] PNGLR 522. Where the 40th day for appeal falls on a Sunday an appeal filed on the following Monday is filed within time: SC885 (2007) *Tony Kila & Ors v Talibe Hegele & Ors.* Once the Supreme Court has determined an appeal there is no further right of appeal. There is no power in the Supreme Court to grant special leave to appeal after refusing leave to appeal nor to extend the 40 days for appeal outside the 40 days: *Avia Aihi v The State (No.1)* [1981] PNGLR 81, Kidu CJ, Kearney DCJ , Greville-Smith, Andrew and Kapi J. ;*Application by Wili Kili Goiya* [1991] PNGLR 170. Followed and applied in civil proceedings in SC812 (2005) *PNG Water Board v Gabriel Kama & Ors.* Entry of judgment is not a precondition to a right of appeal and failure to enter judgment does not affect the running of time under s17: *Wood v Watking (PNG) Pty Ltd* [1986] PNGLR 88. For amendment of a notice of appeal see notes on *Supreme Court Rules* Order 7 rule 24 and Order 11 rule 11.

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18. SECURITY FOR APPEAL.

(1) The Supreme Court or a Judge may, in special circumstances, order that just security be given for the costs of an appeal or an application for leave to appeal and, if an application is granted, for the prosecution of the appeal.

(2) If any security ordered under Subsection (1) is not given in accordance with the order, the appeal, or the application for leave to appeal, as the case may be, shall be deemed to have been abandoned.

19. STAY OF PROCEEDINGS ON APPEAL.

Unless otherwise ordered by the Supreme Court or a Judge, an appeal, or an application for leave to appeal, to the Supreme Court does not operate as a stay of proceedings.

Commentary:

Section 19. A single judge does not have power to order costs on a stay application: *PNG Pipes Ltd v Mujo Sefa* [1998] PNGLR 551. The section cannot be used to obtain a stay of an order voiding an election under the *Organic Law on Provincial and Local Level Government Elections*: *Jimson Sauk Papaki v Don Pom Polye* [1999] PNGLR 1. A stay cannot be obtained against an order for costs where there is no specific appeal against the order for costs: *National Capital Ltd v Port Moresby Stock Exchange* [2010] PGSC 6; SC1053 (21 May 2010) *We start with the principal premise that the judgment creditor is entitled to the benefits of the judgment. The others factors include the following:• Whether leave to appeal is required and whether it has been obtained;• Whether there has been any delay in making the application;• Possible hardship, inconvenience or prejudice to either party;• The nature of the judgement sought to be stayed;• The financial ability of the applicant;• Preliminary assessment about whether the applicant has an arguable case on the proposed appeal;• Whether on the face of the record of the judgment there may be indicated apparent error of law or procedure;• The overall interest of justice;• Balance of convenience;• Whether damages would be sufficient remedy. "McHardy v Prosec Communication Pty Ltd* [2000] PGSC 22; SC646 (30 June 2000); an application to set aside a stay order should be made within a reasonable time and any application to the Supreme Court should clearly show the basis of seeking the jurisdiction of the court: *Kalinoe v Paraka* [2010] PGSC 13; SC 1024.

Division 3.

Additional Provisions Relating to Appeals in Criminal Cases.

20. APPLICATION OF DIVISION 3.

This Division applies to and in relation to criminal proceedings.

21. RESERVATION OF POINTS OF LAW.

(1) When any person is indicted, the National Court shall, on the application of counsel for the accused person made before verdict, and may in its discretion, before or after verdict without such application, reserve any question of law that arises on the trial for the consideration of the Supreme Court.

(2) If the accused person is convicted, and a question of law has been reserved under Subsection (1) before judgement, the National Court may–

(*a*) pronounce judgement on the conviction and respite execution of the judgement; or
(*b*) postpone the judgement until the question has been considered and decided,

and may–

(*c*) commit the person convicted to prison; or
(*d*) admit him to bail on recognizance, with or without sureties, and in such sum as the Court thinks proper, conditioned to appear at such time and place as the Judge directs, and to render himself in execution, or to receive judgement, as the case may be.

(3) The National Court shall state, in the case signed by the Judge or Judges exercising the jurisdiction of the Court, the question of law reserved under Subsection (1), with the special circumstances on which it arose, and the case shall be transmitted to the Supreme Court.

(4) Any question reserved under Subsection (1) shall be heard and determined by the Supreme Court.

(5) Any question reserved under Subsection (1) shall be heard and determined after argument by and on behalf of the prosecution, and of the accused or convicted person or persons, if they desire that the question shall be argued, and the Supreme Court may–

(*a*) affirm the judgement given at the trial; or
(*b*) set aside the verdict and judgement and order a verdict of not guilty or other appropriate verdict to be entered; or
(*c*) arrest the judgement; or
(*d*) amend the judgement; or
(*e*) order a new trial; or
(*f*) make such other order as justice requires,

or the Court may send the case back to be amended or restated.

Commentary:

Section 21 Where a question of law has been referred to the Supreme Court it is not necessary to adjourn the trial pending a decision on the reference: *The State v Tanedo* [1975] PNGLR 395 per Prentice DCJ.

22. CRIMINAL APPEALS.

A person convicted by the National Court may appeal to the Supreme Court–

(*a*) against his conviction, on any ground that involves a question of law alone; and
(*b*) against his conviction, on a question of mixed fact and law; and
(*c*) with the leave of the Supreme Court, or on the certificate of the National Court that it is a fit case for appeal, against his conviction on any ground of appeal–

(i) that involves a question of fact alone; or
(ii) that appears to the Supreme Court to be a sufficient ground of appeal; and

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Commentary:

Section 22 "*on an appeal against conviction, the Supreme Court must be satisfied that there is in all the circumstances a reasonable doubt as to the safeness or satisfactoriness of the verdict before the appeal can be allowed*.": *John Beng v The State* [1977] PNGLR 115. The same principle applies on appeal by the Public Prosecutor again sentence*: A/Public Prosecutor v Konis Haha* [1981] PNGLR 205, Kidu CJ, Andrew, Kapi, Pratt, and Miles J. J. A person wishing to appeal on questions of fact must seek leave*: Opai Kunungel v The State* [1985] PNGLR 144. As to what is a question of fact see commentary to s14. A person wishing to appeal against sentence must seek leave to appeal: *Jim Kas v The State* (1999) SC772. This is the effect of the reasons published by Kapi DCJ and Sakora J. The majority, Amet CJ, Los and Woods J. J. held to the contrary but reasons have never been published. A trial judge should (a) identify the elements of the offence and establish whether each element is proven by the evidence; (b) identify discrepancies in the evidence and say if it is considered significant or not and give reasons. Not to do so may be an error of law*: Deklyn David v State* (2006) SC 881. There is no rule that a trial judge must reject all of a witness's evidence because he finds some of it inconsistent. A judge is free to accept some evidence from a witness and reject other parts of the evidence, even if it relates to closely linked events: *Ano Naime Maraga & 2 Ors v The State* [2009] PGSC 5; SC968 (30 April 2009) See also the commentary to section 16 and on amendment of the notice of appeal O11 r11.

(*d*) with the leave of the Supreme Court, against the sentence passed on his conviction, unless the sentence is one fixed by law.

Commentary:

Section 22 (d) was struck down as unconstitutional by the case of *Jim Kas v The State (1999) SC772*, then declared Constitutional and reinstated by the case of *Lionel Gawi v The State*

(2006) SC850 which held that the section regulates, it does not prohibit an appeal, it is sanctioned by s37(16) of the *Constitution*.

23. DETERMINATION OF APPEALS IN ORDINARY CASES.

(1) Subject to Subsection (2), on an appeal against a conviction the Supreme Court shall allow the appeal if it thinks that–

(*a*) the verdict should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
(*b*) the judgement of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
(*c*) there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal.

(2) Notwithstanding that the Supreme Court is of the opinion that the point raised in the appeal might be decided in favour of the appellant, it may dismiss the appeal if it considers that no miscarriage of justice has actually occurred.

(3) If the Supreme Court allows an appeal against conviction, it shall, subject to this Act, quash the conviction and direct a verdict of not guilty be entered.

(4) On an appeal against sentence, if the Supreme Court is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, it shall quash the sentence and pass the other sentence in substitution for it, and in any other case shall dismiss the appeal.

Commentary:

Section 23(4) The effect of section 23 is to confer an unfettered discretion on the Supreme Court to alter the sentence: *Terence Kaveku v The State* [1997] PNGLR 110. On an appeal against sentence the Supreme Court may use its power under this provision either to decrease or increases sentence: *Lawrence Hindemba v The State* (1998) SC 593. The appellant must show that an error occurred which has the effect of vitiating the trial judge's discretion on sentence. The trial judge may have made a mistake as to the facts, acted on a wrong principle of law, taken irrelevant matters into account or not taken relevant matters into account, or given too much or too little weight to a matter he should properly take into account. Even if no identifiable error can be shown, if a sentence is out of all reasonable proportion to the circumstances of the crime the Supreme Court will infer an error must have occurred: *Norris v The State* [1979] PNGLR 605 per Kearney J. at 612-613. Each offender must have the sentence determined by the particular individual circumstances. The trial judge must make an assessment of the degree of participation in the crime. Not to do so may be an error in sentencing: *Ignatius Natu Pomaloh v The State* (2006) SC834.

24. APPEAL BY PUBLIC PROSECUTOR AGAINST SENTENCE.

(1) In this section "sentence" includes any order made on conviction with reference to the person convicted or his property.

(2) The Public Prosecutor may appeal to the Supreme Court against any decision of the National Court, whether on appeal or sitting as a court of first instance, as to sentence, and the Supreme Court may in its discretion vary the sentence and impose such sentence as it thinks proper

25. APPEAL AGAINST QUASHING OF CONVICTION.

Where the National Court has given a judgement quashing a conviction, or any count or part of a charge, the Public Prosecutor may appeal to the Supreme Court against the judgement, and the Supreme Court may–

(*a*) determine the appeal; and
(*b*) if the appeal is sustained make such order for the prosecution of the trial as it thinks necessary or desirable.

26. REFERENCE OF POINT OF LAW FOLLOWING ACQUITTAL ON INDICTMENT.

(1) Where a person tried on indictment has been acquitted whether in respect of the whole or part of the indictment and the Attorney-General desires the opinion of the Supreme Court on a point of law that has arisen in the case–

(*a*) the Attorney-General may, within 40 days after the acquittal, refer the point to the Supreme Court; and
(*b*) the Court shall, in accordance with this section, consider the point and give its opinion on it.

(2) For the purpose of its consideration of a point referred to it under this section, the Supreme Court shall hear argument–

(*a*) by, or by counsel on behalf of, the Attorney-General; and
(*b*) if the acquitted person desires to present any argument to the Court, by counsel on his behalf or, with the leave of the Court, by the acquitted person himself; and
(*c*) by, or by counsel on behalf of–

(i) the Public Prosecutor; and
(ii) the State Solicitor,

or either of them, if they desire to present any argument to the Court.

(3) No report of proceedings under this section shall be published that discloses the name or identity of any person charged at the trial or affected by the decision given at the trial.

(4) Any publication in contravention of Subsection (3) is punishable as contempt of the Supreme Court.

(5) A reference under this section does not affect the trial in relation to which the reference is made or any acquittal in that trial.

27. POWERS OF SUPREME COURT IN SPECIAL CASES.

(1) If it appears to the Supreme Court that an appellant, though not properly convicted on some charge, or on some count or part of the charge, has been properly convicted on some other charge, or on some other count or part of the charge, the Court may–

(*a*) affirm the sentence passed on the appellant; or
(*b*) pass such sentence in substitution for it as it thinks proper and is warranted in law by the verdict on the charge or on the count or part of the charge, on which the Court considers that the appellant has been properly convicted.

Commentary:

Section 27. There is no power in the Supreme Court to grant special leave to appeal after refusing leave to appeal nor to extend the 40 days for appeal by application made outside the 40 days: *Avia Aihi v The State (No.1)* [1981] PNGLR 81, Kidu CJ, Kearney DCJ , Greville-Smith, Andrew and Kapi J. ;*Application by Wili Kili Goiya* [1991] PNGLR 170. See also the commentary to sections 17 and 29.

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(2) Where an appellant has been convicted of an offence and he could on the charge have been found guilty of some other offence, and the Supreme Court is satisfied as to facts that proved him guilty of that other offence, instead of allowing or dismissing the appeal the Court may–

(*a*) substitute for the verdict a verdict of guilty of the other offence; and
(*b*) pass such sentence in substitution for the sentence passed at the trial as is proper and as is warranted in law for that other offence, not being a sentence of greater severity.

(3) If on appeal it appears to the Supreme Court that although the appellant committed the act or made the omission charged against him he was not of sound mind at the time when the act or omission alleged to constitute the offence occurred, so as not to be responsible for it according to law, the Court may–

(*a*) quash the judgement given at the trial; and
(*b*) order the appellant to be kept in strict custody in the same manner as if that fact had been found under Section 592 of the Criminal Code 1974.

28. NEW TRIAL.

(1) If on an appeal against conviction, the Supreme Court thinks that–

(*a*) a miscarriage of justice has occurred; and
(*b*) having regard to all the circumstances, the miscarriage of justice can be more adequately remedied by an order for a new trial rather than by any other order that the Court has power to make,

the Court may, of its own motion or on the application of the appellant, order a new trial in such manner as it thinks proper.

(2) Where a new trial is ordered, the Supreme Court may make such order as it thinks proper for the safe custody of the appellant or for admitting him to bail.

Commentary:

Section 28. It is quite clearly established in this jurisdiction that where a trial judge has erred procedurally or has made procedural irregularities in the conduct of the trial, the appellate court has ordered that a new trial be conducted: *Charles Bongapa Ombusu v The State (No.2)* [1997]

PNGLR 699 Amet CJ, Kapi DCJ, Los, Injia and Sawong J. J. Where the trial judge intervenes excessively into the evidence called the appeal against the conviction should be allowed and a new trial ordered: *Gibson Gunure Ohizave v The State* (1998) SC 595, Los Sheehan and Akuram J. J. where the trial Judge failed to address himself to the defendant's evidence that he had lost his memory and that therefore the trial judge had not heard his side of the story, and where on a retrial, there seems little prospect of a conviction, the appeal should be allowed and the accused acquitted, rather than order a retrial: *Himson Mulas v R* [1969-70] PNGLR 82. Where the trial Judge failed to note on the plea that the depositions, and the offender on his allocutus, raised self defence, the appeal should be allowed and a new trial ordered: *The State v Kai Joip Dipa* (2007) SC 868. Where the trial judge allows the whole of the evidence to be tendered by depositions with no oral evidence, including evidence on the contentious issues, he falls into error, the conviction should be set aside and a new trial ordered: *Fred Bukoya v The State* (2007) SC887

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29. TIME FOR APPEALING UNDER DIVISION 3.

(1) Subject to Subsection (2), where a person convicted desires to appeal or to obtain leave to appeal to the Supreme Court, he shall give notice of appeal, or notice of his application for leave to appeal, as the case may be, in the manner prescribed by the Rules of Court within 40 days after the date of conviction.

(2) The time within which notice of appeal, or notice of an application for leave to appeal, may be given may be extended at any time by the Supreme Court on application made within 40 days after the date of conviction.

(3) In the case of a conviction involving a sentence of death or of corporal punishment–

(*a*) the sentence shall not be carried out until after the expiration of 40 days, or such further time as is allowed under this section, after the date of conviction; and
(*b*) if notice is given in accordance with Subsection (1), the sentence shall not be carried out until after the determination of the appeal, or where an application for leave to appeal is finally refused, of the application.

Commentary:

Section 29. In criminal proceedings the sentence is part of the conviction, "date of conviction means" conviction and sentence. The 40 days runs from the date on which sentence is imposed: *Mark Bob v The State* (2005) SC808 at [24]. See also the commentary to sections 17 and 27.

30. SUSPENSION OF ORDER FOR RESTORATION OF PAYMENT OF COMPENSATION OR EXPENSES.

(1) The operation–

(*a*) of any order made on conviction by the court of first instance or by the National Court on appeal for–

(i) the payment of compensation or of any of the expenses of the prosecution; or
(ii) the restoration of any property to any person; and

(*b*) of any provision of any law re-vesting, in the case of any such conviction, in the original owner or his personal representative the property in stolen goods,

is (unless the court of first instance or the National Court directs to the contrary in any case in which in its opinion the title to the property is not in dispute) suspended–

(*c*) in any case until the expiration of 40 days after the date of the conviction, or where the Supreme Court or a Judge allows, under Section 29(2), a further period for giving notice of appeal, or notice of an application for leave to appeal, until the expiration of the further period; and
(*d*) where notice of appeal, or notice of an application for leave to appeal, is given in accordance with this Act, until the determination of the appeal or where an application for leave to appeal is finally refused, of the application.

(2) Where the operation of an order or provision is suspended under Subsection (1), the order or provision does not take effect as to the property in question if the conviction is quashed on appeal.

(3) Where the operation of an order or provision is suspended under Subsection (1), the Supreme Court or a Judge may give such directions as it or he thinks proper for the custody, during the suspension, of any property or goods involved.

(4) The Supreme Court may, by order, annul or vary an order made for–

(*a*) the payment of compensation or of any of the expenses of the prosecution; or
(*b*) the restoration of any property to any person even if the conviction is not quashed,

and the order, if annulled does not take effect, and if varied takes effect as so varied.

(5) In Subsection (4), "order" includes direction referred to in Subsection (1).

31. COSTS OF APPEAL.

(1) On the hearing and determination of an appeal, no costs shall be allowed to either side.

(2) The expenses–

(*a*) of any witness attending on the order of the Supreme Court or examined in any proceedings incidental to the appeal; and
(*b*) of the appearance of an appellant, when in custody, on the hearing of his appeal or on

any proceedings preliminary or incidental to the appeal; and
(*c*) of and incidental to–

(i) any examination of witnesses conducted by any person appointed by the Court for the purpose; or
(ii) any reference of a question to a referee appointed by the Court under Section 8(1)(d),
shall be paid out of the Consolidated Revenue Fund to an amount allowed by the Court, subject to any provision as to rates and scales of payment made by the Rules of Court.

32. DUTIES OF REGISTRAR WITH RESPECT TO NOTICES OF APPEAL, ETC., IN CRIMINAL PROCEEDINGS.

(1) The Registrar shall furnish the necessary forms and instructions in relation to notices of appeal, or notices of application for leave to appeal, under this Act in criminal proceedings to–

(*a*) any person who asks for them; and
(*b*) officers of courts; and
(*c*) officers in charge of correctional institutions, rural lock-ups and police lock-ups; and
(*d*) other officers or persons as he thinks fit.

(2) The officer in charge of a corrective institution, rural lock-up or police lock-up shall cause–

(*a*) the forms and instructions referred to in Subsection (1) to be placed at the disposal of detainees desiring to appeal or to make any application under this Act; and
(*b*) any such notice given by a detainee in his custody to be forwarded on behalf of the detainee to the Registrar.

PART IV. – REFEREES.

33. POWERS AND REMUNERATION OF REFEREES.

(1) Where a reference is made under Section 8(1)(d), the referee–

(*a*) subject to the Rules of Court, has such authority and shall conduct the reference in such manner as the Supreme Court directs; and
(*b*) shall be deemed, for the purpose of the conduct of the reference to be an officer of the Supreme Court.

(2) The report of a referee shall, unless set aside by the Supreme Court, be deemed to be a finding of fact.

(3) Referees shall be paid such fees and expenses as are prescribed by the Rules of Court.

34. DIRECTIONS BY SUPREME COURT.

A referee may seek the directions of the Supreme Court, and shall comply with any such directions whether or not sought by him.

35. POWER OF SUPREME COURT TO IMPOSE TERMS AS TO COSTS, ETC.

Where an order is made under Section 8(1)(d) in any proceedings (other than criminal proceedings), the Supreme Court may impose such terms as to costs or otherwise as the Court thinks proper.

Commmentary:

Section 35 See cases to section 8(1)(e). The court expressed the view in the case of *Don Pomb Pullie Polye v Jim Sauk Papaki & ors* [2000] PNGLR 166 that this section reflects an error in drafting. Where an application is an abuse of process and hopeless and the court is satisfied that costs have been thrown away by counsel for the applicant commencing proceedings improperly the Court may exercise its discretion to order costs against counsel personally: *Don Pomb Polye v Jimson Sauk, Papaki* [2000] PNGLR 166.

PART V.[1] – ADMINISTRATION.

36. PRINCIPAL SEAT OF SUPREME COURT.

[2]The Chief Justice, after consultation with the other Judges, shall determine the Principal Seat of the Supreme Court.

37. SITTINGS AND REGISTRIES OF THE SUPREME COURT.

[3]The Chief Justice, after consultation with the other Judges, shall determine–

(*a*) the place and frequency of sittings of the Supreme Court; and
(*b*) the location and number of registries of the Court.

38. SEAL OF THE COURT.

[4](1) The Supreme Court shall have a seal of the Court for the sealing of all writs and other instruments and documents issued out of the Court and requiring to be sealed.

(2) In addition to the seal provided for by Subsection (1), the Supreme Court shall, for the purposes of authentication, have a seal or stamp with which any summons, office copy, certificate, report or other document requiring authentication may be sealed or stamped.

39. REGISTRAR AND OFFICERS.

[5](1) The Judicial and Legal Services Commission may appoint persons to the following offices of the Court:–

(*a*) a person (including the Registrar of the National Court) to the office of Registrar of the Supreme Court;

(*b*) such other offices as the Judicial and Legal Services Commission considers necessary for the proper administration of justice by the Court.

(2) A person appointed under Subsection (1) is an officer of the Court and is not, while acting as such, subject to direction or control by any person other than the Chief Justice and the other Judges.

(3) The terms and conditions of service of a person appointed under Subsection (1) (other than the Registrar of the National Court and appointed as Registrar of the Supreme Court) are as determined by the Judicial and Legal Services Commission, after consultation with the Departmental Head of the Department responsible for personnel management matters within the National Public Service.

40. POWERS OF THE REGISTRAR.

[6]The Registrar may administer oaths and perform such duties in respect of any proceedings pending in the Supreme Court as are assigned to him by the Rules of Court or by any special order of the Court.

41. RULES OF COURT.

[7]Subject to Section 184 (rules of court) of the Constitution, the Judges of the Supreme Court may make Rules of Court.

42. PRACTICE AND PROCEDURE.

[8]The practice and procedure in and in relation to a matter in the Supreme Court shall be the practice and procedure provided by law or the Rules of Court in relation to matters of that kind except as directed by the Supreme Court at any stage of the matter.

Office of Legislative Counsel, PNG

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[1] Part V repealed and replaced by the *Supreme Court (Amendment) Act* 1987 (No. 14 of 1987).

[2] Section 36 repealed and replaced by the *Supreme Court (Amendment) Act* 1987 (No. 14 of 1987).

[3] Section 37 repealed and replaced by the *Supreme Court (Amendment) Act* 1987 (No. 14 of 1987).

[4] Section 38 repealed and replaced by the *Supreme Court (Amendment) Act* 1987 (No. 14 of 1987).

[5] Section 39 repealed and replaced by the *Supreme Court (Amendment) Act* 1987 (No. 14 of 1987).

[6] Section 40 repealed and replaced by the *Supreme Court (Amendment) Act* 1987 (No. 14 of 1987).

[7] Section 41 repealed and replaced by the *Supreme Court (Amendment) Act* 1987 (No. 14 of 1987).

[8] Section 42 repealed and replaced by the *Supreme Court (Amendment) Act* 1987 (No. 14 of 1987).

9.1 The Supreme Court Rules with Commentary Supreme Court Rules 1984 - 2010

THE INDEPENDENT STATE OF PAPUA NEW GUINEA

Rules of the Supreme Court of Justice 1984,

PURSUANT to Section 184 of the *Constitution* and all other powers there unto enabling, the following Rules of Court for regulating and prescribing the practice and procedure of the Supreme Court of Justice are made and shall come into force on a date specified by publication of a Notice in the National Gazette.

KIDU, C.J.

KAPI, D.C.J.

PRATT, J.

BREDMEYER, J.

KAPUTIN, J.

McDERMOTT, J.

AMET, J.

WOODS, J.

SUPREME COURT LISTINGS RULES (ORDER 12)

PURSUANT to s.184 of the *Constitution* and s.41 of the *Supreme Court Act* Chapter 75 and all other powers thereunto enabling, the following rules prescribing the practice and procedure of the Supreme Court of Justice relating to the conduct of listings (Order 12) shall commence operation on a date prescribed in these Rules.

These Rules are in addition to and form part of the procedure and pre-hearing preparation and listing of cases for hearing contained in the Supreme Court Rules.

Dated and signed by the Judges on this 29th day of October 2010.

Chief Justice, Sir Salamo Injia, Kt.

Deputy Chief Justice, Gibbs Salika, CSM, OBE
Justice Bernard Sakora, CBE, CSM
Justice Mark Sevua, CBE
Justice Nicholas Kirriwom
Justice Les Gavara-Nanu, OBE, CSM
Justice Ambeng Kandakasi
Justice Ellenas V. Batari, MBE
Justice Salatiel Lenalia
Justice Catherine Davani
Justice Panuel Mogish
Justice David Cannings
Justice George Manuhu
Justice Kingsley Allen David
Justice Sao Gabi
Justice Derek Hartshorn, ML
Justice Joseph Yagi
Justice Collin Makail
Justice Ere Kariko, MBE
Justice Graham Ellis,
Justice Don Sawong, MBE
Justice John Kawi

Supreme Court Amendment Rules (2010)(Costs Rules – Order 13)

Pursuant to s184 of the Constitution and s 41 of the Supreme Court act (Chapter No. 37) and all other powers there unto enabling, the following rules prescribing the practice and procedure of the Supreme Court of Justice relating to costs incurred in relation to all proceedings instituted in the Supreme Court, shall come into force on a date specified in the rules.

Dated this 30th day of March 2011

Chief Justice Sir Salamo Injia, KT
Deputy chief Justice Gibbs Gabuma Salika, CSM,OBE
Justice Bernard Sakora, CBE,CSM
Justice Mark Sevua, CBE
Justice Nicholas Kirriwom
Justice Les Gavara Nanu OBE, CSM
Justice Ambeng Kandakasi
Justice Ellenas V Batari, MBE
Justice Salatiel Lenalia
Justice Catherine Davani
Justice Panuel Mogish
Justice David Cannings
Justice George Manuhu
Justice Kingsley Allen David
Justice Sao Gabi
Justice Derek Hartshorn, ML
Justice olin Makail
Justice Ere Kariko, MBE
Justice Don Sawong
Justice Joseph Yagi
Justice Graham Ellis
Justice John Kawi
Acting Justice Regina Sagu

RULES OF THE SUPREME COURT OF JUSTICE

PART I—PRELIMINARY

ORDER 1—INTERPRETATIVE MATTERS

Division 1.—Repeal and interpretation

1. These Rules may be cited as the Rules of the Supreme Court of Justice or by the shorter form Supreme Court Rules.

2. These Rules shall apply to all proceedings commenced or instituted on or after the date of commencement of these Rules.

3. These Rules shall come into force on the date to be fixed by notice in the *National Gazette*.

4. The *Supreme Court Rules* 1977 are repealed.

5. A proceeding pending and judgment, decree or order given or made before the commencement of these Rules, being of a kind to which these Rules apply, shall be treated as if pending, given or made under these Rules and may be proceeded with, enforced, varied or otherwise dealt with accordingly, subject to any special order or direction made or given by the court in a particular case.

6. These Rules are divided in Parts, Orders, Divisions and Rules as follows:—

Division 2.—Definitions and forms

7(a) In these Rules, unless the contrary intention appears:—

"The Act" means the *Supreme Court Act* 1975;

"Application" means an application allowed under these rules and "applicant" has a corresponding meaning;

"Authority" in relation to any special reference means the authority by whom the reference is made under *Constitution* Section 19;

"Court" means the Supreme Court of Justice;

"Judgment" means the judgment, decree, order or sentence of a court or a judge under appeal or in respect of which leave to appeal is sought;

"Judge" means a judge of the Supreme Court of Justice;

"Order" where specifically referred to in these rules means an order of a judge of the court;

"The principal legal adviser" means the Principal Legal Adviser within the meaning of the *Attorney-General Act* 1989;

"Registrar" means—

(a) The Registrar of the Court; and

(b) Includes an acting, deputy or assistant Registrar;

"Registry" means the offices of the Court;

"Reference" means a Reference to the Court under *Constitution* Section 18;

"Special Reference" means a Reference to the Court under *Constitution*, Section 19;

"Substantive proceedings" means proceedings instituted under these Rules, not being in the nature of interlocutory matters or an appeal pursuant to Order 11 Rule 27.

(b) In these Rules, unless the context or subject matter otherwise indicates or requires, a reference to a Part or to an Order or to a Schedule is a reference to that Part, Order or Schedule in these Rules.

(c) A reference to a form by number shall be read as a reference to the form so numbered in the First Schedule.

8. Forms

(a) Subject to sub-rule (b) of this Rule:—

(1) The forms in the First Schedule shall be used where applicable.

(2) It shall be sufficient compliance with any requirement of an Act or these Rules as to the form of any document if the document is substantially in accordance with the requirement or has only such variations as the nature of the case requires.

(3) A form in these Rules shall be completed in accordance with the directions, if any, contained in the form.

(b) Where the citation of an Act stated in a form is subsequently altered, the citation as altered, may be substituted for the citation of that Act in the form.

(c) The forms referred to in Section 32(1) of the Act shall be those so numbered in the Second Schedule.

ORDER 2—ADMINISTRATIVE MATTERS

Division 1.—Certain rules to apply

1. Application of National Court Rules

The following Rules of the National Court shall apply as if they were, with necessary modifications, Rules of the Supreme Court with regard to—

(1)	Sittings and vacations	Order 2 Division 1
(2)	The registry	Order 2 Division 2
(3)	Documents	Order 2 Division 3
(4)	Lawyers	Order 2 Division 5
(5)	Fees	Order 2 Division 6
(6)	Funds in court	Order 2 Division 7

PART 2—ORIGINAL JURISDICTION

ORDER 3—PROCEDURE

Division 1.—Commencement and continuance of proceedings

1. Proceedings which relate to a matter or question within the original jurisdiction shall be entitled "In the Supreme Court of Justice" and shall be commenced and continued in accordance with these Rules.

2. Where any proceedings under Rule (1) are pending before the Court—

(a) a direction not involving a final decision upon the proceedings; or

(b) an interim order to prevent prejudice to the claims of the parties; or

(c) an order for security for costs; or

(d) an order in the nature of orders such as are referred to in Section 8(1)(a), (b), and (c) of the Act—

may be made by a Judge.

3. Upon the direction of the Court, either on the application of a party to the proceedings or of its own motion, a single Judge may take evidence upon any issue of the fact for the determination of the proceedings and state those facts as found by him, and the Court may act upon such statement of facts so far as it thinks fit to adopt it.

Commentary:

ORDER 3

Rule 2

Generally–The Constitution Section 162 (2) provides that in cases provided for by Act of the Parliament or the *Rules of the Supreme Court*, the jurisdiction of the Supreme Court may be exercised by a single judge of the court or by a number of judges sitting together.
(For cases on similar provisions in the *Supreme Court Act* see the commentary to *Supreme Court Act Section 5* – note the Supreme Court Act is the appellate jurisdiction, not the Original Jurisdiction)

2(b) The common-law principles applicable to interlocutory injunctions can be applied by analogy, but not strictly: *Nora Mairi v Alkan Tololo* [1976] PNGLR 59; *Sir Pato Kakaraya v The National Parliament* (2004) SC756. Those principles applied before there were Rules. The Rule defines the powers of the Court which cannot develop the underlying law on the topic. The rule is concerned with prejudice to the parties and cannot be extended to "*matters of national importance".* Constitution Section 155(4) has no application to the interpretation of O3 r2: *Bill Skate and Peter O'Neil v Jeffrey Nape Speaker of the National Parliament* SC754. It does not apply when jurisdiction is given by other legislation and is not the "*original jurisdiction"* of the Court. A Constitution Section 155(2) (b) review application is not the original jurisdiction of the Court: *Viviso Seravo v John Giheno* (1998) SC539.

Rule 2(b)

"Constitution, s 19 (4) and *Supreme Court Rules 1984*, O 3 r 2 (b) give the Supreme Court jurisdiction to grant interim relief in a Reference brought under *Constitution*, s 19.

2. The discretion given by SCR, O 3 r 2 (b) is exercised on proper grounds and circumstances. Relevant consideration to be taken into account in exercising this discretion, are:

(1) The first and most fundamental consideration is the nature of the order sought. If the order sought were to be granted, it must be consistent with the grant of Constitutional power and exercise of those powers by designated persons or authorities under the *Constitution*;
(2) Seriousness of the case in terms of the questions in the Reference to be determined;
(3) Prejudice to be suffered by the referrer in the performance of its public functions including the public interest associated with performance of those functions;
(4) Balance of convenience; and
(5) Preservation of the status quo."
Reference by the Ombudsman Commission; Re-Section 19 of the Constitution [2010] PGSC 43; SC 1027

Rule 2(b) where the removal/ appointment of a public official is in issue.

"[26.] The principles enunciated in *Thaddeus Kambanei* in the context of judicial review proceedings under Order 16 of the *National Court Rules* are in my view, equally applicable to proceedings commenced by ordinary Originating Summons or Writ of Summons seeking declaratory relief in a case concerning removal of a public official on disciplinary grounds.

[27.] The public interest in the good administration of the public office would require the Court to give proper consideration to relevant matters which, amongst others, include the following:
(1) The importance of the public office;
(2) The importance of the public functions of the office to be properly and efficiently performed by persons duly qualified and experienced to hold that public office.

(3) The professional and ethical standing, integrity, ability and experience of the person aspiring to hold the position and to effectively and conveniently discharge the duties of the office during the period of litigation.
(4) Special functions to be performed during the period.
(5) Stability and continuity of proper functioning of the public office during the period.
(6) Maintenance of the status quo.
(7) Public perception and public confidence in the good administration of the office generally.

[28.] The question of damages and the private interests of the person aspiring to be appointed to the position though relevant, are not important considerations.

[29.] In my view, in an application for stay under s 19 and interim relief under s 5 (1) (b) of the *Supreme Court Act* and O 3 r 2 (b) of the *Supreme Court Rules* 1987*,* the criteria to be met are the same in respect of the balance of convenience, maintenance of the status quo and the public interest in the good administration of the public office in question. In respect of the strength of the case on appeal, an arguable case must be demonstrated in an application for stay whereas in an application for interim relief, serious issues must be demonstrated. Other considerations set out in *Gary McHardy* have very little or no application to an application under s 5 (1) (b) and O 3 r 2 (b) in respect of the removal of a public official on disciplinary grounds."
Kapo v Maipakai [2010] PGSC 47; SC 1067

Rule 3

The Supreme Court can direct a single Judge to take evidence pursuant to Order 3 Rule 3 Supreme Court Rules. Notwithstanding that the wording of the Rule permits a Judge of the Court that gives the direction to be so directed, the Judge to be directed, who shall be a Supreme Court Judge, should be someone other than any of the Judges constituting the Court that gives the direction, to avoid issues of prejudice.
Francis Gem [2010] PGSC 23; (2010) SC 1065

ORDER 4—REFERENCES UNDER THE CONSTITUTION

Division 1.—Form of reference

1. A reference under *Constitution* Section 18 or a special reference under *Constitution* Section 19 shall be instituted by a reference and shall—

(a) be entitled under the Section of the *Constitution* by which it is made together with the year and number of the reference; and

(b) and with—

(i) the name of the person, or authority making the reference under Section 18(1) or special reference under Section 19; or

(ii) with the title or proceedings if the reference is under Section 18(2); and

(c) state the name of the person, court, tribunal or authority making the reference; and

(d) be in accordance with forms 1, 2, or 3 whichever is applicable; and

(e) be signed by the person, court, tribunal, authority or proper officer on behalf of the authority as required by law, making the reference; and

(f) be filed in the registry.

2. A reference under *Constitution* Section 18 shall state—

(a) the question to be referred and such facts as are admitted or found by the Judge of the National Court and are necessary for the proper consideration of the question; and

(b) if the facts referred to in sub-rule (a) cannot be conveniently and shortly stated, the findings of the Judge of the National Court shall be annexed to the reference; and

(c) where a question involves the pleadings before the court or tribunal from which it is referred, then so much of the pleadings shall be set out in the reference as raise the question.

Commentary:

ORDER 4

Rule 1 (e) The requirement of this rule (for the reference to be signed by designated officers) also applies to applications under Constitution Section 19: *Central Provincial Government v NCDC* [1987] PNGLR 249. The requirement for signing by specified officers goes to the validity of the application. The Rule is a valid one and is not fulfilled by signature of the lawyer for the Provincial Government. Signature by an unauthorised person cannot be cured by a direction of the Court to get the reference properly signed. : SC917 (2007) *In the Matter of Section 19 of the Constitution – Reference by Fly River Provincial Government Executive* (Ref. No. 3 of 2006) (2007) SC917. The rule was also applied in the case of *Reference by the Atty Gen and Principal Legal Adviser to the National Executive Council* [2010] PGSC 48; SC 1078 which was struck out, one of the grounds being that the Solicitor General was not an authorised person to sign a reference.: The *Supreme Court Rules* do not provide procedure for commencing proceedings in the original jurisdiction of the Supreme Court. *Ad hoc* directions can be given pursuant to Section 185 of the *Constitution*: *Isadore Kaseng v Rabbie Namaliu, and the Independent State of Papua New Guinea (No.1)* [1995] PNGLR 481. Also see commentary to Section 15 of the *Supreme Court Act*. Pursuant to s 11 and s 184 (1) of the *Constitution*, to the extent that O 4 r1and Form 1 of the *Supreme Court Rules* 1984 allow a Reference to be filed by a private citizen under s 18(1) of the *Constitution*, those rules of court are inconsistent with s 18 (1) and therefore invalid*: In Re Reference by Mondiai* [2010] PGSC 39; SC 1087.

Rule 2(b) In a reference made under *Constitution* s18 it is also appropriate that the proceedings be commenced in the National Court and the facts found from which the Constitutional interpretation issue arises before making the reference: *Re Calling of Meetings of Parliament* [1999] PNGLR 285 per Kapi DCJ as he then was and see to the same effect *SCR No.3 of 1982; Re s57, s155(4) of the Constitution* [1982] PNGLR 405 at 407 and *SCR No.5 of 1982; Hugo Berghuser v Joseph Aoae* [1982] PNGLR 379 and *SCR No. 1 of 1982; Re Philip Bouraga* [1982] PNGLR 178.A reference under s18 of the *Constitution* should not be made on assumed facts: *Supreme Court Reference No.5 of 1982* [1982] PNGLR 379 (SC), the trial judge must deal with the facts which give rise to the constitutional issue: *Patterson Lowa v Wapule Akipe* [1992]

PNGLR 399. A reference can only be made where (a) there is an issue as to the interpretation of the Constitution or a constitutional law, (b) the question is not trivial, vexatious or irrelevant, (c) the Supreme Court has not previously finally and authoritatively interpreted and applied the particular provision, (d) no other provision of the Constitution or any other constitutional law gives the National Court jurisdiction to apply or interpret the constitutional law: *Lupari v Somare* (2008) SC930 a t[13]. Section 18 of the Constitution gives no right to a citizen to bring a question of constitutional interpretation directly to the Supreme Court by way of reference. . Such an application may be brought by originating summons seeking appropriate declarations. *: In the Matter of Section 18(1) of the Constitution and in the Matter of Jim Kas, Governor of Madang Province* [2001] PGSC 15; SC670 (28 June 2001

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3. A special reference under *Constitution* Section 19 shall—

(a) state the question, the subject of the reference; and

(b) state the circumstances in which it arises; and

(c) if appropriate, have annexed a copy of the law or proposed law the validity of which is questioned; and

(d) specify the relevant provisions of the Constitutional Law.

Division 2.—Provisions applicable to reference made pursuant to Constitution section 18(2)

4. Where a court or tribunal making a reference consists of a magistrate or some other officer, but not a Judge of the National Court, Rules 6, 7, 8, following apply as if the description of his office were substituted for the words "Judge of the National Court".

5. Where a Judge of the National Court proposes to make a reference under *Constitution* Section 18(2), he may give such directions as he considers proper for the drafting of the reference and for the preparation of the documents for the court including copies for use by the court and the parties at the hearing.

6. The original reference shall be signed by the Judge of the National Court by whom the reference is made or in his absence another Judge of the National Court and shall be transmitted to the Registrar.

7. The Judge by whom the reference is made or, in his absence, another Judge of the National Court may, upon the application of a party or of his own motion, upon notice to the parties, amend the reference at any time before argument.

Division 3.—Provisions applicable to reference made pursuant to Constitution sections 18(1) and 19

8 Repealed by Order 12.

9. The referor may withdraw or amend the reference or special reference—

(a) if no party has intervened;

(i) without leave before hearing, or

(ii) with leave after commencement of hearing but before the court has given its opinion; or

(b) if a party has intervened, with leave of the court or of a Judge.

10. Where leave is granted under Rule 10, it shall be on such conditions as the court or a Judge thinks fit.

11. Notice of withdrawal or amendment or an application for leave shall

(a) be in accordance with form 15 or 6 whichever is applicable;

(b) where leave is sought, be supported by affidavit;

(c) be filed in the registry; and

(d) be served on all parties to the proceedings and given to such persons as the court or a Judge directs.

Division 4.—Service

12. A reference or special reference shall be served on the Principal Legal Adviser unless such application is made by that authority as soon as possible after it is filed in the registry.

13. Where a reference or special reference relates to the Constitutional validity of any Act or a provision in any Act passed by—

(a) The National legislature in relation to any Province; or

(b) The legislature of a Province,

it shall be served on the Provincial Government according to law.

Division 5.—Setting down for hearing

14. A reference shall not be set down for hearing—

(a) until the time allowed by an order under Rule 16 has expired; or

(b) until an application under Rule 18 has been determined.

15. Subject to Rule 14, the Registrar shall—

(a) unless otherwise ordered by the Court or a Judge, set a reference down for hearing at the first sittings of the court to be held at the expiration of 28 days after the date of receipt of a reference; and

(b) give notice of the hearing to the parties.

Division 6.—Court may decline to give opinion

16. The court may decline to give an opinion on the question the subject of the reference or special reference if in the opinion the question is trivial, vexatious, hypothetical or unlikely to have any immediate relevance to the circumstances of Papua New Guinea.

Commentary

Rule 16
*""15. The referring authority must state the specific question that the Court is required to express an opinion on. The question must be stated in the reference in the appropriate manner. As a matter of good practice, reference questions should be stated in a clear and concise manner with sufficient particularity by reference to specific sections or parts of sections of a Constitutional law that the law or proposed law is said to be in conflict with. Constitutional questions should not be framed in a general, ambiguous, convoluted and duplicitous manner. Statement of reference questions in this manner makes the Court''s task difficult in identifying the precise question to be answered and leads counsel into ""an ambitious goose chase in a jungle of provisions"", so to speak, that results in the waste of the Court''s time. It is in the Court''s discretion to strike out such questions or decline to answer the question as offending O 4 r 16 of the Supreme Court Rules 1987. "" (**Special Reference by the Executive of Fly River Provincial Government, Re Organic Law on the Provincial Governments and Local –Level Governments** (2010) SC 1057.)* Applied and followed *in In the Matter of the Forests (Amendment) Act; Reference by the Ombudsman Commission of Papua and New Guine*a [2010] PGSC 40; SC 1088.

Division 1.—Intervention

17. Where—

(a) the Court;

(b) the referor; or

(c) the Principal Legal Adviser—

desires to give notice of a reference under this order to persons who may have an interest in the proceedings, the court may make an order for the purpose.

18. An order made under Rule 15 shall include—

(a) the form of the notice; and

(b) publication of the notice; and

(c) the time limited for filing an application to intervene.

19. Before a reference has been set down for hearing, any person who has an interest in the proceedings may make application to the Court or to a Judge for leave to intervene.

Division 8.—Application to intervene

20. An application under Rule 17 shall be instituted by an application to intervene and shall—

(a) be entitled under the reference in question; and

(b) be entitled with the name of the person making the application; and

(c) state briefly the particulars relied upon; and

(d) be in accordance with form 4; and

(e) be signed by the person making the application; and

(f) be filed in the registry.

Commentary

When the State is a party in litigation it is only the Attorney General you can instruct on behalf of the State. The Solicitor General "shall" act as advocate for the State if instructed by the Attorney General or the Attorney General can instruct another lawyer: Attorney General Act s13(2), at [39];
Lawyers cannot appear for the State unless instructed by the Attorney General, at [59];
(obiter, at [48]):
(a) the discretion to grant leave to intervene is a very wide one;
(b)the applicant must have a substantial interest in the issues to be decided in the case;
(c)it can be either a direct interest, in that the decision of the Court could immediately and directly affect
(d)the interest of the applicant to maintain or abrogate some particular right, power or immunity, or;
the decision will bind another jurisdiction where the applicant is about to be a party in proceedings involving the same legal principles;
(e)the applicant's position/submissions should contribute new or fuller aspects to the issues, and not simply be repetitive of the submission of someone who is already a party;(f) leave to intervene can be restricted to particular issues of interest to the applicant. *Reference pursuant to Section 18 (1) of the Constitution; reference by IGO NAMONA OALA & OALA MOI* SCR No5 of 2010 decision of 28th October 2011, Davani J.

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21. An application to intervene shall be supported by affidavit.

Division 9.—Service of application

22. The application shall be served as soon as possible on all parties to the proceedings.

ORDER 5—REVIEW OF NATIONAL COURT

Division 1.—Form of review application

1. An application to the court under *Constitution* Section 155(2)(b) shall be instituted by an application to review and shall—

(a) be entitled under the Section of the *Constitution* by which it is made together with the year and number of the application; and

(b) be entitled with the name of the person making the application; and

(c) state briefly particulars of the judicial act to be reviewed; and

(d) the order sought in lieu thereof; and

(e) be in accordance with form 5; and

(f) be signed by the person seeking the review; and

(g) be filed in the registry.

Division 2.—Service

1. The review shall be served as soon as possible on all parties to the National Court proceedings from which the judicial act to be reviewed arises

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Commentary*:*

A single judge of the Supreme Court has no power to make interim orders in a judicial review under Constitution Section 155(2) (b) because this is not the (appeal nor) original jurisdiction of the court: Review No. 78/1977; *Application for Review Pursuant to s 155(2) (b) of the Constitution; Viviso Seravo and Electoral Commission v John Giheno* (1998) SC539. The full bench of the Supreme Court has to convene to deal with such issues: *Viviso Seravo v Electoral Commission v John Giheno* (1998) SC555, followed in *Wauni Wasia Ranyeta v Masket Iangelio* (1998) SC562 *and David Lambu v Peter Ipatas (No.3)* [1999] PNGLR 207. But in applications for review of an election petition now see Supreme Court *Election Petition Review Rules 2002 (as Amended) 2007* Order 5 subdivision 4 (see below) where certain jurisdiction has been given to a single judge. Failure of a lawyer to fulfil his obligations to the client by failing to file a notice of appeal is not a ground justifying leave to review*: Application by Stephen Mark* SC925, [2008] PGSC 16. The review power of the Supreme Court Constitution section 155 (2) (b) cannot be invoked where there is still a concurrent right to make application for leave to appeal, or to appeal: *Review pursuant to Constitution section 155 (2) (b) and 155 (4) Application by Anderson Agiru* (2002) SC 686, [2002] PGSC 23. There are 3 categories of cases where jurisdiction has been exercised under Section 155 (2) (b) - (1) where parties allow a statutory right of appeal to expire, (2) where a right of appeal is prohibited or limited by law, (3) where there is no other way of going to the Supreme Court: *Application of Herman Leahy* (2006) SC855 at [57]. An undischarged insolvent has no *locus standii* to seek review : *Autahe v Korerua* [2008] PGSC 39; SC956.

Order 5 of the Supreme Court Rules 1984 is amended by inserting the following:

"Division 4: REVIEW UNDER SECTION 155(2)(b) OF THE CONSTITUTION OF A DECISION OF THE NATIONAL COURT MADE PURSUANT TO PART XVIII OF THE ORGANIC LAW ON NATIONAL AND LOCAL-LEVEL GOVERNMENT ELECTIONS."

2. Definition

Unless expressly stated otherwise in these rules:-

"Applicant" means a party referred to in Sub-division 1.

"Court" means the Supreme Court as defined under the Constitution and the Supreme Court Act.

"Decision" means a final decision of the National Court made after the hearing of an election petition or an order dismissing the petition under Rule 18 of the National Court Election Petition Rules 2002 (as Amended).

"Index" means the Index to the Review Book under these Rules.

"Judge" for the purposes of these Rules means a single Judge of the Supreme Court exercising powers as expressly provided for under these Rules.

"Organic Law" means the Organic Law on National and Local-Level Government Elections.

"Registrar" means the Registrar of the Supreme Court and includes, Deputy Registrar of the Supreme Court.

"Registry" means the Supreme Court Registry at Waigani.

"Respondent" means the Electoral Commission and the party in whose favour a decision is made.

"Rules" means these Rules.

"Transcript" means the transcript of proceedings of the National Court on an election petition under review.

Sub-division 1. Application for Leave to apply for Review

1. A party aggrieved by a decision of the National Court in an election petition brought under Part XVIII of the Organic Law shall file an application in the Supreme Court under Section 155(2)(b) of the Constitution.

2. An application under Section 155(2)(b)of the Constitution in respect of a decision referred to under Rule 1 lies to the Court with leave only.

3. An application for leave shall –

(a) be entitled under Section 155(2)(b) of the Constitution and in the matter of Part XVIII of the Organic Law on National and Local-Level Government Elections; and

(b) be entitled in the name of the person making the application and the name of the respondents; and

(c) state briefly the particulars of the decision of the National Court to be reviewed, the nature of the case, the issues involved and why leave should be given; and

(d) state an address for service of the applicant; and

(e) be signed by the applicant; and

(f) be in accordance with Form 5A; and

(g) be filed in the Supreme Court Registry at Waigani.

4. The application for leave shall be supported by an affidavit of the applicant. The affidavit shall set out the circumstances pertaining to the application and shall have annexed a copy of the election petition and the judgement and order of the National Court.

5. The filing fee for the application for leave shall be K750.00.

6. At the time of filing the application for leave, the applicant shall deposit in the Registrar's Trust Account, the sum of K5,000.00 as security for costs.

7. The application for leave shall be made within 14 days of the decision sought to be reviewed or within such time as extended by the Court, upon application made within that 14 days period.

8. The application for leave and supporting affidavit shall be served personally on the respondents not later than 3 days
before the application is made and an affidavit of service shall be filed within that 3 days period.

9. The application for leave shall be made before a Judge.

10. A decision to grant or a refusal to grant leave is final and shall not be subject to further review.

Sub-Division 2. Filing of Application for Review

11. The application for review shall be filed within 14 days from the date of grant of leave or within such further extended period as the Court determines upon application made within those 14 days.

Commentary:

Order 5 Div 4/2 In **election petition** matters (1) leave *is* required to review a final decision of the National Court, (2) the grant or refusal of leave is discretionary, (3) the 3 criteria set out in *Avia Aiha v The State* [1981] PNGLR 81 are not applicable, (4) there are 2 criteria, (a) is there an important point of law to be determined which is not without merit? And (b) in so far as the application relates to facts, there is a gross error on the face of the record or the finding of fact is so outrageous or absurd as to result in an injustice: *Jurvie v Oveyara* SC935, [2008] PGSC 22. (1) An application for leave to review a decision on an election petition not filed, served and moved before a judge within 14 days of the decision sought to be reviewed, where extension of time is not granted within that 14 days, is rendered incompetent by the Rules, subject to any application under Rule 5/10/32. (2). The purpose of the Election Petition Review Rules is: a) not to treat an election petition review as an ordinary matter but as a special matter requiring the applicant's constant and detailed attention; b) to closely manage the review process; c) to reduce to the minimum the time between the various steps in the review.(3). The times imposed by the Rules are tight and where prompt application is made for relief within the mandatory 14 days accompanied by a reasonable explanation, many circumstances will justify an extension of time under Rule 5/1/7 or after that time a dispensation from the requirements of the Rules under Rule 5/10/32; (4). An applicant under Rule 5/10/32 should explain (A) why a time limit was missed, a Rule not complied with or otherwise why dispensation is required, (B) any delay which has occurred in making the application, (C) that the relief sought by the applicant will not unduly prejudice the other party's case, (D) that the grant of dispensation will enable all of the issues in contention to be promptly brought before the court without further delay: *Vele v Parkop* (2008) SC945*,* and *Yawari v Agiru & ors* (2008) SC948*.*

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The Application for Review shall:-

(a) state that the application lies with leave and state the date on which such leave was granted; and

(b) state whether the whole or part only and what part of the judgment is being reviewed; and

(c) state briefly but specifically the grounds relied upon in support of the review; and

(d) state what judgment, order or relief the applicant seeks in lieu of that decision reviewed; and

(e) be in accordance with Form 5B; and

(f) be signed by the applicant.

13. At the time of filing the application, the applicant shall also:-

(a) indicate on the application whether a transcript is required and if so, a request for the production of the transcript; and

(b) file a draft Index of the Review Book.

14. The application for review shall, amongst other things, include the date and time fixed by the Registrar for the Directions Hearing before a Judge of the Supreme Court.

15. The date fixed for the Directions Hearing under Rule 14 shall not exceed 14 days from the filing of the application.

16. The application shall be filed in the Supreme Court Registry at Waigani.

Sub-Division 3. Transcript

17. Where a request is made for a transcript, the applicant shall meet the cost for the production of the transcript as determined by the Registrar.

Sub-Division 4. Service of Application

18. Within 7 days of filing the application, the applicant shall serve the application together with the draft Index on the respondents named in the application and on any other person the Court considers has an interest in the application.

Sub-Division 5. Notice of Appearance

19. Within 7 days of the service of the application, the respondents or their lawyer shall file a Notice of Appearance in accordance with Form 5C.

Sub-Division 6. Directions Hearing

20. Within 14 days after filing the application, there shall be a Directions Hearing before a Judge.

21. At the Directions Hearing, the Judge may consider and determine or give such directions as may be necessary to ensure prompt disposition of the application, amongst other things:-

(a) question of legal representation;

(b) grounds of review;

(c) identification of legal issues;

(d) consolidation of multiple applications on the one election for purpose of the hearing;

(e) availability of transcript and related matters;

(f) objections to competency of the application;

(g) manner of presentation of argument by parties including filing extract of submissions;

(h) settlement of the Index;

(i) compilation of the Review Book;

(j) the number of days required for the hearing.

Sub-Division 7. Review Book

22. Within 14 days after the Directions Hearing, the applicant shall compile, file and serve the Review Book on each respondent.

23. The Review Book shall be prepared in the following manner:-

(a) in bound volumes in a suitable binder on A4 size paper with tabs;

(b) the thickness of any one volume of the review book shall not exceed 38mm;

(c) the title pages shall give the full and correct title of the proceedings and the names of the lawyers for each party (if any), telephone numbers and their addresses for service;

(d) after the title page there shall follow the index consisting of a complete list of documents contained in the review book as settled by the Registrar, stating in the case of each document, indicating at what page of the review book it appears;

(e) in the Index, the exhibits shall be marked in the order in which they were identified or numbered in the National Court;

(f) the date and a short description of each document shall precede it, but the backsheet or formal heading shall not be printed or copied and jurats, format identification of exhibits and the like shall be omitted;

(g) where the transcript of evidence is reproduced, the name of the witness together with a notation indicating whether the evidence given is in chief (IC), cross-examination (XX) or re-examination (RX) shall appear on the right hand side of each page;

(h) only such documents as are relevant or necessary shall be included in the Review Book.

24. The Review Book shall be paginated and arranged in the following order:-

(a) the title page;

(b) index to Review Book;

(c) order granting leave;

(d) the application for review to the Supreme Court;

(e) the election petition for review;

(f) evidence, oral or affidavit, stating the name of each witness or deponent and page number on which such evidence commences;

(g) testimony taken on commission or before an examiner and put into use as evidence;

(h) exhibits arranged in the order in which were identified or numbered as exhibits in the National Court;

(i) written submissions filed in the National Court;

(j) the reasons for decision of the National Court;

(k) the formal judgment or order of the National Court.

25. A copy of the Review Book shall be examined with the original documents and all copies shall be certified as correct by the parties.

Sub-Division 8. Pre-Hearing Conference

26. Within 21 days from the Directions Hearing, there shall be a Pre-Hearing Conference before a Judge.

27. At the Pre-Hearing Conference, the Judge shall consider and determine or give such directions as may be necessary to ensure prompt disposition, amongst other things:-

(a) legal representation;

(b) the correctness of the Review Book;

(c) the grounds for review to be argued at the hearing;

(d) identify legal issues to be argued at the hearing;

(e) consolidation of multiple applications on the one election;

(f) manner of presentation of argument by parties including filing extract of written submissions;

(g) number of days required for the hearing;

(h) fix a date for the hearing.

Sub-Division 9. Hearing

28. The Registrar shall give notice of the date of hearing fixed by the Court under Rule 27(h), to the parties in accordance with Form 5D.

29. The Court may hear and determine the application or any objection to competency of the application on the date and time fixed for the hearing or may adjourn the hearing.

Sub-Division 10. Dismissal, etc. of Application

30. Where a party has not done any act required to be done by or under these rules or otherwise has not prosecuted his or her application for leave or application for review with due diligence, or has failed to comply with a direction or order of the Court, the Court may on its own motion or on application by a party, at any stage of the proceeding:-

(a) order that the application for leave or application for review be dismissed where the defaulting party is the applicant; or

(b) where the defaulting party is the respondent, the application for leave or application for review shall be set down for an expedited hearing; or

(c) fix a time pre-emptorarily for the doing of an act under these Rules and may make such orders as it deems just.

Sub-Division 11. Stay of enforcement of decision under review

31. The filing of an application for review does not operate as a stay of enforcement of the decision of the National Court, subject of the review.

Sub-Division 12. Dispensation from the Rules

32. The Court may dispense with compliance with any of the requirements of the Rules, either before or after the occasion for compliance occurs, unless it is a requirement of the Organic Law.

Commentary:

Failure to apply for dispensation from *Election Petition Review Rules* with which the applicant has not complied may result in the review being dismissed: *Yawari v Agiru* [2008] PGSC 31, SC 948.12.

Sub-Division 13. Costs

33. The Court may make such orders as to costs as it deems just.

34. Parties may apply to the Court at the end of the hearing for a different rate other than the rates specified in Schedule 1.

35. If parties do not agree to the costs, the Registrar shall tax the costs in accordance with Schedule 1.

36. A party aggrieved by the taxation of costs may within 7 days of the taxation apply to a Judge for a review of the taxation.

37. Where parties agree in writing for the security deposit to be paid out to any party or parties, the Registrar shall pay out the security deposit as agreed between the parties, as endorsed by a Judge.

38. Where there is a dispute as to the distribution of the security deposit, the parties awarded costs may share the deposit in equal proportion to the number of parties.

39. The Registrar shall pay out the share of the costs of a party awarded costs after the taxation of the costs of that party.

40. Where a successful party does not claim the deposit within 3 months after the decision, the deposit shall be refunded to the applicant, as ordered by a Judge.

41. If, on the taxation of any costs, one-sixth or more of the amount of the bill for those costs is taxed off, the lawyer whose bill it is shall not be allowed the fees to which, apart from this Rule, he would be entitled for preparing the bill and for attending the taxation.

ORDER 6—ENFORCEMENT OF CONSTITUTIONAL RIGHTS

Division 1.—Commencement of proceedings

1. An application to enforce Constitutional rights under *Constitution* Section 57 shall in the first instance if not made in the National Court, be made to a Judge.

2. An application shall be supported by affidavit setting out the facts giving rise to the application.

Division 2.—Form of constitutional enforcement application

3. An application under *Constitution* Section 57 shall be instituted by an application to enforce constitutional rights and shall—

(a) be entitled under the Section of the *Constitution* by which it is made together with the year and number of the application; and

(b) be entitled with the name of the court, person or law officer making the application; and

(c) state briefly the circumstances giving rise to the application and specify the relevant Constitutional rights provisions; and

(d) be in accordance with form 6; and

(e) be signed by the person or law officer making the application; and

(f) be filed in the registry.

Division 3.—Service

4. An enforcement application and supporting affidavits shall be served—

(a) on those whose conduct give rise to the action; and

(b) if action for enforcement is taken against the executive arm of Government, in accordance with Order 4 Division 4.

PART 3—JURISDICTION UNDER SUPREME COURT ACT

ORDER 7—APPEALS.

Division 1.—Application for leave to appeal

1. Where an appeal from a judgment lies to the court only with leave, an application shall be determined after an oral hearing.

2. An application for leave to appeal shall be made by filing a notice in writing and shall—

(a) be entitled "In the Supreme Court of Justice" and shall also be entitled as between the party as appellant and the party as respondent; and

(b) show that an appeal lies with leave; and

(c) state the nature of the case, the questions involved and the reason why leave should be given; and

(d) show an address for service of the party giving the notice; and

(e) be in accordance with form 7.

Commentary:

ORDER 7

Rule 2 Notice of application for leave shall be filed in accordance with Form 7: *Henzy Yakham and the National Newspaper v Dr Stuart Hamilton Merriam & ors (infra).*

Rule 2 (c) it is mandatory to set out the three requirements under the Rule; (1) the nature of the case, (2) the questions involved and (3) the reason that leave should be given: *Placer (PNG) Ltd v Anthony Harold Leivers* (2005) SC781. It is not necessary to serve the application: *Gigmai Awal v Salamo Elema* [2000] PNGLR 288

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3. Notwithstanding anything contained in sub-rule (1), application may be made before the court that application for leave to appeal be heard concurrently with or immediately before the hearing of the appeal, and for such consequential orders as may be necessary.

Division 2.—Filing and serving notice of application for leave to appeal

2. The provisions of Rule 10, with the necessary modifications shall apply to an application for leave to appeal and notice of such application.

Commentary:

Rule 4 The purpose of the leave procedure is to sort out the unmeritorious appeals so that the Supreme Court is not clogged. Where leave is sought but not required and notice of appeal has not been filed, leave should be granted if the appeal appears to have merit: *Boyepe Pere v Emmanuel Ningi* (2003) SC711*,* applied in *Oia Aba v MVIL* (2005) SC779 and *The State v John Talu Tekwie* (2006) SC843. Not considered in *Paul Bari v John Rain* (2004) SC768*.* Leave to appeal cannot be sought in a Form 8 Notice of Appeal. Leave to appeal must be separately sought in Form 7 Application for Leave to Appeal: *Henzy Yakham and the National Newspaper v Dr Stuart Hamilton Merriam & ors* [1998] PNGLR 555. A person directly affected by an order of the National Court can appeal even though he was not a party to those National Court proceedings: *Kitogara Holdings v NCDIC* [1988– 89] PNGLR 346; *Kenn Norae Mondiai & anor v Wawoi Guavi Timber Co. Ltd & ors* (2007) SC886*.* **Applications for Leave**. The onus is on the applicant to show a *prima facie* case that the decision of the trial judge was wrong and that substantial injustice will be done by leaving the erroneous decision unrevised: *Breckwoldt v Gnoyke* [1974] PNGLR 106 at 126 (considering the now repealed rules). In *Rimbink Pato v Anthony Manjin* [1999] PNGLR 6 the court said an applicant for leave must advance "*cogent and convincing reasons or exceptional circumstances. There must be clear legal grounds meriting an appeal, and he must have an arguable case".* Although this case has been cited on many occasions in relation to injunctions against the exercise of statutory investigative authority, it has never been cited for the propositions quoted. The main ground to be established on application for leave is that there is an arguable case. Where the decision appealed from falls within the ordinary interlocutory discretion of the trial judge relating to practice and procedure or costs, in addition to disclosing an arguable case, the applicant may have to show that the decision appealed from prevents the agitation at trial of some issue germane to the appellant's case. See the majority opinion in *Sir Julius Chan v The Ombudsman Commission* (1998) SC607– *", leave to appeal is therefore unlikely to be given in circumstances where the judgment challenged may have little or no bearing on the final determination of the issues between the parties; leave should not be given where by the rules of the court there is obvious recourse for further application on the matter, nor should leave be given where the ruling is within the discretion of the Court and discloses no obvious breach of principle: Sir*

Julius Chan v The Ombudsman Commission (1998)(SC607 *(Kapi DCJ, Sheehan and Jalina JJ) at p11 per Sheehan and Jalina JJ.* The various cases are discussed in a single judge decision of *Matiabe Oberia v Police and the State* (2005) SC801. An appeal from an interlocutory ruling on an objection to the competency of a motion to review taxed costs requires leave. The appellant must show exceptional circumstances and compelling reasons for leave to be granted: *Hii Yui Ann v Canisius Karu Karingu* (2003) SC718. There is no stipulation in the rules that an Application for Leave to Appeal be served ***Awal v Elema*** [2000] PGSC 26; [2000] PNGLR 288 (29 September 2000).. **Interlocutory Order**. For cases on what is an interlocutory order see the commentary to the *Supreme Court Act* s 14(3)(b).

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5. When leave to appeal has been granted, the Supreme Court may treat the notice of application for leave as notice of appeal, but otherwise, a notice of appeal shall be filed within 21 days immediately after the date on which leave is granted or within such time as the Court or Judge may allow.

Commentary:

Rule 5 Once leave is granted O7 r5 is invoked:) *Henzy Yakham and The National Newspaper v Dr Stuart Hamilton Merriam & or* (1997) SC 533 per Kidu CJ at 5 and Kapi DCJ at 11. An application to extend time to file a notice of appeal can be brought within that 21 days or outside it if a judge allows. The reasons for failure to filed within 21 days and the amount of delay are relevant issues on an application for extension of time: *Small Business Development Corporation v Totamu* [2010] PGSC 44; SC 1054

Division 3.—Notice of appeal

6. An appeal shall be instituted by a notice of appeal.

Commentary:

Rule 6 The authority of the next friend of an infant to institute or continue an appeal ceases upon the infant obtaining his or her majority. Notice that an infant has reached his majority and has decided to adopt the proceedings should be given to the other parties: D*onigi v PNGBC* (2002) SC 691.

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7. The notice of appeal and all subsequent proceedings shall be entitled "In the Supreme Court of Justice" and shall be entitled as between the party as appellant and the party as respondent.

8. The notice of appeal shall—

(a) state that an appeal lies without leave or that leave has been granted and or annex the appropriate order to the notice of appeal; and

(b) state whether the whole or part only and what part of the judgment is appealed from; and

(c) state briefly but specifically the grounds relied upon in support of the appeal; and

(d) state what judgment the appellant seeks in lieu of that appealed from; and

(e) be in accordance with form 8; and

(f) be signed by the appellant or his lawyer; and

(g) be filed in the registry.

9. Without affecting the specific provisions of Rule 8, it is not sufficient to allege that a judgment is against the evidence or the weight of the evidence or that it is wrong in law, and the notice must specify with particularity the grounds relied on to demonstrate that it is against the evidence and the weight of the evidence and the specific reasons why it is alleged to be wrong in law

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Commentary:

Rule 8 There are three requirements to be stated in a notice of appeal pursuant to Rule 8(c) and Rule 9 – (1) The grounds relied upon to support the appeal must be stated succinctly but specifically; (2) If it is alleged that the judgment is against the evidence or the weight of the evidence, it is not sufficient for a ground to be drafted in those terms only. Instead the notice must specify with particularity the ground relied on to demonstrate that it is against the evidence or the weight of the evidence; (3) If it is alleged that the judgment is wrong in law it is not sufficient for a ground to be drafted in those terms only. Instead the notice must specify with particularity the ground relied on to demonstrate the specific reason why the judgment is alleged to be wrong in law: *Ipili Porgera Investments Limited v Bank South Pacific Limited SCA 15 of 2006, decision of 27th June 2007.* A notice of appeal is not required to state that the appeal raises a question of fact, mixed fact & law or law: *The City Administrator v Yambaran Pausa Saka Ben Ltd* (2009) SC 965 at [6]. A notice of appeal should not prospectively contain grounds requiring leave before leave is obtained. The third alternative in par. 2 of Form 8 that leave is to be sought at the hearing of the appeal is without legal basis and must be deleted: *Yakham v Merriam* [1998] PNGLR 555 at 562. But stating the proposed grounds of appeal will not invalidate the application for leave: *Turia v Nelson* [2008] PGSC 32; SC949 (6 November 2008).

Division 4.—FIling and serving notice of appeal

10. Upon filing the notice of appeal, the appellant for the purposes of Sections 17 and 29 of the Act shall be deemed to have given notice of appeal in the prescribed manner.

11. Where the appeal is from a Judge of the National Court sitting on an appeal, a copy of the notice of appeal shall be left with the court or tribunal from the judgment of which the appeal was brought to the National Court.

12. A copy of the notice of appeal shall be served without delay by or on behalf of the appellant on each party—

(a) affected by the relief sought by the notice of appeal; or

(b) interested in maintaining so much of the judgment as is appealed from.

13. The Court or a Judge may direct—

(a) the notice of appeal be served on any other person; or

(b) service on a particular party or person be dispensed with; or

(c) service be effected in a particular manner.

Commentary

Rule 12 Where the address for service of the respondent is in the same town as the Registry in which the appeal has been lodged periods of 7 to 14 days to serve the notice of appeal are a breach of the requirement to serve without delay:) *Yema Gaiapa Developers Pty Ltd v Hardy Lee* (1995) SC 484*.* This rule does not apply to an Application for Leave to Appeal: *Gigmai Awal v Salamo Elema* [2000] PNGLR 288.

Division 5.—Objection to competency of appeal

14. A respondent who objects to the competency of an appeal or of an application for leave to appeal shall, within 14 days after service on him of the notice of appeal—

(a) file an objection in accordance with form 9; and

(b) serve a copy of the objection on the appellant.

Commentary:

Rule 14 There is no power to extend the period of 14 days to file and serve an objection and no right to raise objections outside the time allowed: *State v Kubor Earthmoving (PNG) Ltd* [1985] PNGLR 448 approved in *Patterson Lowa & ors v Wapala Akipe & ors*[1991] PNGLR 265; [1992] PNGLR 399*;* followed in *Gregory Pule Manda v Yatala Ltd* (2005) SC 795*.* An objection to competency may be raised at any time before judgment at the discretion of the court: *Chief Inspector Robert Kalasim v Tangane Koglwa* (2006) SC 828. *"An objection to competency is really an objection to the jurisdiction of the Court to entertain the point..."*: *Waghi Savings and Loan Society Ltd v Bank of South Pacific Ltd* (1980) SC 185 per Kearney DCJ. An appeal may be incompetent if it does not comply with the *Supreme Court Act* or Rules: *Haiveta v Wingti (No.2)* [1994] PNGLR 189. . An objection should state its jurisdictional basis by referring to the rule, and where it cites insufficiency of the grounds of appeal should also refer to 07 r8(c) and r9: *Pacific Equities& Investments Ltd v Teup Goledu (*2009) SC 962 at [6] & [7]. An objection might be made where (1) there is no right of appeal; (2) there is no reasonable ground of appeal stated in the notice of appeal; (3) the grounds of appeal are frivolous and vexatious; (4) notice of appeal was served out of time; (5) the notice of appeal is irregular:) *PNG Forest Authority v Securamax Securities Pty Ltd* (2003) SC 717*.* Objection has been made where it was contended the appeal should be preceded by an application for leave to appeal: *Waghi Savings and Loan Society Ltd v Bank of South Pacific Ltd* (1980) SC 185; *Nerau v Solomon Taiyo Limited* [1993] PNGLR 395; *Garamut Enterprises Ltd v Steamships Trading Ltd* (1999) SC 625; or that the appeal should have been commenced by Notice of Motion : *Felix Bakani v Rodney Daipo*

(2002) SC 699; or that there was a fatal defect in the form of notice: See *Placer (PNG) Ltd v Leivers* (2005) SC 781 for discussion on the completion of a Form 7. Objection has been filed where it was contended that the appeal could not possibly succeed as a question of law because –the appeal was based on the admissibility of a document admitted into evidence on trial without objection, and a point of law not raised at the trial, and the facts did not give rise to the question of law: *Chief Inspector Robert Kalasim & The State v Aina Mond & ors* (2006) SC 828–the point has already been decided by the appellate Court between the parties or their privies so that there is an *issue estoppel* or *res judicata: Don Pomb Polye v Jimson Sauk Papaki* (1999) SC 643 –the appeal has been filed outside the statutory time limit: *Jeffrey Balakau v Ombudsman Commission* [1996] PNGLR 346. The appellant does not have sufficient interest in the subject matter of the judgment from which the appeal is taken: *Placer (PNG) Limited & Anor v Joshua Siapu Yau & Ors* (2008) SC 916 *(*followed and applied in SC978 (2009) *Tamali Angoya v Tugupa Association Inc).*. It is *not* a proper ground of objection to competency of an application for leave to appeal that the proposed grounds of appeal are unmeritorious, frivolous or vexatious or that the application for leave was unnecessary: *Turia and McKay v Nelson and National Housing Corporation* (2008) SC949. The rule does not apply to Order 10 appeals and an objection to competency should not be filed in such appeals: *Kenn Norae Mondiai & anor v Wawoi Guavi Timber Co. & ors* (2007) SC 886 at [32]. An objection to competency can be made in an Order 10 appeal if a respondent is given leave to do so by applying for directions. Relevant considerations to a grant of leave are (a) whether the application for directions has been filed and served expeditiously (b) whether the application has been prosecuted expeditiously (c) whether the proposed grounds of objection raise issues which would obviously render the appeal incompetent and (d) the interests of justice: *Madang Timbers Ltd v Kambori* [2009] PGSC 18; SC 992

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15. Any party may file affidavits.

16. An objection of which notice has been given shall be determined by the court at or before the hearing of the appeal or of the application for leave to appeal as the court thinks proper.

Commmentary:

Rule 16. A single judge of the Supreme Court has jurisdiction to to deal with an objection to the competency of a leave application filed under O7 Div.5. A party aggrieved by a decision of a single judge will have recourse to the Supreme Court pursuant to s10(2) of the *Supreme Court Act.*: *Amaiu v Kipalan* [2009] PGSC 14; SC 991. But see commentary to s10(2) to the effect that the section gives no right to an aggrieved respondent.

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17. Upon the hearing of the application the burden of establishing the competency of the appeal is on the applicant.

18. If notice of objection is not given and the appeal or the notice of application for leave to appeal is dismissed as incompetent, the respondent shall not receive any costs of the appeal unless the court on special grounds orders otherwise.

Commmentary:

Rule 14 and Rule 18. The court can raise an issue of competency at any time until judgment: *Bruce Tsang v Credit Corporation (PNG) Ltd* [1993], PNGLR 112 and *Haiveta v Wingti (No.1)* [1994] PNGLR 160. An appeal from dismissal of an objection to competency requires leave: *Hii Yii Ann v Canisius Karingu* (2003) SC 718.

Division 6.—Discontinuance of appeal

19. An appellant may at any time file and serve a notice of discontinuance of the appeal and upon it being filed, the appeal shall be abandoned.

20. The notice filed by an appellant under Rule 19 does not affect any other appellant in the appeal.

21. A party filing a notice under Rule 19 shall except in criminal appeals, be liable to pay the costs of the other party or parties occasioned by his appeal.

Commentary:

Rule 21 A party discontinuing an appeal is liable for the costs of other parties in the appeal pursuant to Rule 19 up until the notice of discontinuance is served on them: *Public Curator v Bank South Pacific Ltd* (2006) SC 840.

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22. A party whose costs are payable under Rule 21 may tax the costs and if the taxed costs are not paid within 14 days after service of the certificate of taxation, may enter judgment for the taxed costs.

Division 7.—Security for costs

23. Unless the court otherwise directs no security for costs of an appeal to the court shall be required.

Commentary:

Rule 23 The following are "*special circumstances*" upon which the Court may exercise its discretion to order security for costs: (a) that an appellant is ordinarily resident out of the jurisdiction; (b) that there is reason to believe that the appellant will not be able to pay the costs of the respondent if ordered to do so; (c) that the address of the appellant is not known; (d) that the appellant has changed address after the appeal is instituted with the intention of avoiding the consequences of the appeal. The list is not exhaustive, there may be other facts which establish special circumstances: *Brinks Pty Ltd & Barry Tan v Brinks Inc* [1996] PNGLR 75. In an application for judicial review under Constitution s 155(2) (b) on the question of whether or not security for costs should be ordered, the ultimate test should be whether it is

in the interests of justice to make an order for security for costs having regard to all the circumstances of the case. The onus is on the applicant to demonstrate why the discretion should be exercised in his favour: *David Lambu v Peter Ipatas (No.3)* [1997] PNGLR 207; SC 601.

Division 8.—Amendment by supplementary notice

24. A notice of appeal may, before the date of appointment to settle under Rule 42 be amended without leave by filing a supplementary notice.

Commentary:

Rule 24 An amendment to raise a completely new ground of appeal after the time limited for appeal would be an abuse of the *Supreme Court Act: Dinge Damane v State* [1991] PNGLR 244 per Kapi DCJ at 248, and by the majority, an application out of time for leave to amend a notice of appeal should only be allowed in exceptional circumstances and at the discretion of the court. A completely new matter cannot be raised outside the 40 days allowed by Section 17 of the Supreme Court Act: *Bruce Tsang v Credit Corporation (PNG) Ltd* [1993] PNGLR 112. See also the commentary to Order 11 rule 11 and also to section 17 of the Supreme Court Act.

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25. A party who files a supplementary notice under Rule 24 shall serve and file it in accordance with Rule 12.

Division 9.—Institution of cross appeal

26. A respondent who desires to appeal from any part of the judgment, or to seek a variation of a part of the judgment, need not institute a substantive appeal, but in addition to complying with Order 11 Rule 2 he shall, within the period or extended period provided for by Section 17 of the Act, file in the registry a notice of cross appeal.

27. The notice of cross appeal shall—

(a) be entitled as between the party as cross appellant and the party as cross respondent; and

(b) state that the cross appeal lies without leave or that leave has been granted and annex the appropriate order to the notice of cross appeal; and

(c) state what part of the judgment the respondent cross appeals from or contends should be varied; and

(d) state briefly but specifically the grounds of the cross appeal; and

(e) state what relief is sought in lieu of the order cross appealed from or the variation sought in that order; and

(f) be in accordance with form 10; and

(g) a copy of the notice shall be served immediately on the appellant and any other person affected by the relief claimed; and

(h) form 10 may, if convenient, be combined with form 16.

28. It is not necessary to give notice of cross appeal if a respondent proposes to contend that some matter of fact or law has been erroneously decided against him but does not seek a discharge or variation of a part of the judgment actually pronounced but the respondent shall in that event—

(a) give notice of the contention to the appellant; and

(b) give notice to the appellant of the record of evidence or documents before the National Court relevant to the contention, for inclusion in the appellant's draft index to be prepared in accordance with Rule 40; and

(c) request the Registrar to include such record of evidence or documents in the appeal book.

Division 10.—Retention of exhibits

29. Where an appeal from a judgment may lie by leave or without leave to the court, the officer of the National Court who has custody of the exhibits in the proceedings shall, unless the primary Judge otherwise orders, retain the exhibits—

(a) for 40 days after the date when the judgment is pronounced; or

(b) if within the period of 40 days leave to appeal to the court from the judgment is granted for a further period of 40 days.

30. Upon the filing of a notice of appeal—

(a) the Associate to the primary Judge shall make out and certify a list of exhibits; and

(b) the exhibits, the list and any other documents before the primary Judge shall be delivered to the registry.

31. Where an exhibit cannot be so delivered, the Associate shall in his certificate, state the circumstances and give such information as he can to enable the Registrar to cause the exhibit to be available at the court.

32. The Registrar shall retain the documents obtained under Rules 30 and 31 until the disposal of the appeal and shall, subject to any direction by the court, return them to the persons from whom they were obtained.

Division 11.—Appointment to settle

33. The appellant shall on filing the notice of appeal get from the proper officer in the registry an appointment to settle the appeal book.

34. The appellant shall serve notice of the appointment on each person on whom the appeal is served.

35. The notice of appointment may be subscribed to the notice of appeal.

Division 12.—Collection papers

36. Before the date appointed for settling the appeal book, the appellant shall obtain and produce to the Registrar, if required—

(a) the reasons for judgment of the primary Judge or Court; and

(b) a copy of the notes of evidence taken by the primary Judge certified by his Associate or other authorized person.

37. If a copy of the transcript of proceedings is available, it shall be obtained from the Registrar and corrected in accordance with Rules 38 and 39.

Commentary:

Rule 37 The request for the transcript should be filed at the same time as the Notice of Appeal: *Donigi v PNGBC* (2002) SC 691. Practice Direction 1/94 requires the Form 8 Notice of Appeal to contain (1) the National Court file number, (2) the name of the judge in the National Court, (3) whether a transcript is required: *State v Manorburn Earthmoving Ltd* (2008) SC 933 at [13]

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38. The appellant shall on obtaining a copy of the transcript referred to in sub-rule (2)—

(a) correct any errors that appear in it; and

(b) submit a list of corrections to the respondent; and

(c) afford the respondent a reasonable opportunity of examining the transcript and corrections.

39. If the parties disagree upon the accuracy of any part of the transcript or are unable to agree upon a correction, the question shall be submitted to the Registrar or primary Judge for direction on the matter.

Division 13.—Draft index of appeal book

40. A draft index of the papers which are to constitute the appeal book shall be prepared and filed in the registry before the date appointed for settlement.

41. The appellant shall serve the draft index on the respondent a reasonable time before the appointment to settle the appeal book but no later than two clear days before settlement.

Division 14.—Settlement

42. At the appointment to settle the appeal book, the Registrar shall—

(a) determine what documents and matters shall be included in the appeal book and the order of inclusion and such other matters as he thinks fit concerning the preparation of copies of the appeal papers; and

(b) settle the index in accordance with the Rule 43 sub-rule (m); and

(c) determine the number of copies of the appeal book required; and

(d) may, if he thinks necessary, obtain the direction of the primary Judge; and

(e)Repealed by Order 12

Division 15.—The appeal book

43. (a) The appeal book for use on the hearing of an appeal, shall be prepared in bound volumes or a suitable binder on paper of such size as set out in Order 1 Rule 26 of the National Court Rules and every tenth line on each page shall be numbered.

(b) The thickness of any one volume of the appeal book shall not exceed 38mm.

(c) The title pages shall give the full and correct title of the proceedings, and the names of the lawyers for each party, telephone numbers and their addresses for service.

(d) After the title page there shall follow the index consisting of a complete list of the documents contained in the appeal book as settled by the Registrar, stating in the case of each document whether it is copied or not, and if copied, indicating at what page of the appeal book it appears.

(e) In the Index, the exhibits shall be arranged in the order in which they have been lettered or numbered in the National Court.

(f) The date and a short description of each document shall precede it, but backsheet or formal headings shall not be printed or copied, and jurats, formal identification of exhibits and the like shall be omitted.

(g) Interrogatories and answers, and affidavits of documents, shall not be copied except so far as they were put in evidence.

(h) Where the transcript of evidence is reproduced, the name of the witness together with a notation indicating whether the evidence given is in chief (IC), cross examination (XX) or re-examination (RX) shall appear on right hand side of each page.

Commentary:

Rule 43 (h) A handwritten transcript of evidence should not be included in a Supreme Court appeal book: *Puruno v Koi* (1987) SC 347 per Bredmeyer J. Only relevant transcripts should be included in the appeal book: *Donigi v PNGBC* (2002) SC691.

(i) A copy of the appeal book shall be examined with the original documents, and all copies shall be corrected.

(j) The examined copy of the appeal book shall be filed in the registry with a certificate by the parties or their lawyers that it has been examined and is correct.

(k) The appeal book shall be prepared and produced in a manner satisfactory to the Registrar.

(l) Only such documents as are relevant or necessary shall be included in the appeal book.

(m) The appeal papers shall be paginated and the documents arranged in the following order:—

(1) The notice of appeal to the Supreme Court;

(2) Process and pleadings;

(3) Evidence, oral or affidavit, stating the name of each witness or deponent and page number on which such evidence commences;

(4) Testimony taken on commission or before an examiner and put in or used as evidence;

(5) Exhibits, arranged in the order in which they have been lettered or numbered as exhibits in the National Court.

(6) The reasons for judgment of the primary judge or Court;

(i) where the text of an oral judgment is to be included in the appeal book it shall first be submitted to the Judge for correction and shall, when included in the appeal book, be accompanied by a certificate from the Registrar that, this has been done.

(7) The formal judgment or order of the primary Judge or Court.

(8) If the judgment appealed from is that of a Judge of the National Court sitting on an appeal— notice of appeal, the reasons for judgment and the formal order in that proceeding;

(9) The certificate that the appeal book has been examined and is correct.

Division 16.—Lodgment and service

44. Unless the court or a Judge otherwise orders, the appellant shall, not less than seven days before the commencements of the sittings at which the appeal is set down for hearing—

(a) lodge with the Registrar and

(b) serve on each of the respondents separately represented,

copies of the appeal hook as determined under Rule 42 sub-rule (c).

Division 17.—Costs of appeal book

45. Subject to Section 29 of the Act the costs of the appeal book are costs in the appeal unless the court otherwise orders.

46. The costs of copies of unnecessary documents or of documents copied at unnecessary length shall not be allowed.

Division 18.—Setting down for hearing

47. Unless an appeal is set down for hearing at the appointment to settle the appeal book pursuant to Rule 42(e), the appellant shall set the appeal down for hearing in accordance with Rule 48.

48 Rules 48-51 repealed by Order 12.

52. The court or a Judge may at any time make such orders as appear just for the expediting of the appeal.

Division 19.—Time, and want of prosecution

53. Where an appellant has not done any act required to be done by or under these rules or otherwise has not prosecuted his appeal with due diligence, the court may—

(a) order that the appeal be dismissed for want of prosecution; or

(b) fix a time peremptorily for the doing of the act and at the same time order that upon non compliance, the appeal shall stand dismissed for want of prosecution, or subsequently, and in the event of non compliance, order that it be so dismissed; or

(c) make any other order that may seem just.

Commentary:

Rule 53 A number of Supreme Court decisions have considered this rule and some of the relevant cases are digested in *PNG Nambawan Trophy Ltd v Dynasty Holdings Ltd* (2005) SC 811 and *The Public Curator v Bank of South Pacific Ltd* (2006) SC832 (1) An appeal might be struck out if it is not set down as required by the rules. Where an appeal has not been set down as prescribed, the power to dismiss for want of prosecution remains discretionary. (2) The discretion is to be exercised having regard to all the circumstances of the case including, inter alia, (a)the length of and reasons for delay on the appellant's part; (b)the extent to which, having regard to any delay, evidence likely to be adduced may lose its cogency;(c) the availability of a transcript, and(d)any negotiations between the parties: *Burns Philp (New Guinea) Ltd v George* [1983] PNGLR 55 (considering r 25 of the *Supreme Court Rules 1977*). Now see O7 r48. (3) Matters relevant to the want of due diligence include failure to promptly serve the Notice of Appeal, failure to attend on settlement of the appeal book, failure to explain non attendance: *Yema*

Gaiapa Developers Ltd v Hardy Lee (1995) SC484; failure to respond to correspondence: *Attorney General, Minister for Justice and the State v Papua New Guinea Law Society* (1997) SC 530*, and Donigi v PNGBC* SC 691; and failure to provide any explanation for dilatory conduct where an explanation could properly be expected: *Bernard Juali v The State* (2001) SC 667*; General Accident Fire and Life Assurance v Ilimo Farm* [1990] PNGLR 331. The absence of an explanation is fatal to a respondent to an application for dismissal where an explanation could quite properly be expected: *General Accident Fire and Life Assurance v Ilimo Farm (supra)*.(4) The discretionary powers under O7 r 53(a) should not be exercised in favour of the respondent where no explanation for want of due diligence is made: *General Accident Fire and Life Assurance v Ilimo Farm (supra)*. That a lawyer cannot be present because he is appearing before another judge may be an adequate explanation: *Joe Chan and PNG Arts Pty Ltd v Mathias Yambunpe* SC 537. 7 months delay in applying for the transcript of evidence to be prepared requires a proper explanation and the absence of one may result in the appeal being dismissed: *Donigi v PNGBC* (2002) SC 691. The Court must consider the whole of the circumstances in which an application for dismissal on the grounds of want of prosecution is brought, in particular events that have taken place since the application was filed. The application to dismiss itself should be prosecuted with due diligence. Once a case of delay is established the onus falls on the appellant to explain it: *Dan Kakaraya v Michael Somare, Koiari Tarata and Francis Kaupa* (2004) SC 762. The court may consider the consequences of dismissal of the appeal. If dismissal will not finally dispose of the proceedings between the parties it may be a factor favouring dismissal: *State v Turu & Ors* (2008) SC 904 .18 months delay in filing and serving the index to the appeal book is an inordinate delay: *The Public Curator v Bank of South Pacific Ltd* (2006) SC 840. In deciding how to exercise the discretion vested in the court by the rule it is appropriate for the court to consider the consequences of dismissal: *The Independent State of Papua New Guinea v Raymond Turu and John Maku* (2008) SC 905, strike out for want of prosecution was refused where there had been genuine difficulties in getting the matter set down for appeal and the appeal had a complex history: *The Lawyers Statutory Committee v Canisius Karingu* [2008] PGSC 20; (2008) SC932. That the appellant had been engaged in responding to 5 interlocutory applications by the respondent was a relevant matter to take into consideration in explaining the delay in prosecuting the appeal: *Yer, Secretary for Department of Finance v Yama* [2009] PGSC 13 SC 990. . An appeal dismissed for want of prosecution cannot be re-agitated as an application pursuant to Constitution Section 155 (2) (b): *PNG Waterboard v Gabriel Kama* (2005) SC 821. . An order to seek an appointment with the Registrar requires that the request for the appointment be served on the Registrar: *Thompson v Karingu* [2008] PGSC 35, SC954.
Rule 53(b) An order of the Supreme Court provided that the appellant "within 7 days seek an appointment with the Registrar to settle the appeal book index, failing which the appeal will stand dismissed for want of prosecution". The appellant sent a letter to the Registrar within 7 days seeking an appointment, but the letter was not received within the 7 days. The Court held that the order had not been complied with and that the appeal stood dismissed by the self executing order: *Thompson v Canisius Karingu* (2008) SC954. See note to Rule 56 regarding obtaining court ordered appointments with the Registry.

ABUSE OF PROCESS–The Court always has had authority and of course jurisdiction to ensure the integrity of its process. Accordingly any proceedings not brought in good faith or which are frivolous, vexatious or oppressive can and will be struck out by a Court as an abuse of process: *Polye v Sauk & Ors* [2000] PNGLR 166 (followed and applied in *Tamali Angoya v Tugupa Association Inc* SC 978*)*. A party commencing a multiplicity of proceedings on the same issues will commit an abuse of process unless there is a very good explanation justifying it: *Telikom v ICCC* (2008) SC906 .

54. The respondent may make application for an order under Rule 53 and the court may, after notice has been given to the appellant by the Registrar, make orders on reference from the Registrar.

55. An application for an order under Rule 53 shall—

(a) be in accordance with form 11; and

(b) be supported by affidavit.

Commentary

Rule 55 (a)
The omission in a Form 11 of the words "to appear and show cause" and the omission of a reference to the affidavit relied upon do not prejudice the respondent: *Midan v Lisio* [2010] PGSC 41, SC 1086

56. An order under Rule 53 sub-rule (b) may be varied at any time before the appeal stands dismissed for want of prosecution, and in special circumstances may be varied or revoked after that time.

Commentary:

Rule 56

In order to attract the exercise of the "special circumstances " jurisdiction the applicant has to show (1) why application to extend the time was not made before the time expired; (2) something out of the ordinary delays experienced in litigation, (3) that the event which prevented compliance with the order of the court occurred prior to the expiry of the time limit imposed by the order, (4) that the applicant is now prepared to prosecute the appeal without further delay: *Dr Alan Kulunga v Western Highlands Provincial Government & Ors* (2006) SC859.

Where the court has imposed a self executing order requiring the appellant to take action by a specified time, an appointment required from the Registry should be obtained by prompt personal attendance, not by writing letters. An appeal which is directed to be ready for a particular sittings should be ready for the call over preceding that sittings: *SCA 114 for 2005 National Housing Commission v Mt Hagen Local Level Government — unreported Supreme Court judgment the 8th of May 2009.*

Division 20.—Further evidence on appeal

57. This Division applies to any application to the court to receive evidence in a proceeding on an appeal additional to the evidence in the National Court.

Commentary:

See the commentary to Supreme Court Act sections 6 and 8.

Rule 57 This rule applies to "evidence which the claimant was unable to produce before the decision was given or which he could not reasonably be expected to have produced in the circumstances of the case": *John Peng v The State* [1982] PNGLR 331. Fresh evidence might be admitted in a criminal appeal if the justice of the case requires , even if that evidence was available and known to both prosecution and defence at the trial: *Busina Tabe v The State* [1983] PNGLR 10 (but see *Kuri v The State (No.2)* below). "Fresh evidence" within the meaning of Supreme Court Act s6(1) (a) means evidence which has become available since the hearing or trial, evidence that has come to the knowledge of the party applying since the hearing or trial and which could not by reasonable means have come to his knowledge before that time. Where evidence is "fresh evidence" so defined it must also be relevant, credible, and admissible according to the rules of evidence, and by it a reasonable man would be given cause to doubt, before the Supreme Court might exercise the discretion to allow it "where it is satisfied the justice of the case warrants it". Where the evidence is not fresh the Supreme Court has power to admit it pursuant to s8, "if it thinks necessary or expedient in the interests of justice to do so". Evidence which was not "fresh evidence" but which alleged a conspiracy as to the evidence to be given on a murder trial, should be allowed on appeal against conviction pursuant to the Supreme Court Act s8(1)(b): *Ted Abiari v The State (No.1)* [1990] PNGLR 250 applied in *Mamun v The State* (1997) SC 532 and *Jimmy Ono v The State* (2002) SC698. *Ted Abiari V the State (No. 1)* was effectively overruled in its interpretation of the relationship between sections 6 and 8 of the Supreme Court Act by the 5 judge bench of **Kuri v The State (No.2) (1991)** SC 414, [1991] PGSC 3 which held that section 8 is a machinery provision supplemental to section 6 and not a separate jurisdiction to admit evidence.

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58. This Division applies unless the court otherwise directs.

59. Application shall be made at the hearing of the appeal.

60. The application shall be—

(a) by notice stating the nature of the evidence sought to be called; and

(b) supported by an affidavit stating the grounds of the application.

61. Any evidence necessary to establish the grounds of the application, and the evidence which the applicant wants the court to receive shall be by affidavit.

62. The applicant shall file the Rule 60 notice and any affidavit not later than 21 days before the hearing of the appeal.

63. The evidence of any other party to the appeal shall, unless the court or a Judge otherwise orders, be given by affidavit filed not later than 14 days before the hearing of the appeal.

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Commentary:

Rule 63 The preparation and service, in the time stipulated by the rule, of the affidavit in response to the application is important because the other party (the applicant) has a right to call evidence in rebuttal: *Ted Abiari (No. 2) v The State* [1990] PNGLR 432.

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64. A party to the appeal shall, not later than the time limited for him to file an Affidavit under this rule—

(a) lodge as many copies of the affidavit as the Registrar may direct; and

(b) serve a copy of the affidavit on each other party to the appeal.

Division 21.—Interlocutory order not prejudice relief

65. An interlocutory order or rule from which there has been no appeal shall not operate so as to bar or prejudice the court from giving such decision upon an appeal as may be just.

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Commentary:

Rule 65 An *interlocutory order* means orders "... *which do not decide the issues between the parties"*: *Sir Julius Chan v Ombudsman* [1999] PNGLR 240. See the commentary on Supreme Court Act s 14(3) (b) for further discussion on "interlocutory orders".

Division 22.—adjournment of appeal

66. If for any reason an appeal is not heard or disposed of at the sittings of the court for which it was set down, it shall, subject to any direction which may be given by the court or by a Judge, stand adjourned to the next sittings of the court.

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Commentary:

Rule 66 An adjournment can be granted if the appellant shows that he filed the appeal in person and subsequently obtained a lawyer who wants to amend the notice of appeal before hearing: *Damane v The State* [1991] PNGLR 244.

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ORDER 8—RESERVATION OF CASES OR POINTS OF LAW

Division 1.—Judge may give directions

1. Where a Judge of the National Court reserves a case or any point in a case or any question of law for consideration of the court under Section 15 or 21 of the Act, he or in his absence, another Judge may give such directions as he considers proper for the drafting of the case stating the question reserved and for the preparation of documents for the use of the court.

2. Where a Judge of the National Court proposes under Section 21 of the Act to reserve a question of law, whether or not on the application of the accused, the Judge may give such directions as set out in Rule 1.

Division 2.—Form of reservation

3. The case to be stated shall—

(a) be entitled under the Section of the Act by which it is made, the names of parties and the title of the proceedings from which the question arose; and

(b) shall state the question; and

(c) set forth such facts only as are relevant to raise the question of law reserved; and

(d) if any question turns on the form of the pleadings, so much of the pleadings shall be set out as raises the question; and

(e) state whether—

(i) a judgment on the conviction was pronounced or respited, or was postponed;

(ii) the convicted person was committed to prison or admitted to bail on recognizance to render himself in execution or receive judgment; and

(f) be in accordance with form 12; and

(g) be signed by the Judge.

4. The reservation stating the question shall be transmitted by the Judge of the National Court by whom it was signed to the Registrar.

5. The Judge by whom the reservation was stated may amend the statement of the case at any time before argument.

Division 3.—Service

6. Upon receipt of the reservation, the Registrar shall cause to be served a copy of the reservation—

(a) if under Section 15, on the parties to the proceedings or on their lawyers; and

(b) if under Section 21, on the Public Prosecutor, the accused or his lawyer.

ORDER 9—REFERENCE UNDER SECTION 26 SUPREME COURT ACT

Division 1.—Form of reference

1. References under Section 26 of the Act shall be instituted by a reference which shall—

(a) be entitled under the Section of the Act by which it is made and the title as set out in the indictment; and

(b) make no reference to the identity of the acquitted person; and

(c) specify the point of law referred; and

(d) where appropriate, such facts of the case as are necessary for the proper consideration of the point of law; and

(e) state to the acquitted person—

(i) that the reference will not affect the trial and acquittal;

(ii) that he should inform the Registrar (within the specified time which shall not be less than 28 days after the date of service) if it is intended to present argument to the court either in person or by a lawyer; and

(f) be in accordance with form 13; and

(g) be filed in the Registry.

2. Upon filing the reference, the Principal Legal Adviser, for the purposes of Section 26 of the Act, shall be deemed to have reserved the matter.

Division 2.—Service

3. Upon the filing of the reference, the Registrar shall cause to be served with a copy of the reference—

(a) the person acquitted; and

(b) the Public Prosecutor; and

(c) the Public Solicitor.

4. For the purpose of Rule 3 sub-rule (a), service may be effected—

(a) by sending it by post, addressed to the lawyer who acted for the person acquitted at trial; or

(b) in the case of a body corporate by leaving it at or by sending it by post to the registered office of that body; and

(c) in the case of any other person by—

(i) post as provided by law; or

(ii) delivery to the person to whom it is directed; or

(iii) leaving it with some person apparently over the age of 16 years at the last known or usual place of residence.

Division 3.—Court may give directions

3. Where a reference has been filed, the court may give such directions as may be required concerning the terms of the reference, the matters to be included in it and provision of lawyers for the argument of it.
4. Division 4.—Amendment and withdrawal of reference

6. The Principal Legal Adviser may withdraw or amend the reference by notice—

(a) before hearing without leave; or

(b) after commencement of hearing but before the court delivers its opinion, with leave.

7. Notice of withdrawal or amendment under Rule 7 shall—

(a) be in accordance with form 14; and

(b) be filed in the registry; and

(c) be served where applicable in accordance with Division 2.

ORDER 10—APPEAL FROM ORDERS MADE UNDER ORDERS 16 AND 17 OF THE NATIONAL COURT RULES

Division 1.—Institution of appeal

1. An appeal under this Part shall be instituted by a notice of motion.

2. The notice of motion and all subsequent proceedings shall be entitled "In the Supreme Court of Justice" and shall be entitled between the party as appellant and the party as respondent.

3. The notice of motion shall—

(a) show where appropriate the particulars set out in a notice of appeal under Order 7 Rule 8; and

(b) have annexed—

(i) copies of all documents which were before the Judge of the National Court appealed from; and

(ii) a copy of the order made, certified by the Judge's Associate or the Registrar; and

(c) be in accordance with form 15; and

(d) be signed by the appellant or his lawyer; and

(e) be filed in the registry.

Division 2.—Certain rules to apply

4. The following rules shall apply to matters under this part with regard to—

(a) filing and service: Order 7 Division 4; and

(b) affidavits: Order 7 Rules 61, 62, 63, 64.

Commentary:

ORDER 10

Rule 1 Leave is required to appeal from a grant of leave for judicial review: *Garamut Enterprises Ltd v Steamships Trading Ltd* (1999) SC 625 followed and applied in *The State v David Nelson* (2005) SC 766 . An application for leave under Order 10 should be made in Form 7: SC 766 (2005) *The State v David Nelson* (2005) SC 766. An appeal by way of notice of motion under this order must be filed within 40 days of the judgment appealed from pursuant to the provisions of *Supreme Court Act* Section 17: *Jeffrey Balakau v Ombudsman Commission* [1996] PNGLR 346 (obiter-Section 14 also applies). . Where the 40th day for appeal falls on a Sunday an appeal filed on the following Monday is filed within time: *Tony Kila & Ors v Talibe Hegele & Ors* (2007) SC 885. See also *National Court Rules* O 16 r 11. O16 r11 of the *National Court Rules* and Order 10 of the *Supreme Court Rules* provide the exclusive procedure for applications for judicial review: *Rt Hon Sir Julius Chan v The Ombudsman Commission of Papua New Guinea* (1998) SC 597 . Order 7 rule 14 (objections to competency) does not apply to Order 10 appeals and such objections should not be filed: *Kenn Norae Mondiai & anor v Wawoi Guavi Timber Co. Ltd & ors* (2007) SC886. An objection to competency can be made in an Order 10 appeal if a respondent is given leave to do so by applying for directions. Relevant considerations to a grant of leave are (a) whether the application for directions has been filed and served expeditiously (b) whether the application has been prosecuted expeditiously (c) whether the proposed grounds of objection raise issues which would obviously render the appeal incompetent and (d) the interests of justice: *Madang Timbers Ltd v Kambori* [2009] PGSC 18; SC 992.

Rules 2 and 3 If the motion is not in accordance with the provisions of the Rules it is not a motion for that purpose: *Felix Bakani v Rodney Daipo* SC 659 (single judge) and on appeal – the procedural requirements of the rules are restrictive and onerous and couched in strictly mandatory terms. Those terms must be complied with by the appellant: *Felix Bakani v Rodney Daipo* (2002) SC699. . Followed in the *State v John Tuap and others* (2004) SC 675, [2004] PGSC 14 *and* SC907 (2008) *Substantive Council of the University of Goroka v Minister for Higher Education, Research and Technology* (2008) SC907. An application for extension of time to appeal or to seek leave to appeal must be made within the 40 days prescribed by

Supreme Court Act s 17. If the application is made to a single judge and refused, a further application to the full court must be made within the same 40 days: *Felix Bakani Rodney Daipo* (2002) SC 699. The application made to the full court must be a fresh application and not an application to reinstate or set aside the previously refused application: *The Independent State of Papua and New Guinea v John Tuap* (2004) SC 765.

PART 4—GENERAL PROVISIONS

ORDER 11—RULES OF GENERAL APPLICATION

Division 1.—Application

1. The rules contained in this part apply to all matters brought under these rules unless in these rules, the contrary intention appears.

Division 2.—Notice of appearance to be filed and served

2. A person served with a document by which proceedings are instituted or by which leave or other order is sought under these rules and who desires to be heard at any stage of the proceedings shall, as soon as is practicable or within the time specified in the document or in any other order of the court—

(a) file an appearance in accordance with form 16; and

(b) serve a copy of the appearance on each of the other parties.

Division 3.—Address for service

3. An address for service shall be disclosed on—

(a) any document by which proceedings are instituted in the court; and

(b) an appearance filed under Rule 2 of this Order.

4. The address for service shall—

(a) Contain the name, address and telephone number of—

(i) the person on whose behalf the document is filed; and

(ii) be a place within 15 kilometres of the Registry, at which documents in the proceedings may, during ordinary business hours, be left for the person whose address for service it is; and

(iii) an address to which documents in the proceedings may be posted for that person; and

(iv) where a person is represented by a lawyer it shall be the office of the lawyer or of his Papua New Guinea agent, but in the case of a lawyer who has requested and been allocated by the Registrar a compartment in the Document Exchange Box located within the Registry then the

deposit of a document in such compartment shall amount to ordinary service within the meaning of this sub-rule; and

(b) be in accordance with form 18.

5. The address so disclosed shall remain the address for service until notice of change of address is filed in the registry and served on any other party to the proceedings.

6. Where a lawyer ceases to act for a party, he shall file in the registry a notice of that fact.

Division 4.—Service

7. Where in these rules service is required of any document, it may be effected—

(a) by serving a signed and sealed copy of the document personally on the party to be served; or

(b) by delivering a signed and sealed copy of the document to—

(i) the address for service of a party given in accordance with Division 3; or

(ii) the address for service of a party in the proceedings in the National Court from which the present proceedings arose; or

(c) where a lawyer of a party has an address for service disclosed, service shall be effected at that address whilst such lawyer continues to act for a party.

Division 5.—Pending proceedings

8. Where proceedings under these rules are pending, the court or a Judge may, subject to the Act, make such orders as are considered necessary for—

(a) the custody or release on bail or otherwise if a person in custody; and

(b) the custody, preservation and production of exhibits or other property; and

(c) the suspension or payment of any fine; and

(d) the suspension or variation of any order relating to restitution of property.

Division 6.—Lack of procedural provision

9. Where a person desires to take any step in proceedings under these rules and the manner or form of the procedure is not prescribed, the person may apply to a Judge for directions.

Division 7.—Waiver of rules

10. Where compliance with the provisions of these rules relating to the preparation of documents or appeal books for the court may cause unnecessary hardship expense or delay, the Registrar, may, after consultation with the Chief Justice, or if he is not available, the next most senior Judge in Chambers, waive compliance to such extent as in his opinion is reasonable

Commentary:

ORDER 11

Rule 9 Application could be made under this rule for directions to amend the name of the representative of a deceased estate: *The Public Curator v Bank of South Pacific Ltd* (2006) SC 832.

Division 8.—Adding parties and amendment

11. The court or a Judge may order that any person be added as a party to proceedings under these rules or that the proceedings be amended and may impose such conditions as appear just, and give all consequential directions

Rule 11 Amendment . The *Supreme Court Act* prevails over the Rules: *Acting Public Solicitor v Uname Aumane* [1980] PNGLR 510,512,516. Rules cannot be made which are inconsistent with an Act of the Parliament. The rules must be read subject to the Act: SC798 (2005)*Yanta Development Association v Piu Land Group Inc & ors.* An appellant cannot introduce an entirely new matter to the Notice of Appeal outside 40 days: *Bruce Tsang v Credit Corporation (PNG) Ltd* [1993] PNGLR 112; and cf. the majority in *Dinge Damane v The State* [1991] PNGLR 144 - an application out of time for leave to amend a notice of appeal should only be allowed in exceptional circumstances and at the discretion of the court. Last-minute amendment should only be granted in exceptional circumstances and at the discretion of the court e.g. a sudden change of counsel for the appellant where the point to be raised broadly seems to have merit: *Rolf Schubert v The State* [1979] PNGLR 66. Leave to amend should not be granted on the day of hearing when the ground should properly have been included in the Notice of Appeal and amendment would inevitably delay the hearing, unless adequate reasons are shown: *Birch v The State* [1974] PNGLR 75. Applications to add grounds of appeal in the course of the address in reply should not be entertained: *Van der Kreek v Van der Kreek* [1979] PNGLR 185, nor a change in the nature of the relief sought: *Kenn Norae Mondiai & anor v Wawoi Guavi Timbers Co. Ltd & ors* (2007) SC 886 at [29-31]. A notice of appeal can be amended to vary the grounds of appeal or the relief sought by supplementary notice without leave, prior to settlement of the appeal book (query whether this is so if settlement of the appeal book is delayed beyond 40 days from the decision appealed from); after that date with leave of the court. On an application for leave to amend the test is whether there are special circumstances in a particular case, which would make the case an exceptional case that should warrant the grant of leave to amend the notice of appeal. With leave of the court **points of law not argued in the court below** may be raised if the point could not have been cured by evidence in the trial: SC 812 (2005) *Papua Club Inc v Nasaum Holdings Ltd* and dissenting from that view *"The MVIT v James Pupune [1993] PNGLR 370 line of cases is to be preferred... an appeal court should not determine issues not first raised in the trial court, except with the consent of the parties or with special leave of the court in very exceptional circumstances such as want of jurisdiction"*: *Chief Collector of Taxes v Bougainville Copper Ltd* (2007) SC853. **Adding a Party**. An appellant cannot be added outside the 40 days provided by *Supreme Court Act* s17: *Kenn Norae Mondiai & anor v Wawoi Guavi Timbers Co. Ltd & ors* (2007) SC 886 at [27].

Division 9.—Written submissions

12. (a) The court may of its own motion, direct the preparation of written submissions.

(b) The Registrar shall, if ordered by the court or a Judge, serve notice on the parties of a direction under sub-rule (a).

13. Upon receipt of a direction under Rule 12, each party shall prepare a written case which shall—

(a) bear the title of the proceeding; and

(b) identify the party whose case it is; and

(c) consist of paragraphs consecutively numbered; and

(d) state as concisely as possible—

(i) the circumstances out of which the matters arise; and

(ii) the contentions to be urged by the party concerned; and

(iii) the reasons relied upon; and

(e) a list of all legislation and authorities referred to.

14. So far as practicable, in a written case, references to the portions of the transcript relied upon shall be given by page and line, and extracts shall not be set out.

Commentary:

Rule 14 Neither extracts from the transcript nor from the cases cited should be set out in written extract of argument unless extremely brief: *Mondiai & anor v Wawoi Guavi timber Co Ltd & ors* 2007) SC886.

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15. Each party required to prepare written submissions shall not more than 10 days after receipt of a direction under Rule 12—

(a) file his written submissions; and

(b) lodge with the Registrar such number of copies of the submissions as he may direct.

16. A written submission shall not be available for inspection until all parties have filed their submissions.

17. When all parties have filed their written submissions, each party shall serve a copy of his submissions on each other party.

Division 10.—Written extract of argument

18. In all substantive matters instituted under these rules, the parties to proceedings shall prepare a written extract of argument to the court.

19. The extract shall be—

(a) as nearly as possible in accordance with Rule 13; and

(b) consist of no more than four pages of the size referred to in Order 7 Rule 43, sub-rule (a).

Commentary:

Rule 19 (b) The rule should be observed. The extract of submission should be no more than four pages. Lengthy extracts of argument quoting parts of judgments or affidavits and parts of the transcript are unhelpful: *Mondiai & anor v Wawoi Guavi Timber Co. Ltd & ors* (2007) SC886. Submissions should dovetail with the grounds in the Notice of Appeal, not appear that the appellant has forgotten the grounds of appeal: *The Papua Club Inc v Nusaum Holdings Ltd & Ors* (2005) SC812 at [125].

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20. On the presentation of oral argument, each Judge constituting the court, shall be given a copy of the extract referred to in Rule 18, by counsel presenting the argument.

21. The court may dispense with any requirements of this rule.

Division 11.—List of authorities and legislation

22. Each party to substantive proceedings under these rules shall supply the Associate to the presiding Judge with a list of authorities and legislation to which the party may refer at the hearing together with copies for other Judges constituting the Court.

23. If practicable, the list shall be supplied 48 hours before the day on which the proceedings are listed for hearing. If this is not practicable, then so soon thereafter as is practicable.

Division 12.—Report by trial judge

24. Where—

(a) notice of appeal or application for leave to appeal has been filed; or

(b) a case or question of law has been reserved under Section 15 or 21 or referred under Section 26 of the Act, the trial Judge may report in writing to the Court giving his opinion upon the case generally or upon any point arising in the case of the appellant.

25. Where either Rule 24 sub-rule (a) or (b) applies, the court may, whenever it appears necessary for the proper determination of any application or appeal—

(a) request the trial judge to furnish it with a report in writing in the terms set out in sub-rule 1; and

(b) may direct the Registrar to furnish that judge with any document or information which it considers material.

26. The Registrar shall, after delivery of the trial Judge's report to the members of the court, promptly furnish a copy of the report to each party to the appeal or application.

Division 13.—Appeal to court from directions of judge

27. A party dissatisfied with a direction given by a Judge under these rules may upon notice to the other parties concerned in the proceedings apply to the court which may make such order as appears just.

28. Proceedings under Rule 27 shall be instituted as if it was an appeal under Order 10 and the application of the rules under that Order with all necessary modifications shall apply.

Division 14.—Setting down for hearing

29.[Rules 29 and 30 repealed by Order 13.]

Order 12 COSTS

1 Interpretation

In this Order unless the contrary intention appears:

Bill means bill of costs;

Court in this Order means the Court as defined in the Rules of the Supreme Court of Justice;

Counsel means lawyer instructed by another lawyer to advise or appear; ***Judge***

means a judge as defined in the Rules of the Supreme Court of Justice

Proceeding means any reference, application, appeal, motion, objection to competency or other matter brought before the court pursuant to the Constitution, the *Supreme Court Act*, these Rules or any other jurisdiction of the court, other than criminal matters.

Taxed costs means costs taxed in accordance with this Order.

Taxing Officer means the Registrar or a person whose duty it is to tax costs in the Court, which means that a reference to the taxing officer as *'he'* in these Rules means or includes a reference to *'she'*.

2 Application

The provisions of this Order apply to costs payable or to be taxed under any order of the Court, or under these Rules, and costs to be taxed in the Court under any Act.

3 Party represented by officer of the State or in-house lawyer

If a party is represented by a lawyer (as counsel) who is employed or engaged by the State

or is represented by an in-house lawyer employed or engaged by a party, a fee commensurate with that which would be allowable if the lawyer had been a private lawyer may be allowed to the State or that party despite the fact that the party is unable to vouch payment of the fee either by the signature of the lawyer or otherwise.

4 Time for dealing with costs

(1) The Court or a Judge may in any proceeding exercise its power and discretion as to costs at any stage of the proceeding or after the conclusion of the proceeding.

(2) Where the Court or a Judge makes an order in any proceeding for the payment of costs the Court or a Judge may require that the costs be paid forthwith notwithstanding that the proceeding is not concluded.

(3) An order for costs of an interlocutory proceeding shall not, unless the Court or a Judge otherwise orders, entitle a party to have a bill of costs taxed until the principal proceeding in which the interlocutory order was made is concluded or further order.

(4) (a) When, pursuant to Section 3 or 12 of the *Supreme Court Act* judgment is delivered by less than the full number of Judges who heard the proceeding, if no final order for costs of that proceeding is included in the judgment, the Judges or judge delivering the decision of the Court may hear the parties on costs and make such order for costs, as is considered just.

(b) After hearing argument the Judge or Judges may consult the available absent members of the Court, in which case the order made shall be the order of the majority of the Court.

5 Taxed costs and other provisions

(1) Subject to this Order, where by or under these Rules or any order of the Court~~,~~ or a Judge, costs are to be paid to any person, that person shall be entitled to his taxed costs.

(2) Where the Court or a Judge orders that costs be paid to any person, the Court or a Judge may further order that as to the whole or any part of the costs specified in the order, instead of taxed costs, that person shall be entitled to:

(a) a proportion specified in the order of the taxed costs; or

(b) the taxed costs from or up to a stage of the proceedings specified in the order; or

(c) a gross sum specified in the order; or

(d) a sum in respect of costs to be ascertained in such manner as the Court may direct; or

(e) the costs to be taxed on a party/party or solicitor/client basis, or;

(f) the costs, whether taxed or specified, to be payable by a lawyer, in accordance with Rule 11.

(3) The Court or a judge may make an order under sub rule (2) at any time, whether or not an order that costs be paid to a person has previously been made or entered.

6 Costs in other courts

Where in a proceeding transferred to or removed into the Court or in a proceeding on an appeal to the Court, the Court or a Judge makes an order as to the costs of a proceeding before any other court, the Court or a Judge may:

(a) specify the amount of the costs to be allowed; or

(b) order that the costs be taxed in accordance with this Order; or

(c) make orders for the ascertainment of the costs by taxation or otherwise in that other court.

7 Order for payment

Subject to this Order or to the effect of any written agreement between the parties, a party to a proceeding in the Court shall not be entitled to recover any costs of and incidental to the proceeding from any other party to the proceeding except under an order of the Court or a Judge.

8 Order for taxation — when not required

Where:

(a) an order of the Court directs the payment of costs; or

(b) the proceeding is dismissed with costs; or

(c) an application is refused with costs; or

(d) on the discontinuance of a proceeding; where there is no order or agreement to the contrary; or

(e) a party is otherwise liable under these Rules to pay the costs of another party,

the costs may be taxed without any order directing taxation.

9 Entry of Order for Costs

(1) Where costs are not paid within 14 days after service of a sealed copy of a certificate of taxation of the costs, whether under this Rule or an Order of the Court or a Judge, a party to whom the costs are payable may apply to the Court or a Judge, whichever is appropriate, for the payment of taxed costs.

(2) Application for judgment shall be moved by motion and supported by affidavit and shall be filed and served 3 clear days before the hearing date.

10 Registrar to tax costs

Unless the Court or a Judge in a particular case otherwise orders, bills of costs and fees which:

(a) are payable to a party in respect of business transacted by them in the Court or its registries; and

(b) have been directed by a judgment or order to be taxed or under these Rules are liable to be taxed without express direction;

shall be taxed, allowed and certified by a taxing officer.

11 Liability of Lawyer.

(1) Without limiting the Court's discretion to award costs in a proceeding, if costs are incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default, and it appears to the Court or a Judge that a lawyer is responsible (whether personally or through a servant or agent), the Court or a Judge may, after giving the lawyer a reasonable opportunity to be heard, do any of the following:

(a) disallow the costs as between the lawyer and the lawyer's client or;

(b) if the lawyer is acting as instructed counsel— disallow the costs as between the counsel and the counsel's instructing Lawyer or;

(c) direct the lawyer to repay to the client, costs which the client has been ordered to pay to another party or;

(d) direct the lawyer to indemnify any party other than the client against costs payable by the party indemnified.

(2) Without limiting subrule (1), a lawyer is taken to be responsible for a default under that subrule if a proceeding cannot conveniently proceed, or can proceed only with the incurring of extra costs or with inconvenience to the Court or a Judge or another party to the proceeding, because of the failure of the lawyer:

(a) to attend before the Court in person or by a proper representative; or

(b) to file any document that ought to have been filed; or

(c) to deliver for the use of the Court or a Judge, any document that ought to have been so delivered; or

(d) to be prepared with any proper submission, evidence or account; or

(e) to comply with any provision of these Rules or any judgment or order or direction of the Court or a Judge; or

(f) otherwise to proceed.

(3) Before making an order under subrule (1), the Court or a Judge may refer the matter to the Registrar for inquiry and report.

(4) The Court or a Judge may order that notice of any proceeding or order against a lawyer be given, as specified in the order, to:

(a) the lawyer's client; or

(b) if the lawyer is acting as counsel, his instructing Lawyer.

(5) For the purpose of giving effect to a costs order, the Court or a Judge may give ancillary directions, including a direction to a lawyer to provide to the Court or a party to the proceeding, a bill of costs in taxable form.

12 Scale of costs

(1) Except as otherwise ordered in proceedings commenced on and after the date these Rules came into operation, Lawyers are, subject to these Rules, entitled to charge and be allowed the fees set forth in Schedule 1, and higher fees shall not be allowed.

(2) A person who is not a party to proceedings and who is called as a witness or attends at Court in compliance with a summons issued pursuant to Section 8 of the S*upreme Court Act* or any other power of the Court, is entitled to recover from the party calling that person or requesting the issue of the summons, the reasonable expenses incurred in giving evidence or attending Court.

(3) The Court or a Judge may order that the party who called the person referred to in subrule (2) as a witness or requested the issue of the summons under which the person attended before the Court or a Judge, to pay the reasonable expenses of that person.

13 Taxing officers to assist each other

The taxing officers shall assist each other in the discharge of their duties and so, for the proper despatch of the business of the respective officers, a taxing officer may tax or assist in the taxation of a bill of costs which has been referred to another taxing officer for taxation and to ascertain what is due in respect of the costs, and in that case, shall certify accordingly.

14 Costs of interlocutory proceedings

Unless the Court or a Judge otherwise orders, the final Order for costs shall include all interlocutory costs Orders.

15 Costs reserved

Where the costs of an application or other proceeding are reserved by the Court or a Judge, the costs so reserved shall follow the event unless the Court or a Judge otherwise orders.

16 Notice of adjournment of taxation

If the taxation of a bill is adjourned for any reason, the party with the carriage of the taxation shall send notice of the adjournment by post or personal service or to any Lawyer or person not present at the time of the adjournment on whom the original bill of costs was or ought to have been served.

17 Time limit for taxation

A bill shall not be taxed unless the party entitled to costs files a bill within 12 months of the date of the final order for costs.

18 Delay before taxing officer

Where in a proceeding before the taxing officer, a party is found to be guilty of neglect or delay or puts another party to any unnecessary or improper expense, the taxing officer may;

(a) certify the costs of the other party; or

(b) allow a nominal or other sum to the party refusing or neglecting to bring in his costs.

19 Cost to be allowed on taxation

On every taxation, the taxing officer shall allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for maintaining or defending the rights of a party, but, except as against the party who incurred them, costs shall not be allowed which appear to the taxing officer to have been incurred or increased:

(a) through over-caution, negligence or misconduct; or

(b) by payment of special fees to counsel or special charges or expenses to witnesses or other persons; or

(c) by other unusual expenses.

unless, on taxation of a lawyer and own client bill, those additional or unusual costs have been approved in writing by the client's.

20 Disbursements in Lawyers' bills

(1) Subject to subrule (2), a disbursement must not be allowed if the disbursement has not been paid before the bill of costs is delivered.

(2) If a bill expressly states that a disbursement was not paid before the bill was delivered, and the bill sets out the unpaid items of disbursement under a separate

heading in the bill, the disbursement may be allowed by the taxing officer if:

(a) the disbursement:

(i) is paid before the certificate of taxation is given; and

(ii) is paid in discharge of an antecedent liability of the Lawyer,

including counsels' fees, properly incurred on behalf of the client; or

(b) the Lawyer provides an unconditional undertaking to the Court to pay the unpaid disbursement from any costs recovered.

21 Taxing officer's discretion

(1) In the case of a fee or allowance which is discretionary, it shall, unless otherwise provided, be allowed at the discretion of the taxing officer.

(2) In the exercise of his discretion, the taxing officer shall take into consideration:

(a) the other fees and allowances to the lawyer and counsel, if any, in respect of the work to which such a fee or allowance applies;

(b) the nature and importance of the proceeding;

(c) the amount involved;

(d) the principle involved;

(e) the interest of the parties;

(f) the fund, estate or person who will bear the costs;

(g) the general conduct and cost of the proceeding; and

(h) all other relevant circumstances.

22 Discontinuance

(1) Where a party to any proceeding discontinues the proceeding without leave as to the whole or any part of the relief claimed by him against any other party, the discontinuing party shall, unless the Court or a Judge otherwise orders, pay the costs of the party against whom the discontinued proceeding is made, occasioned by the discontinued proceedings and incurred before service of notice of the discontinuance.

(2) Rule 8 applies to the taxation and recovery of such costs referred to herein.

23 Continuance of interlocutory injunction

Where the Court or a Judge grants an interlocutory injunction or stay and afterwards grants a further interlocutory injunction or stay continuing the first injunction with or without modification, an order as to costs of the further injunction or stay shall, unless the Court or a Judge otherwise orders, include the costs of the first injunction or stay.

24 Cost of application or step within proceedings

Subject to this Order, the costs of any application or other step in any proceedings shall, unless the Court or a Judge otherwise orders, be deemed to be part of the costs of the party in whose favour the application or other step is determined and shall be paid and otherwise dealt with in accordance with the provisions of this Order.

25 Costs of application or step within proceedings where stood over to hearing

When an application, objection to competency or other proceeding is ordered to stand over to the substantive hearing, and no order is made at the hearing as to the costs of the application, objection to competency or proceeding, the costs of all parties to the application, objection to competency or proceeding shall be deemed to be part of their costs of the proceeding.

26 Party and party basis

On a taxation on a party and party basis:

(a) the costs of briefing more than one Counsel may be allowed;

(b) a retaining fee to more than one Counsel shall not be allowed; and

(c) a fee on brief or other additional costs in respect of Counsel attending before a Registrar or taxing officer shall not be allowed unless the Registrar or taxing officer certifies the attendance to be proper, or the Court or a judge otherwise orders.

27 Absence of Counsel

(1) Where Counsel is briefed to appear on a hearing and costs are taxed on a party and party basis, counsel's fee on the brief shall not be allowed unless:

(a) he is present at the hearing for a substantial amount of the relevant period; or

(b) he gives substantial assistance during the relevant period in the conduct of the proceedings; or

(c) the Court or a Judge otherwise orders.

(2) In subrule (1) ***relevant period*** means the period of the hearing or if the hearing lasts more than 4½ hours, the first 4½ hours.

28 4½ hour periods

(1) In reckoning the 4½ hour period mentioned in rule 27 the mid-day adjournment shall not be included unless the Court or a Judge otherwise orders.

(2) Where the commencement or resumption of a hearing is delayed beyond the listed time the taxing officer may include waiting time in reckoning the 4½ hour period mentioned in rule 27.

29 Fees to Lawyer and Counsel

(1) When a lawyer also acts as Counsel, the Taxing Officer may allow such sum as Counsel's fee as the taxing officer in his discretion thinks just and reasonable.

(2) Where the fees, costs and expenses of an Overseas Counsel are certified by the Court or a Judge, they shall be allowed in accordance with Schedule 1 of these Rules.

30 Disallowance of costs of improper, vexatious or unnecessary matter in documents or proceedings & reduction of costs

(1) On a hearing, the Court or a Judge may, upon application and whether or not objection is taken:

(a) direct that any costs which have been improperly, unreasonably or negligently incurred, be disallowed;

(b) direct the taxing officer to examine the costs incurred, and to disallow such costs as he shall find to have been improperly, unreasonably or negligently incurred; or

(c) direct that a party whose costs are so disallowed, shall pay to the other parties the costs incurred by those parties in relation to the proceeding in respect of which his costs have been disallowed.

(2) Where the question of costs having been improperly, unreasonably or negligently incurred has not been raised before and dealt with by the Court or a Judge, it is the duty of the taxing officer to look into that question, and thereupon, the same consequences shall ensue as if he had been specially directed under paragraph (1) (b) of this rule to examine the costs incurred, and to disallow such costs as he finds to have been improperly, unreasonably or negligently incurred.

(3) Where a party is awarded judgment for less than the maximum civil jurisdiction of the District Court on proceeding for a money sum or damages, any costs ordered to be paid, including disbursements, will be reduced by one-third of the amount otherwise allowable under this Order unless the Court or a Judge otherwise orders.

31 Unnecessary appearance in Court

Where a party appears upon a proceeding before the Court or a Judge or before the

Registrar, in which he is not interested or upon which, according to the practices of the Court, he ought not to appear, he shall not be allowed any costs of appearance unless the Court, Judge or Registrar respectively, so directs.

32 Powers of taxing officer

(1) The taxing officer may, for the purpose of taxation of costs:

(a) summon and examine witnesses either orally or upon affidavit;

(b) administer oaths;

(c) direct or require the production of books, papers and documents;

(d) issue summonses;

(e) make separate or interim certificates;

(f) require a party to be represented by a Lawyer or Counsel; and

(g) do such other acts and direct or take all such other steps as are directed by these Rules or by the Court or a Judge.

(2) A taxing officer may, of his own motion, refer any question arising in a taxation for the direction of a Judge or the Court.

33 Bill of costs

(1) A bill shall be in the form prescribed in Schedule 2 and shall contain particulars of:

(a) work done by the Lawyer, his servants and agents; and

(b) costs claimed for the work done in paragraph (a) above; and

(c) disbursements made.

(2) There shall be endorsed on the bill, a certificate signed by a Lawyer verifying the additions in it, and there shall be attached to it or otherwise filed with it in a convenient manner, originals or legible copies of receipts for significant disbursements, or if a disbursement has not been paid, copies of all relevant accounts.

35 Appointment to tax bill of costs

(1) If a bill is filed, the taxing officer must appoint a time to tax the bill and endorse the bill with the date and time of the appointment in the form attached as Schedule 2.

(2) The party who filed the bill must serve a copy of the bill on each other party to the

taxation at least 21 days before the date appointed for taxation.

35 Objection to bill of costs

(1) A party on whom a bill is served, may, by notice, object to any item in the bill.

(2) The notice shall list each item or part thereof in the bill which is objected to and shall also state concisely and specifically the nature and grounds of objection to each item or part objected to and the amount which it is contended should be taxed off.

(3) The notice shall be filed and served on the party in whose favour the bill is to be taxed and on any other interested party not less than 7 days before the day appointed for taxing the bill.

(4) A party on whom a notice is served under subrule (5) must prepare a written statement of response to each item or part of an item of the bill objected to, stating concisely and specifically, the basis on which it is claimed the item or part is allowable and the reason the objection cannot be sustained, including references to any authorities relied on.

(5) The statement of response shall be filed and served on the party on whom the bill was served not less than 3 days before the day appointed for taxing the bill.

(6) Oral submissions may be made at the taxation conference:

(a) subject to the discretion of the taxing officer; and

(b) only for the purpose of explaining or clarifying an objection set out in a notice under subrule (3) or a response to an objection set out in a statement under subrule (4).

(7) Subject to the discretion of the taxing officer to be exercised in exceptional circumstances, on taxation of the bill:

(a) no amount is to be taxed off, nor any ground of objection to an item or part of an item of a bill allowed, unless each amount, ground, item or part, is specifically set out in a notice under subrule (2); and

(b) no amount is to be allowed in respect of an item or part of an item of a bill which is objected to in a notice under subrule (2) if no response to the objection has been made under subrule (4).

(8) The taxing officer has a discretion:

(a) to tax the costs of a notice under subrule (2), a response under subrule (4), and of any other objections, and:

(i) add them, or a part of them, to; or

(ii) deduct them, or a part of them, from;

any sum payable by or to a party to the taxation; or

(b) to fix a lump sum in respect of the costs of the notice or other objection and add to it, or deduct it from any sum payable by or to a party to the taxation.

(9) If, on the taxation of any costs, one-sixth or more of the amount of the bill for those costs is taxed off, the lawyer whose bill it is, shall not be allowed the fees to which, apart from this Rule, he would be entitled, for preparing the bill and for attending on the taxation.

36 Certificate of taxation

(1) Within 7 days of completion of taxation, the taxing officer shall issue a sealed certificate of taxation, with sufficient number of office copies as are needed for the parties responsible for the payment of costs.

(2) The certificate of taxation must be served by the party entitled to costs, on the party responsible for its payment.

(3) If, after 14 days from the date of service of the certificate of taxation, the costs remain unpaid, the Court or a Judge may, on motion by a party, supported by an affidavit, direct the entry of judgment for costs in the amount stated in the Certificate of taxation.

37 Review of Taxation

(1) A Court or a Judge may review the decision of a Taxing Officer, only if the taxing officer has given a certificate in accordance with that decision.

(2) A party aggrieved by the taxed costs may, within 14 days from the date of issue of the Certificate of Taxation, apply to the Court or a Judge, for leave to review the taxing officer's decision, such application to be supported by affidavit and shall be served on the other party, 3 clear days before the date of moving the application.

(3) The application shall be made by Notice of Motion and supported by affidavit which shall, amongst other things, specify the list of items to which the applicant objects and must state concisely the nature and grounds of each objection.

38 Extension of time

(1) Before the expiration of the 14 days referred to in rules 36(3) or 37(2) hereof, a party shall apply for an extension of time to pay taxed costs, such application to be supported by affidavit and served on the other party, 3 clear days before the date of moving the application.

(2) Where a party applies for an extension of time he shall, unless the Court or a Judge otherwise orders, pay the costs of and occasioned by the application or any order made on or in consequence of the application.

39. Interest on Costs

Every award of costs shall carry interest at up to 8% per annum from 14 days after the date

of service of the Certificate of Taxation on the party liable to pay, irrespective of whether application for extension of time or review is made and which service must be established by an affidavit of service.

Schedule of Costs

SCHEDULE 1

SUPREME COURT COSTS RULES

ITEM	MATTER FOR WHICH CHARGE MAY BE MADE	CHARGE K
1.	Preparing a Notice or Entry of Appearance	75.00
2.	Preparing an Application or Notice of Motion	250.00
3.	Preparing an Affidavit, having regard to the complexity of the matter and the circumstances of the case.	250.00-850.00
4.	Preparing Appeal Books, including collating all necessary material, attendances on the printer and general oversight of their preparation - lawyer	150.00 per hour
	- clerk	25.00 per hour
5.	Preparing any other document including an Application for Leave to Appeal, Notice of Appeal and Reference, having regard to all the circumstances of the case.	350.00-1,000.00
6.	Perusal of documents, having regard to the complexity of the document and the seniority of the lawyer or Counsel	150.00-450.00 per hour
7.	Preparing short letters	50.00
8.	Preparing ordinary letters	75.00
9.	Perusing short letters	25.00
10.	Perusing ordinary letters	50.00
11.	Printing or photocopying	4.00 per page
12.	Attendance by telephone – Up to 10 minutes - Over 10 minutes	 50.00 75.00
13.	Any attendance that is capable of being made by a clerk, such as at the Court Registry	50.00
14.	Any attendance that requires the attendance of a lawyer, including attendance for inspection of documents, and having regard to the complexity of the matter and the seniority of the lawyer	150.00-450.00 per hour.
15.	Appearance in Court, depending on the complexity of the matter and the seniority of the lawyer, and excluding waiting time	150.00-450.00 per hour, but not to exceed 3,000.00 per day
16.	Attendance at Court for waiting time	150.00 per hour but not to exceed 850.00 per day.
17.	Appearance at Court to receive Judgment	150.00-450.00
18.	Where a lawyer is required to travel from the town	

	where he practices to appear in Court, he shall be allowed return airfares to attend the Court, together with reasonable hotel expenses and a reasonable allowance for transport within the town of trial.	

19.	A lawyer may incur an amount for Counsel's fees where it is proper to do so, and where the fee appears to be fair and reasonable having regard to the circumstances of the case and the seniority of Counsel. The fees incurred may be claimed as a disbursement. The fees for Overseas Counsel are only recoverable in accordance with Rule 29(2).	
20.	If the case or circumstances warrant it, an allowance may be claimed under this item in addition to any other item that appears in this schedule, for general care and conduct, having regard to: (a) the complexity of the matter and the difficulty or novelty of questions raised; (b) the importance of the matter to the party and the amount involved; (c) the skill, labour, specialized knowledge and the responsibility involved in the matter on the part of the lawyer; (d) the number and importance of the documents prepared or perused, but without regard to length; (e) the time taken by the lawyer; (f) research and consideration of questions of law and fact	150.00-450.00 per hour
21.	Allowance for professional witnesses called because of their professional, scientific or other special skill or knowledge	Not more than 350.00 per hour and not to exceed 1,500.00 per day
22.	Other witnesses	The amount of salary or wages actually lost but not more than 50.00 per hour and not to exceed 400.00 per day.
23.	All Court fees	To the extent to which they have been properly incurred and paid.
24.	Preparing bill of costs and attendance on taxation of costs - Lawyer, depending on the complexity of the matter and the seniority of the lawyer; - Clerk	 150.00 – 350.00 per hour 25.00 per hour.

SCHEDULE 2

BILL OF COSTS

IN THE SUPREME COURT)
OF JUSTICE AT *(@ - insert place of Court*)
PAPUA NEW GUINEA)

(@ - insert appropriate SC No. of 20

BETWEEN:

(@ - insert name)
Appellant/Applicant

AND:

(@ - insert name)
Respondent

THE *(@ - insert title of party entitled to costs)* **BILL OF COSTS TO BE TAXED AND PAID BY THE** *(@ - insert title of party liable to pay costs)* **ON A** *(@ - insert party/party, solicitor/client, indemnity.etc)* **BASIS PURSUANT TO** *(@ - insert applicable Rule or Court Order)*

I appoint am/pm on the day of 20 at the Registrar's Chambers in the Supreme Court House *(@ - insert place)* to be the time for hearing of the within taxation of the Bill of Costs

(@ -

(@ - insert front sheet requirement for name of lawyers and details)

IN THE SUPREME COURT)
OF JUSTICE AT *(@ - insert place of Court*)
PAPUA NEW GUINEA)

(*@ - insert appropriate SC file No. of 20)*

BETWEEN:

(@ - insert name)
Appellant/Applicant

AND:
(@ - insert name)
Respondent

THE ……BILL OF COSTS TO BE TAXED AND PAID BY THE ……..ON A ……BASIS PURSUANT TO …….

					Taxed off	
No. of Item	Date	Item	Disbursements	Charges	Disbursements	Charges
		PREPARATION OF DOCUMENTS				
1.		*(@ - insert description of document)*				
2.						
3.						
4.						
		PERUSAL OF DOCUMENTS				
5.		*(@ - insert description of documents)*				
		PREPARATION OF HEARING				
6.		*(@ - insert particulars of research etc.)*				
		COURT APPEARANCES				
7.		*(@ - insert particulars of appearances)*				

		PREPARATION OF CORRESPONDENCE				
8.		*(@ - insert number of short letters)*				
9.		*(@ - insert number of ordinary letters)*				
		PERUSAL OF CORRESPONDENCE				
10.		*(@ - insert number of short letters)*				
11.		*(@ - insert number of ordinary letters)*				
		ATTENDANCES				
12. 13.		By telephone – Up to 10 minutes – *(@ - insert number and particulars)* Over 10 minutes – *(@ - insert number and particulars).* In person – - Attendances capable of being made by a Clerk – *(@ - insert particulars)* - Attendances requiring lawyer – *(@ - insert particulars).*				
		OUT OF TOWN LAWYERS – EXPENSES				
14.		*(@ - insert particular of airfares, accommodation and transport).*				
		OVERSEAS COUNSEL				
		(@ - insert particular of Certification by Judge or Court).				

		ADDITIONAL ALLOWANCE				
16.		*(@ - insert particulars of special case or circumstances).*				
		WITNESSES				
17.		Professional witnesses – *(@ - insert particulars).* Other witnesses – *(@ - insert particulars).*				
		COURT FEES				
18.		*(@ - insert particulars).*				
		TAXATION OF COSTS				
19.		Preparing Bill of Costs and attendance on Taxation of Costs. - Lawyer *(@ - insert particulars)* - Clerk - *(@ - insert particulars)*				
		TOTAL:				
		CERTIFICATE				
20.		I have checked the within Bill of Costs and verify that it is correct. Attached hereto or filed with it are legible copies of receipts for significant disbursements. Dated this day of 20 . *(@ - insert name of lawyer and firm of lawyers.)*				

Order 13

The Supreme Court Rules are amended by inserting the following:

ORDER 13 – LISTINGS RULES 2010

Purpose

The purpose of these Rules is to prescribe procedures for the listing of all matters in the Supreme Court with the establishment of a Supreme Court General List with listing of matters to be coordinated by the Registrar Supreme Court and to be conducted by a Judge(s) assigned by the Chief Justice.

These Rules are a consolidation of all previous Practice Directions and Notes issued by the Registrar between 1983 to 2010 in relation to call over and listing of all Supreme Court cases. Upon commencement of these Rules, those Practice Directions and Notes cease to apply.

These Rules are in addition to other provisions of the *Supreme Court Rules* relating to pre-hearing preparation and setting down of cases for hearing. These Rules are intended to improve the disposition of Supreme Court matters in a timely, fair and economical manner. Nothing in these Rules derogates from the time limitations imposed by any other Rule.

1. Interpretation

Unless the contrary intention appears:

"Appeal" means an appeal to the Supreme Court.

"Appeal Book" means an appeal book described in O7 r43 or an application book as referred to in Rule 7;

"Appellant" means the party who filed the originating process (whether an appeal, reference or application) in the Court;

"Application" means any application as provided for under the *Supreme Court Rules, Supreme Court Act*, the *Constitution* and any other legislation.

"Book" means an appeal, application or reference book of documents as required by Rule 7*;*

"Call Over List" means the list established by Rule 7(1);

"Circuit Calendar" means the annual circuit calendar for the year as determined by the Chief Justice;

"Directions List" means the list established by Rule 8(1);

"Duty Judge" means the Duty Judge for the month as determined by the Chief Justice and referred to in Rule 2*;*

"General List" means the list of all matters filed in the Supreme Court Registry*;*

"Hearing List" means the list of matters fixed for hearing in accordance with Rule 12(1)

"matter" means any appeal, application, review or other proceeding on the General List and includes any interlocutory application in respect of such matter;

"Objection/s" means an Objection to Competency;

"Rule" means a Rule in this Order;

"Status Conference" means the Status Conference to be held in accordance with Rule 10;

"Summary Determination" means an application to dismiss a matter;

2. Duty Judge

(1) The Chief Justice shall assign a Judge(s) to conduct listings and hear applications or motions which he or she has jurisdiction to hear, which will include urgent applications as provided in Rule 14 of these Rules.

(2) The Judge assigned in (1) is also the Duty Judge for that circuit month.

3. File Reference

Matters bearing the following file reference will be listed in the *General List*

SCA No. of	(year) -	Appeals and Applications for Leave to Appeal commenced by Notice of Appeal.
SCRA No. of	(year) –	Criminal appeals.

SCM No.	of	(year) -	Appeals commenced by Notice of Motion (Order 10)
SCRev.No. of		(year) -	Reviews commenced by application to review under s.155(2)(b) of the Constitution, civil, crime and elections.
SCRef. No.	of	(year) -	Supreme Court referrals filed pursuant to ss.18 and 19 of the *Constitution.*
SCOS No. of		(year) -	Supreme Court Originating Summons.
SCRes. No. of		(year) -	Reservations
SCAPP. No.	of	(year)	Bail, appl. For extension of time to appeal, s57 human rights applications etc.

4. Hearings

The Chief Justice will assign Judges to conduct hearings of the Court as may be determined in the Annual Circuit Calendar issued by the Chief Justice; and at such other times and places as the Chief Justice decides having regard to the volume of appeals and the urgency or importance of an issue to be decided.

5. Senior Clerk

The Registrar shall assign staff to manage the General List and to perform the Registrar's duties given under this Order, the *Supreme Court Act* and the *Supreme Court Rules*.

6. The General List

(1) There shall be a General List kept by the Registrar, which is the list of all matters registered in the Registry, which list shall contain the current status report of those matters.

(2) When a matter is filed in the Registry, it shall be immediately listed in the General List.

(3) An application for review of an election petition shall proceed as provided in Order 5 Division 4. All other matters shall be called over, have their status checked by the Duty Judge and be listed for hearing in accordance with these Rules.

7. Call over List

(1) There shall be a call over list maintained by the Registrar;

(2) No substantive matter shall be added to the Call Over List unless a book is filed;

(3) In respect of an appeal under O7 the book shall be as provided in O7 Div. 14 & 15. For other applications, references and all other matters to be heard by the Court the index and the application book or reference book shall be prepared as closely as possible, and as far as relevant, to the provisions in O7 Div. 14 & 15;

(4) For interlocutory applications to be heard by a Judge a book shall not be required;

(5) Any issue arising in respect of the book not determined to the satisfaction of the parties by the Registrar shall be referred to the Duty Judge ;

(6) A substantive matter shall be added to the Call over List when the Book is filed;

(7) The Registrar shall call all matters on the call over list, once every month on the second Tuesday of the month and may:

(a) refer matters to the Directions List, for directions for setting down of the matter for hearing; or

(b) remove a matter from the call over list to the Summary Determination list.

8. Directions List and Directions Hearing

(1) There shall be a Directions List prepared after the call over which shall contain all matters that are ready for hearing as determined by the Registrar.

(2) A Directions Hearing shall be conducted by the Duty Judge on the first Monday of the circuit month.

(3) Notice of the Directions Hearing shall be given by the Registrar, in Form 10A or in the manner determined by him or as directed by the Duty Judge, immediately after the Call over.

(4) Where parties are represented by a lawyer, a lawyer who has carriage or knowledge of the matter must attend the Directions Hearing.

(5) At the Directions Hearing, the Duty Judge may review the steps taken by the Registrar at the Call over and may, if necessary, issue directions in relation to the following;

a) Legal representation for parties.

b) The grounds of appeal, review, etc.

c) Issues on appeal, review, etc.

d) Availability of National Court depositions including the trial Judge's reasons for decision.

e) Typed transcript of the proceeding.

f) Filing of Index to the Book and its certification.

g) Any other issues in relation to the contents of the Book.

h) Manner of presentation of arguments including directions as to when extract of submissions and submissions will be filed, in accordance with Order 11, Divisions 9 and 10 of the *Supreme Court Rules*.

i) Decide whether further directions should issue or whether hearing dates can be allocated.

j) Allocation of hearing dates for the matter.

k) Issuing of directions under O11 r9 or s.185 of the *Constitution*, where appropriate.

(6) Upon fixing a date for the hearing of a matter:

a) The Registrar shall add the matter to a draft Hearing List in accordance with Rule 12 and issue to all parties a Notice of Hearing in Form 18, which Notice shall be taken out by the appellant's or applicant's lawyer and served on the other parties immediately after the Directions Hearing.

b) The Duty Judge shall refer the matter to the Status Conference.

9. Further Directions Hearings

The Duty Judge may conduct further Directions Hearings in the circuit month and cases may then be fixed for hearing. Cases fixed for hearing at such subsequent Directions Hearings shall be added to the draft Hearing List

10.Status Conference

(1) A Status Conference shall be held on the Monday of the week prior to the Court sittings;

(2) At the Status Conference, the Duty Judge shall review each matter on the draft Hearing List and may, amongst other things, issue further directions as may be necessary to make the proceedings ready for hearing or the Judge may confirm that the matter is ready for hearing by checking the following:-

(a) Confirm parties' compliance with directions issued at the Directions Hearing.

(b) Confirm the correctness of the Book.

(c) Refer to summary determination, matters which fail to comply with directions issued at the Directions Hearing or otherwise fail to comply with procedures prescribed by the relevant rule or statute.

(d) Confirm length of hearing time.

(e) Confirm that written submissions have been prepared and filed in compliance with earlier directions.

(f) Confirm that the parties have prepared extracts of submissions in accordance with O11 r18 to be handed up at the hearing of the matter.

(g) Confirm the date or dates for the hearing of the matter.

(3) After hearing parties or a party, the Duty Judge may confirm the hearing date, or adjourn the Status Conference as is necessary, to enable the parties to fully comply with directions or may refer the matter for summary determination.

11.Status Conference Form

Upon completion of the Status Conference the Duty Judge's Associate shall record a summary of the Status Conference in Form 10 "B" and shall place it on the Court file.

12. The Hearing List

(1) There shall be a draft Hearing List and a Hearing List maintained by the Registrar. The draft Hearing List shall contain all of the matters listed for hearing at the Directions Hearing. The Hearing List shall contain all of the matters listed for hearing with hearing dates confirmed at the Status Conference.

(2) Within 2 days of the Status Conference a Hearing List shall be prepared by the Registrar in consultation with the Associate to the Duty Judge and the List shall be issued to all of the parties in the list. The Hearing List is not subject to alteration except by the Chief Justice or the Court before which the matter is listed.

(3) The hearing of a matter shall proceed on the date and time fixed in the Hearing List.

(4) If a matter is not heard at the appointed time it must not be adjourned generally. The matter must be fixed or adjourned to either the next sittings of the Court or the next call over or to the next Directions Hearing, which ever is appropriate.

(5) At the hearing, the Court may exercise its discretion to summarily hear and determine any matter where the appellant fails to comply with directions issued at a Directions Hearing or Status Conference.

(6) The Court may also hear a party's application to summarily dismiss for failure to comply with directions. The application must be in writing and supported by an affidavit, served on the respondent party one clear working day before the hearing.

13. Adjournments

(1) Proceedings in a Directions Hearing or Status Conference shall not be adjourned generally, even by consent.

(2) If parties require time to consider their position or negotiate a settlement, the proceedings may, with the approval of the Duty Judge, be adjourned for a comparatively lengthy period, but always to a fixed date with liberty to restore the matter to either the Call over List or Directions Hearing or Status Conference, within that time.

(3) A substantive hearing of a matter shall not be adjourned unless sufficient cause is shown to the Court, by the party applying for an adjournment.

(4) The application shall be in writing, supported by affidavit, to the Bench before whom the appeal is listed for hearing and not to any other Judge(s) or another Bench.

(5) The application must be filed and served 3 clear days before the date allocated for the hearing of the matter.

14. Urgent applications

(1) Subject to expressed jurisdictional limits, urgent applications for a stay or other urgent interlocutory applications may be made before the Duty Judge.

(2) The appointment for hearing of the application is obtained from the Duty Judge or in his absence the Chief Justice by prior application to the Registrar.

(3) The request for an appointment must be in writing and explain the reasons for the urgency.

(4) If the applicant desires to proceed *ex parte* the application for an appointment must explain why he seeks to dispense with the requirement for service of the application.

(5) The Registrar upon receipt of a request for an appointment for hearing and on being satisfied with the reasons for urgency, shall refer the request to the Duty Judge or the Chief Justice in Form 10 "C".

(6) The application will not be set down for hearing unless the following documents are filed:-

(a) Originating Process;

(b) Application;

(c) Supporting Affidavit/s;

(d) Where appropriate, an Undertaking as to Damages; and

(e) A draft order.

(7) The applicant must, in the application, first seek an order dispensing with the requirement for service of the application.

(8) The supporting affidavit must demonstrate the urgency of the matter and the reasons why the requirement for service of the application is unnecessary, such as difficulty with locating the respondent in order for service to be affected.

(9) Upon hearing the application, the Duty Judge may make orders including:

(a) An order dispensing with requirements of service;

(b) An interim order which provides some solution, until the return date;

(c) For service of the Order, the Originating Process, Motion, Supporting Affidavit, Undertaking as to Damages (where appropriate) and other documents filed in the proceedings, on or by a specified date;

(d) Giving “liberty to apply”;

(e) Giving a specific return date, when the interim orders become returnable before the Duty Judge; and

(f) For filing an affidavit of service of the documents referred to in (c) above.

15.Applications

All applications for interlocutory orders must contain a concise statement of the Court's jurisdiction to grant the orders being sought. With the exception of urgent applications, all other applications for interlocutory orders shall be made to the Duty Judge on a scheduled motions day.

16.Summary Disposal

(1)The Court may summarily determine a matter:

(a) on application by a party; or

(b) on referral by a Judge; or

(c) on the Court's own initiative; or

(d) upon referral by the Registrar in accordance with the procedure set out in sub rule (2) below or pursuant to s11 of the *Supreme Court Act*.

(2)Where the Registrar refers a matter to the Court for summary determination, the following procedure shall be followed:

(a) the Registrar shall give notice in Form 10D to each of the parties of his intention to refer the matter to a Judge or the Court for summary determination, fixing a date for hearing not less than 30 days from the day the notice is sent. Where there is no other means of bringing the notice to the attention of the Appellant, the Registrar may publish the notice in the media.

(b) the Registrar shall place on the file any written response or a note of a verbal response received and advise the Appellant to appear in Court on the date fixed.

(c) the Registrar shall forward the file to the Court, together with any response received, on the day fixed for hearing.

(d) The Court or a Judge (where a Judge has jurisdiction) may determine the matter summarily based on the response received and report by the Registrar, and any representation made by the parties; or issue directions for the future conduct of the proceedings.

(e) If the parties are unrepresented, the Registrar shall draft the Court Order, enter it and forward sealed copies to the parties.

(f) If the matter is dismissed the Registrar, shall forward a sealed copy of the Order together with a copy of the judgment, if any, to the National Court which made the decision.

(g) If the matter is dismissed the file shall be closed and forwarded to Archives for storage.

17. Commencement of these Rules

These Rules shall commence operation on the date they are signed by the Judges.

18. Repeal

Upon commencement of these Rules the Rules mentioned in the Schedule are repealed.

The Schedule

Order	Division	Rules
4	3	8, 15
7	18	42(e) and 48-51
11	14	29-30

FIRST SCHEDULE - FORMS

Form 1.—Reference (Section 18(1) Constitution)

O.4 Rule 1(C) Form 1

GENERAL FORM OF REFERENCE (CONSTITUTION S.18(1))

IN THE SUPREME COURT
OF JUSTICE

S.C.R. No. of 20
(Insert number and year)

Reference Pursuant to
Constitution Section 18(1)

Reference by (Insert name of
person making reference)

REFERENCE

1. THIS REFERENCE is made by (*insert name of person making the reference*) for an opinion on a question relating to interpretation or application of a Constitutional Law.

2. THIS Reference arises (*herein state briefly the nature of and circumstances in which the question arise*s).

3. THE QUESTION IS (*to be stated*).

4. THE LAW or PROPOSED LAW the validity of which is the subject of this reference is: (*where appropriate a copy of the law or proposed law is to be annexed*).

5. THE CONSTITUTIONAL LAW provisions, relevant are: (*state title of Constitutional Law, Section number and title*).

DATED:

Sgd

_____

(*To be signed by person making the reference or his lawye*r)

FILED BY: (Form 17)

Application for Directions

Application will be made to a Judge of the Supreme Court Waigani at … a.m. on the day of … 20…

_____
Registrar

_____

Form 2.—Reference (Section 18(2) Constitution)

O.4 Rule 1(C) Form2

GENERAL FORM OF REFERENCE (CONSTITUTION S. 18(2))

IN THE SUPREME COURT
OF JUSTICE

S.C.R. No. of 20
(Insert number and year)

Reference pursuant to
Constitution Section 18(2)
concerning or (*insert nature of the reference*)

Between (*insert names of parties in Court or tribunal from which reference made*)

REFERENCE

1. THIS REFERENCE is made by (*insert name of Judge, Magistrate, or Tribunal making the reference*).

2. FOR an Opinion on a question relating to interpretation or application of a Constitutional Law.

3. THIS Reference arises (*herein state briefly the nature of the hearing and circumstances in which the question arises OR if necessary, annexe copy of findings of Judge or referor, together with particulars under O.4 Rule 2 if necessary*).

4. THE QUESTION IS (*to be stated*)

DATED:

Sgd _____
Judge
Magistrate
Tribunal

Form 3.—Special Reference (Section 19 Constitution)

O.4 Rule 1(C) Form 3

GENERAL FORM OF SPECIAL REFERENCE (Constitution S.19)

IN THE SUPREME COURT
OF JUSTICE

S.C.R. No. ... of 20
(Insert number and year)

Special Reference Pursuant to
Constitution Section 19

Reference by (Insert name of
Authority)

SPECIAL REFERENCE

1. THIS REFERENCE is made by an authority referred to in Section 19 of the *Constitution* FOR an Opinion on a question relating to interpretation or application of a Constitutional Law.

2. THIS Reference arises (*herein state briefly the nature of and circumstances in which the question arises*).

3. THE LAW or PROPOSED LAW the validity of which is the subject of the special reference is annexed hereto (*where appropriate a copy of the law or proposed law is to be annexed*).

4. THE CONSTITUTIONAL LAW provisions, relevant are (*State title of the Constitutional Law and state Section by number and title*).

5. THE QUESTION IS (*to be stated*).

DATED:

Sgd (*to be signed by Authority according to law*).

Designation of the officer
signed to be stated

FILED BY: (Form 17)

Application for Directions
(see Form 1)

Form 4.—General Form of Application

O.4 Rule 11(a), 20(d) Form 4

GENERAL FORM OF APPLICATION
(Heading as Applicable)

Application will be made to a Judge of the Supreme Court, Waigani at . . . am on the . . . day of . . . 20 . . .

1. FOR (*state nature of application*)

2. GROUNDS (*specify each particular ground by paragraph*).

3. Affidavits in support of this Application sworn by (*list names, dates*).

Dated:

Sgd _____
(Applicant or his Lawyer)

FILED BY: (Form 17)

_____

Form 5.—General Form of Application to Review

O.5 Rule 1(e) Form 5

GENERAL FORM OF APPLICATION TO REVIEW UNDER CONSTITUTION S. 155(2)(b)

IN THE SUPREME COURT
OF JUSTICE

S.C. REV. NO. of 20
(*Insert number and year*)

Review Pursuant to
Constitution Section 155(2)(b)
Application by (*insert name of person seeking Review*)

APPLICATION TO REVIEW

1. THIS REVIEW OF THE NATIONAL COURT is sought by (*insert name of person seeking the review*).

2. THE JUDICIAL ACT TO BE REVIEWED is—

National Court No:

Parties:

Date of Order:

Order:

(*Where appropriate, a copy of the National Court Order is to be stated and annexed*).

3. GROUNDS (*specify each particular ground by paragraph*).

4. ORDER (*state relief sought*).

DATED:

Sgd _____

(*To be signed by person seeking the review*)

FILED BY: (Form 17)

NOTICE: (Form 18)

Form 5A

Order 5 Division 4 Sub-division 1

Rule 3(f)

IN THE SUPREME COURT
OF JUSTICE

SC REVIEW No. .... 20....

(Insert Number and Year)

Application under Section 155(2)(b) of the *Constitution* And in the Matter of Part XVIII of the *Organic Law on National and Local-Level Government Elections.*

A.B.

Applicant

C.D.

Respondent

APPLICATION FOR LEAVE TO REVIEW

APPLICATION will be made to the Supreme Court, at Waigani at ..... am/pm on the ..... day of ..... 20...., for:

1. LEAVE TO APPLY FOR REVIEW:
(state date of the decision and the decision for review).

2. GROUNDS:
(state briefly the particulars of the decision of the National Court to be reviewed and the nature of the case)

3. THE ISSUES INVOLVED:

4. REASONS WHY LEAVE SHOULD BE GIVEN:

5. ADDRESS FOR SERVICE OF THE APPLICANT:

Dated this .....day of..... , 20..... .

Sgd_____
(Applicant)

Order 5 Division 4 Sub-division 2 Rule 12 (e)

Form 5B

IN THE SUPREME COURT
OF JUSTICE

S.C. REV. NO. ... OF 20...
(Insert number and year)

Review Pursuant to *Constitution* Section 155(2)(b)

Application by (insert name of party seeking Review)

Respondents

(insert name of party seeking Review)

APPLICATION TO REVIEW

1. THIS REVIEW OF THE DECISION OF THE NATIONAL COURT is sought by: (the applicant)

2. LEAVE TO APPLY FOR REVIEW WAS GRANTED ON:
(state date and name of Judge who granted leave)

3. THE DECISION TO BE REVIEWED is:

National Court No: EP No. ..... 20....
Parties:
Date of order:
Trial Judge:

4. STATE BRIEFLY THE NATIONAL COURT DECISION AND ATTACH A COPY OF THE DECISION OR ORDER:

5. GROUNDS:
(specify each particular grounds by paragraph)

6. ORDERS SOUGHT:

Dated this .....day of .....20.....

Signed: _____

(Applicant)

FILED at the Supreme Court Registry at Waigani
BY:

Name of applicant	Name (Lawyer)
Address (Residential)	Address (Business)
Address (postal and e-mail where available)	Address (postal and e-mail where available)
Telephone	Telephone
Fax	Fax

Transcript of Proceeding in the National Court

Transcript required? Yes/No

Transcript requested? Yes/No

(For completion by the Registrar Only)

APPOINTMENT OF DATE FOR DIRECTIONS HEARING

The Supreme Court will conduct a Directions Hearing at .....a.m./p.m. on ..... day of .....20... at the Supreme Court at Waigani, National Capital District.

At the Directions Hearing, the Judge shall consider amongst other things, the following:

(a) question of legal representation;

(b grounds of Review;

(c) identification of legal issues;

(d) consolidation of multiple applications on the one election for purpose of the hearing;

(e) availability of transcript and related matters;

(f) objections to competency of the application;

(g) manner of presentation of argument by parties including filing extract of submissions;

(h) settlement of the Index;

(i) compilation of the Review Book;

(j) the number of days for the hearing.

_____

REGISTRAR
(Date)

_____

Form 5C

Order 5 Division 4 Sub-division 5
Rule 19

GENERAL FORM OF NOTICE OF APPEARANCE
(Headings as applicable to proceedings)

NOTICE OF APPEARANCE

TAKE NOTICE, I enter an appearance on this review.

Dated at .....this ..... day of ..... 20. ...

Signed: _____
(Respondent or his/her Lawyer)

FILED:
BY:

Name of respondent	Name: Lawyer
Address: (Residential)	Address: (Business)
Address: (postal and e-mail where available)	Address: (postal and e-mail where available)
Telephone	Telephone:
Fax:	Fax:

_____

Order 5 Division 4 Sub-division 9
Rule 28

Form 5D

GENERAL FORM OF NOTICE OF HEARING
(Heading as applicable to the application for review)

NOTICE OF HEARING

The application for review will be heard at the sittings of the Supreme Court at Waigani, (or such other place as specified) at .....a.m./p.m. on the ..... day of ....., 20...

Further details can be obtained from the registry.

Signed _____
Registrar
Dated:

FILED at the Supreme Court Registry at Waigani

BY:

Name: (Personal)	Name: (Lawyer)
Address: (Residential)	Address: (Business)
Address: (postal and e-mail where available)	Address: (postal and e-mail where available)
Telephone:	Telephone:
Fax:	Fax:

_____

Form 6.—Application to Enforce Constitutional Rights

O.6 Rule 2(d) Form 6

GENERAL FORM OF CONSTITUTIONAL ENFORCEMENT APPLICATION (CONSTITUTION SECTION 57)

IN THE SUPREME COURT OF JUSTICE

S.C.A. No. of 20
(*Insert number and year*)

Enforcement Pursuant to *Constitution* Section 57

Application By (*insert name of person or Court*)

APPLICATION TO ENFORCE CONSTITUTIONAL RIGHTS

1. THIS ENFORCEMENT of Rights and Freedoms is sought by (*name of person*)

2. On Behalf of (*person/s to be named*)

3. THIS APPLICATION arises (*briefly state the nature and circumstances in which the matter arises*).

4. The CONSTITUTIONAL LAW Provisions, relevant are (*state the title of the Constitutional Law and state Section by number and title*).

DATED:

Sgd _____
(*To be signed by person making the application or his Lawyer*)

Filed By: (Form 17)

NOTICE: (Form 18)

_____

Form 7.—Application for Leave to Appeal

O.7 Rule 2(e) Form 7

APPLICATION FOR LEAVE TO APPEAL

IN THE SUPREME COURT OF JUSTICE SC APPEAL No of 20

A.B.
Applicant/

C.D.
Respondent

APPLICATION will be made to the Supreme Court, Waigani at . . . am on the . . . day of . . .

1. LEAVE TO APPEAL

2. GROUNDS

(*state grounds on which application is based*)

Dated:

Sgd _____
(*Applicant or his lawyer*)

FILED BY: (Form 17)

_____

Form 8.—Notice of Appeal

O.7 Rule 8(e) Form 8

GENERAL FORM NOTICE OF APPEAL

IN THE SUPREME COURT S.C. APPEAL No.…of 20…
OF JUSTICE

A.B
Appellant

C.D.
Respondent

NOTICE OF APPEAL

1. THE Appellant appeals from the whole (*or if a part specify part*) of the judgment of (*specify National Court or National Court Judge*) given on (*specify date*) at (*place*).

2. (*Where applicable*) THE appeal lies without leave OR (*where applicable*) THE appeal is brought pursuant to leave granted on (*specify order*) OR Leave to appeal is sought at the hearing as the matters to be raised in that application are in whole and/or in part (*whichever is applicable*) the substantive matters constituting the grounds of appeal as set out in the grounds numbered (*here state*).

3. GROUNDS (*specify each particular ground by paragraph*).

4. ORDER SOUGHT (*state what judgment or order appellant seeks in lieu of the judgment appealed from*).

Dated:

_____
Sgd: Appellant or his Lawyer

FILED BY: (Form 17)

APPOINTMENT

The Appeal Book will be settled before the Registrar at the Supreme Court at (*time*) on the (*date*).

_____
Registrar

Form 8 - in paragraph 2 all words after "OR" are to be deleted, that is the words "Leave to appeal is sought at the hearing, as the matters to be raised in that application are in whole and / or in part (*whichever is applicable*) the substantive matters constituting the grounds of appeal as set out in the grounds numbered (*here state*).": SC 533 (1997) *Henzy Yakham and the National Newspaper v Dr Stuart Hamilton Merriam & ors*. Practice Direction 1/94 requires the Form 8 Notice of Appeal to contain (1) the National Court file number, (2) the name of the judge in the National court, (3) whether a transcript is required: SC 933 (2008) *State v Manorburn Earthmoving Ltd* at [13].

_____

Form 9.—Notice of Objection to Competency

(HEADING AS IN FORM 8)

NOTICE OF OBJECTION TO COMPETENCY

OBJECTION to the competency of this appeal will be made at the Supreme Court, Waigani at . . . am on the . . . day of . . . 20

OBJECTION is made on the following grounds (*set out concisely the whole of the grounds of the objection*).

DATED:

Sgd _____
(*To be signed by Respondent or his Lawyer*)

FILED BY: (Form 17)

_____

Form 10.—Notice of Cross Appeal

O.7 Rule 27(f) Form 10

GENERAL FORM NOTICE OF CROSS APPEAL

IN THE SUPREME COURT OF JUSTICE

S.C. APPEAL No. of 20

A.B.
Cross Appellant

C.D.
Cross Respondent

NOTICE OF CROSS APPEAL

1. The Respondent cross appeals from (*specify part*) of the judgment of (*specify National Court or National Court Judge*) given on (*specify date*) at (*place*).

2. (*Where applicable*) The cross appeal lies without leave.

3. (*Where applicable*) The cross appeal is brought pursuant to leave granted on (*specify order*) OR Leave to cross appeal is sought at the hearing as the matters to be raised in that application are in whole and/or in part (*whichever is applicable*) the substantive matters constituting the grounds of cross appeal as set out in the grounds numbered (*here state*).

4. GROUNDS (*specify each particular ground by paragraph*).

5. ORDER SOUGHT (*state what judgment or order cross respondent seeks in lieu of the judgment appeal from*).

Dated:

Sgd _____
(*Respondent or his Lawyer*)

FILED BY: (Form 17)

_____

FORM 10 "A"

012 Rule 8(5)(a) to (k)

(Title of proceedings)

NOTICE FOR DIRECTIONS HEARING

To:

Appellant/Lawyer:

Respondent/Lawyer:

(Heading in the matter)

Take note that the above described matter is listed for Directions Hearing before a of the Supreme Court at _____(*Court House*) at ___a.m./p.m. on the_____ _____day of _____ 2010.

You are required to attend at the Directions Hearing to assist the Judge confirm that the matters listed below have been complied with or that parties have addressed them. These are;

(a) Legal representation.

(b) Grounds of appeal.

(c) Issues on appeal.

(d) Availability of Court or tribunal's depositions including the trial Judge's Reasons for decision.

(e) Typed transcript of the proceeding.

(f) Filing of Index to the Book and its certification.

(g) Any other issues in relation to the contents of the Book.

(h) Manner of presentation of arguments including directions as to when extract of submissions and submissions will be filed, in accordance with Order 11, Divisions 9 and 10.

(i) In relation to applications and objections, whether further directions should issue or whether they can be allocated hearing dates.

(j) Number of hearing days to be allocated for the substantive hearing of appeal.

(k) Issuing of directions under s.185 of the *Constitution*, where appropriate.

Where hearing date(s) have been allocated, the Judge will refer the matter to the Status Conference, to take place on a Monday before the Supreme Court week, to be conducted in accordance with Rule 10 and 11 of these Rules.

Dated this day of 20.....

Issued by:

…….

Registrar

FORM 10 "B"

STATUS CONFERENCE FORM *O12 r11*

(*To be completed by Duty Judge's associate after completion of the Status conference. Matters not applicable to be struck out*.)

Title of appeal/matter :

Date :

Coram :

ORDERED:

The parties have complied with (not complied with) directions issued at the Directions Hearing in respect of the matters set out in Rule 10 of the Supreme Court Listing Rules;

The appeal book is correct/not correct;

The parties estimate the length of the hearing time of the appeal will be...;

The written submissions of the parties have been filed (or will be filed by .....) in accordance with the directions issued at the Status Conference;

The parties will have extracts of submission not exceeding 4 pages available for handing up at the hearing of the appeal;

The date for the hearing of the matter will be.....;

OR

The matter is referred to the Registrar to institute the procedure for Summary Disposal;

Further Directions...

Associate

FORM 10 "C" *O12 r 14(5)*

SUPREME COURT REGISTRY
REGISTRAR'S REFERRAL FORM
(*To be completed by Registrar, Deputy Registrar (SC) or in their absence Assistant Registrar (SC) only)*

TO : Chief Justice/Duty Judge
FROM :
DATE :
RE : SCA, SCAPP etc (*file reference and name of parties*):

I refer the above matter for (*tick appropriate item*):

..... Directions
..... Fixture of date and time for Mention/Hearing of Motion etc
..... Advice on point of law or procedure
..... Others

State action required and brief reasons:

..... (*Signature*)
(Registrar/Deputy Registrar (SC)

FOR ENDORSEMENT BY CHIEF JUSTICE/DUTY JUDGE ONLY

DATE:

DIRECTIONS ISSUED/ACTION TAKEN

Chief Justice/Duty Judge

Action taken by Registrar in compliance with directions (Endorsement by Registrar/Deputy Registrar (SC) only)

Dated this..... day of..... 20..... Registrar
NOTE: Complete Form in duplicate. Copy of Form to be placed in running file.

FORM 10 "D"

O12 r16(2)(a)
Notice for Summary Determination

Date:

To: Messrs _____
(Name of Appellant or his/her lawyer & Address)

Copy to: Messrs _____
(Name of Respondent or his/her lawyer & Address)

Title of Matter: _____

RE: **NOTICE TO SHOW CAUSE WHY YOUR MATTER SHOULD NOT BE SUMMARILY DISMISSED**

I refer to the above matter and advise that this matter is listed for summary determination before the Supreme Court at _____ (name of Court house) at a.m/p.m. on the _____ day of _____ 20...../or before the Supreme Court on the sittings commencing on _____ 20..... to _____ 20.....

The grounds or reasons are*:

1. _____

2. _____

3. _____

You are required to attend Court on the date and time fixed above and to show cause why your matter should not be summarily dismissed.

If you wish to give an explanation before appearing in Court, you may do so by letter delivered to the Registrar or by affidavit filed in the Court Registry at least 7 days before the date mentioned above.

Yours faithfully

……
Registrar

*Specify matters under s11 of the Supreme Court Act or O7 r53 of the Supreme Court Rules.

Form 11.—Application under Order 7 Rule 53

O.7 Rule 55(a) Form 11

GENERAL FORM APPLICATION FOR ORDER UNDER ORDER 7 RULE 53

(HEADINGS AS IN FORM 8)

APPLICATION

APPLICATION will be made to the Supreme Court, Waigani at … a.m. at the… day of . . . 20

1. FOR AN ORDER:—

(*herein state order sought*)

(a)

(b) or such other order as the Court may make.

2. Affidavit in support of this Application is sworn by (*name*) on the (*date*).

Dated:

Sgd _____

(*Respondent or his Lawyer*)

A.B. (Appellant) TAKE NOTICE:

If you or your lawyer do not appear to show cause why such orders should not be made, the Court may make orders in your absence.

_____

Form 12.—Reservation

O.8 Rule 3(f) Form 12

GENERAL FORM OF RESERVATION

IN THE SUPREME COURT
OF JUSTICE

S.C. Reservation No. . . . of 20
Reservation (pursuant to Section 15 or 21 of the Supreme Court Act where applicable)

To be entitled as in proceedings from which question arose

RESERVATION

1. THIS RESERVATION is made for an opinion on (*the case or point of law*).

2. THIS Reservation arises (*state briefly such facts or pleadings as necessary and circumstances in which question arises*).

3. State matters required by Order 8 Rule 3(e).

4. THE QUESTION IS (*to be stated*).

Dated:

Sgd: _____
Judge

NOTICE: (Form 18)

_____

Form 13.—Reference

O.9 Rule 1(f) Form 13

GENERAL FORM OF REFERENCE
(SUPREME COURT ACT SECTION 26)

IN THE SUPREME COURT OF JUSTICE

S.C. Act. R. No. of 20
(*Insert year and number*)

Reference pursuant to
Section 26 of the
Supreme Court Act

REFERENCE

1. THIS REFERENCE is made for an opinion on a point of law.

2. THIS REFERENCE arises (*state briefly such facts as necessary and circumstances in which question arises the trial and name of person acquitted*).

2. THE QUESTION IS (*to be stated*).

Dated:

Sgd _____
Principal Legal Adviser

FILED BY: (Form 17)

NOTICE:

This reference on a point of law does not affect the outcome of your trial and acquittal.

If you desire to present argument either in person or by your lawyer in the Supreme Court, you are to inform the Registrar within . . . days after service of this Reference upon you.

Address of the Registrar is Supreme Court, Waigani, NCD.

The Postal address is: P.O. Box 7018, BOROKO.

Telephone No: 257099.

NOTICE: (Form 18)

_____

Form 14.—Notice of Amendment or Withdrawal of Reference

O.4 Rule 11 Form 14
O.9 Rule 8

GENERAL FORM NOTICE OF AMENDMENT
OR WITHDRAWAL OF REFERENCE

(*Heading as appropriate*)

NOTICE

1. This Reference is hereby (*state*) OR Pursuant to leave granted by (*state date of order*).

2. (*Where applicable*) The Amendment is as follows:—

(*Set out particulars*)

Dated:

Sgd _____

(*To be signed by Lawyer or person giving Notice*)

FILED BY: (Form 17)

_____

Form 15.—Notice of Motion

O.10 Rule 3(c) Form 15

GENERAL FORM NOTICE OF MOTION

IN THE SUPREME COURT
OF JUSTICE

S.C.M. No. of 20

A.B.
Appellant

C.D.
Respondent

NOTICE OF MOTION

1. THE Appellant appeals from the whole (*or if from part specify part*) of the Order of (*specify National Court or National Court Judge*) given on (*specify day*) at (*place*).

2. GROUNDS (*specify each particular ground by paragraph*).

3. ORDER SOUGHT (*state what Order appellant seeks in lieu of order appealed from*).

4. ANNEXES are:—

(a) Copies of all documents before National Court in sequence.

(b) Certified copy of Order.

5. AFFIDAVIT in support of this Motion is sworn by (*name*) on the (*date*).

Dated:

Sgd _____

(*To be signed by appellant or his lawyer*)

FILED BY: (Form 17)

NOTICE: (Form 18)

_____

Form 16.—Appearance

1.11 Rule 2(a) Form 16

GENERAL FORM OF APPEARANCE

(Headings as applicable to proceedings)

APPEARANCE

TAKE NOTICE, I…enter an appearance on this appeal.

DATED:

Sgd _____
(*Respondent or his Lawyer*)

FILED BY: (Form 17)

_____

Form 17.—Address for Service

O.11 Rule 4(b) Form 17

GENERAL FORM OF ADDRESS FOR SERVICE

FILED:	Name (*Personal*)	Name	(*Lawyer*)
Address	(O.11 R.4(a)(ii))	Address	(O.11 R.4(a)(iv))
Address	(Postal)	Address	(Postal)
Telephone	Telephone		

_____

O.11 Rule 29 Form 18

GENERAL FORM OF NOTICE OF HEARING

NOTICE

This (*state proceedings*) will be heard at the sittings of the Supreme Court, Waigani, commencing on the day of…Further details can be obtained from the registry.

Sgd _____
Registrar

SECOND SCHEDULE

Form 1.—Notice of Appeal or Application for Leave to Appeal against National Court decision

O.1 Rule 8(c) Form 1

S.C. Appeal No. of 20

SUPREME COURT OF JUSTICE

NOTICE OF APPEAL AND OF APPLICATION FOR LEAVE TO APPEAL AGAINST A DECISION OF THE NATIONAL COURT

1. NAME OF APPELLANT:.....
(*Apil tauna ladana*) (*Nem bilong man i laik apil*).

2. OFFENCE:.....
(*Oi emu kerere*) (*Trabel bilong yu*).

3. DATE CONVICTED:.....
(*Kerere dinana*) (*Dei bilong kalabusim yu*).

4. PLACE OF NATIONAL COURT SITTINGS:.....
(*e.g. Waigani, Chimbu, etc.*)
(*National kota ia heabi gabuna*) (*Ples bilong nasinol i sidaun*).

5. SENTENCE:.....
(*Lagani o hua hida dibura oi noho*) (*Hamas kalabus yu kisim*).

6. DATE SENTENCES:.....
(*Edena dina kota ia siaia oi lao dibura rumai*) (*Taim yu kisim kalabus*).

7. SET OUT THE REASON WHY YOU WANT TO APPEAL:
(*Dahaka dainai oi ura apil, anina oi gwauraia*) (*Raitim wanem yu laik apil*)

.....

.....

.....

.....

.....

I hereby give notice of appeal and notice of application for leave to appeal against the above decision on the grounds stated above.

Further grounds as may be considered necessary may be added to this Notice following legal advice being given to me.

DATED the . . . day of . . . 20..

TO: The Registrar
Supreme Court
PO Box 7018
BOROKO

.....
Appellant (*ladamu oi torea*)
(*Raitim nem bilong yu*).

3RD SCHEDULE 1
SCALE OF COSTS – Election Petition Review

PART 1. PRE-TRIAL FEES

ITEM

1. An allowance of up to K650.00 per hour:

a. Institution of proceedings;

b. Interlocutory proceedings;

c. Other Documents: Preparing (including where necessary filing, serving or delivering) any document;

d. Opinions and Conferences;

e. Attendances;

f. Preparation for Hearing.

2. Preparation of the Review Book K700.00

This is the preparation allowance, the original and all copies of documents are charged at K1.00 per page.

3. Letter & Phone calls

a. Letters Out - K75.00 (if faxed or e-mailed, add Telikom charges)

b. Letters In - K40.00 (if faxed or e-mailed, add Telikom charges)

c. Phone calls In and Out may be charged at the hourly rate and with Telikom charges – proof from Telikom for time spent must be produced.

4. Copy documents:

Photocopy, printed and carbon copies - all sizes K4.00 per page

PART 2. – LAWYER'S FEES

Directions Hearing	K 800.00
Any other application	K 600.00
Appearing and arguing a Petition – First Day 2/3rd of first day for second day and subsequent days	K3,000.00
Taking a deferred Judgement	K 600.00

Where the trial Judge has certified the fees, costs and expenses of a second lawyer resident within the jurisdiction or for an overseas counsel – there shall be allowed the same amount as for the first lawyer

PART 3. – LAWYER'S TRAVELLING EXPENSES

1. Where a lawyer is required to travel from the town where he practices to appear as counsel in Court he shall be allowed reasonable travel and accommodation expenses.

2. Where the fees, costs and expenses of an overseas counsel are certified by the Court there shall be allowed return business class airfares to Brisbane (except where the airfare is for a lesser amount, or counsel is appearing in more than one matter during the same period) and reasonable hotel expenses.

3. Within the town of trial for Lawyers and Overseas Counsel for all attendances at the Court there is allowed a total of half an hour for the journey to and the journey back from the Court of K375.00 (i.e. half an hour is allowed at the hourly rate of K650.00).

PART 4. – ALLOWANCES TO WITNESSES

1. Villagers and others who give evidence at the trial of a Petition – K10.00 per day.

2. Where a person who gives evidence at a trial of a Petition is on salary or wages – the amount of salary or wages actually lost may be allowed at the taxing officer's discretion.

3. Proof by affidavit that a salary or wages is actually earned by the witness, annexing proof of loss of salary or wages signed by the employer of the witness must be produced to the taxing officer.

4. Where a witness who gives evidence at a trial of the Petition does not reside in the town where he is required to give evidence, he shall be allowed such additional sum as is reasonable for travel expenses to and from that town by PMV or by sea and for accommodation and transport within that town – at the discretion of the taxing officer.

5. The allowance for transport within the town shall be the ordinary PMV cost. Where a witness stays with relatives or friends whilst attending the hearing of a petition a sum of K30.00 per day may be allowed at the discretion of the taxing officer.

6. A witness attending in more than one cause will be entitled to a proportionate part only in each cause.

PART 5. – TAXATION OF COSTS

1. Taxation:

Preparing bill of costs and copies and attending to lodge; attending taxation; vouching and completing bill, paying taxing fee and lodging for certificate or order	K1,500.00

2. Review:

Preparing and filing notice of motion to review decision of taxation officer; preparing and delivering objections or answers to objections, including copies for service and filing and considering opponent's answers on objections as the case may be; attending hearing of review	K1,500.00

CASES

STATUTES

RULES