Supreme Court
&
National Court
Case Notes

January to December
2017

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Actions against the State

vicarious liability

pleadings

Kisa v Talok [2017] PGSC 51; SC1650 (15 December 2017)

Supreme Court: Gavara-Nanu J, Ipang J, Lindsay J

APPEAL – Appeal against whole of the decision of the National Court – tort – tortfeasor – Wrongs (Miscellaneous Provisions) Act, Ch 297, s 1 – statutory provision not pleaded in the statement of claim – appellant not pleading that the first respondent as tortfeasor committed tort whilst acting in the course of his duties – pleadings defective – no cause of action disclosed in the pleadings – defective pleadings incurable on appeal – appeal dismissed.

The appellant is an officer of the Correctional Service based in Wabag, Enga Province. The first respondent is a policeman based at Surinki Police Station, Enga Province. It was claimed that on 27 April 1999, the first respondent shot and wounded the appellant resulting in the appellant sustaining pellet wounds to his body. The appellant claimed that at the time of the incident, the first respondent was in company of other policemen trying to clear a road block in his area. The appellant sustained pellet wounds to his right upper arm, right chest wall, left chest wall, left side of his abdomen and his lumber regions. He claimed that he was subsequently hospitalised for two months then went for further medical review in 2009 and 2013. He sued for damages for the negligence of the first respondent. On the 30 November 2016, the National Court dismissed the proceedings.

Held

1. In order for the appellant to establish a cause of action and vicarious liability against the State, he had to specifically plead s 1(1) and (4) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297 in the statement of claim and plead that the first respondent (tortfeasor) committed the tort whilst acting in the course of his duties as policeman.
2. The failure by the appellant to plead s 1(1) and (4) of the *Wrongs (Miscellaneous Provisions) Act* and allege that the first respondent committed the tort whilst acting in the course his duties rendered the pleadings defective: *Kelly Lerro v Phillip Stagg & Ors* (2006) N3050 and *Phillip Takori v Simon Yagari & Ors* (2008) SC905 adopted and followed.

Administrative law

plaintiff appointed school principal by Provincial Education Board

Mayo v Bangie [2017] PGNC 249; N6922 (2 August 2017)

National Court: Liosi AJ

ADMINISTRATIVE LAW – JUDICIAL REVIEW – Plaintiff appointed school principal by Provincial Education Board – appointment revoked by Teaching Service Commission – first defendant appointed principal by TSC chairman – no reasons given for decisions – natural justice – whether chairman's decisions ultra vires ss 9 & 11 Teaching Service Act 1988 – whether second and third defendants' decisions in breach of ss 39(1) & 151(1) TS Act – TS Act established Provincial Education Boards and conferred on them powers as appointing authorities – TSC not an appointing authority – NCR, O 16 rr 7 & 9(5) – appropriate case for award of damages.

Held

1. The second defendant, as chairman of the third defendant, Teaching Service Commission, has no power of appointment to positions.
2. Neither the second nor third defendants are appointing authorities as defined by s 1 of *Teaching Service Act* 1988.
3. Under s 39(1) of the *Teaching Service Act*, appointments to a position in a provincial high school may be made by the Provincial Education Board.
4. The second and third defendants breached ss 39(1) & 151(1) of the *Teaching Service Act* by giving directions on a specific appointment
5. The second and third defendants' decision to reinstate the first defendant as principal of Minj Secondary School was ultra vires their powers.
6. The Jiwaka Provincial Education Board's appointment of the first plaintiff as principal of Minj Secondary School was lawful.
7. The decisions of the second and third defendants were quashed, and the first plaintiff was declared the duly appointed principal of Minj Secondary School.
8. The second and third defendants were ordered to pay damages to the first plaintiff for loss of salary and entitlements, to be assessed.

Appeal

against convictions and sentences

wilful murder, death penalty

Hagena v The State [2017] PGSC 55; SC1659 (11 December 2017)

Supreme Court: Gavara-Nanu J, Mogish J, Hartshorn J, Kangwia J, Pitpit J

APPEAL – Appeals against convictions and sentences – convictions on eight counts of wilful murder – maximum penalty – evidence of an accomplice – direct evidence – circumstantial evidence – false alibis – false denials – corroboration – evidence of an accomplice corroborated – not necessary for trial judge to warn himself regarding evidence of an accomplice – convictions safe.

APPEAL – Evidence – records of interview – one appellant making full admissions – two other appellants electing not to answer questions – belated attempts by two appellant during trial to create alibis – false alibis and false denials by appellant – attempts by the appellants to remove themselves from the crimes – false alibis and false denials amounting to corroboration of evidence of an accomplice and other prosecution witnesses – convictions affirmed – appeals against convictions dismissed.

APPEAL – Appeals against sentences – multiple killings – robbery – robbery in the high seas tantamount to piracy – cold blooded killings committed in the high seas by seven armed men – use of dangerous weapons – victims shot with guns and viciously attacked with a bush knife – ambush –surprise attack – use of mobile phones to execute plan to kill – victims attacked in a boat – revenge killings – victims unarmed – victims had no way of escaping – victims known to the ring leader – victims related to the ringleader – victims pleas for mercy ignored – victims comprised of men, women and children.

APPEAL – Appeals against sentences – severity of sentences – elaborate planning of the crimes which at least took two days – use of mobile phones, speed boats and guns to execute the plan – high degree of sophistication in planning and execution of the plan to kill – agreement between the appellants to kill the victims – all appellants willing and active participants in the killings – ring leader explaining clearly to other appellants his strong desire to kill the victims – other appellants pledging their total support to the ringleader to kill the victims – ring leader informing other appellants his plans to ambush the victims in the high seas where the victims could not escape – victims totally innocent, unarmed and unable to defend themselves – worst kind of wilful murder – sentences affirmed – appeals against sentences dismissed.

All the appellants, including Allan David (Allan) the principal prosecution witness and an accomplice knew each other well. Their leader, Gregory Kiapkot (Gregory) is now deceased.

On 25 September 2007, the appellants and Allan met Gregory at Kokopo Beach. Gregory bought two bottles of negrita rum and a bottle of coke and invited the appellants and Allan to go with him to Tavui No 1 Village along Nonga Road. They all travelled by a PMV bus to Rabaul then got on another PMV bus to Tavui No 1 Village. They went to the nearby beach where they drank the negrita rum and coke.

While they were still drinking, Gregory and a couple of accomplices left the rest still drinking. They returned to the beach late at night with two dinghies, two firearms and a bush knife.

Sometime later, Gregory called the appellants, Allan and other accomplices and told them about his plan to kill the owners of a dinghy called Palex from West Coast, Namatanai, New Ireland Province, the next day when they travelled from Kokopo to West Coast, Namatanai. He asked them for their help. Gregory was from the same village as Palex owners and was related to them. He told the appellants, Allan and other accomplices, about the owners of Palex having a fight with his uncle in their village some time back. During the fight Palex owners broke his uncle's leg. He took his uncle to Kavieng General Hospital where he received treatment. When his uncle's leg did not heal, he took him to Nonga Base General Hospital in East New Britain Province for further treatment. He said he paid a lot of money for his uncle's medical treatment. The owners of Palex were supposed to compensate his uncle but they did not and it made him very angry and it was time for him –"*to eat their shit*".

After Gregory spoke, the appellants and other accomplices, including Allan, pledged to help Gregory kill the Palex owners the next day. Mobile phones were given to a number of accomplices by Gregory so that they could communicate with each other. They all discussed and planned to kill Palex owners the next day when Palex travelled between Kokopo Beach and West Coast, Namatanai. They all slept at the beach that night.

The next day on 26 September 2007, Gregory and a number of accomplices went ahead towards the Duke of York Islands in one of the dinghies. Other accomplices, including Allan, followed later in the other dinghy. One accomplice was left at Kokopo Beach with a mobile phone so that he could monitor the movements of Palex and inform them when it left Kokopo Beach for West Coast, Namatanai.

When Gregory and his accomplices arrived at a location called Makada Point, at the Duke of York Islands, they met Botchia Hagena (Boptchia) who then joined them. Not long after, their accomplice at Kokopo Beach phoned them and told them that Palex had left Kokopo for West Coast, Namatanai.

When Palex arrived at Makada Point, Gregory and his accomplices including Allan blocked it with the two dinghies from the front and back. One of Gregory's accomplices shot dead the driver of Palex and a crew member. Thereafter, Gregory and his accomplices boarded Palex and stole all its cargo, then killed all the passengers.

Allan and a few other accomplices travelled back to Matupit Point in East New Britain Province. They later went to Kokopo, on the next day, they got on a dinghy and travelled to West Coast, Namatanai. While they were staying at a village called Lokon, news came that Palex had been found with the decomposing body of a female passenger still in it.

When Allan heard this, he became very worried. He could not eat or sleep properly so he confided in a village pastor who counseled him and urged him to speak out about the thing that was bothering him. Allan said while he was at Lokon, there was a weeklong church rally, which he attended. The people were praying for "*exposal*" (sic). He said after talking to the Pastor, he feared God so he wanted to speak out about the "*incident*". He told the Pastor that he wanted to talk to the police. The Pastor then arranged with the police from Namatanai to go to the village and talk to Allan. The police later interviewed Allan in which Allan confessed the killings.

There was evidence that during the investigation, the police threatened Allan. Allan also spent more than a year living with the arresting officer. Allan admitted this but the arresting officer denied it.

Held

1. The learned trial judge correctly warned himself of the dangers in accepting and relying on uncorroborated evidence of an accomplice to make findings of guilt. In this case, however, the evidence of an accomplice was corroborated by independent evidence as well as false denials, which amounted to corroboration. Thus, there was no need for the learned trial judge to warn himself: Gavara-Nanu J, Mogish J, Kangwia J and Pitpit J (Hartshorn J dissenting). *John Jaminan v The State (No 2)* [1983] PNGLR 318 followed and adopted; *The State v Marianno Wani Simon* (1987) N600 adopted with approval.
2. The accomplice who was also the principal prosecution witness was honest and truthful, as his decision to confess the killings came from a contrite heart and was motivated by deep and profound religious conviction: Gavara-Nanu J, Mogish J, Kangwia J and Pitpit J.
3. It was unsafe for the learned trial judge to accept and rely on the uncorroborated evidence of an accomplice to make findings of guilt against two of the appellants who denied the charges; especially when the accomplice was threatened by police during investigations and after he had admitted living with the arresting officer for over a year before trial (Hartshorn J). *Abraham Saka v The State* (2003) SC719 discussed and adopted.
4. The wilful murders were committed with dangerous and lethal weapons. There was pre-meditation and elaborate planning of the crimes. There was high degree of sophistication in the planning and execution of the crimes. Dinghies (speed boats) and mobile phones were used to plan and execute the crimes. Extreme violence was used on multiple victims, which included women, children and elderly. Crimes committed in the high seas. Victims were unarmed and helpless they had no way of escaping. The wilful murders were the worst kind. Maximum penalty of death warranted: *Ure Hane v The State* [1984] PNGLR 105; *John Elipas Kalabus v The State* [1988] PNGLR 193; *Manu Kovi v The State* (2005) SC789 and *Steven Loke Ume v The State* (2006) adopted.

5. Per Gavara-Nanu J, Mogish J, Kangwia J and Pitpit J: The appeals against conviction for eight counts of wilful murder and the sentence of death were dismissed. Per Hartshorn J (dissenting): the appeals by Hagena and Taul against conviction should be upheld and the guilty verdicts substituted by not guilty verdicts, and the appeal by Paraide against conviction and sentence should be dismissed. Accordingly, by majority: the appeals against conviction and sentence were entirely dismissed.

against interlocutory injunction

National Teachers Insurance Ltd v Tet [2017] PGSC 49; SC1647 (22 December 2017)

Supreme Court: Kirriwom J, Kassman J, Kangwia J

APPEAL – Against interlocutory judgment – ss 31 & 39 Insurance Act – whether there was offer and acceptance of a binding contract of insurance – necessity to show errors of law or fact by trial judge.

The second respondent was employed by the third respondent, when he was asked by the first respondent to obtain vehicle insurance. The first respondent rejected the quotation provided by the third respondent as being too high and paid a lesser amount to the second respondent to act as his agent in obtaining cheaper insurance. The second respondent then commenced employment with the appellant and issued a certificate of insurance to the first respondent and his financier. The first respondent subsequently submitted a claim to the appellant, which was rejected on the basis that there was no evidence of payment of a policy premium or policy document, so that there was no policy of insurance with the first respondent.

Held

1. The contractual elements of offer by the third respondent and acceptance by the first respondent, were not shown, so that there was no privity of contract between those parties.
2. The elements of offer by the appellant and acceptance by the first respondent were shown, so that there was a contract of insurance between those parties.
3. The failure of the appellant to issue a policy of insurance showed non-compliance with its obligations under s 31 of the *Insurance Act*.
4. Pursuant to s 39 of the *Insurance Act*, the appellant was responsible for the actions of the second respondent, as its agent.
5. If there was fraud by the second respondent or other employees of the appellant, that was a matter for the appellant, but no fraud was alleged or could be imputed against the first respondent.
6. There being no error shown by the trial judge, the appeal was dismissed.

dismissal for want of prosecution

Task Guard Ltd v Foulton [2016] PGSC 76; SC1560 (16 December 2016)

Supreme Court: Sakora J, Kandakasi J, Yagi J

CIVIL APPEAL – PRACTICE AND PROCEDURE – Appeal against dismissal of proceedings for want of prosecution – National Court Rules, O 4 r 36(1) – delay in prosecuting the claim – aggregate period of delay over 3.5 years – failure to set proceedings down for trial in 7 years – lawyer's inability to practise not a reasonable excuse – whether respondents suffered prejudice and injustice – whether there was reasonable apprehension of bias where the primary judge heard motion to dismiss before motion to set down for trial.

The appellant issued the proceedings in 2004. The matter not having been set down for trial in seven years, due partly to the appellant's lawyer not holding a practising certificate for substantial periods, the respondents filed a motion to dismiss the proceedings for want of prosecution. The appellant subsequently filed a motion to set the matter down for trial. On the hearing date of the respondent's motion, the primary judge ruled that he would hear the respondent's motion first, and depending on the outcome of that motion, would hear the appellant's motion on another date. The respondent's motion was granted, and the appellant appealed against the dismissal of the proceedings.

Held
1. The period of delay was inordinate.
2. There was no reasonable explanation for the delay.
3. A lawyer's failure to hold a practising certificate is not a satisfactory explanation for delay.
4. The order in which motions are heard is a matter of practice and procedure within the judge's discretion.
5. The judge's discretion is properly exercised when he hears the motion filed first in time or hears the motion which will be determinative of the utility in hearing another motion, and such a decision does not give rise to an apprehension of bias.

Lange v Madang Cocoa Growers Export Co Ltd [2017] PGSC 52; SC1651 (15 December 2017)

Supreme Court: Gavara-Nanu J, Toliken J, Bona J

PRACTICE AND PROCEDURE – Appeal – application to dismiss for want of prosecution – O 7 r 48(a) Supreme Court Rules 2012 – delay – onus on appellant to show reasonable explanation – need for finality of proceedings.

The appellants' appeal had been filed in May 2015, and they obtained a stay of the decision in November 2016, pending the appeal. They were ordered to have the appeal

ready for hearing in the next sittings in December 2016. In February 2017 they were ordered to file the appeal books. The respondents filed an application under O 7 r 48 to dismiss the appeal for want of prosecution. The appellants filed no affidavits explaining the delay.

Held

1. Once an appeal has been filed, the appellants are under an obligation to proceed with it expeditiously to finality.
2. When delay in proceeding with the appeal has been shown, the appellant then bears the onus of showing a reasonable explanation for the delay.
3. The respondents had shown that there had been a long and inordinate delay.
4. The appellants gave no explanation for that delay.
5. The appeal was therefore dismissed for want of prosecution.

locus standi

Rimbunan Hijau (PNG) Ltd v Enei [2017] PGSC 36; SC1605 (25 September 2017)

Supreme Court: Salika DCJ, Kandakasi J, Toliken J

APPEAL – Locus standi – legal capacity to sue – landowner group not named as plaintiff – exemplary damages barred by s 34 of Wrongs (Miscellaneous Provisions) Act – grounds raising issues not raised in court below.

TORTS – Illegal use of land – trespass – common law requirement for possessory title – requirement inappropriate and inapplicable to the circumstances of the country.

DAMAGES – Measure of damages – to be assessed by reference to trespasser's gain – appropriateness of awarding exemplary damages.

EVIDENCE – Defendant's failure to object to evidence at trial – court may use the evidence available to it – need to establish error in trial judge's method of assessment.

In 1984 the Local Land Court awarded ownership of some land to the Warata Clan. In 1988 the clan entered into a written agreement with the appellant for the rental of the land for the purpose of storage of logs pending shipment, for a monthly rental fee. This continued until 1996, when the project was completed, and the appellant left the area. In 1997, following an appeal and rehearing, the Local Land Court awarded ownership to the Moga Clan. In 1998 the respondents, who had not been in possession of the land, issued proceedings against the appellant, claiming general, special and exemplary damages for trespass and illegal use of the land. The Moga Clan was not a party. The first respondent died and was substituted by the second respondent. At the trial, the appellant admitted that the Moga Clan was the landowner. The judge found that the appellant was a trespasser who had illegally used the land and had made a

profit from the shipment and sale of logs which had been stored on the land. There was no evidence of the income, expenses or profit made by the appellant, or of actual damage suffered by the respondents. The judge assessed the damages by reference to the gain made by the appellant, using evidence which had not been objected to by the appellant, and made further awards of special and exemplary damages, totalling about K6.2m. The appellant appealed on grounds including that, under s 34 of the *Wrongs (Miscellaneous Provisions) Act*, a cause of action by a deceased's estate cannot include exemplary damages, the respondents had no legal capacity to sue in place of the Moga Clan, and there was no evidence to support the awards of damages, which were manifestly excessive.

Held

1. The grounds relating to the respondents' locus standi and legal capacity, and to the *Wrongs Act*, were not raised before the trial judge, and were therefore not allowed to be raised on appeal.
2. The appellant had not at the trial objected to the evidence adduced by the respondents, or called evidence in rebuttal, and was therefore not permitted to raise objections to the evidence on appeal.
3. The common law requirement for a person alleging trespass, to show possessory title, was inappropriate and inapplicable in the circumstances of PNG.
4. The trial judge was entitled to assess the respondents' loss by reference to the gain made by the appellant, and not just by the loss suffered by the respondents.
5. The trial judge was entitled to use the evidence before him, to assess the damages as best he could.
6. No error having been shown in the trial judge's findings, the appeal was dismissed.

objection to competency

Kuman v Digicel (PNG) Ltd [2017] PGSC 41; SC1638 (31 August 2017)

Supreme Court: Kandakasi J, Manuhu J, Logan J

CIVIL – PRACTICE AND PROCEDURE – Supreme Court – notice of objection to competency of the appeal – Supreme Court Rules, O 7 r 14 – at least one ground of appeal invoking court's jurisdiction – inclusion in notice of appeal of some grounds raising question of fact alone – Supreme Court Act 1975, s 14(1) – failure to obtain prior grant of leave to appeal in respect of such grounds – ability of Supreme Court to control its own procedure so as to prevent abuse of process – grounds raising question of fact alone struck out.

The respondent had filed a notice of objection to competency of the appellant's notice of appeal. The notice of appeal contained grounds based on questions of mixed fact and law, but also questions of fact for which leave to appeal had not been sought or obtained and was therefore in breach of the Rules relating to applications for leave to appeal. A notice of appeal which contains some valid grounds, validly invokes the court's jurisdiction, so that an objection to competency is not a correct response. The

court considered whether or not the invalid grounds of appeal could be struck out, leaving the remaining grounds to proceed.

Held

1. The notice of appeal contained grounds based on questions of mixed fact and law, but also based on questions of fact, for which leave to appeal was required, but not obtained.
2. The appellant had failed to follow the required procedures under the Rules relating to applications for leave to appeal.
3. The purpose of an objection to competency is to determine if the appeal court has jurisdiction to hear the appeal.
4. A notice of appeal which contains some valid grounds of appeal validly invokes the court's jurisdiction (Kandakasi J dissenting).
5. An objection to competency is not a correct response to a notice of appeal which contains some valid grounds of appeal.
6. The objection to competency was dismissed.
7. The court always has an inherent power to control its own proceedings.
8. The respondent's oral application to strike out the invalid grounds of appeal was granted.
9. The invalid grounds of appeal were struck out, to reduce the issues for consideration in the appeal.

practice and procedure

National Gaming and Control Board decision to become sole operator

Monian Ltd v Agon [2017] PGNC 379; N5762 (15 December 2017)

National Court: Nablu J

APPEAL – PRACTICE AND PROCEDURE – Decision of National Gaming and Control Board to become sole operator – whether that was decision under Division 4 – whether decision able to be challenged by appeal or judicial review – ss 149–155 Gaming Control Act.

The appellant was aggrieved by the respondents' decision to become the sole gaming operator in PNG, with a resultant change to the appellant's operating licence. The appellant issued proceedings by way of an appeal under s 155 *Gaming Control Act*. The court considered whether such an appeal was only applicable to decisions made under Division 4 of the Act relating to objections to the grant of a licence.

Held

1. The appeal provision in s 155 *Gaming Control Act* relates only to objections to decisions made under Division 4 to grant a licence.
2. The respondents' decision was a policy decision, not a decision to grant a licence.

3. As the appellant was not an objector to the grant of a licence under Division 4, the appeal process in s 155 of the Act was not available to it.
4. The court had no jurisdiction to hear the appeal which was incompetent, and the appeal proceedings were dismissed.

Special Land Titles Commission decision

Gene v Koito [2017] PGNC 192; N6863 (7 September 2017)

National Court: Cannings J

APPEAL – Special Land Titles Commission decision on ownership of customary land and distribution of benefits – Land Titles Commission Act 1962, ss 15, 29, 38 – whether LTC had jurisdiction to determine distribution of benefits arising from mining project on disputed land – whether LTC obliged to inspect land – whether LTC obliged to take into account memorandum of agreement of parties – whether LTC observed principles of natural justice – whether proper consideration given to principles of adverse possession.

The appellant appealed against the decision of a Special Land Titles Commission that determined customary ownership and land use rights and apportioned the land use benefits in accordance with those rights. The appeal grounds were that the LTC exceeded its jurisdiction by determining how benefits would be distributed, failed to inspect the disputed land, made a decision against the weight of the evidence, failed to take into account a memorandum of agreement between the parties, and did not observe the principles of natural justice as it failed to consider the principle of adverse possession. The respondents objected that the appellant was not a party to the LTC proceedings and therefore lacked standing, and that the appeal was misconceived as the decision appealed against no longer existed due to a successful appeal against it in separate proceedings.

Held

1. A person does not have to have been a party to the proceedings of a Land Titles Commission to have standing as a "person aggrieved" by its decision.
2. The decision of the LTC was evidence that the appellant was a party, not just a witness, and this objection was dismissed.
3. The fact that the decision appealed against has been substituted by an order of the National Court in a separate appeal does not extinguish the appellant's capacity to appeal against the original decision, and this objection was dismissed.
4. A dispute as to distribution of benefits is a dispute concerning ownership of customary land under s 15(1) *Land Titles Commission Act*, and the appeal ground against excess of jurisdiction was dismissed.
5. The written decision of the LTC was evidence that its obligation under s 29A was discharged, and this appeal ground was dismissed.
6. The appellant failed to establish that the LTC decision was against the weight of the evidence, and this appeal ground was dismissed.

7. There was insufficient evidence that the memorandum of agreement relied on by the appellant represented a meeting of minds of all parties to the LTC proceedings, and this appeal ground was dismissed.
8. The failure of the LTC to fully take into account the principle of adverse possession did not establish a failure to observe the principles of natural justice, and this appeal ground was dismissed.
9. The appeal was dismissed.
10. The justice of the case required that the court not amend the decision it made in the related appeal, which was confirmed as the prevailing decision.

statutory interpretation

Mining Act

Tex Onsite (PNG) Ltd v Nekitel [2017] PGNC 188; N6781 (31 May 2017)

National Court: Nablu J

APPEAL – STATUTORY INTERPRETATION – Decision of the Registrar of Tenements to rectify Register by deregistering licence applications – ss 20, 28, 30, 114, 116, 125, 143 and 144 Mining Act – whether applications were erroneously registered during moratorium period – whether applicant required to be heard before decision – whether decision to rectify Register to be made by Director or Registrar – whether moratorium period ran from date of Minister's decision not to renew licence or date when Registrar registered the Minister's decision.

The Minister had made a decision not to renew certain exploration licences, which decision was registered by the Registrar. The appellant lodged applications for the licences, which applications were registered by the Registrar. Section 30 of the *Mining Act* prescribed a moratorium on applications within 30 days after the date on which the land ceased to be the subject of the licences. After being directed by the Managing Director, the Registrar de-registered the applications, on the basis that he had mistakenly accepted them during the moratorium period. The appellant appealed on various grounds, including that the moratorium period commenced on the date when the Minister made his decision, and not on the date when his decision was registered by the Registrar, so that its applications were outside the moratorium period.

Held

1. Registration of an application for a licence did not confer any right on the applicant to be heard before a decision was made.
2. The appellant had no legal or equitable interest capable of protection by s 116 of the *Mining Act*.
3. The appellant was therefore not denied natural justice on the decision to de-register its applications.

4. The power to rectify the Register at the direction of the Managing Director is conferred on the Registrar by s 125 of the Act.
5. Section 125(1) of the Act applies to entries of licence applications in the Register.
6. There was therefore no error in the Registrar's decision to rectify the Register.
7. The moratorium period did not run from the date of expiry of the licences, but from the date when the expiry was registered in the Register.
8. The Minister's decision not to renew the licences was not effective until it was registered in the Register.
9. The appellant's applications had therefore been registered within the moratorium period.
10. There was no error in the Registrar's decision to rectify the Register by deregistering the applications.
11. The appeal was dismissed.

Bail

application to Supreme Court

medical grounds

Maraga v The State [2010] PGSC 60; SC1573 (20 December 2010)

Supreme Court: Injia CJ

SUPREME COURT – BAIL – Application pending appeal – medical grounds – exercise of discretion – bail refused.

The applicant had been convicted of murder and was serving a life sentence, against which he had appealed. He applied for bail pending appeal, supported by medical evidence of a tooth condition and possible TB.

Held

1. An applicant for bail after conviction and pending appeal must show exceptional circumstances.
2. An applicant's medical condition may be an exceptional circumstance, if it seriously endangers his health or life, as shown by reputable medical evidence.
3. TB is a serious but manageable disease, which is not an exceptional circumstance.
4. No exceptional circumstances having been shown, bail was refused.

Supreme Court Act, s 10

Kavo v The State [2014] PGSC 76; SC1571 (23 December 2014)

Supreme Court: Injia CJ

SUPREME COURT – BAIL – Application pending appeal – s 10 of Supreme Court Act – appeal against conviction and sentence for misappropriation – exercise of discretion – exceptional circumstances – multiple grounds – principles – totality of factors to be considered – interests of justice to be considered – bail granted.

The applicant was a provincial governor who had been convicted and sentenced to a term of imprisonment for misappropriation. He applied for bail pending appeal, and so was required to show exceptional circumstances. The applicant showed multiple factors, which needed to be taken together and considered as a totality when determining whether there were exceptional circumstances.

Held

1. Exceptional circumstances must be shown to justify the grant of bail pending appeal against conviction and sentence.
2. Where multiple grounds are shown, they must be considered as a totality when determining if they amount to exceptional circumstances.
3. The performance of his duties of public office, the prospects of success on appeal, and the delay in hearing the appeal were a totality of factors showing that the interests of justice justified the grant of bail.
4. Bail was granted, on conditions.

pending appeal

after conviction for contempt

Tigavu v The State [2011] PGSC 68; SC1570 (18 March 2011)

Supreme Court: Injia CJ

SUPREME COURT – PRACTICE AND PROCEDURE – Bail pending appeal from conviction and punishment for contempt – conviction for contempt of criminal nature – stay of conviction and punishment for contempt not available under s 19 of Supreme Court Act – bail application under Bail Act and s 10 of the Supreme Court Act is available – grant of bail has same effect as staying enforcement of sentence.

The appellant had been convicted and was serving a sentence of imprisonment for contempt in a civil case. Pending his appeal, he sought a stay or bail. A conviction for contempt is criminal, so that s 19 of the *Supreme Court Act* is not applicable. For bail to be granted pending an appeal, exceptional circumstances needed be shown.

Held
1. A conviction and punishment for contempt in a civil case is criminal in nature.
2. Section 19 of the *Supreme Court Act* is not applicable to criminal matters.
3. Bail in a criminal matter may be granted under the *Bail Act* and s 10 of the *Supreme Court Act*.
4. For bail to be granted pending appeal, exceptional circumstances must be shown.
5. Exceptional circumstances were not shown, and bail was refused.

Bail Act, s 11

Samson v The State [2017] PGSC 11; SC1588 (10 May 2017)

Supreme Court: Makail J

PRACTICE AND PROCEDURE – BAIL – Bail sought pending appeal – applicant convicted of manslaughter and sentenced to 12 years imprisonment – grounds for bail – good grounds of appeal – good prospects of success – applicant a candidate contesting National General Election – whether exceptional circumstances established – s 11 Bail Act, Ch 340.

The applicant had been convicted of manslaughter and sentenced to 12 years imprisonment. He applied for bail pending appeal, on the grounds that he had good prospects of success, and that he needed to be out on bail in order to contest the National General Election, which were exceptional circumstances.

Held
1. An applicant for bail pending appeal from conviction and sentence must show exceptional circumstances.
2. Good prospects of appeal are not exceptional circumstances.
3. A desire to contest an election is not an exceptional circumstance, particularly where the application is not made promptly.
4. Application for bail refused.

second application to Supreme Court

relevance of considerations

Kange v The State [2016] PGSC 75; SC1562 (3 November 2016)

Supreme Court: Kandakasi J, Toliken J, Polume-Kiele J

CRIMINAL LAW – BAIL – Application to Supreme Court after refusal of bail by National Court and Supreme Court – Bail Act, s 13(2) – applicant charged with murder – relevance of considerations in Bail Act, s 9(1) – whether applicant needs to establish change of circumstances – whether threats by other prisoners sufficient.

The applicant, who was detained in custody in connection with a murder charge, applied to the Supreme Court for bail for a second time after his first was rejected, and after a refusal of two earlier separate applications in the National Court. The State had opposed the first of the two applications before the Supreme Court. The objection then was based on s 9(1)(c)(i), (ii) and (iii) of the *Bail Act* because the acts constituting the offence allegedly committed by the applicant consisted of a serious assault, a threat of violence and possession of a firearm. The applicant argued that he should be granted bail as he was innocent of the charge, his business interests were adversely affected by his continuing detention, his health was poor, and the welfare of his family had been greatly affected by his detention. The Court rejected those arguments and declined the application. The second application was based on claims of threats of personal harm, injury or death to the applicant from fellow remandees or prisoners in the prison.

Held

1. In the absence of an express authorisation by the *Bail Act* or elsewhere for a fresh application for bail to be made to the Supreme Court after an earlier failed application before it, the Supreme Court could only have jurisdiction to deal with a further application on the basis of a change in circumstances since the last application.
2. An applicant in a second or further bail application in the Supreme Court must demonstrate to the satisfaction of the court that there has been a material change in circumstances since the last refusal of bail, which warrants a grant of bail, in order to persuade the court to grant the application.
3. An applicant charged with murder enjoys a presumption in favour of granting of bail.
4. If one or more of the circumstances in s 9(1) applies, the court is not obliged to refuse bail, which is within the bail authority's discretion.
5. An applicant charged with murder must, in order to convince the court to exercise its discretion in his favour, show that his continued detention is unjustified.
6. The issue of threats of intimidation, harassment, personal injury or death to a prisoner or a remandee by other prisoners or remandees is not a circumstance that warrants the grant of bail, as appropriate measures can be taken by the Correction Services through the Commissioner and its relevant officers: see *Re Application of Paul Tiensten* (2014) SC1343.
7. In the present case, the applicant did not establish a credible case of intimidation, harassment, personal injury, harm or death, or how in any case those matters are beyond the duty and responsibility of the Correction Service to deal with effectively and ensure the threats are not acted upon.

Banking

funds held by agent in trust

National Superannuation Fund Ltd v National Capital Ltd [2017] PGNC 258; N6952 (28 August 2017)

National Court: Hartshorn J

BANKING – Funds held by agent in trust – application for release of funds prior to trial – Order 12 r 1 & O 10 r 21 National Court Rules.

The plaintiff had paid K125m to the first defendant, as agent for the State, for Treasury Bills issued by the State. On maturity, the principal and interest were payable to the plaintiff, but the State did not pay. Of the subscription amount, the State had spent K70m, and only K55m was held in the first defendant's bank account as agent for the State. The plaintiff requested the release of those monies, but the first defendant refused on the basis that the monies belonged to the State. The plaintiff issued proceedings and applied by way of motion for the monies to be released to it, prior to the trial. The second and third defendants agreed with the application. The court considered the issue of whether a question could be determined separately before the trial, when it would not necessarily resolve the substantive proceedings.

Held

1. No-one, other than the plaintiff, claimed an entitlement to the monies held by the first defendant.
2. There could be no dispute that the monies held by the first defendant belonged to the plaintiff.
3. The question of the release of the monies would not necessarily dispose of the proceedings, but the court nevertheless had a discretion under O 10 r 21 *NCR* to determine the question separately.
4. There being no evidence of prejudice to the first defendant or to the determination of the substantive proceedings, the court exercised its discretion to determine the question separately, before the trial.
5. The K55m held by the first defendant in its bank account was to be released immediately to the plaintiff.

Civil

practice and procedure

application to amend name of plaintiff

Roadstabilisers (PNG) Ltd v Wereh [2017] PGNC 311; N6990 (11 September 2017)

National Court: Hartshorn J

CIVIL – PRACTICE AND PROCEDURE – Application to amend name of plaintiff – Order 8 rr 50 and 53(3) National Court Rules.

Proceedings had been issued for breach by the defendants of a contract for work performed by the plaintiff. The defendants applied to dismiss the proceedings on the basis that the named plaintiff was not incorporated and so had no legal capacity. The plaintiff applied orally, without a notice of motion, to amend the plaintiff's name to a similar name of a company which was incorporated.

Held

1. Pursuant to O 8 rr 50 and 53, the court had power to order amendment without an application by notice of motion.
2. There was no evidence that the mistake in the name of the plaintiff caused the defendants to be misled or caused doubt as to the identity of the plaintiff.
3. The plaintiff was given leave to amend its name.
4. The defendants' application was refused.

application to dismiss proceedings

Wari v Dekenai Constructions Ltd [2017] PGNC 410; N7649 (15 February 2017)

National Court: Kariko J

CIVIL – PRACTICE AND PROCEDURE – Application to dismiss proceedings – claim filed on behalf of estate of deceased – deceased died intestate – no Letters of Administration granted – plaintiff appointed by Public Curator as his agent – whether Public Curator had power to appoint agent before being granted Letters of Administration – s 4 of Public Curator Act – s 44 of Wills, Probate and Administration Act.

The plaintiff issued proceedings against the defendant, claiming damages for negligence. He purported to issue the proceedings on behalf of the estate of his deceased father, who had been employed by the defendant. His father had died intestate, and no Letters of

Administration had been granted. The defendant applied to dismiss the proceedings, on the basis that the plaintiff lacked legal capacity to issue them on behalf of the estate. The plaintiff relied on a letter from the Public Curator which said that he had appointed the plaintiff as his agent in administering the estate, pursuant to s 4 of the *Public Curator Act*.

Held

1. Under s 44 of the *Wills Probate and Administration Act*, the property of a deceased person who dies intestate vests initially in the Public Curator until Letters of Administration have been granted.
2. Under s 4 of the *Public Curator Act*, the Public Curator has the power to appoint a person as his agent for the purpose of administration of the estate.
3. The Public Curator is unable to exercise his power under s 4 until Letters of Administration of the estate have been granted to him.
4. As no Letters of Administration had been granted to the Public Curator, his appointment of the plaintiff as his agent was unlawful.
5. As no Letters of Administration had been granted to the plaintiff, he had no legal capacity to issue legal proceedings on behalf of the estate.
6. The proceedings were dismissed.

summons for production of documents

Deputy Commissioner of Taxation of Commonwealth of Australia v Hii [2017] PGNC 415; N7642 (20 November 2017)

National Court: Kariko J

CIVIL – PRACTICE AND PROCEDURE – O 11 r 7 National Court Rules – summonses for production of documents – application to set aside – summonses issued following registration of foreign judgment – whether an abuse of process.

The plaintiff had registered a foreign judgment in PNG against the defendant and obtained an injunction restraining the defendant from dealing with his assets. In separate proceedings by the plaintiff, the defendant had been declared insolvent. The plaintiff issued nine summonses for production of documents to the shareholder/director of and lawyer for a company which the plaintiff believed had purchased an asset from the defendant. There was no trial, hearing or application pending in the proceedings. The non-party applicants applied under O 11 r 7 to set aside the summonses for being an abuse of process.

Held

1. When exercising its discretion under O 11 r 7 *NCR*, the court must determine if the summonses were for the bona fide purpose of obtaining evidence for a pending hearing or application.
2. While the plaintiff was entitled to take steps to enforce its judgment, there was no pending hearing or application in the proceedings.

3. The number and scope of the summonses, when there was no pending hearing or application for enforcement of the judgment or breach of the injunction, indicated that they were a fishing expedition.
4. The issue of the summonses was therefore an abuse of process.
5. The application to set aside the summonses was granted.

Civil aviation

liability for charges imposed by an Aviation Service Provider

Aerocentury Corporation v PNG Air Services Ltd [2017] PGNC 429; N8336 (15 August 2017)

National Court: Hartshorn J

CIVIL AVIATION – Liability for charges imposed by an Aviation Service Provider – whether person charged was owner or operator – ss 8–128 Civil Aviation Act 2000.

The plaintiff was the owner of four aircraft which it leased to another company, who operated the aircraft in PNG. The defendant was an aviation service provider, which obtained judgment against the other company for unpaid charges for aviation services provided to the aircraft. The defendant exercised a lien over one of the aircraft for the amount of the outstanding judgment. The plaintiff sought declarations that it was not liable for the charges, because it was not the owner or operator of the aircraft within the meaning of the *Civil Aviation Act*.

Held

1. When interpreting revenue-raising legislation, a strict approach will be adopted.
2. The intention of the legislation was that neither the owner nor operator of the aircraft would be liable for the charges, unless they were in possession of the aircraft.
3. The plaintiff was not in possession of the aircraft.
4. The plaintiff was neither the registered owner nor registered operator of the aircraft under the *Civil Aviation Act*.
5. The plaintiff was therefore not liable for the aircraft service charges incurred by the operator in possession of the aircraft.
6. The plaintiff was entitled to the return of the monies it had paid into trust.

Commissions of Inquiry

constitutional validity of Commissions of Inquiry Act

Special Reference by the Fly River Provincial Executive [2017] PGSC 25; SC1602 (1 September 2017)

Supreme Court: Injia CJ, Salika DCJ, Kirriwom J, Higgins J

CONSTITUTIONAL LAW – Validity of Commissions of Inquiry Act 1951 – whether Act, as a pre-Independence law, should comply with s 38 of the Constitution – Act not invalid – Constitution, s 38, Sch 2.6.

The Fly River Provincial Executive filed a Special Reference challenging the constitutional validity of the *Commissions of Inquiry Act* 1951 (the Act). The reference was filed after a Commission of Inquiry, which had been established by the Prime Minister under the Act to investigate and report on the procedures employed by the Department of Justice and Attorney-General to brief private law firms to represent the State, had commenced hearing and had summoned the Provincial Administrator of Western Province to give evidence in relation to brief-out arrangements by the Fly River Provincial Government. The Provincial Executive took issue with the summons and filed the reference. The Provincial Executive argued that, although the Act was a pre-Independence law, it should comply with the law-making conditions prescribed by s 38 of the *Constitution,* which it failed to do.

Held

1. The *Commissions of Inquiry Act* 1951 is a "pre-independence law" pursuant to Schedule 2.6(1) of the *Constitution.*
2. Pursuant to Schedule 2.6(1) and (2), the adoption of and application of the *Commissions of Inquiry Act* 1951 is "Subject to any Constitutional Law…", but not to s 38 of the *Constitution.*
3. The *Commissions of Inquiry Act* 1951 is a constitutionally valid law.

Company law

appeal against decision of Registrar of Companies

Papua New Guinea Institute of International Affairs Inc v High Tech Industries Ltd [2014] PGSC 78; SC1577 (31 October 2014)

Supreme Court: Injia CJ, Sawong J, Kariko J

COMPANY LAW – APPEAL – Decision of court in appeal against decision of Registrar of Companies – meaning of property held on trust – real property owned by deregistered

company vested in Registrar – property subject of a sub-lease agreement between deregistered company and another company (sub-lessee) – whether sub-lease void for uncertainty – whether property held under express or constructive trust by deregistered company for the benefit of the sub-lessee – property sold by Registrar to another company for K1.00 – whether registered title should be set aside for constructive fraud – Companies Act, ss 373, 374 & 408.

A company, which was the registered leaseholder of State leasehold land, entered into a sub-lease agreement with the respondent for the occupation of the property. The term of the sub-lease was the balance of the term of the head lease less one day, for an annual rent of K1.00. The State Lease was then surrendered for subdivision purposes and a separate registered lease issued over a portion of the land to the company. The existing sub-lease was "transposed" on the new State Lease. Thereafter the company was deregistered and, by s 373(1) of the *Companies Act*, its property was vested in the second appellant. By virtue of s 373(2) & (4) of the *Companies Act*, the second appellant was entitled to deal with such property except "property held on trust" for the benefit of another person. There was some evidence that the property was worth several millions of kina. The second appellant sold the property for K1.00 to the first appellant, which became the registered proprietor. The respondent appealed to the National Court. The trial judge found that the property was the subject of an existing constructive trust, set aside the registered State Lease on the basis of constructive fraud, and ordered the second appellant to transfer the property to the respondent, resulting in this appeal.

Held

1. Upon deregistration of Longreach Clothing Co Ltd (LCC), the property situated on Allotment 1, s 54 contained in registered State Lease Volume 13, Folio 56 (formerly Allotment 4-9, Section 54 Hohola, State Lease Volume 19, Folio 4524) owned by LCC (the property) was vested in the Registrar of Companies (ROC) by virtue of s 373(1) of the *Companies Act*.
2. The trial judge had wide discretionary jurisdiction given by s 408 of the *Companies Act* to make the orders which he had made.
3. "Property held on trust" in s 373(2) and (4) of the *Companies Act* means all types of property held under any trust arrangements and includes State leasehold land held under an express trust or constructive trust.
4. The property was capable of being held on constructive trust.
5. The property was not shown to be held on constructive trust.
6. A sub-lease, which has stipulated start and end points, is not void for uncertainty.
7. The nature of, and interest created by, the sub-lease agreement between LCC and the respondent over the Crown Lease and transposed on the new State Lease, was a question to be determined after consideration of all the evidence.
8. The transfer of the property to the first appellant by the ROC, and the registration of the transfer by the Registrar of Titles (ROT), were vitiated by constructive fraud.
9. The court erred in ordering the transfer of the property to the respondent, when the evidence did not establish the nature of, or the interest created by, the sub-lease.

10. The appeal is dismissed in respect of the orders to quash the decision of the ROC to sell the property to the first appellant and to set aside the first appellant's registered title.
11. The appeal is upheld, and the orders quashed in respect of that part of the decision of the primary judge to find that the property was held on constructive trust by LCC for the benefit of the respondent.
12. The appeal is upheld, and order quashed in respect of that part of the decision of the primary judge to order the transfer of the property to the respondent.
13. The matter is remitted to the National Court for a rehearing in accordance with this decision, before another judge.

application for leave to bring derivative action

Re Kimbe Nivani Properties Ltd [2017] PGNC 422; N7696 (3 August 2017)

National Court: Hartshorn J

COMPANY LAW – Application for leave to bring derivative action – shareholder seeking to issue proceedings in name of company – principles to be applied – s 143 Companies Act

The applicant was a shareholder and director of the company, KNPL. He alleged that, without his knowledge, another director had set up a rival company, transferred the name and assets of KNPL to that company for no value, and continued to trade under KNPL's name to the detriment of KNPL. He therefore sought leave to bring proceedings against the other director and company in the name of KNPL. The other director denied wrongdoing.

Held

1. As s 143 *Companies Act* was similar to s 165 *Companies Act* New Zealand, the New Zealand case authorities on interpretation of the section would be applied.
2. In order to obtain leave under s 143 *Companies Act*, the applicant must have standing under s 143(1) and should show four matters under s 143(2).
3. The applicant had standing, an arguable case, the likely costs were exceeded by the likely benefit, a prudent businessman would pursue the proposed action, the company was not taking similar action, and it would be in the company's interests to take the proposed action.
4. The application for leave to issue derivative proceedings in the name of the company was granted.

application to set aside statutory demand

Re Koitaki Plantations Ltd [2017] PGNC 51; N6670 (23 March 2017)

National Court: Hartshorn J

COMPANY LAW – Application to set aside a statutory demand and to dismiss the proceeding – requirements for valid service on company – ss 338, 431(1)(c), 432(a) Companies Act – O 13 r 2(3) National Court Rules – s 155(4) of Constitution does not confer primary rights – whether judgment creditor obliged to attempt other means of enforcement before issuing statutory demand.

The respondent company applied under s 338 of the *Companies Act* to set aside a statutory demand, and under O 12 r 40 *National Court Rules* (*NCR*) and s 155(4) of the *Constitution* to dismiss the petition. The application to set aside was filed outside the time limit prescribed in s 338(2) of the Act and challenged the validity of service on the basis that the statutory demand was served on two addresses, one of which was wrong. The court considered the requirements under ss 431 and 432 of the Act for valid service on a company. The application to dismiss could not be made under s 155(4) of the *Constitution* which facilitates enforcement of, but does not confer, primary rights, and there was already a remedy available in the *NCR*. Order 13 r 2(3) *NCR* did not restrict a creditor, who had obtained judgment for a debt, from seeking enforcement by way of a statutory demand without first having attempted other means of enforcement.

Held

1. Service of the statutory demand was validly effected by leaving the document at the registered office or address for service of the company.
2. The fact that the statutory demand was also served at another address did not detract from the validity of the service at the registered office or address for service.
3. The application to set aside the statutory demand was made outside the time limit prescribed by s 338(2) *Companies Act*, and no extension could be given.
4. The application to set aside the statutory demand was refused.
5. The application to dismiss the petition could not be made under s 155(4) of the *Constitution,* as alternative means of facilitating relief were provided in the *NCR*, and O 12 r 40 was the correct basis for the application.
6. Order 13 r 2(3) did not affect or fetter the petitioner's right to enforce a judgment by means of a statutory demand, without having first attempted other means of enforcement.
7. The issue of a statutory demand, without having first attempted other means of enforcement, was not an abuse of process.
8. The application to dismiss the petition was refused.

liquidation

application for a stay of petition

Re TST 4 Mile Ltd [2017] PGNC 281; N6996 (25 August 2017)

National Court: Hartshorn J

COMPANY LAW – LIQUIDATION – Application for a stay of petition seeking appointment of a liquidator – relevant principles – Order 8 r 27 & O 12 r 40 National Court Rules.

The creditor company issued a petition to appoint a liquidator to the debtor company, which then applied for a stay of the petition. The court considered and applied the principles for a stay of a winding-up petition.

Held

1. The debtor company had a genuine counter-claim for an amount in excess of the creditor's claim.
2. As there was a genuine counter-claim, it was irrelevant that the debtor company did not dispute the debt.
3. There were no special circumstances which would make it inappropriate for the petition to be stayed.
4. The debtor company being otherwise able to pay its debts as they fell due, it would be unjust to allow the company to be wound up, when there was a real prospect that the debt would be satisfied by bringing the counter-claim to judgment.
5. The application was granted, and the petition was stayed.

application to set aside statutory demand

Pacific Assurance Group Ltd v Pacific International Hospital Ltd [2017] PGNC 292; N6992 (20 September 2017)

National Court: Hartshorn J

COMPANY LAW – LIQUIDATION – Application to set aside statutory demand – s 338 Companies Act – meaning of calendar month and corresponding date principle considered – ss 3 and 11 Interpretation Act.

The plaintiff was served with a statutory demand on 31 May, and as one month from 1 June fell on Saturday 1 July, filed an application to set it aside on Monday 3 July. The defendant objected, on the ground that such application was required under the *Companies Act* to be filed within one calendar month of the date of service of the demand. The court considered the meaning of a calendar month when the last day fell on a date outside the month in which the event occurred.

Held

1. Pursuant to s 3 *Interpretation Act*, a month referred to in s 338 *Companies Act* means a calendar month.
2. Pursuant to s 11(1) *Interpretation Act*, the period of time from the happening of an event is exclusive of the day of the event.
3. For the purposes of s 338(2) *Companies Act*, a calendar month from the date of service of the demand means the period ends on the corresponding date in the subsequent month.
4. Where a corresponding date cannot be found in the subsequent month, it is appropriate to apply the English common law as the underlying law in PNG, so that the period ends on the last date in the corresponding month.
5. A calendar month from the date of service of the demand on 31 May meant that a corresponding date could not be found in the subsequent month which ended on 30 June, so that the period ended on the last date in June.
6. The last date in June was Friday 30, and as the application was filed on 3 July, it failed to comply with the time limit prescribed in s 338 *Companies Act*.
7. The proceedings were dismissed.

Constitutional law

interpretation of

Forestry Act

Papua New Guinea Forest Industries Association Inc v Tomuriesa [2017] PGSC 24; SC1601 (1 September 2017)

Supreme Court: Injia CJ, Salika DCJ, Kirriwom J, Gavara-Nanu J

CONSTITUTIONAL LAW – Validity of s 121(1) of the Forestry Act 1991 – whether the imposition of "levy" under s 121(1) of the Forestry Act 1991 is "an imposition of taxation" within the meaning of s 209 of the Constitution – whether s 121(1) of the Forestry Act 1991 is inconsistent with s 209 of the Constitution and therefore invalid – Constitution, ss 18(2) & 209.

In National Court proceedings, the applicant sought declaratory orders that the imposition of certain levies under s 121 of the *Forestry Act* and a ministerial determination made under that provision were unlawful. In the course of the trial, the trial judge referred to constitutional questions concerning the interpretation and application of s 121 of the *Forestry Act*. The central issue was whether the imposition of the levy was "an imposition of taxation" within the meaning of that expression in s 209 of the *Constitution.*

Held

1. A reference under s 18(2) of the *Constitution* is determined on the facts as found by the trial judge and contained in the refence, not on additional material.
2. Section 121 of the *Forestry Act* is a statute enacted by Parliament which authorises the imposition of a levy for the purpose of the raising of finance and expenditure of the National Government to finance the National Forestry Authority, a statutory authority or instrumentality of the National Government.
3. The imposition of a levy under s 121 of the *Forestry Act* is an imposition of taxation within the meaning of s 209(1) of the *Constitution.*
4. Section 121 of the Act and s 223 of the Regulation remove the Parliament's authority and control over the imposition of a log export levy in essential areas of the imposition of a levy, and vest those powers in the Executive, through the Minister for Forests.
5. Some of those powers were not expressed in the clear and unambiguous terms required of taxing powers and were too wide.
6. Section 121 of the *Forestry Act* and s 223 of the *Forestry Regulation* are therefore inconsistent with s 209(1) of the *Constitution* and are declared unconstitutional and invalid.

Ombudsman Commission

powers and functions of

In re Alleged Improper Borrowing of AUD1.239 Billion Loan [2017] PGSC 8; SC1580 (30 March 2017)

Supreme Court: Salika DCJ, Mogish J, Cannings J, Kassman J, Higgins J

CONSTITUTIONAL LAW – Powers and functions of Ombudsman Commission – investigation of conduct of governmental bodies, officers and employees of governmental bodies etc – Constitution, s 219(1)(a) – Organic Law on the Ombudsman Commission, s 13.

GOVERNMENTAL BODIES – OFFICE OF PRIME MINISTER – Constitution, s 142 – whether conduct of Prime Minister can be investigated under Organic Law on the Ombudsman Commission – whether conduct of Prime Minister can be subject of comment or findings when Ombudsman Commission publishes results of investigation.

OMBUDSMAN COMMISSION – Procedures for investigation under Organic Law on the Ombudsman Commission – s 17(1): requirement to inform "the responsible person" of intention to make investigation – whether Prime Minister is a "responsible person" for purposes of an investigation into alleged improper overseas borrowing by National Government – whether failure to inform a "responsible person" means Commission lacks jurisdiction to investigate and publish results of investigation regarding conduct of that person.

CONSTITUTIONAL LAW – Interpretation – Constitution, Subdivision II.2.C – whether Ombudsman Commission has jurisdiction to make comments, in a report of an investigation, involving interpretation or application of provisions of Constitutional Laws – whether such comments offend against Constitution, s 18 (original interpretative jurisdiction of the Supreme Court).

The National Court referred 11 questions of constitutional interpretation and application to the Supreme Court under s 18(2) of the *Constitution.* The questions arose during proceedings commenced by the Prime Minister (PM) against the Ombudsman Commission (OC), in which the PM challenged the jurisdiction of the OC regarding an investigation under the *Organic Law on the Ombudsman Commission* into the conduct of various governmental bodies and officers relating to an overseas bank loan obtained by the National Government and procurement of consultants, in so far as the investigation was in relation to his conduct. He also challenged the OC's power to distribute a provisional report of that investigation, which contained comments that he considered were adverse to and derogatory of him. The questions raised four general issues: (1) whether the OC can investigate conduct of the PM under the *Organic Law on the Ombudsman Commission* (questions 1 to 4); (2) whether conduct of the PM can be the subject of comment or findings when the OC publishes the results of an investigation under that *Organic Law* (question 5); (3) whether the OC is obliged, before investigating conduct of the PM under the *Organic Law on the Ombudsman Commission*, to inform him of its intention to make the investigation (questions 6 to 10); (4) whether the OC can in any report published by it under that *Organic Law* make comments involving interpretation or application of Constitutional Laws (question 11).

Held

1. The Prime Minister is not a constitutional office-holder.
2. The Ombudsman Commission can investigate the administrative conduct of the Prime Minister under the *Organic Law on the Ombudsman Commission* as he is an "officer" of a "governmental body" for the purposes of s 219(1)(a)(ii) of the *Constitution* and s 13(b) of the *Organic Law on the Ombudsman Commission*.
3. The conduct of the Prime Minister can be the subject of comment or findings when the Commission publishes the results of an investigation under the *Organic Law on the Ombudsman Commission*, as he is an officer of the National Government.
4. The Ombudsman Commission is not obliged, before investigating a matter under the *Organic Law on the Ombudsman Commission*, to inform the Prime Minister of its intention to make the investigation unless he is the actual target of the investigation as he is not the permanent head of any governmental body, and therefore does not fall within the definition of "responsible person" provided by the *Organic Law*; and the Commission is only obliged to give notice to responsible persons, as defined by the *Organic Law*.
5. Failure to give s 17(1) notice to a responsible person is a breach of a directory, not a mandatory, requirement.
6. The Ombudsman Commission can, in a report published under the *Organic Law on the Ombudsman Commission*, make comments involving interpretation or application of Constitutional Laws, and does not offend against s 18(1) (*original interpretative jurisdiction of the Supreme Court*) of the *Constitution* by doing so.

7. Section 18(1) is a restriction on the exercise of judicial power which does not prevent other constitutional institutions such as the Ombudsman Commission from interpreting or applying Constitutional Laws when performing their functions, which are not judicial in nature.
8. Proceedings of the Ombudsman Commission are only subject to review for excess of jurisdiction, not lack of jurisdiction.

practice and procedure

enforcement of constitutional rights

Liria v O'Neill [2017] PGNC 143; N6834 (1 August 2017)

National Court: Makail J

CONSTITUTIONAL LAW – PRACTICE AND PROCEDURE – Enforcement of constitutional rights – right to stand for elective public office – whether right breached by polling conducted on a Sunday – whether same issue pending before Supreme Court Reference – whether issue sub judice – ss 22, 23, 50(1)(d) and 55 Constitution – s 130(1)(b) Organic Law on National and Local-level Government Elections.

The plaintiff was a candidate in the National Elections. Section 130(1)(b) of the *OLNLLGE* provided that the polls would open on each day other than a Sunday. He issued proceedings by way of a Supreme Court Reference under s 18 *Constitution,* on the issue of whether or not the Electoral Commissioner's requirement for voting to continue on a Sunday was unconstitutional. In the plaintiff's electorate, polling took place on a Sunday, and the first defendant was declared the winner. The plaintiff issued these proceedings, claiming that polling on a Sunday was a breach of his right under s 50(1)(d) *Constitution* to stand for elective public office. He sought interim relief preventing the first defendant from attending Parliament and being declared the duly elected member. The court considered whether the subject of these proceedings was the same as in the pending Supreme Court Reference.

Held

1. The cause of action in the National Court for breach of a constitutional right was different to the action in the Supreme Court Reference on the constitutionality of polling on a Sunday.
2. A finding that the plaintiff's constitutional right was breached, necessarily required a finding by this court that polling on a Sunday was unconstitutional.
3. The issue of the constitutionality of polling on a Sunday was already pending before the Supreme Court.
4. As the Supreme Court was already seized of the issue, it was sub judice.
5. The plaintiff's application for interim relief was refused.

interim relief application

Reference by the Ombudsman Commission of Papua New Guinea [2017] PGSC 2; SC1565 (3 March 2017)

Supreme Court: Injia CJ, Salika DCJ, Makail J

CONSTITUTIONAL LAW – PRACTICE AND PROCEDURE – Application for interim relief pending determination of Reference – interim orders to prevent Parliament from conducting proceedings on third and final reading on Bills to Amend Constitutional Laws – jurisdiction under s 19(4) of Constitution – jurisdiction of court to intervene at any stage – exercise of discretion – court not to consider merits of substantive Reference – application refused – Constitution, s 19(2), (4) & (5) – Supreme Court Rules 2012, O 3 r 2.

A Bill to amend the *Constitution* and an Organic Law had completed two readings in Parliament and was awaiting a third reading, when the Ombudsman Commission made a constitutional reference on the validity of the two proposed laws. It then applied for interim orders staying Parliament from proceeding to a third debate and vote on the laws.

Held

1. The court has jurisdiction, under s 19(4) of the *Constitution* and O 3 r 2 of the *Supreme Court Rules*, to determine the application for interim orders.
2. The referrer's authority to bring a reference under s 19 of the *Constitution* includes the authority to seek interim orders.
3. When determining an interlocutory application for interim relief, the court is not determining the merits of the substantive reference.
4. The court may intervene at any stage of the parliamentary law-making process.
5. The court should not intervene unless there are serious issues raised and the Referrer stands to suffer prejudice.
6. The preservation of the status quo favoured refusal of a stay which would interrupt the parliamentary process.
7. The application for an interim stay order was refused.

s 18(1) application

locus standi

Application by Jondi [2016] PGSC 77; SC1561 (20 December 2016)

Supreme Court: Gavara-Nanu J, David J, Yagi J

CONSTITUTIONAL LAW –– PRACTICE AND PROCEDURE – Application under Constitution, s 18(1) – declarations sought as to interpretation and application of provisions of the Constitution regarding nomination of a Prime Minister in a motion of no confidence

under s 145(2)(a) of the Constitution – requirements for locus standi – not intended as open licence for any ordinary citizen – applicant from political party must be authorised by party.

The applicant filed an application in the Supreme Court under s 18(1) of the *Constitution* seeking declarations as to the constitutionality of a motion of no confidence in the Prime Minister. Four motions of no confidence in the Prime Minister were instituted; three were rejected by the Parliamentary Committee for various reasons and the fourth was dealt with by the Parliament and was defeated. In each of the motions of no confidence, the person nominated or proposed as the Prime Minister, in the event of a successful motion of no confidence, was not from the political party with the greatest number of elected members in Parliament.

The applicant sought declarations that where a person is to be decided upon by the Parliament as the next Prime Minister in the event of a successful motion of no confidence, that person should be appointed from within members of the registered political party with the greatest number of candidates declared elected in the last general election. The *Supreme Court Rules* 2012 require that before an application under s 18(1) of the *Constitution* can be heard, the court should declare that the applicant has standing. The applicant asked the court to declare that he had standing on the basis that he is not only a citizen but also the General Secretary of the Peoples National Congress (PNC), the political party which commands the majority of the elected members of Parliament, and which was invited by the Governor-General to form the government pursuant to s 63 of the *Organic Law on the Integrity of Political Parties and Candidates* 2003.

Held

1. The question of whether an applicant under s 18(1) of the *Constitution* has standing is a matter at the discretion of the Supreme Court, to be exercised in accordance with the rules of the underlying law formulated in *Re Petition of MT Somare* [1981] PNGLR 265 (*Somare Rules*).
2. An applicant must demonstrate the following considerations under the *Somare Rules*:
   (i) s/he has personal interests or rights that are directly affected by the subject matter of the application; or
   (ii) s/he is a citizen who has a genuine concern for the subject matter of the application; or
   (iii) s/he is the holder of a public office, the functions of which relate to the subject matter of the application.
3. An official of a political party pursuing an application under s 18(1) of the *Constitution* must show that s/he is acting with the approval or endorsement of the political party.
4. The procedure under s 18(1) of the *Constitution* is not intended as an open licence to any ordinary citizen.
5. Request for a declaration as to standing refused.

Contempt

application for discharge

Madang Development Corporation Ltd v Rabtrad Madang Ltd [2017] PGNC 171; N6784 (13 June 2017)

National Court: Hartshorn J

CONTEMPT – Application for discharge before expiry of term – relevant principles – O 14 r 50 *National Court Rules*.

The applicant was a lawyer who had been found guilty of contempt of court and sentenced to a term of nine months' imprisonment. Nearly three years later, his appeal against sentence was dismissed, and he began to serve his term. After serving just over one month of his term, he applied for an early discharge under O 14 r 50 *NCR* and purged his contempt by making the payment required by the original court order. The court considered and applied the principles relevant to early discharge.

Held

1. By serving only 38 days of a nine-month sentence which had been confirmed by the Supreme Court as appropriate, the applicant had not suffered punishment proportionate to the contempt.
2. An apology made by the applicant, even if sincere, was not enough to warrant a remission of sentence.
3. Although the applicant had purged his contempt, it was only done on the hearing of the application nearly three years after his sentencing.
4. The contempt being serious, and there being no special factors, the interest of the State in upholding the rule of law would be prejudiced by an early discharge.
5. The application for early discharge was refused.

lawyers

Mai v Madang Development Corporation Ltd [2016] PGSC 82; SC1576 (20 May 2016)

Supreme Court: Injia CJ, Ipang J, Lindsay J

CONTEMPT – Lawyers – sentence of 9 months' imprisonment for contempt of court – appeal against punishment – whether contempt appropriate for enforcement of judgment debt – principles for sentencing for contempt of court – no error shown – appeal dismissed.

The appellant was a lawyer who had unlawfully taken K700,000.00 from a client's funds in his trust account, and was ordered in civil proceedings to repay the monies by a date. He did not comply with the order, and the respondents brought contempt proceedings against

him. He pleaded guilty and was sentenced to 9 months' imprisonment. He appealed against the sentence on the grounds that it was excessive and imprisonment was not appropriate. The court determined a series of guidelines applicable to sentencing for contempt.

Held

1. A conviction and punishment for contempt is criminal in nature, and the ordinary penal laws apply.
2. The judicial determination of punishment for contempt is discretionary, and on appeal, a clear error of law or fact by the sentencing judge must be shown.
3. The principles applicable to the imposition of imprisonment as a penalty for contempt are still evolving, but there are a number of guidelines to be followed.
4. Restraint in sentencing for contempt is appropriate, imprisonment should rarely be used as a disciplinary sanction, and is usually a last resort confined to the most serious cases.
5. Where unlawfully taking a large sum of monies from a trust account amounted to criminal conduct for which a lengthy term of imprisonment could be imposed, done by a lawyer who was an officer of the court, his deliberate and continuing failure to repay the monies made it a 'disobedient contempt', and meant that the contempt was not technical, it was most serious and contumacious, and the appropriate penalty to act as a deterrent and punishment was a term of imprisonment.
6. An offender's medical condition may be relevant, but it is not the overriding factor in sentencing.
7. No error of law or fact having been shown, the appeal was dismissed.

Contracts

breach of oral contract

Mountain Oil Ltd v Tokaju Engineering Services Ltd [2017] PGNC 430; N8546 (28 August 2017)

National Court: Hartshorn J

CONTRACTS – Breach of oral contract – defendant's accountant had ostensible or implied authority – defendant bound by accountant's conduct – liability for breach established.

The plaintiffs were companies which had supplied fuel to the defendant, for which invoices had been issued but were unpaid. The defendant denied entering into any agreement for the supply of fuel from the plaintiff. There was evidence that the defendant's accountant had issued purchase orders for fuel, which was supplied by the plaintiffs, who issued invoices, some of which were paid by the defendant. The court considered whether the accountant had ostensible authority to enter into the agreement on behalf of the defendant.

Held

1. The evidence was sufficient to establish that the defendant's accountant had ostensible authority to bind the defendant.

2. The plaintiffs had entered into an oral contract with the defendant's accountant, which was binding on the defendant.
3. The defendant breached the oral contract by failing to pay for fuel which had been delivered.
4. Judgment was entered for the plaintiffs against the defendant.

claim for monies owing

Asi Holdings Ltd v Luma [2017] PGNC 427; N8349 (30 January 2017)

National Court: Hartshorn J

CONTRACTS – Claim for monies owing under a contract for work performed – claim for variation to contract – defendant's evidence of invoices received and fully paid – no further evidence from plaintiff – need for plaintiff to prove its case on the balance of probabilities.

The parties entered into a contract for the performance of road works. Following completion of work and payment of invoices, the plaintiff claimed monies were still owing for work performed on an approved variation to the scope of works. The defendant produced evidence that all invoices rendered by the plaintiff had been fully paid. The plaintiff produced no evidence to rebut this.

Held

1. The plaintiff was required to prove its claim on the balance of probabilities.
2. The defendant produced evidence in full answer to the plaintiff's claim.
3. The plaintiff produced no evidence to rebut the defendant's evidence.
4. The plaintiff had failed to prove its case on the balance of probabilities.
5. The proceedings were dismissed.

consultancy agreement

Infratech Management Consultants Ltd v PNG Ports Corporation Ltd [2017] PGNC 185; N6855 (18 August 2017)

National Court: Cannings J

CONTRACTS – Consultancy agreement – progress claims – whether defendant breached contract by failing to pay progress claims – whether defendant breached contract by unilateral termination of contract without notice – variations to original contract – whether agreed and enforceable.

In November 2005 the plaintiff and the defendant entered into a contract under which the plaintiff was to provide engineering design services to the defendant for K934,604.00. The contract was to be completed within 18 weeks. It was not completed within that time. The plaintiff and the defendant blamed each other for the delay. There was at

least one variation to the contract, under which it was agreed that the defendant would pay the plaintiff a further K99,693.75 for further services provided. The plaintiff alleges a second variation to the contract, under which it would be paid further amounts for further services, but this was disputed by the defendant. In the period from December 2005 to April 2007 the plaintiff rendered five invoices in the form of progress claims. The defendant paid all of the first invoice and most of the second, but failed to pay any of the third, fourth or fifth invoices, the total amount unpaid being K1,281,464.69. On 18 April 2007 the defendant unilaterally terminated the contract without prior notice. The plaintiff commenced proceedings against the defendant claiming debt and damages for breach of contract, in two respects: (1) failure to pay the full amounts due under the last four invoices; and (2) unlawful termination of the contract. A trial was conducted on the issue of liability.

Held

1. Each invoice was a reasonable claim for payment referable to the original contract and/or the two sets of variations agreed to by the parties; there being in fact and law a second set of variations agreed to by the parties. The defendant was liable in debt for breach of contract, constituted by its failure to pay the full amounts due under all invoices.
2. The defendant terminated the contract wrongfully, in that (a) the defendant failed to act in accordance with any term of the contract allowing for termination; (b) the plaintiff was not in material breach of the contract; and (c) the cause of delay in completion of the contract was the defendant's failure to comply with its contractual obligation to provide in a timely manner adequate technical information to the plaintiff to enable the plaintiff to complete the designs. The defendant was liable in damages for breach of contract (which were adequately pleaded in the statement of claim) constituted by its wrongful termination of the contract.
3. The defendant is liable in debt and damages for breach of contract and is liable to interest on debt and damages.
4. The parties have a limited period within which to reach agreement on the amount of debt, damages and interest to which the defendant is liable, and on costs, failing which the court will decide whether to proceed to trial on assessment of debt, damages and interest or refer the case to mediation.

evidence

Delta Kikori Ltd v Andq Trading Ltd [2017] PGNC 89; N6707 (19 May 2017)

National Court: Kandakasi J

CONTRACTS – Evidence – agreement for carriage of goods by sea – service provided – claim for invoices rendered and not paid – onus on plaintiff to produce adequate evidence to establish claim – failure to produce original or copies of supporting documents – best evidence rule – onus on party wishing to rely on secondary evidence to explain

whereabouts of original or inability to adduce it – mere assertions of the existence of bills of landing insufficient – failure to produce evidence fatal.

The plaintiff was a shipping company which carried goods for reward. The plaintiff carried goods for the defendant and issued invoices for a number of shipments. The defendant paid some, but disputed the balance, and requested copies of various documents supporting the claimed amounts. The plaintiff did not provide the original or copies of those documents. At the hearing, the plaintiff's shipping manager gave evidence that bills of lading and shipping notices corresponding to the invoices had been issued but gave no explanation for not producing them.

Held

1. The onus is on the plaintiff to produce evidence sufficient to establish its claim, to the required standard.
2. A party relying on a document as proof of its contents must adduce primary evidence of the document.
3. A party wishing to rely on secondary evidence of a document must provide a satisfactory explanation for why the original cannot be adduced.
4. Under the *Sea-carriage of Goods Act*, the carrier is required to issue bills of lading for the carriage of goods.
5. The plaintiff could therefore be expected to have originals or copies of bills of lading, showing the goods carried.
6. The plaintiff failed to produce either the original or copies of the bills of lading and other shipping documents relied on to establish its claim and gave no explanation for the failure.
7. The plaintiff's pleadings and assertions of the existence and contents of the documents were not sufficient to discharge its onus of proof.
8. The plaintiff's claim was dismissed.

gaming machines owned and licensed by National Gaming Board

Opotio v Courtabelle Investments Ltd [2017] PGNC 226; N6930 (6 October 2017)

National Court: Cannings J

CONTRACTS – Gaming machines owned and licensed by National Gaming Board – faulty poker machine – refusal to pay winning bet – whether refusal to pay was breach of contract by poker machine operator.

The plaintiff played games on a poker machine, which showed a winning bet of K40,800.00. The machine operator refused to pay, on the grounds that the machine had malfunctioned, the amount shown was in excess of the prescribed statutory limit of K10,000.00, and that responsibility for the malfunction lay with the machine owner.

Held

1. There was an implied contract between the plaintiff and the defendant, whereby if the poker machine displayed a winning bet, the defendant was obliged to pay that amount to the plaintiff, unless the bet was void.
2. The burden of proving that a bet was void was on the party making the allegation.
3. The defendant could not rely on the statutory defences provided by s 31 of the *Gaming Machine Regulation* to establish that the bet was void, as the statute had not been pleaded, and in any event had only come into effect after the cause of action arose.
4. The fact that the poker machine was not owned by the defendant was not a defence to a claim for breach of contract between the plaintiff and the defendant.
5. Having failed to prove that the bet was void, the defendant breached the contract by refusing to pay the winning bet.
6. Judgment was entered for the plaintiff in the sum of K40,800.00 plus general damages to be assessed.

interpretation of terms

Reko PNG Ltd v Gopera Investment Ltd [2017] PGNC 112; N6752 (26 April 2017)

National Court: Hartshorn J

CONTRACTS – Interpretation of terms – dispute over logging and marketing agreement – whether LMA was extended by letter – whether LMA was terminated by letter – intention of parties shown in other agreement – contract could be varied in the absence of a clause in the contract permitting variation – variation may be affected by conduct – termination letter not complying with termination process as agreed under the LMA.

The parties had entered into a Logging and Marketing Agreement (LMA), which did not contain any clause for extension or renewal. Prior to expiry, the defendant wrote a letter which the plaintiff contended was an extension of the LMA, and on the same date, the plaintiff wrote a letter accepting the extension. The parties continued under the LMA. Some months after the expiry of the original term, the defendant wrote a letter purporting to terminate the LMA for breach of certain contractual obligations. The plaintiff sought declarations that the extension was lawful, and the termination was unlawful. The defendant contended that any extension was unlawful, because there was no clause in the LMA permitting an extension or variation.

Held

1. The parties were not precluded from varying or extending the agreement, by the absence of a clause specifically permitting variation or extension.
2. The parties could agree to vary or extend, and their intention to do so could be inferred from their conduct.

3. The intention of the parties to extend the LMA was shown by the defendant's extension letter, the plaintiff's letter of acceptance, the provisions of the Heads of Agreement, and by the conduct of the parties, so that the LMA had been validly extended.
4. The defendant's termination letter did not comply with the termination provisions of the LMA, and so was not valid.
5. The LMA therefore remained in effect.
6. The declarations of lawfulness of the extension and unlawfulness of the termination were granted.

oral agreements

Gambu v Kurame [2017] PGNC 203; N6868 (13 September 2017)

National Court: Cannings J

CONTRACTS – Oral agreements – alleged oral agreement between plaintiff and defendants for defendants to support plaintiff's funding proposal – need to prove existence of agreement.

The plaintiff claimed that he entered into a contract with a company, the second defendant, under which it was obliged to provide him with K100,000.00 funding of a piggery project he proposed to develop on land on which he conducted an existing business. He claimed that he entered into the contract through an oral agreement with the first defendant who was at the time the general manager of the second defendant. He claimed that after entering into the contract, he paid K5,500.00 to a consultant to prepare his project proposal and spent K19,069.00 for a function at his place of business to entertain the first defendant and directors of the second defendant, to launch his project proposal. He claimed that the defendants breached the contract by failing to provide the funding promised. He commenced proceedings against the defendants, seeking damages of K619,069.00 for breach of contract. The first defendant did not defend the proceedings. The second defendant filed a notice of intention to defend but did not file a defence. The plaintiff did not seek default judgment but took the matter to trial. The second defendant was granted leave to appear at the trial on liability and oppose the claim.

Held

1. As the cause of action pleaded in the statement of claim was breach of contract, the plaintiff bore the onus of proving on the balance of probabilities the existence of a contract, the elements of which are: an agreement between the parties, an intention to create legal relations and support of the agreement with consideration (*Steven Naki v AGC (Pacific) Ltd* (2005) N2782).
2. There was no credible evidence of any agreement between the plaintiff and either of the defendants or any intention to create legal relations or any support of any agreement with consideration.
3. The plaintiff failed to prove his case and the proceedings were dismissed, with costs.

sale of land

oral contracts

Tiri v Eka [2017] PGSC 13; SC1586 (27 April 2017)

Supreme Court: Kirriwom J, Batari J, Neill J

CONTRACTS – Sale of land – oral contract – contract for sale between parties not in writing and hence void – part-purchase price paid – breach by delay in paying balance – summary ejectment of buyer – no bona fide dispute over title – sale of property by National Housing Corporation.

The parties had entered into an oral agreement for the purchase of land by the appellant from the respondent for K9,000. The appellant occupied the property, but after 4.5 years, the sum of K2,600.00 remained unpaid. The respondent issued proceedings for ejectment in the District Court and sold the land to a third party. The appellant offered to pay the balance, but the respondent refused to accept it. In the District Court the appellant sought specific performance of the contract. The court ruled that the contract was void, the part-payment was to be returned to the appellant, and the sale to the third party was valid. On appeal to the National Court, the contract was found to be invalid for breach of ss 2 and 4 of the *Frauds and Limitations Act*, and the District Court decision was affirmed. On appeal, the appellant claimed that there was a bona fide dispute over the title.

Held

1. The oral agreement breached the statutory requirement for contracts for the sale of land to be in writing.
2. The agreement was void from the outset.
3. There was no bona fide dispute over title.
4. Neither the District Court nor the National Court erred.
5. The appeal was dismissed.

Costs

security for costs

Borok v OK Tedi Mining Ltd [2017] PGNC 378; N7087 (30 October 2017)

National Court: Hartshorn J

CIVIL – Application for security for costs – need to estimate likely costs – principles relevant to the exercise of discretion – O 14 r 25(1)(b) National Court Rules.

The plaintiffs issued representative proceedings on behalf of customary landowners, claiming damages from the defendant for use of the land after expiry of a Mining Lease.

The defendant applied under O 14 r 25 (1)(b) for payment of security for costs, on the basis that the plaintiffs were suing for the benefit of others and would be unable to pay the defendant's costs if ordered, because they had already been unable to pay costs ordered against them in these and other proceedings. The court considered and applied the principles relevant to the exercise of its discretion.

Held

1. Although the defendant had not estimated the likely future costs to be incurred, the fact that costs had already been incurred in the proceedings for which the plaintiffs were already liable and which remained unpaid, was sufficient reason to believe that the plaintiffs would be unable to pay future costs if ordered to do so.
2. The defendant having established each of the matters relevant to the exercise of discretion by the court, the application for security for costs in the amount for which the plaintiffs were already liable was granted.
3. The plaintiffs were ordered to give security in the sum of K15,545.70 within 14 days, or in default, the proceedings would stand dismissed.

Criminal law

accused died after trial while decision pending

The State v Wosae [2017] PGNC 420; N7652 (13 June 2017)

National Court: Kariko J

CRIMINAL LAW – Accused died after trial while decision was pending – whether or not to continue – relevant considerations – persona of criminal proceedings – lack of provision on practice & procedure – orders in the interests of justice – ss 37(5), 185 & 155(4) Constitution – s 571 Criminal Code.

The accused had pleaded not guilty to several criminal charges, a trial was conducted, the decision was reserved, and the case was then adjourned. The accused subsequently died, before a decision on verdict was delivered. In the absence of any statutory provision or prescribed practice or procedure for such an occurrence, the court considered whether or not it was in the public interest for the matter to proceed to a verdict, or if the case could not proceed in the absence of a living accused.

Held

1. A judgment in a criminal proceeding attaches exclusively to the persona of the individual who was charged, and a verdict is only enforceable against that individual.
2. Sections 155(4) and 185 of the *Constitution* give the court power to make directions and orders which may be deemed necessary to do justice in a particular case, when no remedy is otherwise provided.
3. There was no utility in continuing with a trial after the death of the accused.
4. The proceedings were dismissed, with effect from the date of death of the accused.

appeal against conviction

abuse of trust

Paul v The State [2017] PGSC 33; SC1630 (3 November 2017)

Supreme Court: Cannings J, Makail J, Murray J

CRIMINAL LAW – Appeal against conviction for abuse of trust – Criminal Code, ss 6A, 229E(1) and 531 – trial – whether a relationship of trust, authority or dependency existed between accused and child complainant – relevance of consent – alternative charges – "lumped up" charges – duty of trial judge to set out and address elements of offence.

The appellant was convicted of three counts of the child sex offence known as 'abuse of trust' under s 229E(1) of the *Criminal Code*. He appealed against conviction on five grounds: (1) there was no relationship of trust, authority or dependency; (2) the sexual relations were consensual; (3) he was unfairly convicted of alternative charges after being acquitted of the primary charges on the indictment; (4) the three primary and three alternative charges were unfairly "lumped up" on the same indictment; and (5) the trial judge failed to clearly set out the elements of the offences of which the appellant was convicted and failed to address his mind to the elements and failed to require the State to prove each element beyond reasonable doubt.

Held

1. There was sufficient evidence on which the court could find the existence of a "relationship of trust, authority or dependency", given that the definition of that term in s 6A of the *Criminal Code* is not exhaustive.
2. The fact that the sexual relations were consensual was not relevant, as absence of consent is not an element of an offence under s 229E(1).
3. There was no impropriety or unfairness occasioned by the appellant being convicted of the three alternative charges on the indictment.
4. There was no breach of s 531 of the *Criminal Code*, as the six charges on the indictment alleged a series of similar acts against the appellant.
5. It would have been desirable for the trial judge to more clearly set out the elements of the offence and to specifically refer to the statutory definition of "relationship of trust, authority or dependency". However, the error was immaterial as it was evident that the judge had a clear appreciation of the elements of the offence following submissions from counsel and applied the elements to the findings of fact.
6. All grounds of appeal were rejected. The verdict was not unsafe or unsatisfactory. The appeal was dismissed.

after plea of guilty

Gala v The State [2017] PGSC 32; SC1629 (3 November 2017)

Supreme Court: Cannings J, Kariko J, Shepherd J

CRIMINAL LAW – Appeal against conviction for murder – guilty plea – trial judge's duty to be alert to possible defences apparent from depositions or allocutus – discretion to set aside conviction after guilty plea – Supreme Court Act, s 23(1) – whether reasonable doubt about safeness or satisfactoriness of verdict – legal representation – whether appellant entitled to an advocate of his choice – whether leave should be granted to allow a non-lawyer to represent an appellant.

The appellant had been convicted after pleading guilty to one count of murder. He had been legally represented at the hearing. He appealed on the ground that the trial judge failed to properly consider the guilty plea in light of indications in the depositions and the allocutus that there was a possible defence of provocation, which if accepted would have resulted in conviction on the lesser offence of manslaughter. At the appeal hearing, the appellant applied for and was granted leave of the court to allow a fellow prisoner, who was not a lawyer, to represent him.

Held

1. The right of a party to a legal representative of his or her choice is not absolute. If the party chooses not to appear in person, the legal representative must be a lawyer admitted to practice or a person to whom, following application, the court grants leave to appear.
2. In determining an application for leave to allow a non-lawyer to appear as a legal representative, a range of matters should be considered including whether legal aid has been refused, whether objection is taken by the respondent, whether the proposed lay advocate appears to have basic legal knowledge and is in a position to assist the court, whether it is a complex matter requiring experienced counsel, whether the interests of the person to be represented are likely to be advanced, and whether there is any prejudice to the opposite party.
3. As part of the trial judge's duty to ensure that an accused person is afforded the full protection of the law under s 37 of the *Constitution,* the judge must be alert to potential defences in the depositions or arising during arraignment or at any stage of the trial process up to formal passing of sentence.
4. The judge has an inherent discretion to vacate a guilty plea and set aside a conviction whenever it is in the interests of justice to do so. The discretion would generally only need to be exercised when the potential defence appears to have a reasonable prospect of success.
5. The potential defence of provocation was not readily apparent from the depositions or the allocutus and remained only a possible defence, without reasonable prospects of success. The trial judge did not err in law by not raising it with the defence counsel or by not vacating the guilty plea or by not setting aside the conviction.
6. The verdict was not unsafe or unsatisfactory. The appeal was dismissed.

attempted murder

Maiyau v The State [2017] PGSC 47; SC1644 (21 December 2017)

Supreme Court: Cannings J, Hartshorn J, Kangwia J

CRIMINAL LAW – Appeal against conviction for attempted murder – Criminal Code, s 304(a) – whether reasonable doubt about safeness or satisfactoriness of verdict – whether trial judge failed to give effect to presumption of innocence – whether trial judge failed to give effect to requirement that prosecution prove guilt beyond reasonable doubt – whether trial judge erred by regarding body language of accused as admission of guilt – whether trial judge failed to have regard to other rational explanations for accused's body language – whether trial judge failed to make independent assessment of accused's witnesses – whether proper assessment made of medical evidence.

This was an appeal against conviction for attempted murder. The trial judge accepted the State's version of events, which was that after an argument between the appellant and his girlfriend, the complainant, in a nightclub carpark, the appellant deliberately drove his motor vehicle into and over the complainant, with the intention of killing her. The trial judge relied on the evidence of the complainant and three other State witnesses who were in the car park and saw the argument between the appellant and the complainant. The trial judge rejected the evidence of the appellant, who denied driving his vehicle into or over the complainant, his Honour taking the view, based on body language including facial expressions, that the appellant was lying and that other defence evidence, including medical evidence, suggesting other possible causes of the complainant's injuries, was not persuasive as it was not put to the State's witnesses particularly the complainant, contrary to the rule in *Browne v Dunn* (1893) 6 R 67 (HL). The appellant raised six grounds of appeal: (a) error of law by failing to give effect to the presumption of innocence; (b) error of law by failing to insist that the prosecution prove its case beyond reasonable doubt; (c) error of law by treating the accused's body language and facial expressions as an admission of guilt; (d) error of fact and law by failing to have regard to other rational explanations for accused's body language; (e) error of fact and law by failing to make an independent assessment of the accused's witnesses; and (f) error of law by failing to make a proper assessment of the medical evidence. In addition, the appellant argued that the complainant's evidence was impossible to believe and that there were material inconsistencies in the evidence of State witnesses.

Held

1. To succeed on an appeal against conviction, an appellant must by virtue of s 23 of the *Supreme Court Act* establish that the verdict is unsafe or unsatisfactory, the conviction entailed a wrong decision on a question of law or there was a material irregularity in the trial, and the Supreme Court must consider that a miscarriage of justice has occurred.
2. The six grounds of appeal were arguments that the conviction was unsafe and unsatisfactory and entailed wrong decisions on questions of law. All were dismissed

as the trial judge: (a) gave effect to the presumption of innocence; (b) did not depart from the evidentiary requirement that the prosecution prove its case beyond reasonable doubt; (c) did not treat the accused's body language and facial expressions as an admission of guilt; (d) did not err in law by failing to have regard to other rational explanations for accused's body language; (e) made a proper assessment of the evidence of the accused's witnesses; and (f) made a proper assessment of the medical evidence.

3. The argument that the trial judge erred by accepting evidence of the complainant that was "impossible" to believe was based on an opinion unsupported by any evidence; and there was no material inconsistency in the evidence of the State witnesses.
4. There was no miscarriage of justice, so the appeal was dismissed.

charges of abuse of office

The State v Hevelawa (No 1) [2017] PGNC 197; N6815 (7 July 2017)

National Court: Salika DCJ

CRIMINAL LAW – Charges of abuse of office – s 92 Criminal Code – charge of conspiracy to defraud – s 515 Criminal Code – charges of misappropriation – s 383A(1)(a) Criminal Code – factors creating conflict of interest – obvious vested interest – dishonest intention.

The second and third defendants were senior public servants, and the second defendant was married to the first defendant. The three defendants signed a contract for the provision of gardening services by a company owned solely by the first defendant. The normal tender processes were not followed, other quotations were not obtained, and the contract was open-ended. Invoices were rendered, and the second and third defendants approved payments. Evidence showed that the prices in the contract, and the invoiced amounts paid, were significantly inflated. The court considered each element of each offence, and the duties of public officials whose personal interests gave rise to a conflict with their professional obligations, thereby amounting to an abuse of office, and their dishonest intention being shown by the signing of the contract.

Held

1. The signing of a contract for provision of services in breach of required procedures, and when the contractor was married to the person required to authorise the contract, showed a conspiracy between the defendants.
2. It was an obvious conflict of interest for the second defendant to sign a contract for the payment of monies to a company owned solely by his wife.
3. It was an obvious conflict of interest for the second and third defendants to authorise payment of monies under a contract in which the second defendant had a vested interest.
4. It was an abuse of office for the second and third defendants to sign a contract without complying with required procedures, and where there was an obvious conflict of interest.

5. The evidence showed that the prices in the contract and the monies paid to the first defendant pursuant to the contract were significantly inflated.
6. The signing of the contract, and the payment of monies pursuant to the contract, showed the dishonest intention of the defendants.
7. Being satisfied that each element of each charge had been proven beyond reasonable doubt, each of the defendants was convicted on each charge.

evidence

false alibi

The State v Ragi [2017] PGNC 213; N6887 (26 September 2017)

National Court: Higgins J

CRIMINAL LAW – EVIDENCE – Allegation of rape – quality of identification evidence – scrutiny required even of purported recognition evidence – whether false alibi can be relied on as evidence of guilt.

The accused was charged with rape and had been identified by the victim. He gave evidence of being elsewhere with other people who supported his alibi, but all their evidence was rejected as being false. The court considered the reliability of identification evidence, and whether an adverse inference could be drawn against the accused, based on lies told by him and his witnesses. The court found that establishing the falsity of a statement is not probative of the contrary proposition.

Held

1. There is a need for caution in the evaluation of visual identification and recognition evidence.
2. The accused and his witnesses gave false evidence of an alibi.
3. The lies told by the accused were adverse to his credibility, but were not inconsistent with his innocence.
4. The guilt of the accused was therefore not proven beyond reasonable doubt.
5. The accused was found not guilty of the charge.

manslaughter

criminal negligence

The State v Sharp [2017] PGNC 230; N6813 (28 July 2017)

National Court: Higgins J

CRIMINAL LAW – EVIDENCE – Manslaughter – ss 24, 287, 302, 327 Criminal Code – capsizing and sinking of passenger ferry – whether negligence of the managing director or the master

of the vessel sufficient for conviction – negligence must be personal, not vicarious – negligence must be gross and deserving of criminal punishment – no case to answer requirement that evidence insufficient for prima facie case – Prasad Direction – evidence leaving reasonable doubt even in absence of any defence case – verdict to be entered without calling on defence.

The accused were the owner and master of the MV *Rabaul Queen*, which had capsized and sunk during heavy weather. They were charged with the manslaughter of 140 passengers. The court considered the onus on the prosecution of establishing each element of the offence beyond reasonable doubt, so that the element of negligence had to be personal and not vicarious, above the civil standard and so gross as to warrant conviction, and to have materially contributed to the deaths. Where the onus had not been discharged against the owner, there was no case to answer. Where a prima facie case was shown against the master, but the evidence was insufficient to enable a jury to reach a finding of guilt, there must be an acquittal.

Held

1. There is no onus on an accused to disprove the prosecution case, and nor can an adverse inference be drawn from a failure of the accused to provide evidence.
2. The degree of negligence required to be shown for manslaughter is greater than the civil standard and must be so gross as to warrant conviction.
3. For a finding of no case to answer, the evidence must be legally insufficient for a conviction, or if sufficient for a prima facie case, be such that no tribunal of fact would convict on it, even in the absence of evidence from the defendant.
4. The evidence was insufficient for a conviction of the owner, even in the absence of evidence from him, so that he had no case to answer.
5. The evidence was sufficient to show a prima case against the master but was such that no tribunal of fact would convict on it, even in the absence of evidence from him.
6. A verdict of acquittal was entered for the owner, and a verdict of not guilty was entered for the master.

misappropriation

Criminal Code, s 383A

The State v Bruno [2017] PGNC 12; N6596 (24 January 2017)

National Court: Cannings J

CRIMINAL LAW – Misappropriation – Criminal Code, s 383A – elements of offence – circumstances in which State money ceases to be property of the State – whether State money has been applied to purposes to which it can lawfully be applied – meaning and proof of 'dishonesty'.

The accused was charged with two counts of misappropriation. He was the acting head of a governmental body. The State alleged that in the days after he was in fact told that

his appointment was revoked and that he would be replaced, and before the date that his successor actually assumed office, the accused gave instructions for two cheques to be drawn against the governmental body's bank account: a cheque for K55,000.00, drawn in favour of a law firm, which, on the accused's instructions, commenced proceedings in the National Court challenging the revocation of his appointment; and a cheque for K36,000.00, paid in cash, which was given to the accused. It was alleged that the proceeds of each cheque were applied to purposes to which they could not lawfully be applied (to the use of the accused or other unauthorised recipients) and that the accused was guilty of misappropriation of State property. The accused pleaded not guilty, and a trial was conducted. His defence was, in relation to the K55,000.00 cheque, that it fell within his discretionary powers to authorise that amount of expenditure, which was not for his personal use but proper expenditure in the interests of the body of which he was the head. As to the K36,000.00 cash cheque, the proceeds were applied to pay sources and other expenses in relation to a secret and official operation, but he was prevented by his successor from providing an acquittal of these funds.

Held

1. The elements of an offence under s 383A(1)(a) are that a person:
   (i) applies;
   (ii) to his or her own use or to the use of another person;
   (iii) property;
   (iv) belonging to another person;
   (v) dishonestly.
2. Elements (i) and (iii) were, in both charges, non-contentious in that the accused "applied" (gave instructions for the use of) "property" (the State money, being the proceeds of each cheque).
3. Elements (ii), (iv) and (v) were contentious, and gave rise to two central issues in relation to each charge: (a) whether the money had been applied to proper, lawful purposes (elements (ii) and (iv)); and (b) whether the accused acted dishonestly (element v).
4. If State money is applied to a lawful purpose, it ceases to be property of the State, thus element (iv) would be unproven. If it is applied to an unlawful purpose, it remains State property and its use by the accused or any other person would mean that elements (ii) and (iv) are satisfied (*Brian Kindi Lawi v The State* [1987] PNGLR 183).
5. Element (v) requires the court to be satisfied that the accused applied the property "dishonestly" to his own (or another's) use. It is a question of fact for the trial judge to determine, based on the facts of the case and according to the ordinary standards of reasonable and honest people (*Brian Kindi Lawi v The State* [1987] PNGLR 183).
6. As to count 1: (a) the K55,000.00 payment to the law firm was for the purpose of court proceedings aimed at protecting the personal position of the accused and made in breach of established protocols for engagement of private law firms by governmental bodies, it was therefore an unlawful and improper payment, which amounted to application of State money to the use of the accused and other persons, thus elements (ii) and (iv) were proven; and (b) it was proven that the accused should and would have known that it was an unlawful use of State money, thus he acted dishonestly and element (v) was proven.

7. As to count 2: (a) obtaining State money in the form of K36,000.00 cash is inherently suspicious and it is incumbent on a person who obtains such a substantial sum of State money in cash to disclose proper purposes to which it has been applied, which the accused did not do, the consequence being that the cash was deemed to have been applied to unlawful purposes, thus elements (ii) and (iv) were proven; and (b) it was proven that the accused should and would have known that it was an unlawful use of State money, thus he acted dishonestly and element (v) was proven.
8. The accused was accordingly found guilty of both counts.

The State v Kaniku [2017] PGNC 10; N6595 (23 January 2017)

National Court: Cannings J

CRIMINAL LAW – Offences – misappropriation, Criminal Code, s 383A(1) – elements of offence – meaning and proof of dishonesty.

Two accused were charged with misappropriation. They were the only shareholders and directors of a company that was paid K493,240.00 of government money, in advance, pursuant to a written contract to ship flood-relief food supplies from Central Province to Gulf Province. Their company failed to ship the supplies, most of the food perished and only a small proportion found its way to the required destination. Both pleaded not guilty, and a trial was conducted.

Held

1. The elements of an offence under s 383A(1)(a) are that a person:
   (i) applies;
   (ii) to his or her own use or to the use of another person;
   (iii) property;
   (iv) belonging to another person;
   (v) dishonestly.
2. The first four elements were non-contentious in that the accused, having received, through their company, government money, (being ‘property’ (iii) that ‘belonged to another person’ (iv)), intended to be used for shipping of food supplies, deposited it into their company’s bank account and withdrew the bulk of it for purposes other than shipping the food supplies (‘applied’ (i) it to their own use or ‘to the use of others’ (ii)).
3. The final element, which required the State to prove that the accused applied the money dishonestly (v), was contentious.
4. Element (v) requires the court to be satisfied that the accused applied the property “dishonestly” to his own (or another’s) use. It is a question of fact for the trial judge to determine, based on the facts of the case and according to the ordinary standards of reasonable and honest people (*Brian Kindi Lawi v The State* [1987] PNGLR 183).
5. Here the evidence showed that a large amount of government money was wasted due to a decision-making process lacking in due diligence and undertaken by incompetent government officials, which allowed the accused's company to be paid in advance for a service it was in no position to provide. However, it was apparent

that the accused had made a genuine, if hopelessly inadequate, attempt to get their company in a position to be able to provide the service it had been contracted to provide. There was insufficient evidence of an intention to defraud the State or to collude with government officials to enter into a scam or bogus scheme. The State was unable to prove, beyond reasonable doubt, the element of dishonesty.

6. As dishonesty was an essential element of the offence, each accused was found not guilty.

The State v Kimin [2017] PGNC 145; N6839 (14 August 2017)

National Court: Salika DCJ

CRIMINAL LAW – Misappropriation – s 383A(1) Criminal Code – dishonest procuring of money – dishonest application of money – relevant test – whether reasonable right-minded person would regard act as dishonest.

Two of the accused were senior public servants in the Provincial Government. They signed authority and approval for a cheque payment far in excess of their powers, and in breach of procedures. They and the third accused received payments from the proceeds of the cheque. There was no evidence that any of the three accused were entitled to receive the payments, and they were charged with misappropriation.

Held

1. The three accused put in false claims for monies from the District Service Improvement Programme, received payments, and applied the payments to their own use and to the use of others.
2. The evidence was sufficient to prove beyond reasonable doubt that Paul Guli and Gugumi Kimin unlawfully and dishonestly procured payment of the monies.

practice and procedure

factors relevant to sentencing

The State v Moripi [2017] PGNC 202; N6867 (31 July 2017)

National Court: Salika DCJ

CRIMINAL LAW – PRACTICE AND PROCEDURE – Factors relevant to sentencing – convictions for conspiracy to defraud & obtaining goods by false pretences – ss 404(1)(a) and 407 of Criminal Code – obtained K207,000.00 from issue of the false invoices – sentence of four years' imprisonment.

The defendant had pleaded guilty and been convicted of conspiracy to defraud and obtaining a large sum of money by false pretences, with no restitution having been

made. The court considered the principles relevant to sentencing for such offences, including the need for deterrence.

Held

1. K207,000.00 had been dishonestly taken by the defendant over a period of ten months, while holding a position of trust, without restitution, in circumstances where the offence was prevalent.
2. For restitution to be relevant to sentence, it must already have been actually made.
3. Sentences of three and four years' imprisonment respectively were imposed, to be served concurrently, and to be suspended upon repayment of K207,000.00.

notice of voir dire and ground of objection

Paru v The State [2017] PGSC 27; SC1632 (3 November 2017)

Supreme Court: Injia CJ, Ipang J, Lindsay J

CRIMINAL LAW – PRACTICE AND PROCEDURE – Notice of voir dire and grounds of objection – duty of trial judge to ensure voir dire hearing conducted in accordance with established principles.

The appellant had been convicted of wilful murder, based solely on his written confession. At the trial, the appellant contested the voluntariness of his confession, and a voir dire was conducted. His objection was made on several grounds, including that he had been denied his right to a lawyer under s 42 of the *Constitution.* The judge found that the confession was freely given and admitted it into evidence. On the appeal, the court considered all the grounds of objection.

Held

1. A conviction may be based solely on a confession, if the judge is satisfied that it contains clear admissions of each element of the offence, to the required standard of proof, of beyond reasonable doubt.
2. Failure to comply with s 42(2) of the *Constitution* is not by itself sufficient to render a confession inadmissible.
3. A judge has a duty to conduct a voir dire in accordance with established principles, including that the accused must give prior written notice clearly setting out the grounds of objection, allow sufficient time for the prosecution to prepare, and confine the hearing to those specified grounds.
4. If the judge does not isolate and determine each ground in the notice by the application of the required principles, the voir dire will be distorted, and may result in a mistrial.
5. The judge did not conduct the voir dire in accordance with accepted principles.
6. The appeal was upheld, and the matter remitted for rehearing by another judge.

prosecution of sexual penetration of minor

The State v Apolos [2017] PGNC 207; N6876 (8 September 2017)

National Court: Higgins J

CRIMINAL LAW – Prosecution for sexual penetration of minor – rape and incest – essential elements to be proved beyond reasonable doubt – complaint evidence – effect of delay in reporting – plea of not guilty – findings of guilt.

The accused was charged with sexual penetration of a child who was his daughter. The credibility of the complainant's evidence was supported by complaints which were not contemporaneously made. The court analysed and applied the principles relating to proof of each element of each charge, beyond reasonable doubt.

Held

1. The evidence was sufficient to establish each element of each charge, beyond reasonable doubt.
2. The accused was found guilty of three counts of sexual penetration of a child without her consent.
3. The incestuous nature of the offences was an aggravating factor.

sentences

manslaughter

The State v Leahy [2017] PGNC 210; N6880 (22 September 2017)

National Court: Cannings J

CRIMINAL LAW – SENTENCES – Manslaughter – Criminal Code, s 302 – guilty plea – offender, a security officer, shot and killed a man he believed was a suspect who had just committed an armed robbery – intention was to fire warning shots, not to shoot the deceased – death caused by negligence rather than deliberate act.

The offender pleaded guilty to manslaughter of a young man who he shot and killed in the course of his employment as a security officer. The offender was a licensed firearm user. He believed that the deceased was escaping after committing an armed robbery. He fired warning shots to get the deceased to surrender but he did not surrender. The deceased was swimming in the sea at the time he was shot dead. The offender did not intend to hit the deceased. Death was caused by negligence rather than by deliberate act. This is the judgment on sentence.

Held

1. The maximum penalty for manslaughter is life imprisonment. The starting point for sentencing for this sort of killing (involving a lethal weapon with both mitigating and aggravating factors) is 13 to 17 years' imprisonment (*Manu Kovi v The State* (2005) SC789 guidelines applied).
2. Mitigating factors: the offender acted alone; death arose due to negligence rather than a deliberate act; he made early admissions and cooperated fully with the Police and the Court; he pleaded guilty; he has expressed genuine remorse; he has no prior convictions; he has a very favourable pre-sentence report, demonstrating that he is fundamentally a person of good character whose family and personal relationships are strong, supportive and enduring; he and his family showed genuine compassion and caring for the deceased's family by paying bel kol and contributing to funeral expenses.
3. Aggravating factors: high degree of negligence; use of a firearm; the deceased was in a vulnerable position and reasonably regarded as harmless at the time the offender shot him; the death was totally unnecessary.
4. The high number of mitigating factors warranted a sentence below the starting point range: 12 years imprisonment was imposed. Six years of the sentence was suspended.

principles to be applied

The State v Kole [2017] PGNC 319; N6968 (14 August 2017)

National Court: Batari J

CRIMINAL LAW – SENTENCES – Principles to be applied – unlawful killing – payback – clear intent to cause grievous bodily harm – prevalence of offence – guilty plea – mitigating factors – 18 years' imprisonment – ss 19 & 300 Criminal Code.

The victim had earlier been acquitted of the killing of the accused's brother. On seeing him during a church service, the accused armed himself with a kitchen knife and stabbed the victim once in the back, causing his death. The accused surrendered to the police, admitted to the crime, and said that it was done to payback the victim for killing the accused's brother. Following a plea of guilty, the court considered and applied the principles of sentencing for unlawful killing.

Held

1. When exercising its discretion to consider a term of less than the maximum, the court will take into account both aggravating and mitigating factors.
2. A guilty plea with remorse and evidence of personal loss must be set against the prevalence of the offence, the need for deterrence, and the need to protect the community.
3. The commission of a violent offence in a church during a service was an aggravating factor.

4. A head sentence of 18 years' imprisonment with hard labour was an appropriate sentence.

s 383A (misappropriation of property)

The State v Bruno [2017] PGNC 34; N6652 (23 February 2017)

National Court: Cannings J

CRIMINAL LAW – SENTENCES – Section 383A (misappropriation of property) – acting head of governmental body convicted after trial of two counts: amounts of K55,000.00 and K36,000.00 – sentence of 3 years.

The offender was convicted after trial of two counts of misappropriation committed in the last few days that he held office as the acting head of a governmental body. Under count 1, he authorised the use of K55,000.00 of State money to pay a law firm he engaged to commence court proceedings challenging his removal from office and the appointment of his successor. Under count 2, he directed that a government cheque for K36,000.00 be cashed, he obtained the cash and failed to acquit the cash. This is the judgment on sentence.

Held

1. The maximum penalty for the amounts misappropriated is, for each count, ten years' imprisonment.
2. As two offences were committed, it is appropriate to fix a head sentence for each offence, then determine whether the sentences should be served concurrently or cumulatively, and then apply the totality principle to arrive at a final sentence, and then, after deducting any pre-sentence period in custody, determine whether all or part of the final sentence should be suspended.
3. In fixing a head sentence for each offence, the modified sentencing guidelines from *Wellington Belawa v The State* [1988-89] PNGLR 496 ought to be applied: K1.00 to K1,000.00: suspended sentence; K1,000.00 to K10,000.00: four years' imprisonment; K10,000.00 to K40,000.00: four to six years' imprisonment; K40,000.00 to K1 million: six to ten years' imprisonment.
4. For count 1, involving K55,000.00, with a starting point of six to ten years, mitigating factors are: it was a one-off transaction; no evidence that the money was applied to an entirely wasteful or selfish purpose; there was no direct adverse effect on any individual or group; the offender's reputation has been tarnished already; he has cooperated with the Police and the Court; no prior conviction; long and unblemished prior record of public service. Aggravating factors are: large amount of State money misappropriated; serious breach of trust; serious effect on public confidence in the integrity of the public sector. Other relevant considerations: the offender took the matter to trial and there has been no restitution. Because of the strength of the mitigating factors, a sentence below the starting point range is appropriate: five years' imprisonment.

5. For count 2, involving K36,000.00, with a starting point of four to six years and a smaller amount than in count 1 and similar mitigating and aggravating factors, the appropriate sentence is three years' imprisonment.
6. The total potential sentence is 5 years' + 3 years' = 8 years' imprisonment. As the offences were two separate events, the sentences should be cumulative. However, by applying the totality principle, due to special circumstances peculiar to the offender, such as his age, his poor prospects of re-employment, his medical condition, his long record of public service, his impressive pre-sentence report, the total sentence was reduced to three years' imprisonment.
7. There being no pre-sentence period to deduct the question was whether all or any of the three years should be suspended. In misappropriation cases the major consideration is whether there has been any actual restitution of the money misappropriated and whether there is a realistic prospect of restitution within a limited period. There was proof of neither. None of the sentence was suspended. The offender was thus sentenced to three years' imprisonment, to be served in custody.

ss 92, 383A, 515 Criminal Code

The State v Hevelawa (No 2) [2017] PGNC 198; N6875 (15 September 2017)

National Court: Salika DCJ

CRIMINAL LAW – SENTENCES – Sections 92, 383A, 515 Criminal Code – conspiracy to defraud – abuse of authority of office – misappropriation – appropriate sentence – sentencing trend in dishonesty cases.

The prisoners had each been convicted of conspiracy to defraud and misappropriation of K118,000.00, and two of the prisoners had been convicted of abuse of authority of office. The court considered the appropriate sentencing principles and recent case authorities and determined that the range of sentences suggested by the Supreme Court in *Belawa's* case needed to increase to reflect the increased prevalence of such offences since that case was decided.

Held

1. After taking into account mitigating and aggravating factors, the appropriate sentence for each conviction for conspiracy to defraud and misappropriation is five years' imprisonment.
2. After taking into account mitigating and aggravating factors, the appropriate sentence for each conviction for abuse of authority of office is two years' imprisonment.
3. Each of the sentences is to be served concurrently.
4. Each prisoner is ordered to pay K32,945.50 to the Office of Library and Archives within 12 months, by way of restitution.

5. Upon such payment having been made, three years of each sentence is to be suspended.

sexual penetration of girl under 16 years

The State v Pinda [2017] PGNC 322; N6960 (6 April 2017)

National Court: Batari J

CRIMINAL LAW – SENTENCES – Sexual penetration of girl under 16 years – victim aged 14 years – first time offender aged 19 years – plea – sentencing principles – appropriate approach to sentencing – use of range instead of starting point as guide.

CRIMINAL LAW – SENTENCES – Particular offence – sentencing policy – sexual penetration of girl under 16 years – change in legislation increasing seriousness of offence and penalty – legislative intent not to punish sexual penetration – effect on sentencing discretion – sentence of six years' imprisonment wholly suspended appropriate – Criminal Code, s 229A(1).

The offender pleaded guilty to one count of sexual penetration of a girl under the age of sixteen, she being 14 years of age and the offender being 19 years of age at the time of the offence. The sexual penetration after consensus being uncontested.

Held

1. The use of a sentencing 'scale' or 'range' as a guide in sentencing is preferred to a starting point because 'starting points' give the impression of an inflexible sentencing option.
2. Because there are legal excuses or defences available in some factual circumstances to sexual intercourse with a girl under the age or 12, or 14 years of age, the seriousness of the offence and the aim to protect young children should not overcloud Parliament's intention of defences available to the accused with the onus on the accused.
3. In the circumstances of the case a sentence of 6 years' imprisonment, wholly suspended on probation terms is appropriate.

sexual penetration of child under the age of 16 years

The State v Masit [2017] PGNC 284; N6997 (24 October 2017)

National Court: Cannings J

CRIMINAL LAW – Sexual penetration of child under the age of 16 years – aggravation – ss 6A, 229A(1) & (3), 229F(1)(a), 534(1)(c) Criminal Code – elements of offence – strict proof of complainant's age required – Evidence Act, s 63.

The accused, an adult male, was charged under s 229A(1) and (3) *Criminal Code* with engaging in an act of sexual penetration with a child under the age of 16, in circumstances of aggravation in that there was an existing relationship of trust between them. The accused conceded that he sexually penetrated the complainant but said that he did not do so on the date alleged, and that she was over the age of 16. In the alternative, he said that the complainant consented, and he had a reasonable belief that she was aged 16 or older, a defence under 229F(1)(a) *Criminal Code*. The court considered whether each element of the offence had been proven beyond reasonable doubt.

Held

1. The date specified on the indictment, even if incorrect, was immaterial as the accused conceded that he sexually penetrated the complainant on several occasions over a period of several months on dates close to the date specified.
2. In the trial of a child sexual offence, strict proof of age is required.
3. The State failed to prove the complainant's age, beyond reasonable doubt.
4. As one element of the offence had not been proven, it was unnecessary to determine the defence of consent.
5. It was not open to the court to consider an alternative verdict on a lesser charge, as there was no alternative charge on the indictment.
6. The accused was found not guilty and discharged.

wilful murder

accomplice evidence

Emos v The State [2017] PGSC 54; SC1658 (11 December 2017)

Supreme Court: Gavara-Nanu J, Mogish J, Hartshorn J, Kangwia J, Pitpit J

CRIMINAL LAW – Review of conviction of two applicants, after trial, of three counts of wilful murder – review of sentence of death imposed on applicants.

EVIDENCE – Reliance on uncorroborated evidence of an accomplice – dangers of relying on such evidence – tribunal of fact must be warned of danger of relying on such evidence – whether trial judge obliged to issue a self-warning – whether trial judge's failure to warn himself of danger of relying on uncorroborated accomplice evidence was an error of law – whether error of law resulted in substantial miscarriage of justice.

The applicants who are a father (Selman) and son (Misialis) were both charged with three counts of wilful murder. The applicants denied all three charges. The offences were alleged to have been committed on 31 July 2008, at Tokarkar Plantation Mangroves near Kokopo, East New Britain Province. The applicants were each convicted of all three counts of wilful murder and sentenced to death. The State alleged that Selman conspired with a man by the name of Willie in the evening of 29 July 2008, to kill the three deceased, and then guns and dinghies were arranged by Willie with the assistance of three other

men to kill the deceased; and that the next morning, Selman got on a dinghy at Kokopo Beach to go to West Coast, Namatanai. In that boat were the three deceased. Selman gave evidence that soon after the dinghy left Kokopo, it developed engine problems, the sea at that time was very rough and there were strong winds; and the dinghy sank in the high seas with all its cargo after it was hit by strong currents. He managed to swim to a nearby island and was rescued. The deceased died in the seas by drowning.

The prosecution on the other hand relied on the evidence of an accomplice who told the Court that he and the men that Selman secured to kill the three deceased, followed Selman and the deceased in another boat. When they caught up with them in the high seas, the deceased were ordered to return to Tokarkar Plantation Mangroves near Kokopo. When they arrived there, they were all shot dead. The deceased were buried among the mangroves. Selman was then dropped off somewhere else, in the dinghy that was used by the three men. The accomplice's evidence was not corroborated, but this evidence was relied upon heavily by the trial judge to convict the applicants. The trial judge did not warn himself of the dangers in accepting and relying on the uncorroborated evidence of the accomplice to make findings of fact, which led the Court to upholding the State's case.

Held

1. The failure by the trial judge to warn himself of the dangers of accepting and relying upon the uncorroborated evidence of an accomplice to make findings of guilt was a fundamental error of law. *Abraham Saka v The State* (2003) SC719 followed.
2. The trial judge either overlooked or ignored crucial evidence which, with closer and proper attention, would have created doubt in his mind as to the guilt of the applicants. This led to the trial judge making findings that were against weight of the evidence. *Les Curlewis v David Yuapa* (2013) SC1274 and *Kawaso Ltd v Oil Search PNG Ltd* (2012) SC1218 followed. *House v King* [1936] 55 CLR 499; *Micallef v ICI Australia Operations Pty Ltd & Anor* [2001] NSWCA 274 and *Air Marshall McCormack & Anor v Vance* [2008] ACTA 16 adopted.
3. The trial judge should not have given any weight to the evidence of an accomplice which was not corroborated by any independent evidence. Especially where the evidence was weak and unreliable and marred by inconsistencies: *The State v Joseph Tapa* [1978] PNGLR 134 adopted with approval.
4. Application for review of conviction granted. Convictions and sentences quashed. Verdicts of not guilty entered.

elements of the offence

The State v Beng [2017] PGNC 150; N6814 (31 July 2017)

National Court: Cannings J

CRIMINAL LAW – Wilful murder – Criminal Code, s 299(1) – elements of the offence – whether any of the accused killed the deceased – whether killing unlawful – whether the

accused who killed the deceased intended to do so – Criminal Code, s 7 – whether any accused enabled or aided another in committing the offence.

Three accused were indicted for wilful murder following a late-night altercation at a social club, involving two groups of men, in which one man was stabbed and later died from the injury. All accused pleaded not guilty and a trial was conducted. The State alleged that the second accused directly killed the deceased by stabbing him, that he acted unlawfully, intending to cause his death, making him guilty of wilful murder under s 299(1) of the *Criminal Code*, and that the two other accused enabled and aided the second accused to commit the offence, making them also guilty of wilful murder under ss 7(1)(b) and (c) of the *Criminal Code*. The State presented four witnesses who gave evidence of seeing the second accused stab the deceased, while the deceased was being held by the first accused. All accused gave sworn evidence. All stated that they were present but denied involvement in the death of the deceased and denied knowledge of how he was killed.

Held

1. Under s 299(1) of the *Criminal Code*, the offence of wilful murder has three elements:
   - the accused killed the deceased,
   - the killing was unlawful, and
   - the accused intended to cause the death of the deceased.
2. It was proven beyond reasonable doubt that the second accused killed the deceased as: there was credible and consistent eyewitness evidence by four witnesses of the second accused stabbing the deceased; the medical evidence was consistent with the eyewitness evidence; the evidence of all accused was not credible and was uncorroborated.
3. As no excusatory defence was claimed by the second accused, his killing of the deceased was unlawful.
4. It was proven beyond reasonable doubt that the second accused intended to kill the deceased, given the nature and extent of the injuries inflicted on the deceased. The second accused was therefore guilty of wilful murder.
5. Though there was evidence of the first accused's involvement in the assault on the deceased, it was insufficient to prove beyond reasonable doubt that he assisted the second accused with the intention of killing the deceased. The first accused was not guilty.
6. Though there was evidence that the third accused started the fight that led to the altercation in which the first accused stabbed the deceased, it was not proven that he aided or assisted the second accused in killing the deceased.
7. In summary, the second accused was convicted of wilful murder as charged and the first and third accused were acquitted.

juvenile accused

The State v "GBTD" (Juvenile) [2017] PGNC 61; N6683 (23 March 2017)

National Court: Cannings J

CRIMINAL LAW – Trial – Juvenile Justice Act applied – wilful murder – Criminal Code, s 299(1) – whether the accused killed the deceased – whether the killing was unlawful – whether the accused intended to kill the deceased.

The juvenile accused was charged with wilful murder, by entering a house in which the deceased and two other men were sleeping, and fatally stabbing the deceased without warning. The State relied on evidence from the two men who were sleeping alongside the deceased and woke to find the accused brandishing a knife and behaving aggressively, and from a woman who said she witnessed the accused behaving aggressively shortly after the death of the deceased. The accused relied on an alibi and gave sworn evidence that he was asleep at his house at the time, supported by the evidence of his parents. The court considered issues of identification, alibi and circumstantial evidence, and applied them to the three elements of the offence of wilful murder under s 299(1) of the *Criminal Code*.

Held

1. It was proven beyond reasonable doubt that the accused killed the deceased as: the State witnesses were impressive; the identification evidence was of high quality; the accused's alibi was unconvincing; and circumstantial evidence led only to the conclusion that he killed the deceased.
2. As the accused did not rely on any specific excusatory defence, the killing was not authorised, justified or excused by law and was therefore unlawful.
3. It was proven beyond reasonable doubt that the accused intended to kill the deceased, as he inflicted a deep stab wound which would have required great force, and after stabbing the deceased, the accused attacked and wounded another person.
4. The accused was therefore convicted of wilful murder.

Damages

assessment of damages

summary judgment

National Court: Hartshorn J

Parua v Gamato [2017] PGNC 48; N6671 (6 February 2017)

DAMAGES – ASSESSMENT OF DAMAGES – Following summary judgment on liability – relevant principles – plaintiff required to prove loss – defendant required to rebut proof – no evidence allowed unless based on pleading – State as defendant – no defence filed or evidence given by defendant.

The plaintiff was a lawyer who performed work pursuant to instructions received from the first defendant, for which she charged fees and rendered bills. Some were paid, leaving an outstanding balance of over K7m. She issued proceedings, no defences were filed, and summary judgment on liability was entered. On this assessment of damages, the defendants raised various defences including non-compliance with statutory requirements and the amount being grossly excessive.

Held

1. The entry of summary judgment resolved all issues of liability against the defendants.
2. The plaintiff had to prove her loss by appropriate admissible evidence, on the balance of probabilities, and the defendants were entitled to rebut that evidence by appropriate admissible evidence.
3. The plaintiff established her loss of fees by admissible evidence, on the balance of probabilities.
4. The defendants could not object to issues of liability, and failed to rebut the plaintiff's evidence, as they had not pleaded any defences and so could not give evidence of matters not pleaded.
5. The plaintiff's claims for other types of damages were not pleaded, so that no evidence of them could be given.
6. Damages were assessed in the sum of K7,324,420.83, and judgment for that amount was entered for the plaintiff.

National Court required to follow Supreme Court findings

National Capital District Commission v Yama Security Services Ltd [2017] PGSC 34; SC1606 (1 September 2017)

Supreme Court: Kassman J, Logan J, Lindsay J

CIVIL APPEAL – Supreme Court – judgment on liability for damages set aside – duty of court to facilitate process for pleadings and full trial to determine merits of issues – not in the interests of justice to remit.

CONTRACTS – Public authority – construction – Public Finances (Management) Act 1995, s 61 – requirement for approval of Minister.

DAMAGES – Measure of – duty of court to facilitate proper determination of issues – breach of contract clause – validity – whether penalty or liquidated damages.

PRACTICE AND PROCEDURE – Requirement for National Court to rule consistently with Supreme Court findings – not open to the National Court to find facts and law contrary to Supreme Court findings.

The parties had entered into a contract for the respondent to provide security services to the appellant. After a period, the appellant terminated the contract. The respondent sued for damages for breach of contract, quantifying its claim by reference to a termination clause which provided that the measure of damages would be the balance of the amount payable under the contract. Default interlocutory judgment was entered, with damages to be assessed. The parties purported to compromise the proceedings by a deed of release, the terms of which were never approved pursuant to s 61 of the *Public Finances (Management) Act* 1995. For this reason, that deed was later held to be invalid by the Supreme Court. A trial for the assessment of damages in respect of the default judgment was then conducted in the National Court. At that trial, the respondent claimed the amount it would have been paid for the balance of the term of the contract. The appellant's evidence was that the appellant had, after termination, been offered, taken up and been paid for, alternative work. In the extempore judgment, the trial judge quantified damages by reference to the termination clause plus compound interest, making particular reference to the entry by the appellant into the deed of release, plus costs. Later in chambers, revising the judgment from transcripts, the judge included an order that the appellant pay the respondent's costs in the sum of K5 million, without further hearing the parties.

Held

1. As the Supreme Court had already held in earlier proceedings that the deed of release was invalid by reason of breach of s 61 of the *Public Finances (Management) Act* 1995, the trial judge was not at liberty to proceed on the basis that the deed of release was not invalid.
2. With a clause in a contract providing for assessment of damages, the question is always one of construction of the clause in question, to the end of answering

whether, at the time of contract, the principal purpose served by the clause was one of deterring a party from terminating the contact or, instead, to compensate an innocent party for a breach of contract.

3. Clause 12(d) provides for a lump sum, the amount of which will vary according to the balance of the remaining term of the security contract, to be paid irrespective of whether a breach is trifling or not. Having regard to the principles adopted for this jurisdiction in *Post PNG Ltd v Yama Security Services Ltd*, cl 12(d) provides for a penalty, and is invalid.
4. As the assessment of damages was made on a false premise, the judgment must be set aside.
5. The recitation in the revised reasons for judgment of a radically different order in respect of costs, appears to have been an error of recollection by the trial judge, running counter to the accepted practice set out in the *Australasian Institute of Judicial Administration Guide for Judicial Conduct* at para 4.5.1.
6. There should be no order for a retrial, as the respondent had an opportunity to call evidence to prove a loss known to the law and failed to do so.
7. The appeal is allowed, the order of the National Court made 2 March 2016 set aside, ordered that the appellant pay the respondent by way of damages the sum of K1.00, the respondent to pay the appellant's costs of the appeal and the trial in the National Court in respect of assessment of the damages.

tort and infringement of constitutional rights

Goiya v Anor [2017] PGNC 36; N6660 (1 March 2017)

National Court: Injia CJ

DAMAGES – Tort and infringement of constitutional rights – police raid in search of weapons and sorcery materials – plaintiffs subjected to intimidation, humiliation, degradation, threats and assault – State denying vicarious liability for criminal actions of policemen – whether actions of police were connected with their employment – Constitution, ss 36, 37, 41, 42, 44, 57, 58 – Wrongs (Miscellaneous Provisions) Act, s 4.

The plaintiffs were members of a local church although they were from a different province. At the instigation of the first defendant, the police defendants came armed and drunk to the plaintiffs' house, purportedly to search for weapons and evidence of sorcery, without a search warrant. They broke into, and then completely destroyed the plaintiffs' house. They abused the plaintiffs and their families, accused them of sorcery, fired gunshots, and assaulted them. They cut off the leg of a cat and forced the second plaintiff to eat it, at gunpoint, and then forced him to eat materials alleged to be used in sorcery. After injuring him, they forced him to drink his own blood flowing from his wounds. They publicly paraded the plaintiffs around the village and surrounding area, informing the people that the plaintiffs were sorcerers. They then locked the plaintiffs in the cells for 39 days without charging them and without food,

medical treatment, or access to a lawyer or to family. They finally charged the plaintiffs with sorcery, for which they were convicted in the District Court. The plaintiffs sought to hold the State vicariously liable for the torts and breaches of human rights committed by the police.

Held

1. The first to fifth defendants were personally liable, jointly and severally, for the destruction of property, torts and cruel and inhumane treatment inflicted on the plaintiffs.
2. The second to fifth defendants breached the plaintiff's human rights under ss 36, 37, 42 and 44 of the *Constitution,* and were unlawful pursuant to s 41 of the *Constitution.*
3. The plaintiffs were entitled to damages under ss 57 and 58 of the *Constitution.*
4. The plaintiffs' pleadings were sufficient to establish a claim of vicarious liability of the State under s 4 of the *Wrongs (Miscellaneous Provisions) Act*.
5. The conduct of the police was not necessarily criminal, but it was in excess of their powers and in breach of constitutional rights and was performed in and connected with the course of their authorised employment duties.
6. Judgment was entered for the plaintiffs against the defendants, with damages to be assessed.

trespass to land

Nambawan Super Ltd v Petra Management Ltd [2017] PGNC 108; N6748 (29 May 2017)

National Court: Cannings J

DAMAGES – Trespass to land – unlawful entry of plaintiff's land by defendants and undertaking of earthworks by defendants – assessment of damages and costs of land restoration, after entry of summary judgment.

The plaintiff secured summary judgment against the defendants for the tort of trespass to land, expressed in the following terms: "judgment is entered for the plaintiff for trespass and for the cost of restoring the land which has been dug up by the first defendant". At the trial on assessment of damages and cost of land restoration, the plaintiff claimed K20,000.00 damages and K153,120.00 for cost of land restoration. The defendants submitted that nothing should be awarded as the value of the land had actually increased since they entered it and there was insufficient evidence that the land had been dug up, thus the plaintiff had failed to prove any losses.

Held

1. As the purpose of an award of damages is to put the innocent party in the same position, as far as possible, as it would have been in if the wrongdoer had not committed the wrongful act, the claim for K20,000.00 general damages,

representing corporate time and energy allocated to resolving the problems caused by the defendants' unlawful incursion and activities on the plaintiff's land was modest and reasonable. The defendants' assertion that the value of the land had increased due to the defendants' actions was unsupported by the evidence, and in any event was an irrelevant consideration. The plaintiff was awarded K20,000.00 general damages.

2. The claim for cost of land restoration was well supported by the evidence. The defendants' assertion that no land was dug up was rejected as it related to the question of liability, which was foreclosed by entry of summary judgment. The plaintiff was awarded K153,120.00.
3. The total award was K173,120.00. The question of whether interest was payable on that sum was a matter of discretion to be exercised under the *Judicial Proceedings (Interest on Debts and Damages) Act* 2015. Interest can be awarded despite a plaintiff not expressly claiming it. Interest was awarded at the rate of 8% per annum on the total award of damages and costs of land restoration in respect of the period from the date of judgment on liability to the date of judgment on assessment = K99,578.62.
4. The total judgment sum was K173,120.00 + K99,578.62 = K272,698.62.

Defamation

whether a letter to head of a governmental body was defamatory of officer

Warka v Agai [2017] PGNC 5; N6589 (11 January 2017)

National Court: Cannings J

DEFAMATION – Whether a letter to the head of a governmental body complaining of conduct of an officer of that body was defamatory of the officer – whether defamatory material was published – defences of public interest, fair comment, truth.

The defendants wrote a letter to the head of a governmental body complaining about the conduct of the plaintiff, an officer of the body, and alleging that he was involved in misconduct. The plaintiff was aggrieved by the content of the letter and commenced proceedings against the defendants, claiming damages for defamation. At the trial the defendants conceded writing and sending the letter and that its content had been published but denied liability on the ground that the content was not defamatory of the plaintiff, but if it was defamatory, its publication was lawful by virtue of three defences under the *Defamation Act*: the public interest defence under s 8(2); the fair comment defence under s 9(1); the truth defence under s 10.

Held

1. The elements of a cause of action in defamation are that: the defendant made a defamatory imputation of the plaintiff; the defendant published it; and the publication

was unlawful in that it was not protected, justified or excused by law (*Defamation Act*, ss 5, 24; *Theresa Joan Baker v Lae Printing Pty Ltd* [1979] PNGLR 16).

2. The defendants' letter insinuated that the plaintiff attempted to bribe the first defendant so the first defendant would give his approval for a project in which the plaintiff had an interest. It contained defamatory imputations, which were published, at least, to the recipient of the letter.
3. As to the three defences pleaded: (i) the letter was not a "report" of "proceedings" of a statutory body, hence the *Defamation Act*, s 8(2)(f) defence failed; (ii) the defamatory imputations had some purported factual basis and amounted to serious allegations against a public officer and constituted fair comment respecting the conduct of a public officer in the discharge of his public functions and the character of that person (the plaintiff) so far as his character appears in that conduct, hence the *Defamation Act*, s 9(1)(c) defence succeeded; (iii) the defendants failed to prove that the defamatory statements in the letter were true, hence the *Defamation Act*, s 10 defence failed.
4. Though only one defence succeeded, that was sufficient to render publication of the defamatory matter lawful. The plaintiff failed to establish a cause of action in defamation and the proceedings were dismissed, with costs.

Election petitions

objection to competency of petition

Kirilyo v Tkatchenko [2017] PGNC 283; N7008 (21 November 2017)

National Court: Cannings J

ELECTION PETITIONS – Objection to competency of petition – need for strict compliance with Organic Law on National and Local-level Government Elections, s 208 (requisites of petition) – s 208(d): whether addresses of attesting witnesses adequately stated – s 208(a): whether facts relied on to invalidate the election adequately set out.

Two respondents to an election petition objected to competency of the petition. The first respondent (the successful candidate) argued two grounds of objection: (1) that the petition was in breach of s 208(d) (*requisites of petition*) of the *Organic Law on National and Local-level Government Elections* in that it was not attested by two witnesses whose addresses were stated; and (2) that the petition was in breach of s 208(a) of the *Organic Law* in that it did not, in five respects, adequately set out the facts relied on to invalidate the election. The second respondent (the Electoral Commission) argued two grounds of objection: (1) that the petition was in breach of s 208(a) in that it did not state sufficient particulars as to the winning margin and related matters; and (2) that the petition was in further breach of s 208(a) of the *Organic Law* in that it did not, in 12 respects, adequately set out the facts and grounds relied on relied on to invalidate the election. The petitioner opposed both objections.

Held

1. Strict compliance with each of the requirements of s 208 of the *Organic Law* is required. Substantial compliance is not sufficient.
2. The *Election Petition Rules* 2017 prescribe the level of detail as to the address of an attesting witness that will satisfy the requirements of s 208(d) of the *Organic Law* which stipulates that a petition "be attested by two witnesses whose occupations and addresses are stated".
3. The petition was non-compliant with Rule 4 and Form 1 of the *Election Petition Rules* 2017, and it failed to provide any additional detail that would satisfy s 208(d) of the *Organic Law*. The first ground of the first respondent's objection was upheld. It followed that the petition was dismissed for that reason alone.
4. As to the second ground of the first respondent's objection, three of the five sub-grounds were upheld and two were dismissed.
5. As to the second respondent's objection, both grounds of objection were dismissed.
6. The petition was accordingly dismissed. Costs followed the event, so that the petitioner was ordered to pay the first respondent's costs (as his objection to competency was sustained) and the second respondent (as its objection to competency was refused) was ordered to pay the petitioner's costs.

practice and procedure

application to refer questions to Supreme Court for interpretation

Chan v Schnaubelt [2017] PGNC 286; N6999 (13 November 2017)

National Court: Makail J

ELECTION PETITIONS – PRACTICE AND PROCEDURE – Application to refer questions to Supreme Court for interpretation – manner of casting ballot-paper – folding of ballot-paper in shape of aeroplane – whether illegal – whether breach of secrecy of vote – no serious constitutional question – proposed questions trivial and within exclusive jurisdiction of National Court – Constitution, s 18(2) – Organic Law on National and Local-level Government Elections, ss 138(b), 206 & 215.

The petitioner was an unsuccessful candidate in the election. He challenged the validity of the return of votes on the basis that, at the instigation of the first respondent, some voters had folded their ballot papers in the shape of aeroplanes which revealed the votes cast by his supporters. This was said to be a breach of the *Organic Law* which require a voting paper to be folded so as to conceal the vote, and to be illegal under the *Criminal Code*. The petitioner applied to refer questions arising out of this issue to the Supreme Court for interpretation. The court considered the exclusive jurisdiction of the National Court to determine such issues.

Held

1. When a question is sought to be referred to the Supreme Court under s 18(2) *Constitution* for interpretation, the National Court must determine if the question is trivial, vexatious or irrelevant.
2. The questions sought to be referred concerned illegal practices in the return of votes, which were not vexatious or irrelevant, but were trivial and within the exclusive jurisdiction of the National Court.
3. The application for referral was refused.

dispensation to file and serve notice of objection to competency in 21 days

Dop v Goi [2017] PGNC 313; N6985 (30 October 2017)

National Court: Makail J

ELECTION PETITIONS – PRACTICE AND PROCEDURE – Application for dispensation of requirement to file and serve notice of objection to competency in 21 days – principles relevant to exercise of discretion – Election Petition Rules 2017, rr 12 and 22.

The second respondent had failed to file a notice of objection to competency of the petition within 21 days, as required by r 12 *Election Petition Rules*, and applied under r 22 to dispense with compliance with that requirement. The court considered the principles relevant to the exercise of its discretion.

Held

1. A failure by the second respondent to finalise legal representation while a time limit was running against it was not a satisfactory explanation for the failure to file the objection within time.
2. The second respondent's delay was not excessive, and the petition had not yet been set for trial.
3. No prejudice was shown which would be caused to the petitioner if the time was extended, which could not be cured by an order for costs.
4. The second respondent's application to dispense with the requirements of r 12 *Election Petition Rules* was granted, with costs in favour of the petitioner.

14-day time limit to serve petition

Opa v Mendani [2017] PGNC 297; N6974 (11 October 2017)

National Court: Makail J

ELECTION PETITIONS – PRACTICE AND PROCEDURE – 14-day time limit to serve petition – publication of petition one day late – no extension of time sought – Election Petition Rules 2017, rr 8 & 22.

The petitioner filed an election petition on 1 September. Under r 8 of the *Election Petition Rules*, the petition was required to be served within 14 days. A notice of petition was published in a daily newspaper on 15 September. The petitioner applied by motion for orders that the publication was outside the time limit due to the fault of the newspaper, and that service within time be deemed to have occurred on 12 September, being the date of his payment for the publication.

Held

1. Rule 22 *Election Petition Rules* (*EP Rules*) is a rule of general application, which cannot be used when there is a specific rule applicable.
2. The court has no discretion outside r 8(1) *EP Rules* to extend the time for compliance with the requirement for service.
3. The reason for the petitioner's failure to comply with the requirement was irrelevant, as no application to extend time had been made within the time limit.
4. The petition had not been served within time, and no application to extend that time had been made within the required time or at all.
5. The petition was therefore not valid and was dismissed, with the security deposit to be paid to the respondents.

two writs and two candidates declared for one electorate

Dekena v Kuman [2017] PGNC 181; N6849 (21 August 2017)

National Court: Makail J

ELECTION PETITIONS – PRACTICE AND PROCEDURE – Two writs and two candidates declared for one electorate – application for injunction to prevent candidate declared as member to attend sittings of National Parliament – Organic Law on National and Local-level Government Elections, ss 175(1)(a) and (b) & 206 – application to dismiss proceeding – proceedings commenced by originating summons an abuse of process – jurisdiction of National Court.

The plaintiff was a candidate who had received the most votes and had been declared the winner in his electorate. The first defendant was also a candidate who had also

been declared the winner in the same electorate, by a different returning officer. The first defendant's writ had been accepted and he had been sworn into Parliament. The plaintiff filed an originating summons claiming a breach of his constitutional rights and seeking declaratory relief and sought an interim injunction to restrain the first defendant from attending Parliament. The first defendant sought to dismiss the proceedings as an abuse of process, because it was not an election petition.

Held

1. The plaintiff's proceedings were a dispute as to the validity of the election or return of the first defendant.
2. Pursuant to s 206 *Organic Law*, any such dispute may only be brought by way of an election petition, and not otherwise.
3. The plaintiff's proceedings were not an election petition and were therefore an abuse of process.
4. The application for interim relief was refused, and the proceedings were dismissed.

qualifications of candidate

Siune v Palma [2017] PGNC 330; N7039 (15 December 2017)

National Court: Makail J

ELECTION PETITIONS – Qualification of candidate – right to stand and hold public office – candidate adjudged insolvent by court after nominating – court decision stayed by Supreme Court – effect on successful candidate – whether person remains member of Parliament – Constitution, s 103(3)(d).

The first respondent stood for election as a candidate in the General Election. Five weeks later, he was adjudged insolvent by the National Court. He filed an appeal, and the Supreme Court granted a stay of the court order, pending determination of the appeal. Five weeks after that, he was declared the successful candidate. An unsuccessful candidate filed a petition seeking orders pursuant to s 103(3)(d) *Constitution* that, as the first respondent had been adjudged insolvent, he was not qualified to remain a member of Parliament.

Held

1. The effect of the Supreme Court stay was to restore the first respondent to the position he was in prior to the National Court adjudication order, which was that he was not insolvent.
2. As the first respondent remained solvent, he was not disqualified from remaining a member of Parliament.
3. The petitioner's application was refused.
4. The petition was dismissed, and the security deposit was to be paid to the respondents.

Elections

practice and procedure

interlocutory application to stop counting before declaration of vote

Waranaka v Ralai [2017] PGNC 148; N6809 (21 July 2017)

National Court: Kirriwom J

ELECTIONS – PRACTICE AND PROCEDURE – Interlocutory application to stop counting before declaration of vote – alleged discrepancies during counting – no request for halt and re-count made to Returning Officer under s 170 of Organic Law on National and Local-level Government Elections – no exceptional circumstances – only Electoral Commissioner has power to stop election process – court devoid of power to intervene in absence of election petition under s 206 OLNLLGE.

The plaintiff was a candidate in the National Election, in which the voting papers were being counted. He applied by way of originating summons and notice of motion to stop the counting before the declaration, on the grounds of alleged irregularities, and for a re-count of all the primary votes. The court considered the courses of action open to a candidate aggrieved by irregularities during the vote-counting process.

Held

1. The power to stop counting and order a re-count of votes vests at first instance with the Returning Officer under s 170 *OLNLLGE*.
2. A court has no specific power to intervene in or stop the election process, except by way of an election petition under s 206 *OLNLLGE*, or in exceptional circumstances under s 155(4) *Constitution.*
3. The courts should be slow to intervene under s 155(4) *Constitution* because to do so may be usurping the powers of the Electoral Commissioner.
4. The plaintiff had not made an application to the Returning Officer, and there were no exceptional circumstances to justify intervention by the court.
5. The plaintiff's application was dismissed.

Employment law

constructive dismissal

Kerowa v Harriman [2017] PGNC 261; N6940 (11 October 2017)

National Court: Cannings J

EMPLOYMENT LAW – Constructive dismissal – whether the employee was forced to resign due to wrongful conduct of employer – whether employer had duty of care which was breached – whether employer liable to pay worker's compensation for death of employee – whether death occurred during course of employment – Employment Act – Workers' Compensation Act.

An employee of the fourth defendant was killed in a motor vehicle accident, ten days after tendering his resignation. The plaintiff, as the administrator of the deceased's estate, claimed damages for constructive dismissal, negligence and a workers' compensation claim, based on allegations that the employer's conduct had caused the employee to become clinically depressed and to kill himself. The court considered the elements of each cause of action, and whether or not each element had been proven.

Held

1. There was no statutory basis for a claim of constructive dismissal.
2. There was no evidence that the employer's conduct had forced the employee to resign.
3. The common law claim for constructive dismissal was not established.
4. While the employer owed its employee a duty of care, which was breached, there was no evidence that it resulted in the employee becoming clinically depressed or that it resulted in the death of the employee, which in any event was not reasonably foreseeable.
5. The claim of negligence was not established.
6. The deceased was killed in a motor vehicle accident when he was driving a vehicle without authority for a personal purpose at a time and in a place not required for his employment, and therefore his death did not arise out of or in the course of his employment.
7. The claim for workers' compensation was not established.
8. The proceedings were dismissed.

right to strike

PNG Ports Corporation Ltd v PNG Maritime & Transport Workers Industrial Union [2017] PGNC 107; N6747 (29 May 2017)

National Court: Cannings J

EMPLOYMENT LAW – REMEDIES – Injunctions and declarations – industrial relations – whether union members have right to strike – whether industrial action is illegal – whether declaration should be made as to illegality of apprehended industrial action – circumstances in which it is appropriate to grant permanent injunction to restrain illegal activities – Constitution Basic Rights and Freedoms.

The plaintiff sought declarations of illegality and injunctions restraining industrial action which included a proposed strike by members of the defendant union. The plaintiff alleged that the defendant's actual and proposed actions would interfere with its trade or business, were in breach of the *Harbours Board Act*, *Industrial Relations Act*, *Protection of Transport Infrastructure Act*, *Constitution* and the common law, and were therefore unlawful. The defendant denied that its actions were unlawful. The court considered the rights of employees under international labour law, and their human rights under the *Constitution.*

Held

1. There is no law in Papua New Guinea that makes industrial action by employees, including a strike, intrinsically illegal.
2. Employees in Papua New Guinea have an implied right, subject to any express prohibition imposed by contract, award or law, to engage in non-violent industrial action taken in the context of a genuine industrial dispute.
3. Such a right is properly regarded as part of the fundamental right of all employees to withdraw their labour, recognised by international labour laws and treaties to which PNG is a party, and as an enforcement of their Basic Rights and Freedoms under the *Constitution.*
4. The plaintiff failed to establish that the strike organised by the defendant was illegal, or that any future strike action would be illegal.
5. The declarations and injunctions sought by the plaintiff were refused.

wrongful dismissal

failure to follow disciplinary procedures

Wala v Thomas [2017] PGNC 11; N6599 (23 January 2017)

National Court: Cannings J

EMPLOYMENT LAW – Wrongful dismissal – whether employer breached written contract of employment by failing to follow disciplinary procedures.

The plaintiff's employment with the second defendant was terminated one year after he and the second defendant entered into a three-year written contract of employment. The plaintiff sued the second defendant, claiming damages for breach of contract. The plaintiff argued that the second defendant breached the contract by failing to follow the disciplinary procedure set out in the standard terms and conditions that formed part of the contract.

Held

1. The second defendant breached the contract by terminating the contract for cause without following the disciplinary procedure set out in the contract, contrary to the terms of the contract which required that, before terminating the contract for cause, the disciplinary procedure set out in the contract had to be implemented.
2. A further breach of contract was committed by the second defendant's failure to pay all entitlements due to the plaintiff upon termination of the contract.
3. The plaintiff established a cause of action in breach of contract. The proceedings shall continue, subject to any agreement by the parties to the contrary, to a trial on assessment of damages and unpaid entitlements.

Family law

petition for decree of dissolution of marriage

Kingston v Kingston [2017] PGNC 335; N7054 (25 October 2017)

National Court: David J

FAMILY LAW – Petition for decree of dissolution of marriage – no ancillary relief sought – application to amend petition or file separate petition for ancillary relief – settlement of property – damages in respect of adultery – proceedings for settlement of property instituted by respondent in Family Court of Australia – forum non conveniens – Matrimonial Causes Act, ss 1, 3, 14, 56(3)(b) – Matrimonial Causes Rules, ss 87, 89, 96 and 192.

The petitioner instituted proceedings for a dissolution of marriage in October 2016, in PNG, seeking no other relief. The respondent issued proceedings for a property settlement in November 2016, in Australia. In January 2017 the Australian Court refused the petitioner's application to stay those proceedings and granted the respondent's application to stay the petitioner from proceedings in PNG. In August 2017 the Australian Appeal Court varied the order by only staying the petitioner from proceedings in PNG to attempt to stay the Australian proceedings. In December 2016 the petitioner applied for leave to amend the petition to seek ancillary relief by way of a property settlement as well as damages for adultery or leave to file a new petition seeking all that relief, to be heard together with the existing petition. The respondent cross-applied to stay the petitioner's application. The Court considered the consequences of having proceedings for the same relief in two different jurisdictions, and the application of the *forum non conveniens* principle.

Held

1. The Court's jurisdiction under the *Matrimonial Causes Act* and Rules to grant ancillary relief by way of amendment to a petition is qualified by s 87(2) of the Rules.
2. The ancillary relief sought by amendment to the petition being for property settlement and damages for adultery was therefore prohibited by s 87(2) *Matrimonial Causes Rules*.
3. The petitioner's application for leave to amend the petition to claim ancillary relief was refused.
4. Where there are proceedings for the same relief in different jurisdictions, judicial comity requires the Court to ascertain which is the most convenient forum for determining the issues.
5. Having regard to relevant factors, Australia was the most convenient forum for determining the issue of property settlement.
6. The petitioner's application for leave to file a fresh petition seeking a property settlement was refused.
7. The petitioner's application for leave to file a fresh petition seeking damages for adultery was granted, with the fresh petition to be heard together with the existing petition for a decree of dissolution of marriage.

Human rights

breach of

assessment of damages

Kandakasi v The State [2017] PGNC 9; N6601 (20 January 2017)

National Court: Cannings J

DAMAGES – Assessment of damages following entry of default judgment – breaches of human rights – false imprisonment – malicious prosecution – general damages – plaintiff lost sight in one eye due to Police brutality – other injuries incurred, including loss of teeth.

The plaintiff was assaulted, arrested, detained for two days, charged and prosecuted by Police for suspected involvement in a crime. As a result of the assault, he lost eyesight in one eye, lost four teeth and suffered other abrasions and bruising. The charges against him were dismissed in the District Court. He commenced proceedings against the State, claiming that it was vicariously liable for the civil wrongs committed by the Police: breach of human rights (*Constitution,* s 36 (*freedom from inhuman treatment*)), false imprisonment and malicious prosecution, and seeking damages. The State failed to defend the matter and default judgment was entered against it. The State did not apply to set aside the default judgment and did not appeal against it. A trial on assessment of damages was set down. The plaintiff sought damages in seven categories: (a) general

damages, K101,000.00; (b) breach of human rights, K10,000.00; (c) false imprisonment, K10,000.00; (d) malicious prosecution, K20,000.00; (e) exemplary damages, K35,000.00; (f) special damages (past and future loss of salaries, unspecified, and out of pocket expenses, K2,300.00), (g) cost of repair to his vehicle's gearbox, 3,000.00, a total of K181,300.00 plus past and future salary losses. As a preliminary argument, the State asked the Court to revisit the issue of liability and dismiss the proceedings on grounds that the actual wrongdoers had not been named as defendants and the statement of claim was defective as it failed to plead the nexus between the wrongdoers and the State, and failed to plead that the wrongdoers were employed by the State and that the State was vicariously liable under s 1(1) of the *Wrongs (Miscellaneous Provisions) Act*. The State argued, in the event that its preliminary argument did not succeed, that the plaintiff be awarded no more than K106,500.00.

Held

1. When assessing damages after entry of default judgment, the judge should make a cursory inquiry so as to be satisfied that the facts and cause of action are pleaded with sufficient clarity. If it is reasonably clear what the facts and cause of action are, liability should be regarded as proven. Only if the facts or the cause of action pleaded do not make sense or would make an assessment of damages a futile exercise should the judge inquire further and revisit the issue of liability.
2. Here the facts and causes of action are clear. The preliminary argument of the State raised issues regarding the quality of the pleadings and might, if raised earlier, have resulted in judgment not being entered in favour of the plaintiff. But no application to set aside the default judgment had been made, no appeal was filed, and the argument was made late, without notice. It was not appropriate to entertain it. Liability was not revisited.
3. The seven categories of damages were assessed in the manner contended for by the State: (a) general damages, K85,000.00; (b) breach of human rights, K2,000.00; (c) false imprisonment, K500.00; (d) malicious prosecution, K9,000.00; (e) exemplary damages, zero; (f) special damages, K10,000.00, (g) cost of repair to gearbox, zero, a total award of K106,500.00.
4. In addition, interest of K10,245.30 is payable, making the total judgment sum K116,745.30.

Wakalu v Police [2017] PGNC 8; N6600 (20 January 2017)

National Court: Cannings J

DAMAGES – Assessment of damages following entry of default judgment – breaches of human rights – Police brutality – general damages – freedom from inhuman treatment – denial of full protection of the law – right to liberty.

The three plaintiffs were detained by villagers on suspicion that they had committed a crime. The villagers handed over the plaintiffs to the police, who assaulted them and forced them to strip naked, then tied each of them to the bonnets of police vehicles,

then paraded them on a public road to the police station, announcing to members of the public that they had caught the criminals and inciting members of the public to further assault them. The police, on arrival at the police station, forced the plaintiffs to stand naked on the bonnets of the police vehicles and to confess publicly that they had committed the crime. The plaintiffs were then detained for three days in the police lock-up, naked and without medical treatment. They were detained a further three days before being taken before a court. On the day that they were taken to court they were again assaulted by police. They were remanded in custody at a correctional institution for a further period of six weeks without charge. They were not told at any stage of their right to see a lawyer. The incident in which they were stripped naked and paraded in public on the bonnets of police vehicles was reported in the media, which led the National Court to commence proceedings on its own initiative under s 57(1) of the *Constitution* to enforce the rights of the plaintiffs. The Public Solicitor subsequently represented the plaintiffs in these civil proceedings, the Court directed the plaintiffs to file a statement of claim and the matter proceeded on pleadings, with the defendants represented by the Solicitor-General. The defendants failed to file a defence, default judgment was entered and the matter proceeded to a trial on assessment of damages.

Held

1. This was a case where compensation for breaches of human rights should be assessed separately from general damages (covering pain and suffering, permanent loss of functionality of various parts of the plaintiffs' legs, arms, teeth etc).
2. General damages were assessed at K20,000.00 each.
3. The plaintiffs' human rights were breached on nine distinct occasions and in respect of each occasion, each plaintiff was awarded K3,000.00: 9 x K3,000.00 = K27,000.00.
4. The breach of constitutional rights was so severe or continuous as to warrant an award of exemplary damages, of K10,000.00 each.
5. Special damages were not adequately pleaded or proven. Nothing was awarded.
6. The total award of damages was K57,000.00 each. In addition, interest of 6,577.80 is payable, making the total judgment K63,577.80 for each plaintiff, the grand total of damages payable by the third defendant, the State, to all plaintiffs being K190,733.40.

enforcement

in context of relationship of intimacy and trust

Keoa v Keoa [2017] PGNC 263; N6941 (12 October 2017)

National Court: Cannings J

HUMAN RIGHTS – ENFORCEMENT – Human rights in context of relationship of intimacy and trust – Constitution, s 36.

The applicant sought compensation for breaches of human rights committed against her by her former de facto partner, the respondent, by assaulting, detaining or intimidating her on eleven occasions over a four-year period. The respondent admitted some of the assaults but claimed justification as he was acting under extreme provocation, so that he had not infringed her human rights.

Held

1. Eight of the eleven allegations of assault and/or intimidation were sustained.
2. Each act of assault or intimidation was an act of unjustified physical and/or emotional violence, and thereby breached the applicant's right of freedom from cruel treatment under s 36(1) *Constitution.*
3. The applicant was awarded damages in the sum of K8,000.00 and exemplary damages of K2,000.00, being a total award of damages of K10,000.00.

police brutality

Lome v Sele [2017] PGNC 184; N6854 (18 August 2017)

National Court: Cannings J

HUMAN RIGHTS – ENFORCEMENT – Police brutality – vicarious liability of Police Commissioner and State – defendant not employed by Police Commissioner – whether plaintiff required to prove that police officer was acting within the scope of his lawful police functions – ss 36 & 37 Constitution.

The plaintiff was assaulted by the first defendant police officer who was on duty and performing police functions at the time. He claimed a breach of his human rights and obtained default judgment against the first defendant. He further claimed that the second and third defendants were vicariously liable for the first defendant. Liability was denied on the basis that the plaintiff had not proved that the first defendant had been acting within the lawful scope of his employment duties.

Held

1. The plaintiff proved that the first defendant was on duty at the time, and assaulted him for no good reason, causing him injury.
2. The plaintiff proved that the first defendant thereby breached his human rights under ss 36(1) (*freedom from inhuman treatment*) and 37(1) (*protection of the law*) *Constitution.*
3. To establish vicarious liability, it was not necessary for the plaintiff to prove that the first defendant committed the breach while on duty and acting within the lawful scope of his duty.
4. It was sufficient to prove that the first defendant was acting or purporting to act in the course of his duty.
5. The plaintiff proved that the first defendant was on duty and purporting to act in the course of duty, when he committed the breach.

6. The State, as the first defendant's employer, was therefore vicariously liable.
7. The Commissioner of Police was not the first defendant's employer and could not be vicariously liable for his conduct.
8. The Commissioner did not authorise the first defendant's unlawful actions, and so could not be personally liable.
9. Judgment on liability was entered against the third defendant, the State.

food provided to detainees in correctional institutions

Yasause v Keko [2017] PGNC 183; N6853 (18 August 2017)

National Court: Cannings J

HUMAN RIGHTS – Food provided to detainees in correctional institution – application for enforcement of human rights – Constitution, s 36(1): freedom from inhuman treatment – Constitution, s 37(1): protection of the law.

A prisoner brought an application on behalf of all detainees at a correctional institution for enforcement of human rights, which he alleged were breached by the respondents (the commanding officer of the institution, the Commissioner of the Correctional Service and the State) by their failure to provide the detainees with food that conformed with minimum dietary requirements imposed by law. He alleged that detainees were subject to an unbalanced and non-nutritious diet, and this led to poor health and illness for many detainees. He alleged that detainees' human rights were breached in two respects. They were (a) subject to treatment that was cruel and inhuman, contrary to s 36(1) of the *Constitution* (*freedom from inhuman treatment*) and (b) denied the full protection of the law, contrary to s 37(1) of the *Constitution* (*protection of the law*). The respondents did not refute the applicant's evidence as to the actual diet of the detainees but denied that the diet was inadequate or led to poor health or illnesses. They argued that there was no breach of human rights as the detainees' diet met minimum nutritional standards and was a proper and reasonable diet given that the detainees were in custody and had a better diet than many non-detainee citizens and there were funding and environmental constraints faced by the commanding officer of the prison.

Held

1. The detainees were given the same food each day with little variation. However, there was insufficient evidence that their diet led to poor health or illnesses.
2. It was not proven that the non-variable diet amounted to treatment that was cruel or otherwise inhuman. There was no breach of human rights under s 36(1) of the *Constitution.*
3. The *Correctional Service Act* 1995 and the *Correctional Service Regulation* prescribe food and dietary requirements for detainees, which are minimum requirements that must be complied with in order to adhere to and administer the human rights of detainees. A detainee must be provided with food that is adequate to maintain

his or her health and well-being (Act, s 123(1)) and that satisfies minimal nutritional standards, in that food must be provided in prescribed amounts and proportions from five food groups: (a) protein, (b) staple, (c) fruit, (d) vegetables and (e) dairy (Regulation, s 70) in accordance with a monthly schedule of detainee meals authorised by the Commanding Officer of the correctional institution (Regulation, ss 69 and 71).

4. It was proven that there was a continual, routine and substantial failure to comply with the food and dietary requirements for detainees prescribed by law, in that the detainees are with occasional exceptions provided the same meals each day, which consist of food from groups (a) and (b), with no or negligible quantities from groups (c), (d) and (e). Further it appears that the Commanding Officer does not prepare a schedule of monthly detainee meals as required by the Regulation. The nature and extent of non-compliance meant that the detainees' right to full protection of the law was breached by the respondents.
5. It was appropriate and necessary for the Court to make declarations and orders under s 57(1) and (3) of the *Constitution* to protect and enforce the human rights of the applicant and other detainees.
6. Ordered: the Commanding Officer and the Commissioner shall ensure that a schedule of detainee meals that is compliant with the food and nutritional requirements of the Act and the Regulation, is devised and implemented by 1 January 2018.
7. Remarks: the Commanding Officer and the Commissioner are at liberty to apply to the Court for orders under ss 57(1) and (3) and 225 of the *Constitution* that the National Government provide additional arrangements, staff and facilities, including funds, to ensure compliance with the orders of the Court.

prisoners

application for early release on humanitarian and medical grounds

Mal v Commander Beon Correctional Institution [2017] PGNC 87; N6710 (8 May 2017)

National Court: Cannings J

HUMAN RIGHTS – Application for enforcement – application by prisoner for early release on humanitarian and medical grounds – whether notice required under s 5 Claims By and Against the State Act – whether applicant obliged to exhaust administrative remedies before making application – ss 36, 37 and 57 Constitution.

The applicant had been convicted of wilful murder, and in 2011 was sentenced to 17 years' imprisonment. An appeal against sentence was dismissed. After serving less than six years, she applied for early release on humanitarian grounds, by way of an application under s 57 of the *Constitution* for enforcement of her human rights, on the grounds of

her poor health. Before making her application, she did not give notice under s 5 of the *Claims By and Against the State Act*, or exhaust other avenues for early release, such as parole. The application was also opposed on the basis that there was insufficient evidence of a breach of human rights, but even if proven, the preferable remedy was damages, not release from custody due to the adverse public perception that would be created by granting early release to a prisoner convicted of a serious offence.

Held

1. The applicant was not making a claim against the State for the purposes of the *Claims By and Against the State Act*.
2. It was therefore unnecessary to give notice under s 5 of that Act of the intention to make a claim against the State.
3. A prisoner is under no obligation to exhaust administrative remedies such as applying for parole, release on licence or a pardon, before making an application for early release as an enforcement of human rights.
4. The applicant's health was so poor and her mobility so impaired that to require her continued detention in a prison without the necessary facilities to manage and treat her ailments, would be to submit her to inhuman treatment and infringe her right to be treated with humanity and respect for the inherent dignity of the human person, under ss 36 and 37(1) *Constitution.*
5. A prisoner, who establishes a breach of human rights, is not restricted to obtaining an award of damages.
6. Under s 57(1) and (3) *Constitution,* the court may grant an appropriate remedy for enforcement of human rights, including ordering early release.
7. Relevant considerations to the exercise of discretion include the prisoner's medical condition, the length of time spent in custody, the proportion of the sentence served, the eligibility for parole, the nature and circumstances of the offence, if the release poses any threat to public safety, the attitude of the victim and/or the victim's relatives, and public perception.
8. The application to enforce the prisoner's human rights by early release from custody was granted.

delay in Supreme Court judgment

Yasause v The State [2017] PGNC 195; N6857 (1 September 2017)

National Court: Cannings J

HUMAN RIGHTS – Application by prisoner for enforcement of human rights – Constitution, ss 36, 37 & 41: right to full protection of the law – alleged delay by Supreme Court in determination of appeal against conviction – no jurisdiction in National Court.

The applicant was serving a 30-year sentence for murder, and in 2013 had appealed against conviction. The Supreme Court had not delivered a decision 21 months after the hearing. He applied in 2015 to the National Court for enforcement of his human

rights breached by the Supreme Court's delay, namely, his rights to protection against mental torture, full protection of the law, in particular the right to a fair hearing within a reasonable time and to have his conviction reviewed by a higher court, and protection against harsh and oppressive or other proscribed acts. The Supreme Court in fact delivered its decision in 2016. The court considered whether the National Court had jurisdiction to determine alleged breaches of human rights by a higher court.

Held

1. The National Court had no jurisdiction, as it would be unconstitutional for the National Court to make a determination of alleged human rights breaches against a higher court, such as the Supreme Court.
2. A further reason for dismissing the application was that the applicant had an entitlement to apply for enforcement of human rights to the Supreme Court, under s 57(1) *Constitution.*
3. The application was dismissed.

sentenced to death

Enforcement of Basic Rights under s 57 Constitution; Re Prisoners Sentenced to Death [2017] PGNC 266; N6939 (12 October 2017)

National Court: Cannings J

HUMAN RIGHTS – Constitution s 57, Subdivision VI.4.D – Organic Law on the Advisory Committee on the Power of Mercy – prisoners sentenced to death – right to full protection of the law – power of Head of State to commute sentence – whether National Court has power to initiate proceedings to protect and enforce human rights – whether National Court can conduct inquisitorial or adversarial proceedings.

The National Court invoked s 57 *Constitution* to commence inquisitorial proceedings on its own initiative by way of an inquiry into the human rights of prisoners sentenced to death, the principal purpose being to identify if those rights are being afforded to them in relation to the role of the Advisory Committee on the Power of Mercy. The court's jurisdiction to do so was challenged.

Held

1. The National Court obtains power to commence proceedings on its own initiative to protect and enforce human rights, and conduct such proceedings as an inquiry, rather than as adversarial proceedings, from s 57(1) *Constitution.*
2. The opinion of the Supreme Court in *The State v Transferees* (2015) SC1451, that the National Court lacks such power, is obiter dicta, and not binding on the National Court.
3. Prisoners sentenced to death are entitled to the protection of a number of constitutional human rights, including those arising under Subdivision VI.4.D *Constitution* and the *Correctional Service Regulation* which are tantamount to

human rights, and so are entitled to the full protection of such laws under s 37(1) *Constitution.*

4. The failure of the government to activate the Committee on the Power of Mercy has resulted in all prisoners sentenced to death being unable to invoke their right to full protection of the law, by applying for the exercise of the power of mercy.
5. The court declared that there has been a failure over an extended period on the part of the National Government, in particular the National Executive Council, to comply with its duty to facilitate appointments of members of the Advisory Committee on the Power of Mercy and to ensure that arrangements were made, and staff and facilities provided, and steps taken to enable and facilitate the proper and convenient performance of its functions.
6. The court ordered that the National Executive Council by 1 January 2018 facilitate appointments of members of the Advisory Committee on the Power of Mercy and ensure that all arrangements are made, staff and facilities are provided, and steps are taken to enable and facilitate, as far as may reasonably be, the proper and convenient performance of its functions.
7. The court ordered that unless and until that order is complied with, the execution of any prisoner who has been sentenced to death, irrespective of whether his appeal and review rights have apparently been exhausted, is stayed.

Injunctions

election dispute

Pato v Kopyala (No 1) [2017] PGNC 399; N7276 (26 July 2017)

National Court: Hartshorn J

INJUNCTIONS – Election dispute – irregularities in scrutiny of ballot boxes – Electoral Commissioner had issued direction for ballot boxes to be removed – direction ignored – urgent interim relief granted – O 4 r 49 & O 14 r 9 NCR – Organic Law on National and Local-level Government Elections – whether interim relief should continue – principles applicable to exercise of discretion.

The plaintiff was a candidate in the General Election. The Electoral Commissioner issued a directive for two ballot boxes to be removed from scrutiny, but the direction was ignored. Before issuing proceedings, the plaintiff obtained urgent interim injunctive relief for compliance with the directive, which was done. The plaintiff issued proceedings by way of an originating summons, seeking declaratory orders as the substantive relief, and applied to have the interim relief continue until the determination of the substantive proceedings. The court considered the principles applicable to the exercise of discretion in granting injunctive relief, including whether or not the plaintiff had shown a serious issue to be tried.

Held

1. Section 153A *OLNLLGE* does not preclude the court from exercising its discretionary power to grant relief for the enforcement of a direction from the Electoral Commissioner.
2. For the court not to grant such relief would effectively legitimise disobedience of the Electoral Commissioner's direction and call into question the powers of the Commissioner and the integrity of the electoral process.
3. The plaintiff had therefore shown a serious issue to be tried.
4. Damages were not an adequate remedy, and the balance of convenience favoured a continuation.
5. The interim injunctive relief was ordered to be continued until the determination of the substantive proceedings.

practice and procedure

application to set aside interim order

Pato v Kopyala (No 2) [2017] PGNC 400; N7279 (28 July 2017)

National Court: Hartshorn J

INJUNCTIONS – PRACTICE AND PROCEDURE – Application to set aside interim orders first made ex parte and then extended after inter partes hearing – relevant principles – requirement for motion to contain concise jurisdiction – need to protect integrity of election process – O 4 r 49, O 12 rr 1, 8 & 40 NCR – s 155(4) Constitution.

The plaintiff was a candidate in the General Elections, who had obtained ex parte interim injunctive orders to enforce compliance with a directive from the Electoral Commissioner to exclude two ballot boxes from being counted, after that directive had been ignored. After an inter partes hearing, the injunctive orders were extended to the determination of the substantive proceedings. The directive was complied with, and the election process was almost complete. The Electoral Commissioner issued another directive, retracting the earlier one. The defendants applied to set aside the orders, on the basis of a change in circumstances.

Held

1. Order 12 r 1 is a general provision, and O 12 r 40 is not applicable to an application to set aside an order.
2. Order 12 r 8(4) is the precise rule applicable to an application to set aside an order.
3. The defendants could not rely on s 155(4) *Constitution* to set aside the order, as there was already a specific remedy provided by O 12 r 8(4).
4. Order 4 r 49(8) requires a motion to contain a concise reference to the jurisdiction and, as the defendant's motion did not contain a reference to O 12 r 8(4), it did not validly invoke the court's jurisdiction.

5. There was no proper explanation for the revocation of the lawful directive of the Electoral Commissioner.
6. The integrity of the election process would not be protected by setting aside an order enforcing a lawful directive.
7. The defendants' application to set aside the orders was refused.

proposed deportation of non-refugees

Application by Boochani [2017] PGSC 4; SC1566 (13 March 2017)

Supreme Court: Injia CJ, Salika DCJ, Hartshorn J

INJUNCTIONS – Interlocutory injunctions – application to restrain deportation of asylum seekers already determined to be "non-refugees" – O 13 r 15 of Supreme Court Rules – no jurisdiction under s 57(1), (3) and (6) of Constitution – no primary right conferred by s 155(4) of Constitution – principles for exercise of discretion – application refused.

The applicants were persons who had been determined to be non-refugees, following processing of their claims for asylum after the Manus Island Regional Processing Centre had been closed under court order. They were some of the 730 persons who had issued substantive proceedings claiming breaches of their constitutional rights by being unlawfully detained, damages for the breaches, and enforcement of their rights by being restrained from being deported to their home countries and being ordered to be taken to Australia or a country of their choice. The substantive proceedings did not include a challenge to the process followed in the determination of their non-refugee status. The applicants sought interim injunctive relief restraining them from being deported, pending determination of the substantive proceedings. The court considered whether s 57(1), (3) and (6) of the *Constitution* conferred jurisdiction to grant interlocutory injunctions, and whether s 155(4) of the *Constitution* could confer a primary right or only the jurisdiction to issue facilitative orders in aid of enforcement of a primary right. The court considered and re-affirmed the principles applicable to the grant of interlocutory injunctions, and the requirement of O 13 r 15 for the application to cite the court's jurisdiction.

Held

1. The application for interim relief did not comply with O 13 r 15 as it did not contain a concise description of the court's jurisdiction to grant the relief.
2. The application for interim relief did not disclose a primary right which needed to be enforced.
3. There was no nexus between the interim relief sought and the substantive cause of action.
4. Section 57(1), (3) and (6) of the *Constitution* do not confer jurisdiction on the court to grant interlocutory injunctions.

5. Section 155(4) of the *Constitution* does not confer any primary right, only the jurisdiction to issue facilitative orders in aid of enforcement of primary rights.
6. The applicants did not establish that they had a serious issue to be tried, or that the interim relief was necessary to preserve their rights to the substantive relief, or that damages would not be an adequate remedy.
7. The application for interim injunctive relief is refused.

Insolvency

whether real property held as joint tenant forms part of insolvent estate

Hapoto v Kiage [2017] PGNC 262; N6942 (11 October 2017)

National Court: Cannings J

INSOLVENCY – Whether real property held as joint tenant with deceased forms part of insolvent estate – failure to register by surviving joint tenant – s 122 Land Registration Act.

The plaintiff and her husband were joint registered proprietors of a property. After his death, she did not apply to be registered as the sole proprietor. She was subsequently declared insolvent, and the first defendant trustee in insolvency was appointed on the petition of the second defendant creditor. He sold the property to a third party. The plaintiff sought a declaration that the sale was illegal, and an order that the purchase price be reimbursed to the purchaser. The defendants applied to summarily dismiss the proceedings for failing to disclose a cause of action.

Held

1. The failure of the originating summons to disclose a reasonable cause of action, was cured by the contents of the evidence and submissions.
2. The fact that the plaintiff had not applied under s 122 *Land Registration Act* to be registered as the sole surviving owner, and was not so registered, did not make it illegal for the trustee of her insolvent estate to sell the property to a third party.
3. As illegality was unproven, no relief could be granted.
4. The proceedings were dismissed.

Judgments and orders

Provincial Land Court

referral to mediation

Koti v Susame [2017] PGNC 1; N6586 (10 January 2017)

National Court: Cannings J

JUDGMENTS AND ORDERS – Judicial review of proceedings of Provincial Land Court – nature of appropriate relief – nature of relief referred to mediation – whether National Court can give effect to mediated agreement in absence of agreement of all parties – s 155(4) of Constitution.

The first applicant succeeded in a judicial review which set aside a Provincial Land Court decision on ownership of customary land. The National Court then referred the question of the appropriate relief to be granted to mediation. The mediator allowed non-parties to take part in the mediation. All the parties and non-parties agreed on the relief which should be granted, except for the first applicant, who therefore applied to the court to terminate the mediation, and for the matter to return to court for determination. The court refused, and instead sought the mediator's opinion on how the matter should be determined. The mediator gave his opinion that the first applicant did not really represent the persons he claimed to represent, and so the agreement reached by the other parties and non-parties should be accepted. The court then heard the parties, when the first applicant sought orders that the hearing resume and the court make orders determining the final relief to be granted, while the other parties sought orders that the court should approve the agreement reached between them and the non-parties at the mediation, without any further hearing.

Held

1. Though the conventional approach of the National Court in judicial review proceedings, upon finding legal error in the decision that has been reviewed, is to quash the decision and/or remit the decision for reconsideration and not to stand in the shoes of the original decision-maker or otherwise make a decision on the merits, the court should in exceptional circumstances feel free to depart from convention and exercise the power available to it under s 155(4) of the *Constitution,* to make such "such other orders as are necessary to do justice in the circumstances of a particular case", even if that means making a decision on its merits and even where questions of customary land ownership are involved.
2. There were exceptional circumstances in the present case, as the disputes underlying the judicial review proceedings had continued on a course of mediation and litigation for a period in excess of 20 years, and the mediated agreement represented a consensus of all but one of the parties to the judicial review proceedings.

3. It was necessary to do justice in the circumstances of this particular case to order, without further hearing, that the mediated agreement be given effect as an order of the National Court and that the judicial review proceedings be determined accordingly.

review of taxed costs

Palma v Electoral Commission PNG [2017] PGNC 298; N6975 (24 October 2017)

National Court: Makail J

JUDGMENTS AND ORDERS – COSTS – Review of taxed costs – whether reasonably and necessarily incurred – whether excessive – O 22 rr 44 & 45 National Court Rules – National Court Election Petition Rules 2002 (as amended), r 19(4) – Schedule 2.

The unsuccessful petitioner had been ordered to pay the second respondent's costs of the proceedings, which were taxed in the absence of the petitioner, in the sum of K275,119.00. On review by the petitioner of the taxed costs, the court considered the need for the objections to particularise each item objected to, and identify how the costs were excessive, or unreasonably incurred.

Held
1. The same principles applicable to taxations of costs under O 22 rr 44 and 45 *National Court Rules* were applicable to costs taxed under the *Election Petition Rules*.
2. It is for the objector, not the court, to identify which items were excessive or unreasonably incurred.
3. The amount of costs allowed was reduced on review to K171,969.06.

Judicial review

application for leave

O 16 r 4 National Court Rules

Sakora v Judicial and Legal Services Commission [2017] PGNC 291; N6991 (19 September 2017)

National Court: Hartshorn J

JUDICIAL REVIEW – Application for leave – Order 16 r 4 National Court Rules – whether undue delay – whether detrimental to good administration.

The plaintiff had been notified of a decision to appoint a Tribunal, which was subsequently constituted and commenced sitting. The plaintiff filed an application for leave to proceed by way of judicial review against the decision to appoint the Tribunal, two months after the date of notification of that decision. The court considered the principles relevant to the exercise of its discretion.

Held

1. A decision to appoint a Tribunal is not a proceeding within the meaning of O 16 r 4(2) *National Court Rules*.
2. A delay of 63 days from the date of notification of the decision to appoint a Tribunal to the date of filing the application for leave is undue delay.
3. It is detrimental to good administration for a Tribunal which has been specifically appointed to perform an investigative function to be prevented from performing that function.
4. A delay of 63 days during which a Tribunal was constituted and commenced sitting was detrimental to good administration within the meaning of O 16 r 4(1) *National Court Rules*.
5. The application for leave to proceed by way of judicial review and all other relief is refused.

relevant principles

Top Brat Trading Ltd v Hitolo [2017] PGNC 83; N6704 (26 April 2017)

National Court: Anis AJ

JUDICIAL REVIEW – Application for leave – relevant principles – O 16 r 3(2)(a) NCR – objection to competency of originating summons seeking substantive relief – pleading substantive relief serves no purpose – unnecessary to include background information and proposed contentions – inclusion of substantive relief in originating summons not fatal provided it is also pleaded in Statement – need to exhaust administrative remedies – ss 160 and 161 Land Registration Act, Ch 191.

The applicant signed a contract for the purchase of property. He contended that before completion, and without his knowledge, the vendor signed another sale contract with another party, the Registrar registered a transfer of title to the applicant, and then immediately cancelled the transfer and registered a transfer of title to the other party. The applicant filed an originating summons (OS) seeking leave to proceed by way of judicial review of the Registrar's decisions. In the OS, he pleaded that he sought leave, supported by a lengthy pleading of facts and contentions, and claimed various relief including damages. The State objected to the competency of the OS, on the basis that O 16 r 3 prohibited the claim of substantive relief in the OS, which could only be sought in the Statement and subsequent substantive notice of motion. The State also contended that the applicant had not applied to the Registrar to exercise his powers under ss 160–161 of the *Land Registration Act* (*LRA*), and so had not exhausted alternative remedies before applying for leave.

Held

1. The pleading of substantive relief in an originating summons seeking leave for judicial review, while incorrect, was not fatal as long as the substantive relief was also pleaded in the Statement.
2. The originating summons contained unnecessary pleadings including some substantive relief, but the substantive relief was also pleaded in the Statement.
3. The application for leave to proceed by way of judicial review was therefore not incompetent.
4. Sections 160-161 of the *LRA* conferred a discretionary power on the Registrar but did not confer any rights on other persons such as the applicant.
5. The applicant was therefore not required to first apply to the Registrar before seeking judicial review.
6. The applicant satisfied the other requirements for leave relating to standing, no undue delay and an arguable case.
7. The application for leave to proceed by way of judicial review was granted.

Commissioner of Police decision to dismiss member from Police Force

Kuringin v Baki [2017] PGNC 26; N6619 (15 February 2017)

National Court: Makail J

JUDICIAL REVIEW – Commissioner of Police decision to dismiss member – member convicted by District Court of criminal offences – sentenced to imprisonment for three months wholly suspended – whether dismissal instant – Police Act, s 33.

Section 33 of the *Police Act* provided that any member convicted of an offence, for which a term of imprisonment was imposed, shall be dismissed forthwith. The plaintiff was a member of the Police Force, who was convicted of assault and sentenced to imprisonment by a District Court. He was subsequently charged with various disciplinary offences under the *Police Act*, found guilty and dismissed from the Force. He sought judicial review of the dismissal on the basis that the disciplinary process was not correctly followed. The application was opposed on the basis that even if there was error in the disciplinary process, the Commissioner had a discretion to issue disciplinary proceedings, in addition to the statutory obligation to dismiss.

Held

1. The provision for dismissal in s 33(2) of the *Police Act* is not limited to convictions for dishonesty.
2. The provision for dismissal in s 33(2) is mandatory when there is a conviction for dishonesty, or a conviction for which a term of imprisonment has been imposed.
3. There was no error in the Commissioner laying disciplinary charges, even though the member had already been convicted and sentenced.
4. The application for judicial review was dismissed.

decision to suspend Departmental Head

Morola v O'Neill [2017] PGNC 238; N6878 (22 September 2017)

National Court: Makail J

JUDICIAL REVIEW – Decision to suspend Departmental Head – breach of procedure – error of law – whether ultra vires – breach of natural justice – s 28 Public Services (Management) Act 2014 – s 29 Public Services (Management) (Employment of Departmental Heads) Regulation 2014.

The plaintiff was a Departmental Head who had been suspended by the first defendant pending an investigation into serious allegations made against her and replaced on an acting basis by the third defendant. She sought judicial review on the grounds that the defendants had not followed the procedures for suspension prescribed by s 29 *Public Services (Management) (Employment of Departmental Heads) Regulation*.

Held

1. The plaintiff had not been given an opportunity to be heard, before a decision to suspend her was made.
2. The failure to be given an opportunity to be heard is a breach of s 29 *PS(M)(EDH) Regulation*.
3. The application for judicial review is granted.
4. Damages are not an appropriate remedy, in view of the harm done to the plaintiff's reputation.
5. The decision to suspend the plaintiff as Departmental Head is quashed.
6. The plaintiff is to be reinstated to the position of Departmental Head.
7. Upon reinstatement of the plaintiff, the appointment of the third defendant is to cease.

employment dismissal and reinstatement

Palaso v Kereme [2017] PGNC 231; N6816 (27 February 2017)

National Court: Gavara-Nanu J

JUDICIAL REVIEW – Defendants' decision to annul plaintiff's decision to dismiss third defendant from employment and defendant's decision to order reinstatement – employee charged with serious disciplinary offences – standard of proof in disciplinary hearings before public bodies or authorities and the Public Services Commission – should be higher than civil standard – evidence relied on by plaintiff fell short of that standard – denial of fair hearing – denial of benefit of PSC decision – whether appropriate to order reimbursement of lost salary and entitlements for long period – need for deterrence – special and exceptional circumstances.

The third defendant was employed by the plaintiff. Following receipt of complaints of corrupt conduct against him, he was charged and found guilty of serious disciplinary offences and was dismissed. He appealed to the PSC, who annulled the decision and ordered his reinstatement. The plaintiff sought judicial review of the PSC decision, on grounds including that the PSC had applied technical rules of evidence at its hearing. The court considered the adequacy of the plaintiff's evidence in support of the charges, by reference to a standard of proof higher than the civil standard, such that a failure to establish the charges to that standard meant that the third defendant did not get a fair hearing. The court further considered the appropriateness of ordering reimbursement of lost salary and benefits for five years, where this may be necessary to act as a deterrent to the plaintiff and other employers.

Held

1. The standard of proof for public bodies and the PSC, when determining serious disciplinary charges, is the need for evidence which is cogent, convincing and compelling to a standard higher than the civil standard.
2. By relying on untested evidence, which was strongly denied by the third defendant, the plaintiff's decision fell short of that standard.
3. There was therefore no error in the PSC's decision to annul the plaintiff's decision and to order reinstatement.
4. The suffering experienced by the third defendant from being wrongly found guilty of the charges and terminated, and the need to deter public bodies from such conduct, were exceptional circumstances which justified an order for reimbursement of lost salary and entitlements from the date he ceased receiving them, despite this being a lengthy period.
5. The application for judicial review was refused.
6. The plaintiff was ordered to reinstate the third defendant to the position he held when terminated, or if no longer available, an equal position, with no loss of salary or entitlements.
7. The parties are to agree on the amount of the lost salary and entitlements to be reimbursed to the third defendant.

Land Board decision

Sulawei Ltd v Sipison [2017] PGNC 19; N6640 (10 February 2017)

National Court: Makail J

JUDICIAL REVIEW – Land Board decision – exemption of State Lease from being advertised – exemption granted by Minister – Land Board recommended State Lease be re-advertised – no substantive decision made by Land Board on successful applicant – right to apply for State Lease intact – no denial of natural justice – application for judicial review premature – Land Act, ss 57, 58, 69 & 71.

The plaintiff had obtained an exemption from the requirement for applications for a State Lease to be advertised, from the Minister, but did not have the application listed before the Land Board for hearing. Ten years later the Land Board advertised, and the plaintiff became one of five applicants, but the Board did not make a decision on who to recommend to the Minister should be the successful applicant. The plaintiff sought judicial review of the Board's decision to advertise and consider the applications.

Held

1. The fact that a person has a State Lease exempted from advertisement does not give him a right to be recommended by the Land Board as the successful applicant.
2. The fact that a person has a State Lease exempted from advertisement does not give him a right to be granted the State Lease.
3. As the plaintiff had no such rights, and as the Land Board had not yet made a recommendation, the plaintiff did not establish that he had any right which was adversely affected by any decision of the Land Board.
4. In the absence of such a decision, the plaintiff's application for review was premature, and was dismissed.

leave applications

Kalinoe v Kereme [2017] PGSC 35; SC1626 (22 September 2017)

Supreme Court: Salika DCJ, Geita J, Kangwia J

SUPREME COURT – Judicial Review – Appeal against decision of National Court to dismiss appellant's application for judicial review – lack of legal capacity and standing of appellant as basis for dismissal of application – no appeal against grant of leave for judicial review – National Court erred in making decision on standing again – appellant as employer had standing and legal capacity to seek review – application for judicial review not a claim under the Claims By and Against the State Act – legal capacity not a ground for leave to apply for judicial review – sufficient interest is the ground – appellant's administrative decision overturned by first respondent – appellant entitled to seek judicial review.

The appellant was a Departmental Head who had made a decision to terminate the second respondent's employment. The decision was overturned on appeal to the first respondent. The appellant thereupon applied for, and was granted, leave to proceed by way of judicial review of the first respondent's decision. At the hearing of the substantive review, the court found that the appellant lacked the legal capacity to issue judicial review proceedings, which could only be issued by the Attorney-General and dismissed the proceedings. The appellant appealed.

Held

1. When applying for leave to proceed by way of judicial review, an applicant was required to show that he had sufficient interest.

2. As the Departmental Head who had made the decision, the appellant had shown sufficient interest.
3. The respondents had not appealed from the grant of leave, and so could not now challenge the appellant's sufficient interest.
4. An application for judicial review is not a claim under the *Claims By and Against the State Act*.
5. The court erred in re-hearing the issue of the appellant's sufficient interest.
6. The appeal was upheld, and the National Court decision was quashed.

leave for review

expiry of appeal period

Unas v Rabaul Shipping Ltd [2017] PGSC 16; SC1591 (29 May 2017)

Supreme Court: Injia CJ

JUDICIAL REVIEW – Leave for review of decision on judicial review – expiry of appeal period – principles – exceptional circumstances – factual errors – serious questions raised showing manifestation of substantial injustice – leave granted – Constitution, s 155(2)(b) – Supreme Court Rules, O 5 r 1.

The respondent had successfully challenged, by way of judicial review, the applicants' decision to issue an amended survey certificate in 2012 which reduced the passenger numbers and weight limits for the respondent's vessel. The appeal period expired. The applicants applied under s 155(2)(b) of the *Constitution* for leave to review the decision, on the ground that the judge had made serious factual errors which resulted in substantial injustice.

Held

1. An applicant for leave to review under s 155(2)(b) of the *Constitution* must show standing, a satisfactory explanation for allowing the appeal period to expire, a satisfactory explanation for any delay in making the application, that there are exceptional circumstances showing substantial injustice, and that it would be in the interests of justice to review the decision.
2. Factual errors, which were determinative of the outcome of the case, were exceptional circumstances.
3. The primary judge erred in making factual findings and conclusions from those facts, which were determinative of the outcome of the case.
4. Those errors were exceptional circumstances that raised serious questions and led to a substantial injustice, which it was in the interests of justice to review.
5. The application was granted.

practice and procedure

decision to dismiss plaintiff from company

Kramer v National Executive Council [2017] PGNC 127; N6779 (16 June 2017)

National Court: Makail J

JUDICIAL REVIEW – PRACTICE AND PROCEDURE – Decision to dismiss plaintiff from company – decision made by shareholder/trustee – Kumul Petroleum Holdings Ltd – whether decision amenable to judicial review – application to dismiss for failure to disclose a cause of action and abuse of process – National Court Rules – ss 8 & 10(13) Kumul Petroleum Holdings Limited Authorisation Act – O 12 r 40(1)(a) & (c) NCR.

The plaintiff was the chairman and director of Kumul Petroleum Holdings Ltd, a company incorporated under the *Companies Act*. Pursuant to the *KPHLA Act* and a Trust Deed, the shares in the company were held by the Prime Minister as Trustee. Section 10(13) of the *KPHLA Act* gives the Trustee the sole discretion to remove any director. Before making a decision to remove the plaintiff, the Trustee sought and obtained approval from the NEC. The plaintiff issued proceedings by way of judicial review, challenging the decision to dismiss him on the ground that the NEC had no power to dismiss or be involved in the dismissal of a director. The defendant applied to dismiss the proceedings for failing to disclose a cause of action and being an abuse of process, on the ground that the decision was not amenable to judicial review.

Held

1. Kumul Petroleum Holdings Ltd is a company incorporated under the *Companies Act*.
2. Section 8 of the *KPHLA Act* provided that the company was not a department of the Public Service, and no office-holder was a public servant.
3. The decision to dismiss the plaintiff was made by the shareholder of the company, and not by the NEC.
4. The decision to dismiss was an ordinary master-servant relationship issue.
5. A dispute over the decision to dismiss was one of private law, not public law, so that the decision was not amenable to judicial review.
6. The appropriate remedy for the plaintiff was to issue proceedings by way of a writ of summons or originating summons.
7. The issue of proceedings by way of judicial review was therefore an abuse of process.
8. The proceedings were dismissed.

promotion and appointment of correctional officers

Gah v Warpo [2017] PGNC 391; N7174 (7 April 2017)

National Court: Gavara-Nanu J

JUDICIAL REVIEW – ADMINISTRATIVE LAW – Promotion and appointment of correctional officers to vacant positions – powers of Commissioner for Correctional Service – direct promotion made by Commissioner without using prescribed selection process – Correctional Service Act 1995, ss 3, 4, 6, 8, 13, 16, 19, 21, 22 and 30 – Correctional Service Regulation 1995, ss 2, 4 and 5 – Constitution, ss 188(2), 207 and 208.

The plaintiff was a sergeant with the Correctional Service, when he performed an act of bravery. The then CIS Commissioner accepted a recommendation that the plaintiff be promoted to a higher rank, in recognition of his bravery. During the end of year parade ceremony, the plaintiff was promoted to the rank of Inspector, without any prior compliance with the statutory procedures for promotion. He then performed higher duties, while remaining on a Sergeant's salary. After the then Commissioner's death, the new Commissioner issued a circular stating that the plaintiff's promotion had been unlawful, and he was demoted to Sergeant. The plaintiff sought judicial review, on the grounds that the Commissioner was not required to comply with the statutory procedures.

Held

1. Section 13 of the *Correctional Service Act* vests the management and organisation of the Correctional Service in the Commissioner.
2. Sections 4 & 5 of the *Correctional Service Regulation* prescribe the procedures for promotions and appointments which are made by the Commissioner after receiving a recommendation from the Board.
3. The plaintiff's promotion was not made on a recommendation of the Board resulting from compliance with the prescribed procedures but was made on a recommendation by the Chief Superintendent, based on his conduct.
4. The plaintiff's promotion was not a mere brevet or temporary promotion for ceremonial purposes.
5. The Commissioner's powers under s 13 of the Act include the power to appoint and promote, and this power was not limited to be exercised only in accordance with ss 4 & 5 of the Regulation.
6. The Commissioner's power to make direct promotions without going through the prescribed procedures was not absolute, and should be exercised sparingly, on merit and on recommendation.
7. The plaintiff's direct promotion was validly made by the then Commissioner.
8. The circular setting aside the promotion and demoting the plaintiff was therefore not validly made.
9. The plaintiff's application for judicial review was granted.
10. The plaintiff was declared to have validly held the rank of Inspector since the date of his promotion.

11. The defendants were ordered to issue formal documentation of the promotion and pay the plaintiff his salary and emoluments of an Inspector from the date of his promotion.

refusal to grant leave

Ekip v Gamato [2017] PGSC 21; SC1594 (28 June 2017)

Supreme Court: Hartshorn J, Polume-Kiele J, Shepherd J

APPEAL – Against refusal to grant leave for judicial review – meaning of 'sufficient interest' in O 16 r 3(5) National Court Rules – role of court in appeal from exercise of discretion.

The appellants were intending (and now actual) election candidates, who had sought leave to proceed by way of judicial review to challenge the first respondent's decision to appoint the third and fourth respondents as returning officers. Their application for leave was refused by the trial judge, on the primary ground that they lacked standing. The court considered the principles applicable to review of a discretionary decision, and the requirement to show sufficient interest.

Held

1. When reviewing the exercise of discretion by a trial judge in a procedural matter, the court will not interfere unless the decision was clearly wrong.
2. The appellant must identify a clear actual or inferred error in the way in which the discretion was exercised.
3. In order to show sufficient interest to have standing, the applicant must show that he is directly affected by the decision, and that the decision affects his interests and rights.
4. The appellants did not have sufficient interest to have standing, because the decision did not directly affect them or their rights and interests.
5. No error having been shown by the trial judge, the appeal was dismissed.

warrant for arrest

O'Neill v Eliakim [2017] PGSC 53; SC1654 (15 December 2017)

Supreme Court: Yagi J, Higgins J, Foulds J

JUDICIAL REVIEW – Warrant for arrest – decision to issue – administrative decision capable of judicial review – information must demonstrate reasonable grounds to believe that an indictable offence has been committed and that proceeding by summons would not be effective – no such information – issue of warrant without legal jurisdiction – set aside as void – Arrest Act 1977, s 8 – Arrest Regulation 1977, s 8, Form 1 – District Courts Act.

The respondents had issued a warrant for the arrest of the first appellant. The warrant was not supported by an Information, was not in the form prescribed by the *Arrest Regulation* and did not contain the matters required by the *Arrest Act*. The appellants' application in the District Court to set it aside was refused. The appellant's challenge to the warrant was refused by the National Court, on the ground that the Magistrate's decision to issue an arrest warrant was not reviewable. On appeal, the court considered that the process of complying with the requirements for the issue of a valid warrant was an administrative process which was capable of being reviewed.

Held

1. The power to issue an arrest warrant is regulated by the *District Courts Act*, *Arrest Act* and *Arrest Regulation*.
2. The duty of a magistrate considering an application for an arrest warrant is to comply with the provisions of the legislation, including the *Arrest Act*.
3. The warrant was not supported by an Information on oath, did not contain any of the matters prescribed by the *Arrest Act*, and was not in the prescribed form.
4. The decision to issue the warrant was made in non-compliance of the statutory requirements, and so was capable of review by the courts.
5. On its face, the warrant was defective.
6. The appeals were upheld, the warrant of arrest was declared void, and the orders of the District Court with consequential proceedings were quashed.

Land

customary land

challenge to decision of Special Land Titles Commission

Black v Batata [2017] PGNC 85; N6712 (5 May 2017)

National Court: Cannings J

LAND – CUSTOMARY LAND – Challenge to decision of Special Land Titles Commission declaring customary ownership of disputed land – whether mode of commencement of proceedings appropriate – abuse of process.

The plaintiff, who claimed to represent his clan, was aggrieved by the decision of a Special Land Titles Commission that determined the question of customary ownership of an area of land in respect of which a mining tenement had been granted. He commenced proceedings by originating summons, seeking declarations that the Commission had not actually determined the question of customary ownership of the subject land, that its determination of land rights was null and void, that his clan was the true customary land owner and an order that a new Land Titles Commission be established to formally determine the question of ownership. The plaintiff argued that the Special Land Titles Commission had failed to take into account undertakings and determinations made

by its predecessor, that the Commission focussed unduly on user rights rather than the question of ownership, that the Commission paid too much regard to artificial boundaries drawn for purposes of mining tenements and that the Commission failed to consider independent reports before it, which declared that the plaintiff's clan owned the disputed land.

Held

1. All relief sought in the originating summons was refused, as the proceedings were an abuse of process, in that (a) the plaintiff was re-agitating arguments that had already been determined by a final judgment in previous proceedings, which had not been the subject of appeal or review; (b) the mode of commencement was irregular as the proceedings were not an application for judicial review or an appeal and no explanation was provided as to why the plaintiff did not appeal against the decision of the Special Land Titles Commission; (c) the plaintiff, though claiming to represent his clan, failed to comply with procedural requirements for commencement of representative proceedings.
2. Furthermore, the plaintiff failed to identify or give evidence of the decision he was challenging and failed to provide evidence to support the propositions he was advancing.
3. The proceedings were dismissed, with costs.

whether fraud involved in granting State Leases

Mota v Camillus [2017] PGNC 149; N6810 (27 July 2017)

National Court: Cannings J

LAND – CUSTOMARY LAND – GOVERNMENT LAND – SPECIAL AGRICULTURAL AND BUSINESS LEASES – Whether fraud involved in granting of State Leases – meaning of "fraud" in Land Registration Act – actual fraud – constructive fraud.

CLAIMS BY AND AGAINST THE STATE ACT – Whether s 5 notice had to be given – limitation periods – Frauds and Limitations Act, ss 16 and 18 – deed of release – whether applicable when executed by a person associated with, but not a plaintiff.

The Minister for Lands and Physical Planning granted 99-year Special Agricultural and Business Leases to the second defendant over two portions of land, which were formerly customary land. The plaintiffs claimed that they were genuine customary owners of the land and that they were not consulted on and did not agree to the leases being granted. They argued that the circumstances surrounding the granting of the leases to the second defendant involved actual fraud and constructive fraud. They sought declarations that the leases were null and void and an order that the leases be quashed. A trial was conducted. The first defendant (a primary shareholder and director of the second defendant) and the second defendant argued that the proceedings should be summarily dismissed on three preliminary grounds: (a) non-compliance with s 5 of the

Claims By and Against the State Act; (b) being time-barred by s 16 of the *Frauds and Limitations Act*; and (c) non-compliance with a deed of release. As to the substantive question of whether fraud was involved in granting of the two leases, the first and second defendants denied the allegations. They asserted that the genuine former customary landowners had agreed to their land being transferred, by signing purchase agreements, and had been paid accordingly. The third, fourth and fifth defendants (the Registrar of Titles, the Department of Lands and Physical Planning and the State) took no part in the trial.

Held

1. As to the preliminary issues: (a) s 5 of the *Claims By and Against the State Act* did not apply as the plaintiffs were not making a "claim" against the State; (b) the proceedings were not time-barred by s 16(1) of the *Frauds and Limitations Act* as: (i) this was not an action founded on simple contract or tort or any other form of action covered by s 16(1); and (ii) the proceedings are properly regarded as a claim for declarations and other forms of equitable relief, in which case s 16 does not apply; and (c) the deed of release did not apply as it was not executed by most of the plaintiffs.
2. Under Papua New Guinea's Torrens Title System of Land Registration the general principle is that once a lease of land from the State, including a Special Agricultural and Business Lease, is registered, an indefeasible title is conferred on the registered proprietor, subject only to the exceptions in s 33(1) (*protection of registered proprietor*) of the *Land Registration Act*, including s 33(1)(a), which states: "The registered proprietor of an estate or interest holds it absolutely free from all encumbrances except … in the case of fraud".
3. "Fraud" means actual fraud or constructive fraud (where it is proven that the circumstances in which a person has obtained title are so unsatisfactory, irregular and unlawful as to warrant the setting aside of title).
4. Here, the plaintiffs failed to prove actual fraud.
5. The plaintiffs proved constructive fraud as none of the elaborate procedures under ss 10, 11 and 102 of the *Land Act* for acquisition by the State, by lease, of customary land, and granting of Special Agricultural and Business Leases over such land to third parties, were complied with. This was a case of extensive violation of statutory procedures for transfer of interests in customary land. It was proven that the circumstances in which the second defendant obtained title were so unsatisfactory, irregular and unlawful as to amount to constructive fraud, warranting the setting aside of title.
6. The principal relief sought by the plaintiffs was granted: each Lease was declared null and void and quashed, and the Registrar of Titles was ordered to amend the Register of State Leases and all other records of the State under his control to give effect to the declarations. Costs followed the event.

government land

indefeasibility of title

Vailala v National Housing Corporation [2017] PGNC 7; N6598 (20 January 2017)

National Court: Cannings J

LAND – Government land – State Leases – indefeasibility of title – meaning of "fraud" in Land Registration Act, s 33(1)(a) – whether actual fraud must be proven – whether proof of constructive fraud is sufficient.

GOVERNMENTAL BODIES – National Housing Corporation – sale of dwellings – National Housing Corporation Act 1990 – Corporation's duty to comply with provisions of Act when deciding whether to sell dwelling house and to whom it can be sold.

REMEDIES – Appropriate relief re title to residential property in a case of fraud – whether to order that title be declared null and void – whether appropriate to order that property vested in National Housing Corporation be offered for sale to long-term occupier of property.

The plaintiff claimed that a residential property vested in the National Housing Corporation, which he had occupied for 21 years, was sold by the Corporation (the first defendant) to the second defendant in irregular circumstances, contrary to the *National Housing Corporation Act*. He claimed that it was a case of fraud, such that the second defendant's title should be declared null and void and forfeited. He asked that the Corporation be ordered to offer the property for sale to him for the amount at which it had been valued, when the Corporation offered to sell him the property on previous occasions. The defendants argued that the second defendant was the registered proprietor, who had indefeasible title, that there was no fraud, that the Corporation had acted fairly and in accordance with its governing legislation in selling the property to the second defendant who was a bona fide purchaser who had purchased the property in good faith, that the plaintiff was for the bulk of the period of his occupation of the property an illegal and unfaithful tenant and that all relief sought by him should be refused. A trial was conducted to determine whether any relief sought by the plaintiff should be granted.

Held

1. Under Papua New Guinea's Torrens Title System of Land Registration for alienated government land, registration of a lease vests, subject to limited exceptions, an indefeasible (unforfeitable) title in the registered proprietor subject only to the exceptions in s 33(1) of the *Land Registration Act*. Most significantly s 33(1)(a): "in the case of fraud" (*Mudge v Secretary for Lands* [1985] PNGLR 387).
2. "Fraud" means actual fraud or constructive fraud. Constructive fraud exists where the circumstances of a transfer of title are so unsatisfactory, irregular or unlawful, it is tantamount to fraud, warranting the setting aside of registration of title.

3. The plaintiff proved constructive fraud, as the sale of the property to the second defendant was unlawful (contrary to Division IV.4 (*sale of dwellings etc*) of the *National Housing Corporation Act*), the circumstances of sale were peculiar, irregular and suspicious, and the offer to the plaintiff in 2013 was unreasonable.
4. It was in the interests of justice that the sale and the transfer of the State Lease from the Corporation to the second defendant be declared null and void, and the Corporation be ordered to again offer the property for sale to the plaintiff.

in town area

Lus v Kapera [2017] PGNC 13; N6597 (24 January 2017)

National Court: Cannings J

LAND – Government land in town area – identification of registered proprietor – whether registered proprietor's failure to pay land rent and maintain property over long period rendered its title obsolete – whether long-term occupiers of property covered by State Lease can acquire title due to registered proprietor's failure to maintain property and pay land rent.

The plaintiffs were long-term officers of the second defendant, a statutory corporation, until their retrenchment in 2002 and 2008 respectively. As a condition of employment, they occupied a residential property controlled by the second defendant. They remained in occupation of the property after they ceased employment. In 2009 the second defendant asked the plaintiffs to vacate the property, but they declined and commenced proceedings in the National Court (prior to the current proceedings), claiming refund of rent that they had paid on the ground that the second defendant had not maintained the property and had not paid rent as required by the conditions of its State Lease over the property. Judgment was given in their favour in the sum of K11,756.00 in 2009. Further attempts by the second defendant to evict the plaintiffs led the plaintiffs to commence fresh proceedings (the current proceedings) against it, seeking declarations that the plaintiffs own the property, that the prior proceedings determined that the second defendant does not own it and in the alternative that a decision of the second defendant's board in 1990 allowing retrenched officers to purchase the houses they were living in, applied to them. They also sought a permanent injunction to restrain the second defendant from evicting them or threatening to do so. The second defendant together with its managing director (the first defendant) opposed all relief sought, and the matter proceeded to trial.

Held

1. All relief sought in the originating summons was refused, as: (a) the second defendant was the registered proprietor and had indefeasible title to the property subject only to the exceptions in s 33(1) of the *Land Registration Act*, none of which applied; (b) the second defendant's title had not been rendered obsolete for any of the reasons propounded by the plaintiffs, in that: (i) the second defendant's

failure to maintain the property and (ii) the second defendant's failure to pay rent over a long period, had no effect on its title and (iii) the previous court proceedings had no effect on the second defendant's title; (c) the 1990 decision of the second defendant's board created only an eligibility to purchase the property and it was a matter of discretion for the second defendant to decide whether it wanted to offer the property to the plaintiffs, it was not an entitlement.

2. The proceedings were dismissed. The National Court order staying eviction of the plaintiffs was dissolved and replaced by a fresh order allowing the plaintiffs a reasonable time to vacate the property and clarifying the procedure in the event that they do not vacate.

indefeasibility of title

Tikili v Home Base Real Estate Ltd [2017] PGSC 1; SC1563 (21 February 2017)

Supreme Court: Cannings J, Yagi J, Neill J

LAND – GOVERNMENT LAND – State Leases – indefeasibility of title – meaning of "fraud" in Land Registration Act, s 33(1)(a) – whether fraud must be pleaded and proven – whether proof of constructive or equitable fraud is sufficient.

CONTRACTS – Sale of land – two contracts for sale of same land – whether second contract entered into with knowledge of first contract.

WILLS AND PROBATE – Intestate estates – role of Public Curator – Public Curator Act.

The first appellant entered into a contract with the Public Curator to purchase a property which the appellants occupied at that time and paid the deposit. That contract remained uncompleted, when seven months later the first respondent entered into a contract with the Public Curator to purchase the same property and paid the deposit. Transfer of the property from the Public Curator to the first respondent took place, and it became the registered proprietor. The first respondent issued an Originating Summons (OS) seeking declarations that it was the registered proprietor, the appellants were unlawful occupiers, and an order for their eviction. The appellants issued a writ of summons (WS) against the first respondent and the Public Curator, seeking declarations that the transfer of title to the first respondent was void and an order for specific performance of their contract. There was no pleading of actual or constructive fraud against the registered proprietor. The first respondent cross-claimed against the appellants, seeking damages for their unlawful occupation of the property. The OS and WS proceedings were consolidated, the appellant's claims were dismissed, and the first respondent's claims were upheld. The appellants appealed on various grounds including that the trial judge erred in law by refusing to cancel the first respondent's title on the ground of fraud under s 33(1)(a) of the *Land Registration Act*. Prior to hearing the appeal, the Supreme Court granted leave for introduction of fresh evidence by the appellants,

including affidavits by the present Public Curator and a member of his staff suggesting that the contract of sale with the first respondent had been entered into irregularly without the knowledge of the then Public Curator.

Held

1. Under Papua New Guinea's Torrens Title System of Land Registration for alienated government land, registration of a lease vests, subject to limited exceptions, an indefeasible (unforfeitable) title in the registered proprietor subject only to the exceptions in s 33(1) of the *Land Registration Act*. Most significantly s 33(1)(a): "in the case of fraud" (*Mudge v Secretary for Lands* [1985] PNGLR 387).
2. "Fraud" means actual fraud or constructive fraud. Constructive fraud exists where the circumstances of a transfer of title are so unsatisfactory, irregular or unlawful, it is tantamount to fraud, warranting the setting aside of registration of title.
3. The trial judge erred by dismissing summarily the appellants' argument that the first respondent's title should be cancelled on the ground of fraud, as there was sufficient evidence before the Court on which a finding of constructive fraud could reasonably have been made and the statement of claim was couched in sufficient terms to ground a finding of constructive fraud. The ground of appeal alleging error of law by the trial judge in that regard was upheld. It was unnecessary to determine other grounds of appeal.
4. The fresh evidence introduced for the appeal reinforced the availability of a finding of constructive fraud.
5. The appeal was allowed, the decision of the National Court was quashed, and the matter was remitted to the National Court for retrial.

oral contract for sale

enforceability

Lyn v Yaku [2017] PGSC 6; SC1574 (10 March 2017)

Supreme Court: Kirriwom J, Kassman J, Ipang J

LAND – Purchase and sale of – no written contract – party claiming oral agreement to purchase land – claims specific performance and alternative claim for reimbursement – Frauds and Limitations Act 1988, ss 2 and 4.

The plaintiff claimed he entered into an oral agreement with the defendant, where he agreed to purchase and the defendant agreed to sell a property for the sum of K20,000. The plaintiff claimed that he paid to the defendant K7,250 in cash and the balance of the purchase price would be settled by part-payments over a period of time. Further, the plaintiff claims it was agreed he would spend his own money to complete the house and the defendant would transfer title to the plaintiff. The plaintiff's attempt to make a further part-payment of K2,000 in the year 2000 was refused by the defendant and the defendant failed to transfer title to the plaintiff. The plaintiff claimed specific

performance of the sale and purchase agreement and alternatively recovery of monies paid and damages. The plaintiff's claims were dismissed as disclosing no reasonable cause of action.

Held

1. There was no written document confirming the oral agreement referred to and relied on by the plaintiff to purchase the property from the defendant. In those circumstances, the plaintiff did not acquire any legal interest in the land: *Frauds and Limitations Act* 1988, s 2.
2. There was no written document confirming the oral agreement referred to and relied on by the plaintiff to purchase the property from the defendant. The plaintiff had no cause of action to pursue relief as to the sale and acquisition of any legal interest in the land: *Frauds and Limitations Act* 1988, s 4.
3. The decision of the learned primary judge dismissing the claim for specific performance of the oral agreement is confirmed.
4. The decision of the learned primary judge dismissing the plaintiff's alternative claim for monies paid and damages was not heard and determined by the learned primary judge and was dismissed in error. In that regard, the appeal is upheld and the proceedings and claim for relief in that respect is reinstated.

State leasehold land, formerly freehold

Yal v Mission of the Holy Ghost (New Guinea) Property Trust [2017] PGNC 374; N6530 (27 October 2017)

National Court: Cannings J

LAND – State leasehold land, formerly freehold – compensation claim by former traditional owners against State for unjust deprivation of rights and interests in land – Constitution, s 53 – Land (Ownership of Freeholds) Act, Ch 359 – Claims By and Against the State Act – Frauds and Limitations Act.

The plaintiffs claimed to represent former traditional owners of a portion of land, which had been owned by the first defendant since 1927 as freehold, until 1993 when it was converted to a substituted State Lease. After three subsequent transfers to third parties, the title was surrendered in 2009 and converted by subdivision into two separate State Leases granted to the second and fourth defendants. In 2015 the plaintiffs sought declarations that in dealing with the land in 1993, the first and fifth defendants failed to take into account their interests in the land arising from their traditional ownership of it, contrary to the *Land (Ownership of Freeholds) Act*, which had therefore been adversely affected. They sought compensation on just terms against the State as the expropriating authority, pursuant to s 53(2) *Constitution.* The defendants argued that the proceedings should be summarily dismissed for, inter alia, being time-barred and for failure to comply with s 5 *Claims By and Against the State Act* 1996.

Held

1. The court had jurisdiction to determine the claim as it was not a claim to customary ownership of land, and so the proceedings were not an abuse of process.
2. The facts in support of the defence of res judicata were not established.
3. The plaintiffs' case was not founded on fraud, so there was no obligation to commence proceedings by writ instead of originating summons.
4. The relief sought was mainly declaratory, which was equitable relief, so that the claim was not time-barred under the *Frauds and Limitations Act*.
5. The obligation was on the State to prove by evidence that notice of intention to make a claim, under s 5 *Claims By and Against the State Act*, was not given by the plaintiffs, which the State failed to do.
6. It could be inferred from the evidence that the first and fifth defendants failed during the 1993 application process to acknowledge and take into account the enduring interests of the plaintiffs in the land, arising from their being amongst its traditional owners and in continuing occupation and use of parts of the land, contrary to the obligations imposed on the first defendant and the State under Part IV (*conversion of interests to avoid frustrations*) of the *Land (Ownership of Freeholds) Act*.
7. Conversion of the land from freehold to leasehold title in 1993 was therefore affected by illegality.
8. As a consequence, the plaintiffs' interests in the land were adversely affected by the actions of the defendants, such that those interests had been compulsorily acquired by the State as an expropriating authority.
9. The plaintiffs therefore had an entitlement to just compensation on just terms under s 53(2) of the *Constitution,* to be later assessed.
10. Declarations and orders were made accordingly.

State Leases

forfeiture

Lae Bottling Industries Ltd v Lae Rental Homes Ltd [2017] PGSC 43; SC1641 (8 September 2017)

Supreme Court: David J, Murray J, Pitpit J

APPEAL – Forfeiture of State Lease – mode of challenging forfeiture – appeal to National Court under Land Act, s 142 – meaning of 'may appeal'– where right of appeal lost, proceed by way of judicial review under National Court Rules, O 16 – originating summons filed to challenge forfeiture – originating summons subsequently converted to pleadings – application to dismiss proceedings under O 12 r 40 for adopting wrong mode of originating process dismissed by National Court.

The first respondent had been the registered proprietor of a State Lease until it was forfeited and awarded to the first appellant. Following various National and Supreme

Court decisions restoring the first respondent's title, it was again forfeited. The first respondent issued proceedings by way of an originating summons challenging the forfeiture, which were then converted to proceed by way of pleadings. The appellants applied to dismiss the proceedings, on the ground that a challenge to the forfeiture could only be made pursuant to s 142 of the *Land Act*, so that the proceedings were an abuse of process. That application was refused, and after obtaining leave, the appellants appealed that decision.

Held

1. The words 'may appeal' in s 142 of the *Land Act* gave a discretion whether or not to appeal, they did not give a discretion as to the mode of proceeding with an appeal.
2. The correct mode of appealing under s 142 of the Act was by way of appeal, pursuant to O 18 of the *National Court Rules*, and if out of time, by way of judicial review.
3. The appellants were not estopped from raising this argument, which was not raised in the court below, because estoppel cannot give the court a jurisdiction which it does not have.
4. The first respondent's proceedings challenging the forfeiture were incompetent and an abuse of process.
5. The judge having erred in declining to dismiss the proceedings, the appeal was upheld and the proceedings were dismissed as an abuse of process.

statutory duty

Albright Ltd v Mekeo Hinterland Holdings Ltd [2017] PGNC 428; N8335 (8 June 2017)

National Court: Hartshorn J

LAND – Statutory duty – Alleged breaches by State of statutory and common law duties of care to plaintiff – plaintiff not a party to State SABL/Sublease – State not a party to Sub sublease between plaintiff and Sublessee – whether Sub sublease was private commercial agreement – whether breach of ss 10 and 11 of Land Act is enforceable by private action – no prior special relationship between State and plaintiff – no proximity between State and plaintiff – plaintiff had remedy available for claim against Sublessee.

The State obtained a Lease from customary landowners and issued a SPBL/sublease to the first defendant, who entered into a Sub sublease with the plaintiff. The SABL/sublease was subsequently found to have been unlawfully issued and was voided. The plaintiff alleged that the State had breached its statutory duty of care by not enforcing compliance with ss 10 and 11 of the *Land Act* when issuing the SABL/sublease and had also breached its common law duty of care by being negligent in issuing the SABL/sublease, and as a result the plaintiff had suffered loss and damage. Default interlocutory judgment had been entered against the first defendant. In hearing the plaintiff's claim against the State, the court considered the principles applicable to determining the existence of a statutory duty of care, as well as a common law duty.

Held

1. The reference in the Lease to the State giving a guarantee that it had been validly prepared was in a Recital, not an operative clause, and so any breach was not enforceable.
2. In any event, the plaintiff was not a party to the Lease and could not enforce any breach of its provisions.
3. Sections 10 and 11 of the *Land Act* were intended to protect customary landowners and entities agreed by them to be given a sublease.
4. The plaintiff was not a member of that class of persons intended to be protected.
5. The alleged breach of the *Land Act* was not intended to be and was not in the interests of justice to be enforceable by private action.
6. The State did not owe a statutory duty of care to the plaintiff.
7. There was no prior special relationship or sufficient proximity between the plaintiff and the State.
8. The plaintiff had a remedy available against the first defendant sublessee with whom it had entered into the Sub sublease agreement.
9. It would not be fair, just or reasonable, and would be against public policy, to impose liability on the State in those circumstances.
10. The State did not owe a common law duty of care to the plaintiff.
11. The plaintiff's claims against the second, third and fourth defendants were dismissed.

whether customary land or government land

Uam v Tulah [2017] PGNC 182; N6852 (16 August 2017)

National Court: Cannings J

LAND – Whether customary land or government land – Special Agricultural and Business Lease – undertaking by National Government to pay compensation for compulsory acquisition – dispute as to proper recipients of compensation.

INJUNCTIONS – Permanent injunction sought to restrain defendant from receiving further compensation.

The plaintiffs claimed to be the customary owners of a portion of land earmarked by the National Government as a road easement for construction of a national highway. They were aggrieved by a government decision to pay substantial compensation to the defendant for compulsory acquisition of the land. The plaintiffs say that the defendant is not the owner of the land and that he has already wrongfully been paid approximately 25% of the amount promised to be paid by the National Government. They applied by originating summons for a permanent injunction to restrain the defendant from receiving further compensation and an order that any further compensation be paid to their clan. The defendant argued that the proceedings should be dismissed for disclosing no reasonable cause of action, being frivolous and vexatious and an abuse of process

and that the National Court had no jurisdiction as the subject of the proceedings is customary land. If the proceedings are not summarily dismissed on one or more of those grounds, the defendant argued that he was the owner of the land by virtue of being granted a Special Agricultural and Business Lease in 2006 over a portion of land of which the subject land is part. A trial was conducted on the originating summons.

Held

1. Disputes about whether any land is or is not customary land fall within the exclusive jurisdiction of the Land Titles Commission per force of s 15 (*determination of disputes*) of the *Land Titles Commission Act*.
2. Here, the National Court has no jurisdiction as integral to determination of the originating summons is a dispute about whether the subject land is customary land. For that reason, the proceedings must be dismissed.
3. Obiter: It would appear that the subject land is customary land, which is a separate portion to the adjacent portion of government land that is subject to a Special Agricultural and Business Lease of which the defendant is registered proprietor. In the absence of any official document evidencing the defendant's ownership of the subject land, it would appear wrong to regard him as the owner.
4. The proceedings were dismissed, the interim injunctions were dissolved, and the parties were ordered to bear their own costs.

Lawyers

duties and responsibilities during mediation

South Pacific – PNG – Seafoods Co Ltd v National Executive Council [2017] PGNC 214; N6888 (25 September 2017)

National Court: Kandakasi J

LAWYERS – MEDIATION – Duties and responsibilities – duty to conduct matters promptly and efficiently – role of lawyer in mediation process – failure to attend – failure to comply with orders – repeated bad faith – costs against party due to conduct by lawyer – whether mediator owed same duty as court – contempt in face of court – no defence on the merits shown by affidavits – defence struck out – judgment entered for plaintiff – Professional Conduct Rules, rr 8(6) and (7), 15(2), (4)(a) and (b) and (10), 20(1), 3(a), (b) and (c) – ADR Rules, rr 5(2), 9(3) and 10(7).

The defendants had failed to comply with various orders and directions relating to the conduct of a mediation, so that certificates of bad faith had twice been issued against them by the mediator, and no satisfactory explanation had been provided for the non-compliance. The court considered all the circumstances, made various observations on the obligations of lawyers under the *ADR Rules* and *Professional Conduct Rules*, and concluded that the conduct amounted to contempt, for which penalties were required.

Held

1. The repeated bad faith and failure by the defendants and their lawyers to comply with orders and directions made by the mediator and by the court constituted contempt.
2. The defence of the defendants is struck out, and interlocutory judgment is entered for the plaintiff, with damages to be assessed.
3. The defendants are to pay the plaintiff's costs on a full indemnity basis, to be agreed or taxed.
4. The defendants may recover those damages and costs from their lawyer, if his conduct resulted in their failure to comply with the orders and directions.

Lawyers Act

unrestricted practising certificates

Papua New Guinea Law Society v Cooper [2017] PGSC 10; SC1585 (5 May 2017)

Supreme Court: Injia CJ, David J, Collier J

LAWYERS – Lawyers Act – Application to Council of Law Society for Unrestricted Practising Certificate (UPC) made 3 years after Restricted Practising Certificate (RPC) expired – whether application is for "renewal" or a fresh application – relevant considerations for new applications vis-a-vis renewal application – meaning of "renewal application" – exercise of broad discretion by Council – Lawyers Act 1986, ss 39, 40, 41 and 44(1), (2) & (3)

SUPREME COURT – Inherent powers – to determine appeal on an important point of law considered and determined by the trial judge, but not expressly challenged in the grounds of appeal – point underlies the errors set out in the grounds of appeal – parties given opportunity to argue point in the appeal – appeal allowed on that point of law – Constitution, s 155(4).

The respondent was an overseas barrister who did not hold any practising certificate. He applied for an Unrestricted Practising Certificate. The Council refused his application on the ground that, having been called on to do so, he had failed to provide a satisfactory explanation of a matter relating to his conduct as a lawyer. His appeal to the National Court was upheld, on the basis that he had provided an explanation, which did not have to be satisfactory, and that under s 44(3) of the Act, the Council had to renew his certificate. On appeal, the court found that the primary judge had made a fundamental error on a point of law argued before him, but which was not expressly raised in the grounds of appeal. The court could not accept an incorrect understanding of the law, even it was by agreement, and so exercised its inherent powers to determine that point of law and upheld the appeal.

Held

1. An application by a person who is not the holder of a practising certificate is not an application for renewal.
2. An application by the holder of a restricted practising certificate for an unrestricted practising certificate is not an application for renewal.
3. The exercise of discretion by the Council of the Law Society to issue, rather than renew a practising certificate, must be broad and take into account its statutory and other functions.
4. When conducting the review of a Council decision under s 45(2) of the Act, the court must identify the proper basis on which the Council made the decision.
5. The primary judge made a fundamental error on a point of law when identifying the basis on which the Council made the decision as being under s 44(3)(b).
6. The court cannot accept an incorrect understanding of the law, even if by agreement of the parties or when not expressly raised in the grounds of appeal.
7. It is appropriate for the court to correct a clear error, in the interests of justice.
8. Although used sparingly, s 155(4) of the *Constitution* gives the court inherent power to make orders necessary to do justice.
9. There was no injustice in correcting a clear but unpleaded error, when the parties had been given the opportunity to make submissions on the issue.
10. The appeal was upheld, the judgment was quashed, and the matter remitted back to the National Court for hearing by another judge.

Leadership Code

leadership tribunals

evidence and suspension

SC Ref No 1 of 2017; Re Constitution, s 28(5) [2017] PGSC 48; SC1645 (22 December 2017)

Supreme Court: Injia CJ, Kirriwom J, Kandakasi J, Batari J, Cannings J

CONSTITUTIONAL LAW – Constitution, Division III.2 (Leadership Code) – Organic Law on the Duties and Responsibilities of Leadership, Part V (enforcement), s 27(4) (tribunals) – whether amendment of s 27(4) requiring leadership tribunals to make due inquiry "with legal formalities and strict compliance with the rules of evidence …" is inconsistent with Constitution, s 28(5) – tribunal proceedings are not judicial proceedings – OLDRL, s 28 (suspension) – timing of suspension of a leader whose matter has been referred to a leadership tribunal.

The Ombudsman Commission filed a Special Reference to the Supreme Court under s 19 of the *Constitution,* seeking the court's opinion on three questions of interpretation and application of the constitutional laws regarding enforcement of the *Leadership Code*. Questions 1 and 2 related to a 2006 amendment to s 27(4) (*tribunals*) of the

Organic Law on the Duties and Responsibilities of Leadership, by which a Leadership Tribunal is now required to "make due inquiry into the matter referred to it, with legal formalities and strict compliance with the rules of evidence and the provisions of the *Evidence Act*". Question 1 asked whether the amendment is inconsistent with s 28(5) of the *Constitution,* which states that leadership tribunal proceedings "are not judicial proceedings", and therefore invalid and ineffective. Question 2 asked, if question 1 is answered no, what the phrase "with legal formalities and strict compliance with the rules of evidence …" means. Question 3 related to the timing of suspension from duty of a leader whose matter is referred to a Leadership Tribunal, requiring interpretation of s 28(1) of the *Organic Law*, which states: "Where a matter has been referred to a tribunal under s 27 the person alleged to have committed misconduct in office is suspended from duty". The question was whether a leader is suspended: (a) when the Public Prosecutor refers the leader to the appropriate authority; (b) when the appropriate authority appoints a tribunal; (c) when the Public Prosecutor presents the reference to the tribunal; or (d) in circumstances other than the above. The Prime Minister and the Speaker of the National Parliament were granted leave to intervene and designated as first and second interveners respectively.

Held

1. Re question 1, by the court: the 2006 amendment to s 27(4) of the *Organic Law on the Duties and Responsibilities of Leadership* requires leadership tribunals to be conducted in the same manner that court proceedings are conducted, the practical effect being to render leadership tribunal proceedings "judicial proceedings". The 2006 amendment is inconsistent with s 28(5) of the *Constitution* and is therefore invalid and ineffective. The answer to question 1 is yes.
2. It was unnecessary to answer question 2.
3. Re question 3, by Injia CJ, Batari J & Cannings J (Kirriwom J and Kandakasi J dissenting): suspension of a leader automatically takes effect by operation of law when the Public Prosecutor refers the matter, comprising the allegations of misconduct in office accompanied by the statement of reasons, to the Leadership Tribunal at a public hearing. The answer to question 3 is the scenario described in para 3(c).

Limitations of actions

loan agreements

Shelly v Riyong [2017] PGSC 5; SC1567 (23 February 2017)

Supreme Court: Injia CJ, Logan J, Nablu J

LIMITATIONS OF ACTIONS – Loan repayable on demand – when cause of action arises – cause of action arises on making of loan, not making of demand for repayment – subsequent acknowledgements and part-payments of loan debt – consequential recommencement from when time runs for limitation of action purposes – plaintiff's

claim on one view also entailing claim for specific performance or other equitable relief – inapplicability of s 16 – proceeding for recovery instituted within time – Frauds and Limitations Act, ss 7, 10, 11, 16 and 18.

CIVIL – PRACTICE AND PROCEDURE – National Court – application for leave to amend defence – consent of parties to proposed amendment – whether motions judge obliged to grant leave to amend in terms of consent – proposed amendment at variance with admissions and positive case advanced in existing defence – overriding requirement that judge be satisfied that consensually proposed order is appropriate – no error in refusal of leave to amend.

The appellants were appealing against interlocutory decisions by the primary judge to refuse to dismiss the proceedings for being time-barred, and to refuse leave to amend the defence. The respondent had loaned monies and made payments in kind to the appellants on terms which were unclear, but which did not include a term for repayment on a specified date or condition, so that the loan was a simple one, payable on demand. In the absence of a date or condition, the time limit to enforce repayment ran from the date of the loan, except where that time had been extended by virtue of an acknowledgement or part-payment, pursuant to the *Frauds and Limitations Act*. There had been later acknowledgements and part-payments, so that the right to sue for the debt was deemed to have accrued on and not before the date of the acknowledgement or last part-payment. There was no error in refusing a consensual application for leave to amend a defence to include matters which were embarrassing to the existing defence, as the judge has to be satisfied of the appropriateness of the amendment.

Held

1. If a loan agreement specifies a time or condition for repayment, the limitation period for enforcement runs from the expiration of the time or condition.
2. If no time or condition is specified, the limitation period for enforcement runs from the date of the loan.
3. Where there were acknowledgements and part-payments of the loan, the effect of ss 7, 10 and 11 of the *Frauds and Limitations Act* is that the time for enforcement runs from the date of the acknowledgement or last part-payment.
4. Pursuant to s 18 of the *Frauds and Limitations Act*, the claims for specific performance and equitable relief were not subject to the time limit in s 16(1) of the Act.
5. The consent of the parties does not compel a judge to make orders as proposed, and the judge must be satisfied of their appropriateness.
6. Each appeal was dismissed.

Mediation

ADR Rules

Makolkol Development Resources Ltd v Gogi [2017] PGNC 137; N6797 (4 July 2017)

National Court: Anis AJ

MEDIATION – ADR RULES – Application to refer matter to mediation – ADR Rules, 4(2)(c) and 5(2) – whether correct rule cited in notice of motion – issues for referral relate to interpretation and determination of the terms of agreements – landowner participation not required – need for court to determine legal issues before referral to mediation.

The parties were all landowners, who had entered into a written agreement for the distribution of benefits arising from project logging carried out by a contractor engaged by the plaintiffs pursuant to the plaintiffs' Forest Clearance Authority, on two blocks of land. After completion of that project, the plaintiffs commenced new projects on three other blocks of land, which were prevented by the defendant.

The plaintiffs alleged that by the written agreement and an earlier oral agreement, the defendant had waived his right to the benefits from those three blocks, which was denied by the defendant. The plaintiffs applied to refer the matter to mediation.

Held

1. The correct source of jurisdiction for an application to refer a matter to mediation is rule 5(2) of the *ADR Rules*.
2. The issues in dispute, as pleaded, did not involve ownership of customary land or require the participation of all landowners.
3. The issue in dispute was the interpretation of an oral and a written agreement between the parties.
4. The court was in the best position to determine issues of the terms and interpretation of contractual agreements.
5. It was in the interests of justice for the court to determine the correct terms and interpretation of the agreements before the matter could be referred to mediation.
6. The plaintiffs' application was refused.

Negligence

medical negligence

Makapa v Tsiperau [2017] PGNC 6; N6590 (11 January 2017)

National Court: Cannings J

NEGLIGENCE – Medical negligence – death of patient 19 hours after discharge from accident and emergency department of hospital – whether doctor who ordered discharge of patient was negligent – whether medical negligence caused death of patient.

The plaintiffs claimed that their relative, the deceased (a man more than 50 years old), was given inadequate medical care and attention by a doctor (the first defendant) at a hospital (the second defendant), culminating in the first defendant ordering, against the wishes of the deceased and his carers, that the deceased be discharged, and that 19 hours after being discharged, the deceased died. The plaintiffs sued the first defendant, claiming damages for negligence. They also sued the second defendant and the State (the third defendant), arguing that they were vicariously liable for the negligence of the first defendant. The defendants denied liability. A trial was conducted on the issue of liability.

Held

1. In a case of multiple defendants, in which one or more defendants is alleged to be vicariously liable for the conduct of others, the task of the Court is to first determine whether liability is established against the primary defendant and if liability is established, to then determine the question of liability of the other defendants.
2. Here, the first defendant was the primary defendant, so the first question was whether the plaintiffs had established a cause of action in negligence against him.
3. To establish a cause of action in negligence, a plaintiff must prove the elements of the tort: (a) the defendant owed a duty of care to the plaintiff, (b) the defendant breached that duty (acted negligently), (c) the breach of duty caused damage to the plaintiff, and (d) the type of damage was not too remote.
4. Here, elements (a) and (d) were non-contentious, so the primary issues were (b) whether the first defendant was negligent and, if he was, (c) whether the first defendant's negligent acts or omissions caused the death of the deceased.
5. As to (b): the plaintiffs failed to prove that the first defendant was negligent, as: upon admission to the emergency department (to which the patient had been referred by another hospital), the deceased was properly regarded as not requiring critical care and during the 25-hour period that he was in the emergency department he was managed appropriately and assessed as hemodynamically stable, his vital signs were satisfactory and he was recovering well and was prescribed conventional medication for the conditions of which he had symptoms and there was no good reason the first defendant should have decided to retain the deceased in the emergency department or refer him to another part of the hospital for treatment.

For that reason alone, the plaintiffs failed to establish a cause of action against the first defendant and the case against all the defendants was dismissed.

6. As to (c): if it had been proven that the first defendant was negligent, there was insufficient evidence to prove that the treatment of the deceased in the emergency department or his premature discharge led to his death, as there was no post-mortem report or other acceptable evidence of the cause of death and no evidence to rule out the possibility that death was caused by some other condition or event unrelated to his admission to the emergency department.
7. It was unnecessary to determine the question of vicarious liability. The case against all the defendants was dismissed and the parties were ordered to bear their own costs.

Practice and procedure

abuse of process

Jimm Trading Ltd v Maddison [2017] PGNC 109; N6749 (2 June 2017)

National Court: Kandakasi J

PRACTICE AND PROCEDURE – Abuse of process – pleadings – application to dismiss proceedings – NCR, O 12 r 40 – whether application can be made before filing defence – whether pleadings disclose good cause of action – multiple prior proceedings – whether res judicata or issue estoppel apply – applicable principles – whether plaintiff seeking to set aside land transfer due to fraud must join Registrar of Titles – whether action alleging fraud to be by way of writ of summons or judicial review – allegation of fraud required to be specifically pleaded and particularised – where principal alleged to be vicariously liable, servants or agents not to be personally joined – effect of change of company name – s 24 Companies Act.

The plaintiff had issued multiple prior proceedings and appeals against the defendants, which had all been ultimately dismissed. In a writ of summons the plaintiff alleged fraud by the defendants, by the sale and transfer of its mortgaged property to a company which had changed its name and sought to set aside the transfer of title. These proceedings were essentially between the same parties and raising the same issues as the prior proceedings. After filing a notice of intention to defend, the defendants applied to dismiss the proceedings as an abuse of process. The court considered the plaintiff mortgagor's rights of redemption, for which damages could be the only remedy in the absence of fraud. The court further considered whether a writ of summons was the correct mode for a claim of fraud, whether proceedings should have been by way of judicial review naming the Registrar of Titles, whether fraud had been sufficiently pleaded, whether the individual defendants were wrongly joined when they were only pleaded to have been acting as servants or agents of their employer or principal, whether the defendants could apply to dismiss before filing a defence, and whether issues of res judicata and issue estoppel arose such as to make the proceedings an abuse of process.

Held

1. Having filed a notice of intention to defend, the defendants were entitled as of right to make an application to dismiss, before filing a defence, without needing leave of the court.
2. It was not necessary for the plaintiff to join the Registrar of Titles, in order to obtain relief against him.
3. Where fraud is alleged, a writ of summons is the better way of issuing proceedings.
4. Pursuant to s 24(4) of the *Companies Act*, the change of name of a company does not affect its identity or its legal rights or obligations.
5. Where the only allegations against the individual defendants were that they had acted as servants or agents of their employer or principal, who would be vicariously liable for their acts, the individuals were wrongly and unnecessarily joined as parties.
6. The joinder of the individual defendants was scandalous and vexatious, where no individual causes of action were pleaded against them.
7. Where fraud is alleged, it must be specifically pleaded with particularity.
8. The plaintiff's allegation of fraud was not specifically pleaded with sufficient particularity and failed to disclose a cause of action.
9. The writ was between essentially the same parties and raised essentially the same issues as had already been dismissed by courts of competent jurisdiction in multiple prior proceedings.
10. As a consequence, the principles of res judicata and issue estoppel applied to prevent the plaintiff from issuing further proceedings re-litigating the same issues.
11. The issue of further proceedings was an abuse of process, and the proceedings were dismissed.

appeal

questions of law and mixed facts and law

Minicus v Telikom (PNG) Ltd [2017] PGSC 50; SC1652 (15 December 2017)

Supreme Court: Gavara-Nanu J, Geita J, Bona J

PRACTICE AND PROCEDURE – APPEAL – Questions of law and mixed fact and law – exercise of discretion by trial judge – necessity to show clear error by trial judge – s 14(1)(b) Supreme Court Act, Ch 37 – lengthy delay – no reasonable explanation – delay an abuse of process – delay fatal.

The appellant had commenced proceedings in the National Court in 2007. Following various interlocutory matters and an appeal to the Supreme Court, in 2014 the matter was remitted for hearing in the National Court. In 2016 the proceedings were dismissed for want of prosecution, and in October 2016 the appellant filed a notice of appeal.

Held

1. The onus was on the appellant/plaintiff in the National Court proceedings to prosecute them without undue delay.
2. The onus was on the appellant/plaintiff to show that he had taken all steps necessary to diligently prosecute his claim, and to provide a reasonable explanation for any failure to do so.
3. The delay of over two years in prosecuting his claim was lengthy and unexplained.
4. On appeal, the onus was on the appellant to show a clear error by the trial judge in the exercise of his discretion, or, if no error, that the decision was manifestly unreasonable or unjust.
5. No error having been shown by the trial judge, and the decision not being unreasonable or unjust, the appeal was dismissed.

application for leave to serve garnishee notice

Gabriel v Motor Vehicles Insurance Ltd [2017] PGNC 122; N6777 (20 June 2017)

National Court: Foulds J

PRACTICE AND PROCEDURE – Application for leave to serve garnishee notice on defendant's bank – whether defendant is "the State" for purposes of Claims By and Against the State Act – ss 2, 5, 13 and 14 of CBASA 1996.

The plaintiff obtained judgment against the defendant, which it sought to enforce by the issue of a garnishee notice on its banker. The defendant opposed leave to serve a garnishee notice, on the ground that it was the State for the purposes of the *Claims By and Against the State Act*, and so garnishee proceedings were not available against it. The court extensively reviewed and considered the legislation, purpose and history relating to the creation of the defendant, to determine if it was a governmental body formed for a public purpose.

Held

1. There is a two-limb test for determining if a governmental or statutory body is the State, for the purposes of the *CBASA*.
2. There was a form of governmental control, ownership and funding of the defendant, so that it was a governmental body, and it was formed for a public purpose.
3. As the defendant satisfied the two-limb test, it was the State for the purposes of ss 2, 5, 13 and 14 of the *CBASA*.
4. As a consequence, garnishee proceedings were not available against the defendant.
5. The plaintiff's application for leave to issue a garnishee notice against the defendant's bank was refused.

application for review under s 155(2)(b) Constitution

Popuna v Owa [2017] PGSC 3; SC1564 (22 February 2017)

Supreme Court: Gavara-Nanu J, Kariko J, Kassman J

PRACTICE AND PROCEDURE – Application for review under s 155(2)(b) Constitution – inherent power of the Supreme Court under s 155(2)(b) Constitution – application following the summary dismissal of a competent appeal – inherent power cannot be invoked where application for review raises same grounds of grievance as in the appeal – abuse of the process of the court.

After their appeal against a National Court decision was summarily dismissed for want of prosecution, the applicants filed for a review of the same National Court decision pursuant to s 155(2)(b) of the *Constitution.*

Held

1. A dismissal of an appeal by the Supreme Court is a final determination and cannot be appealed against or reviewed except by way of a "slip" application.
2. An application for review under s 155(2)(b) of the *Constitution* raising the same grounds of grievance as in an appeal previously dismissed by the Supreme Court amounts to an abuse of process of the Court.

application to be substituted as plaintiff in place of deceased

Kari v PNG Power Ltd [2017] PGNC 355; N7061 (8 September 2017)

National Court: David J

PRACTICE AND PROCEDURE – Application to be substituted as plaintiff in place of deceased – application not made within time – principles relevant to exercise of court's discretion – need to provide reasonable explanation for delay – O 1 r 7, O 12 r 1 & O 5 rr 10 and 12 National Court Rules.

The two plaintiffs had been injured by electric shock in September 2009. They issued proceedings for damages in November 2014. One of the plaintiffs died in December 2014, and the deceased's uncle applied by way of motion in March 2017 to be substituted as plaintiff. The application was outside the three-month period referred to in O 5 r 12 *NCR*. The court considered the principles relevant to the exercise of the court's discretion to allow substitution.

Held

1. In considering an application for substitution following the death of a party, the court has a discretion, which is to be exercised judicially.
2. A delay of over two years in making the application was a substantial delay.

3. The applicant had failed to provide a satisfactory reason for the delay in making the application and failed to establish that he was the person lawfully entitled to represent the deceased's estate.
4. The defendant had established that its conduct of the defence would be prejudiced if the application was granted.
5. The application for substitution was refused.
6. The defendant having already been prejudiced by the delay in prosecuting the proceedings, if any further application for substitution was not made within one month, the proceedings would stand dismissed.

civil appeal from interlocutory judgment

Nominees Nuigini Ltd v Independent Public Business Corporation [2017] PGSC 46; SC1646 (6 December 2017)

Supreme Court: Kirriwom J, David J, Toliken J

PRACTICE AND PROCEDURE – Civil appeal from interlocutory judgment – notice of appeal – no application for leave to appeal – objection to competency of appeal – compliance with O 7 r 15 mandatory – notice of objection to competency filed out of time – inherent power of court exercised – objection to competency upheld – Supreme Court Act, ss 14(1)(a) and (b) & 14(3)(b) – Supreme Court Rules, O 7 r 15.

The appellant had filed a notice of appeal against an interlocutory decision of the National Court, without first obtaining leave to appeal, as required by s 14 of the *Supreme Court Act*. The respondent filed a notice of objection to competency of the appeal, outside the period prescribed by O 7 r 15 of the *Supreme Court Rules*.

Held

1. Compliance with the time limit prescribed in O 7 r 15 is mandatory, and the court has no power to extend the time.
2. The court always retains an inherent power to control proceedings before it, to prevent an abuse of process.
3. Although the notice of objection to competency was not valid, an objection to competency may be raised at any time.
4. The notice of appeal was not competent, as leave to appeal was required but not sought or obtained.
5. In the exercise of its inherent power, the objection to competency was upheld and the appeal was dismissed.

death of trial judge

Lyanga v The State [2017] PGSC 39; SC1635 (9 November 2017)

Supreme Court: Cannings J, Geita J, Ipang J

PRACTICE AND PROCEDURE – Death of trial judge following hearing of evidence and submissions – decision given by another judge – due process to be followed – principles of natural justice – civil claim against State – vicarious liability – whether necessary to name actual wrongdoer as defendant or in evidence.

The appellant had issued proceedings against the State claiming damages arising from a police raid of his business premises. The original trial judge died after hearing the evidence, including oral evidence, before delivering judgment. Ten years later, another judge took over the matter, did not allow the parties to make fresh submissions, and delivered a decision dismissing the proceedings, based on the affidavits tendered in the earlier trial but not the oral evidence, and relied on a Supreme Court decision delivered seven years after the trial. The appellant alleged procedural unfairness and improper application of the principles of vicarious liability.

Held

1. It is, subject to compliance with natural justice principles, a proper and lawful procedure for a judge who has not heard a case to 'take over' the case and give judgment, due to the inability of the judge who actually heard the case to give judgment due to his or her death or otherwise ceasing to be a judge or for any other reason being unable to perform his or her judicial functions.
2. A judge contemplating taking over a case from another judge should adhere to certain due process requirements, including: parties to be notified of the contemplated course of action and given the opportunity to not consent; the judge should devise a procedure to bring into evidence the previous proceedings; the judge should ensure that all of the evidence and submissions before the previous judge are clarified and obtain a transcript of the original proceedings; the judge should give the parties the opportunity to apply to bring fresh evidence and to make fresh submissions.
3. The second judge did not adhere to those procedural requirements, and consequently arrived at the decision to dismiss the proceedings in a procedurally unfair manner.
4. The ground of appeal as to procedural unfairness was upheld, and the decision under appeal was quashed. There was sufficient material before the Supreme Court on which it could, under s 16(c) of the *Supreme Court Act*, determine the question of liability.
5. Judgment was entered for the appellant, and the proceedings were remitted to the National Court for assessment of damages.

discontinuance of proceedings

National Council of Young Mens Christian Association of Papua New Guinea (Inc) v Firms Services Ltd [2017] PGSC 20; SC1596 (13 June 2017)

Supreme Court: Gavara-Nanu J, Kariko J, Collier J

PRACTICE AND PROCEDURE – Discontinuance of proceedings against a party – striking out paragraphs in statement of claim – paragraphs not irrelevant to cause of action against remaining defendant – error in striking out paragraphs – appeal allowed.

PRACTICE AND PROCEDURE – Pleading fraud – acts alleged to be fraudulent, whether actual or constructive, must be pleaded fully and precisely with full particulars.

LAND – Meaning of s 33(1)(a) of Land Registration Act – constructive fraud – not necessary to prove actual fraud.

The appellant had been the registered proprietor of land, which was sold to the respondent, who became the registered proprietor. The respondent company was owned by the partners in the law firm which acted for both the appellant and respondent in the sale of the property. The appellant issued proceedings by way of originating summons against the respondent and a number of individuals, pleading fraud and collusion between them in the sale of the property. The pleading included particulars of the fraudulent conduct. Before the hearing, the appellant discontinued the proceedings against the individuals. At the hearing, the primary judge granted the respondent's application to strike out the paragraphs which contained pleadings relating to the individuals, on the basis that they had ceased to be relevant after the proceedings against them had been discontinued. The paragraphs included pleadings and particulars of the fraud alleged against the respondent. As there were no longer any pleadings of fraud against the respondent, and evidence could not be given of matters not pleaded, the judge dismissed the claim.

Held

1. There is no rule of pleading which requires parts of a statement of claim referring to persons, to be struck out, simply because those persons have ceased to be parties in the proceedings.
2. The primary judge erred in striking out the pleadings on this basis.
3. The pleadings, before being struck out, contained particularised allegations of fraud against the respondent.
4. The judge's finding that constructive fraud was not a finding which was open to be made was inconsistent with the decision in *Tikili v Home Base Real Estate Ltd* (*supra*).
5. Fraud in land transactions may include constructive fraud (per Gavara-Nanu J, dissenting: fraud under s 33 of the *Land Registration Act* (*LRA*) means actual, not constructive, fraud, committed by or with the knowledge of the registered proprietor. Irregularities in the title process by persons other than the registered proprietor, without the knowledge of the registered proprietor, do not amount to fraud.)

6. The fact that fraud may be constructive does not derogate from the requirement of O 8 r 30 and the common law, that fraud must be pleaded properly and specifically, with full particulars.
7. The pleadings, before being struck out, were prima facie capable of allowing fraud, whether actual or constructive, to be found against the respondent, if proven by evidence.
8. The appeal was upheld, the decision of the National Court was quashed, the appellant was given leave to re-plead its statement of claim, and the matter was remitted back for re-hearing.

discovery sought against Ombudsman Commission

Pruaitch v Manek [2017] PGSC 19; SC1593 (9 June 2017)

Supreme Court: Manuhu J, Murray J, Pitpit J

PRACTICE AND PROCEDURE – Discovery – appellant sought discovery of Ombudsman Commission's investigation documents – National Court Rules, O 9 rr 5, 7 & 16 – rule of law – nature of public interest – private interest – maturity of cause of action – merits of cause of action.

The appellant had issued proceedings by way of originating summons, seeking declarations that the Ombudsman Commisson's referral of him to the Public Prosecutor was unlawful, because he had not been first given a right to be heard on all the material considered by the Ombudsman Commisson. He had appeared and made written responses, before further material was obtained. After the referral, he applied by motion for an order for discovery against the Ombudsman, of minutes of meetings relating to the investigation. His application was refused by the primary judge, on the ground that the rule of law required the withholding of the documents, as their disclosure would be injurious to the public interest.

Held
1. It was not generally in the public interest for proceedings of the Ombudsman Commission to be subjected to other civil proceedings.
2. The constitutional process of a Leadership Tribunal should not be interrupted and must be completed before any challenge can be made to the process.
3. It is injurious to the public interest to disclose material relied upon by the Ombudsman Commission for a referral to the Public Prosecutor, before the conclusion of the Tribunal proceedings.
4. No error having been shown by the judge, the appeal was dismissed.

dismissal of proceedings

Ango v Kaluvia [2017] PGSC 31; SC1628 (3 November 2017)

Supreme Court: Salika DCJ, Higgins J, Lindsay J

PRACTICE AND PROCEDURE – Ex parte dismissal of proceedings for want of prosecution – alleged failure to comply with court directions – directions in fact complied with – power to set aside ex parte orders – dismissal order sought and made irregularly – lack of notice thereof and failure to inform court that orders were complied with – National Court Rules, O 12 r 8(3) – single judge has power to set aside ex parte orders for good cause.

The plaintiff had issued proceedings against some of the defendants, claiming damages for negligence. The court made an order that the plaintiff file and serve an amended writ within a certain time and commence settlement negotiations. The day after that time, in the absence of the plaintiff, the judge made a self-executing order that if the orders were not complied with, the proceedings would stand dismissed. When the matter next came before the judge, in the absence of the plaintiff, the defendant said that the orders were not complied with, and the judge dismissed the proceedings. The plaintiff had in fact complied with the orders. The plaintiff applied to the judge to set aside the dismissal, but the application was refused on the ground that as the proceedings had been dismissed, the court had no power to set aside the ex parte order.

Held

1. On an ex parte application, the applicant has a duty to inform the court of all relevant matters.
2. The defendant breached that duty by failing to inform the court that the plaintiff had complied with the orders.
3. The orders for dismissal had therefore been irregularly obtained, and without prior notice to the plaintiff.
4. A single judge of the court has the power under O 12 r 8(3) to set aside an ex parte final order.
5. The ex parte orders were set aside, and the matter remitted to the National Court.

objection to competency of appeal

Nipo Investment Ltd v Nambawan Super Ltd [2017] PGSC 45; SC1642 (2 November 2017)

Supreme Court: Murray J, Collier J, Geita J

PRACTICE AND PROCEDURE – Objection to competency of appeal – O 10 r 3(b)(i) and (ii) Supreme Court Rules 2012 – compliance with Supreme Court Rules mandatory – Rules not complied with – objection upheld – appeal dismissed.

The appellant had filed a notice of motion appealing against the National Court decision to grant judicial review to the first respondent. The first respondent filed a notice of objection to competency of the motion, on the main ground that all the documents which were before the trial judge were not annexed to the motion, thereby breaching O 10 r 3.

Held

1. An appeal may be incompetent for non-compliance with the *Supreme Court Act* or *Rules*.
2. Non-compliance with O 10 r 3(b)(i) and (ii) is fatal.
3. By failing to annex all the documents, the appeal did not comply with O 10 r 3(b).
4. The objection to competency was upheld, and the appeal was dismissed.

slip rule application

Subendranathan v Paiya [2017] PGNC 417; N7644 (29 May 2017)

National Court: Kariko J

PRACTICE AND PROCEDURE – Slip rule application – O 8 r 59 NCR – s 155(4) of Constitution – final orders made – leave to appeal on ground of alleged error refused – delay of 9 months in filing slip application – whether accidental slip or omission made in orders issued – final orders correctly reflected decision of court.

The applicant was the defendant in proceedings issued by the respondent, in which the court found that the respondent was the valid titleholder of land on which the applicant had encroached. The final orders included orders for the applicant to remove his fencing and structures from the respondent's land and vacate the respondent's land. The applicant alleged that the court had made an error by not restricting those orders to an area of 20 metres, which had been pleaded as the area of the encroachment. The applicant first sought leave to appeal on this ground, which was refused. Nine months after the orders were made, he applied under the slip rule, to correct the alleged error. The court considered the relevant principles applicable to O 8 r 59.

Held

1. Section 155(4) of the *Constitution* was not applicable, as a remedy was already available and provided by O 8 r 59 *NCR*.
2. For O 8 r 59 to be applicable, the court had to have made an accidental slip or error, such that the wording of the order may be corrected to accurately reflect the decision.
3. Order 8 r 59 does not entitle the court to reconsider a final and regular decision.
4. The wording of the orders correctly reflected the intention and findings of the court, so that there was no accidental slip or error.
5. The making of a slip rule application after leave to appeal against the same alleged error had been refused was an abuse of process.
6. The slip rule application was refused.

summary disposal

Kalinoe v Kereme [2017] PGSC 26; SC1631 (3 November 2017)

Supreme Court: Injia CJ, Bona J, Foulds J

PRACTICE AND PROCEDURE – Summary disposal – judicial review proceedings – dismissal of proceedings for failure of plaintiff 's lawyer to appear in court on trial date – ground of dismissal – exercise of discretion – strict compliance with rules of court requiring parties to appear at trial – whether trial judge under duty to take into account other considerations including likely prejudice to the parties' merits of the case – National Court Rules, O 16 rr 13(11)(4) and 13(13)(2)(b).

The appellant had issued proceedings by way of judicial review, which were fixed for hearing on a certain date. The appellant did not appear on that date, and the judge summarily dismissed the proceedings for non-appearance. The appellant appealed on the grounds that the judge failed to take into account the merits of the case and the interests of justice and had thereby improperly exercised her discretion.

Held

1. Where an Act or Rules invest the court with a discretion, without setting out grounds on which the discretion may be exercised, then the discretion is unfettered (this statement of principle from *The State v MVIL and Anor* (2017) N6664, approved and adopted).
2. As the Rule invested the court with the unfettered discretion to dismiss proceedings for failure to appear at the hearing, the judge was not obliged to take into account the merits or interests of justice or any other factor.
3. No error was shown in the exercise of the judge's discretion.
4. The appeal was dismissed.

Review

Constitution, s 155(2)(b)

leave for review

Evoa v Kangu [2017] PGSC 14; SC1589 (19 May 2017)

Supreme Court: Injia CJ

JUDICIAL REVIEW – Leave for review under s 155(2)(b) of Constitution – decision dismissing action to set aside registered State Lease title based on fraud – fraud not pleaded – insufficient evidence of fraud – plaintiff not entitled to seek purchase of second property under Home Ownership Scheme run by NHC – no error manifesting substantial injustice shown – no exceptional circumstances shown – application for leave for review refused.

The first respondent was the registered proprietor of a property which he had purchased from the second respondent, under its Home Ownership Scheme. By way of an originating summons in the National Court, the applicant sought to set aside the first respondent's title on grounds of fraud and failure to comply with the scheme. His claim was dismissed, and the appeal period expired. He applied under s 155(2)(b) to review the dismissal.

Held

1. For the court to exercise its discretion under s 155(2)(b) of the *Constitution,* the applicant must show exceptional circumstances manifesting substantial injustice, and which give rise to a serious question concerning errors in the judge's findings.
2. The applicant showed no error in the judge's findings that the applicant failed to establish a right to purchase the property or had a legal interest in it.
3. An action based on fraud must be specifically pleaded and particularised and shown by evidence.
4. The applicant showed no error in the judge's findings that the alleged fraud was not sufficiently pleaded or particularised and was not shown by the evidence.
5. The first respondent was the registered proprietor, and no challenge to the indefeasibility of that title was shown.
6. Neither exceptional circumstances nor substantial injustice were shown, and the application for review was refused.

review of sentence

Saraga v The State [2017] PGSC 17; SC1592 (5 May 2017)

Supreme Court: Hartshorn J, Polume-Kiele J, Pitpit J

SUPREME COURT – PRACTICE AND PROCEDURE – Application for leave to review sentence – expiry of appeal period – s 155(2)(b) Constitution – whether alleged lack of knowledge of appeal period was reasonable – whether belief in sorcery is an exceptional circumstance.

The applicants had been convicted of wilful murder and sentenced to 27 years imprisonment. Seven months after expiry of the appeal period, they filed notices of appeal against sentence, which were treated as applications for leave under s 155(2) of the *Constitution.* Their grounds were that the primary judge had failed to take into account their belief in sorcery, which was a sensitive issue in PNG.

Held

1. The explanation for the expiry of the appeal period was unsatisfactory, as they would likely have known of the 40-day limit from staff and other inmates.
2. An applicant's belief in sorcery is not an exceptional circumstance.
3. The judge had a wide discretion in sentencing, and the sentence was not disproportionate to the crime.

4. No error was shown in the judge's decision.
5. The applications for leave were refused, and the sentences confirmed.

Supreme Court

appeal

dismissal of proceedings

Wahune v Barton [2017] PGSC 40; SC1636 (10 November 2017)

Supreme Court: Kandakasi J, Makail J, Lindsay J

SUPREME COURT – APPEAL – Against dismissal of proceedings – failing to disclose reasonable cause of action – identification of cause of action – pleading of cause of action – lack of particulars – cause of action vague – mode of proceedings – originating summons – claim for damages – facts in dispute – whether Solicitor-General obliged to accept directions of Attorney-General – third party not entitled to enforce compliance by Solicitor-General with statutory duty – Attorney-General Act 1989, s 13 – National Court Rules, O 4 rr 1, 2 & 3 and O 8 r 32.

The appellants had issued proceedings by way of originating summons against the respondents, seeking to enforce the terms of a settlement alleged to have been agreed with the Attorney-General. The proceedings failed to clearly identify the cause of action, the facts and law were in dispute, and the appellants sought to compel the Solicitor-General to follow a direction from the Attorney-General. The trial judge dismissed the proceedings for failing to disclose a cause of action.

Held

1. A plaintiff is required to clearly and concisely plead each element necessary to establish a cause of action, and the relief sought.
2. It is not the duty of the court to attempt to identify a cause of action.
3. The proceedings should not have been commenced by originating summons, as the facts and law were in dispute.
4. Section 13 of the *Attorney-General Act* does not impose a duty on the Solicitor-General to comply with directions from the Attorney-General.
5. An alleged breach by the Solicitor-General of an obligation, under the *Attorney-General Act*, does not create a cause of action in a third party.
6. No error having been shown in the trial judge's decision, the appeal was dismissed.

interlocutory judgment

Kurkuramb Estates Ltd v Sipison [2017] PGSC 18; SC1595 (19 May 2017)

Supreme Court: Kirriwom J

SUPREME COURT – APPEAL – From interlocutory judgment – leave to appeal – injunctive orders – leave not required – Supreme Court Act, s 14(3)(b)(ii).

PRACTICE AND PROCEDURE – Stay pending appeal – application for stay of substantive proceedings and stay of enforcement of injunctive orders – McHardy Principles considered and applied – apparent errors of law and arguable case – interest of justice – preservation and protection of subject of dispute between the parties – stay ordered – funds held in a party's lawyer's account should be paid to National Court Registrar's Trust Account.

The appellant applied for a stay of National Court proceedings, pending an appeal against a decision to join the third respondent as a party to those proceedings, to remove a Notice of Discontinuance from the court file, and to grant sweeping injunctions and mandatory orders against the appellant and other persons. The grounds of appeal were that those proceedings had already been discontinued by consent of all parties, and the appellant had not been given the opportunity to be heard. After applying the principles relating to the grant of injunctions, the court also considered the desirability of disputed monies being held in the trust account of the National Court instead of in one of the parties' lawyers trust account.

Held

1. The principles relating to the interlocutory grant of mandatory injunctions are set out in *Thaddeus Kambanei v The National Executive Council*.
2. It is in the overall interests of justice to preserve the disputed property.
3. The appellant's application for a stay of the National Court proceedings and injunctive orders was granted.

judicial review

Todiai v Schnaubelt [2017] PGSC 37; SC1637 (13 November 2017)

Supreme Court: Injia CJ

SUPREME COURT – APPEAL – Judicial review – leave to appeal – interlocutory decision dismissing application to dismiss application for judicial review brought under O 16 of the National Court Rules – class action commenced by representatives of resource owners – application to dismiss based on lack of consent/authority of all plaintiffs authorising representatives to bring class action – whether arguable case on appeal made out – separation of plaintiffs' representatives who had consent/ authorisation

from those that did not – action can be continued by those who had obtained consent/ authorisation – whether sufficient cause shown to interrupt trial – defendant not heard on grant of leave may challenge standing in substantive hearing or on appeal – special nature of judicial review proceedings – whether trial should be interrupted by appeal from interlocutory ruling – National Court Rules, O 16 rr 3, 5(1) and 13(2).

The respondents had issued proceedings by way of judicial review, for themselves and as representatives of the resource owners, not all of whom had given their authorisation to the respondents to commence the proceedings in their names. Leave for judicial review was granted, and the respondents filed the substantive notice of motion. The appellants had not been heard on the leave application and applied to dismiss the substantive proceedings on the basis that the respondents lacked standing. Their application was refused, and they applied for leave to appeal that interlocutory decision.

Held

1. A party, who is not heard on the grant of leave for judicial review, may challenge the plaintiff's standing, either in the substantive hearing or on appeal.
2. Where some plaintiffs had standing and others did not, the proceedings may be continued by those who had standing.
3. For leave to be granted to appeal against an interlocutory decision, the applicant must show an arguable case that the interruption of the substantive hearing is necessary to prevent its right to litigate material issues at the hearing from being prejudiced, so that an intervention is warranted to halt the proceedings until the determination of the appeal.
4. The appellants still had the right to litigate the issue of the plaintiffs' standing in the substantive hearing.
5. It would not be in the interests of the speedy determination of judicial review proceedings to allow them to be interrupted by appeals against interlocutory decisions, where those decisions do not prevent the appellant from litigating the same issues in the substantive hearing.
6. The application for leave to appeal was refused.

practice and procedure

distinction between definition and requirement

Marape v Pokaya [2017] PGSC 38; SC1634 (8 November 2017)

Supreme Court: Hartshorn J

SUPREME COURT – PRACTICE AND PROCEDURE – Application pursuant to O 5 r 39 Supreme Court Rules to dispense with the requirements of O 5 r 7 to permit an application for leave to review an interlocutory decision of the National Court in an election petition – distinction between definition and requirement.

The applicant was seeking to review a decision to refuse his application to dismiss an election petition, which was an interlocutory decision. Order 5 r 7 defines 'decision' to mean a final decision. The applicant applied under O 5 r 39 to dispense with that definition, so that he could apply to review the interlocutory decision.

Held

1. Order 5 r 39 allows the court to dispense with a requirement.
2. Order 5 r 7 merely defines 'decision', it does not impose any requirement.
3. As there was no requirement in O 5 r 39, there was nothing to dispense with.
4. The application was refused.

interim stay application

Maladina v The State [2015] PGSC 80; SC1572 (8 July 2015)

Supreme Court: Injia CJ

SUPREME COURT – PRACTICE AND PROCEDURE – Application for interim stay order – ss 5(1)(b) and 22 of Supreme Court Act – stay of criminal proceedings on sentence pending appeal against conviction – discretion to be exercised on the totality of factors.

The appellant had been convicted of fraud-related offences, for which he was awaiting sentence. He had filed an appeal against conviction, and then applied to stay the sentencing pending the outcome of that appeal. When applying the McHardy Principles to the exercise of discretion to grant a stay, the totality of factors is to be considered, although the interests of justice is the dominant factor.

Held

1. An application for an interim order under s 5(1)(b) of the *Supreme Court Act* is not restricted to civil appeals.
2. An appeal against conviction may lie under s 22 of the *Supreme Court Act*, before sentence.
3. When exercising discretion under s 5(1)(b) of the *Supreme Court Act*, the totality of factors must be considered.
4. When weighing up the factors, a sense of injustice was required to conclude that the interests of justice favoured the interruption of the trial.
5. The application for interim orders was refused.

original jurisdiction

In re Application by Kereme [2017] PGSC 23; SC1600 (10 August 2017)

Supreme Court: Injia CJ

SUPREME COURT – PRACTICE AND PROCEDURE – Original jurisdiction – application under s 18(1) of the Constitution – conduct of trial on facts before single judge of the Supreme Court – Constitution, s 18(1) – Supreme Court Rules 2012, O 3 r 3.

The applicant had issued proceedings under s 18(1) of the *Constitution* challenging the validity of various laws, on the grounds of breaches of procedural requirements and inconsistency with constitutional provisions. During the hearing, the full court appointed one of its members to sit as a single judge to take the evidence and make findings of fact.

Held

1. An application brought under s 18(1) of the *Constitution* is an application in the original jurisdiction of the court, conducted under the procedures in O 4.
2. The jurisdiction of a single judge of a full court seized of a matter within its original jurisdiction, to take evidence and make findings of fact, is given by O 3 r 3.
3. In conducting a trial on the facts pursuant to O 3 r 3, the ordinary rules of practice and procedure relating to pleadings and evidence apply.
4. Having considered the pleadings and taken the evidence, the court made findings of fact for presentation to the full court.

taxed costs

PNG Aviation Services Pty Ltd v Somare [2017] PGSC 15; SC1590 (29 May 2017)

Supreme Court: Injia CJ

SUPREME COURT – PRACTICE AND PROCEDURE – Taxed Costs – application for leave for review of certificate of taxation – notice of objection to competency of application – whether leave for review separately required – procedure to be followed – whether provisions of O 7 r 15 applicable by virtue of O 11 r 28(a) of the Supreme Court Rules – meaning of "any proceedings" in O 11 r 28 – Supreme Court Rules 2012, O 12 r 37(2), O 7 r 15, O 11 r 28(a).

The second respondent had filed an application for review of a certificate of taxation, in the form of an appeal for which leave was not required. The appellant objected to the competency of the application for review. The second respondent objected to the competency of the appellant's objection. The court had power to fill in a gap in the Rules

which did not provide for objections to competency of applications for review of taxed costs. The court considered the meaning of "any proceedings" in O 11 r 28, as including originating process such as an application for review of taxed costs. Such an application for review of taxed costs must be by notice of motion. Leave for review in O 12 r 37 is not to be confused with review procedures under O 5, so that no separate application for leave is required.

Held

1. "Any proceedings" within the meaning of O 11 r 28 includes proceedings commenced by originating process such as an application for review of taxed costs.
2. As there was no provision in the Supreme Court Costs Rules for objections to competency of applications for review of taxed costs, the court had the power to fill the gap, under s 184 of the *Constitution* and ss 41 and 42 of the *Supreme Court Act*.
3. The appellant's objection to competency was not incompetent.
4. Order 12 r 37 does not require the applicant to first obtain leave for review.
5. "Leave for review" in O 12 r 37 must not be confused with the ordinary review procedures under O 5, and no separate application for leave was required.
6. The second respondent's application for review was defective because it was in the form of an appeal, instead of a notice of motion.
7. The appellant's objection was upheld, and the second respondent's application for review was dismissed for being incompetent.

stay application

Hii v Deputy Commissioner of Taxation of the Commonwealth of Australia [2017] PGSC 29; SC1626 (14 September 2017)

Supreme Court: Kassman J

SUPREME COURT – Application for stay – Supreme Court Act, ss 5 and 19 – Insolvency Act, ss 150 and 154 – principles of application for stay.

In proceedings in the Queensland Supreme Court, judgment by consent had been entered by the respondent against the appellant, and that judgment had been registered in the PNG National Court. As the judgment was not satisfied, the appellant was declared insolvent by the National Court, and various other orders were made against him. He filed a notice of appeal against the court decision and orders, and the respondent filed objection to the competency of the appeal. The appellant applied for a stay pending appeal, pursuant to ss 5(1)(b) and 19 of the *Supreme Court Act*. The court considered the principles applicable to a stay.

Held

1. The applicant had recourse in the National Court to apply for a stay, pursuant to ss 150 and 154 of the *Insolvency Act*.

2. The applicant had poor prospects of success on the appeal.
3. The respondent had good prospects of success on the objection to competency.
4. Damages would be an adequate remedy for the applicant, if a stay was refused.
5. There was no evidence that the respondent was unable to pay any damages awarded to the applicant if his appeal was successful.
6. The interests of other creditors would be adversely affected if a stay was granted, so that it would be in the interests of justice not to grant a stay.
7. The application for a stay was refused.

Taxation

Goods and Services Tax

South Seas Tuna Corporation Ltd v Palaso [2017] PGNC 421; N7698 (23 November 2017)

National Court: Hartshorn J

CIVIL – COMPANY – O 10 rr 21 & 23 National Court Rules – application for declaratory relief concerning validity of assessments – ss 67(3), 73(7) & 83 Goods and Services Tax Act 2003 – s 32 Interpretation Act.

The defendants had issued an assessment against the plaintiff, which issued proceedings under the *GST Act* for the defendants to state a case in respect of that assessment. The defendants subsequently made two further assessments against the plaintiff, who applied under O 10 rr 21 & 23 for declarations that the last two assessments were void for being made when the defendants were functus officio and only the first assessment was justiciable.

Held

1. The first defendant's power to amend an assessment, or make a new assessment, is not fettered by the first assessment being the subject of judicial proceedings invoked by the objector.
2. The doctrine of functus officio in administrative decisions does not apply to the *GST Act*.
3. The plaintiff's applications were refused.

Torts

negligence

defendant manufacturer of tinned fish

Donatus v RD Tuna Canners Ltd [2017] PGNC 30; N6647 (15 February 2017)

National Court: Cannings J

TORTS – Negligence – plaintiffs' claim that they contracted food poisoning due to consumption of tinned fish, manufactured by defendant, purchased from retail outlet – claim that tinned fish contained foreign object: condom – elements of tort of negligence – whether defendant owed duty of care to plaintiffs – whether defendant was negligent – whether defendant's negligence caused injury to plaintiffs – whether injuries not too remote.

The plaintiffs claimed that they purchased from a retail outlet an unopened can of tinned fish that had been manufactured by the defendant, that they ate part of the contents of the can before realising that it contained, amongst the expected contents, a foreign object, namely a condom, and that they were shocked and became sick as a consequence. They sued the defendant manufacturer, claiming damages for negligence. The defendant challenged the assertions of fact on which the plaintiffs' case was based and denied the allegation of negligence. The defendant argued that the plaintiffs' evidence was unreliable and unbelievable and that its manufacturing and quality assurance processes were of such a high standard as to force the conclusion that the plaintiffs' evidence was false. A trial was conducted on the issue of liability.

Held

1. The facts, as alleged by the plaintiffs, were proven to have occurred: they purchased from a retail outlet an unopened can of tinned fish manufactured by the defendant; they ate part of the contents of the can before realising that it contained a condom, they were shocked and became sick as a consequence.
2. To establish a cause of action in negligence a plaintiff must prove the elements of the tort: (a) the defendant owed a duty of care to the plaintiff; (b) the defendant breached that duty (acted negligently); (c) the breach of duty caused damage to the plaintiff; and (d) the type of damage was not too remote.
3. Here: (a) the defendant, the manufacturer of a product intended for consumption by consumers, owed a duty of care to the consumers, including the plaintiffs; (b) the doctrine of *res ipsa loquitur* (the thing speaks for itself) applied and it was proven that the defendant was negligent; (c) the defendant's negligence caused injury to the plaintiffs; and (d) the types of injuries incurred by the plaintiffs were not too remote.
4. All elements of the tort of negligence were proven and it was declared that the defendant is liable in negligence.

trespass to property

vicarious liability of employer of tortfeasors

Tapu Construction Ltd v Moses [2017] PGNC 4; N6588 (11 January 2017)

National Court: Cannings J

TORTS – Trespass to property – elements of tort – whether sufficient evidence of each element.

EVIDENCE – Conflict in evidence of involvement of defendants in incident in which plaintiff's property was damaged.

EMPLOYMENT – Vicarious liability – whether an employer can be vicariously liable for tortious actions of its employees if the actual employees who committed the tort cannot be identified.

There was an altercation between two groups of people, which led to one group destroying a guesthouse and damaging other properties in the vicinity, including the plaintiff's truck. The plaintiff was not involved in the altercation. The plaintiff alleged that the first defendants were members of the group who damaged its truck, that the first defendants committed the tort of trespass to property, that the first defendants were employed by the second defendant and that the second defendant was vicariously liable for the tort committed by the first defendants. The plaintiff sought damages in trespass to property against both the first defendants and the second defendant. The defendants denied liability. The first defendants gave evidence that they were not involved in the incident and that they were not employed by the second defendant. The second defendant offered no evidence.

Held

1. It was proven that there was an altercation between two groups of people and that one group entered the area of a guesthouse, destroyed the guesthouse and in the process damaged the plaintiff's truck, which was parked in the area.
2. It was proven that the members of the group that damaged the plaintiff's truck committed the tort of trespass to property in that: (a) they (the tortfeasors) interfered with (by damaging or destroying), (b) the plaintiff's chattel (any property other than freehold land); (c) they acted intentionally, (d) they acted without lawful authority, and (e) the plaintiff had actual possession of the chattel.
3. It was not proven that the first defendants were members of the group that damaged the plaintiff's truck. The case against them failed.
4. It was proven that the tortfeasors were employees of the second defendant and that they were on duty.
5. As the tortfeasors were on duty and acting generally within the scope of their employment, the second defendant, as their employer, was vicariously liable for

their tortious conduct, even though they could not be identified. Therefore, the second defendant was liable in damages to the plaintiff.

vicarious liability

Kisa v Talok [2017] PGSC 50; SC1650 (15 December 2017)

Supreme Court: Gavara-Nanu J, Ipang J, Lindsay J

APPEAL – TORT – Tortfeasor – s 1 of Wrongs (Miscellaneous Provisions) Act, Ch 297 – necessity to plead matters showing vicarious liability – no pleading of statutory provision – no pleading that tortfeasor committed tort whilst acting in the course of his duties – pleadings defective – no cause of action disclosed – defective pleadings incurable on appeal.

The appellant had pleaded in his statement of claim, that the first respondent was a policeman who unlawfully shot him. He pleaded that the second and third respondents were responsible for the first respondent's actions and sought damages for the first respondent's negligence. He did not specifically plead that the first respondent's actions occurred during the course of his employment and that, under s 1 of the *Wrongs (Miscellaneous Provisions) Act*, the second and third respondents could be held vicariously liable for those actions. His proceedings were dismissed by the National Court for failing to disclose a cause of action.

Held

1. To establish a cause of action and vicarious liability against the State, the appellant had to specifically plead s 1(1) and (4) of the *Wrongs (Miscellaneous Provisions) Act*, Ch 297 in the statement of claim, and that the first respondent tortfeasor had committed the tort whilst acting in the course of his employment duties as a policeman.
2. The failure by the appellant to plead s 1(1) and (4) of the *Wrongs (Miscellaneous Provisions) Act*, and that the first respondent committed the tort whilst acting in the course his duties, rendered the pleadings defective: *Kelly Lerro v Phillip Stagg & Ors* (2006) N3050 and *Phillip Takori v Simon Yagari & Ors* (2008) SC905 adopted and followed.
3. The appellant cannot raise on appeal on matters which were not pleaded in the statement of claim.
4. Defects in the statement of claim cannot be cured by submissions in the appeal.
5. There being no error shown in the judge's finding that the statement of claim failed to disclose a cause of action, the appeal was dismissed.

vicarious liability of the State

Nare v The State [2017] PGSC 9; SC1584 (28 April 2017)

Supreme Court: Injia CJ, David J, Ipang J, Higgins J, Neill J

CLAIMS BY AND AGAINST THE STATE ACT – Torts committed by police officers – liability of the State – whether act of tortfeasors must be so far removed from their lawful authority as to have no connection to it – vicarious liability of the State established if officers are acting or purporting to act in the course of their functions – no requirement to join individual officers as defendants or name them in the statement of claim – Kewakali v The State (2011) SC1091 overruled – Wrongs (Miscellaneous Provisions) Act 1995, s 1(1) and (4).

Proceedings were issued against the State as the sole defendant, claiming damage as a result of the wrongful acts of unnamed police officers commanded by three named officers, acting as servants or agents of the State. The State essentially denied that those persons were acting in the course of their employment. The tortfeasors' conduct was found to be unlawful by the trial judge, but as it was necessary for the tortfeasors to be joined as defendants, pursuant to *Kewakali v the State* (2011) SC1091, in order to establish vicarious liability, the proceedings were dismissed. On appeal, the court overruled *Kewakali v The State*.

Held

1. It is not mandatory to name or join as a party a tortfeasor who is acting as servant or agent, in order to determine vicarious liability of his master or principal.
2. The wrongful acts were shown to have a sufficient nexus or connection with the scope of the employment duties.
3. The onus was on the State to prove that the unauthorised action of the tortfeasors was so far removed from their authorised action that it had no connection with it.
4. The decision in *Kewakali v The State* is no longer good law and is overruled.
5. The State was vicariously liable for the tortious conduct of the police acting or purporting to act in the course of their duties.
6. The appeal was upheld, and judgment on liability entered against the State.

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