

**PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]**

OS NO 341 OF 2008

BETWEEN:

PNG DEEP SEA FISHING LIMITED
Plaintiff

AND:

GOVERNOR FOR MILNE BAY, HON. LUKE JOHN CRITTEN
First Defendant

AND:

**HON CHARLES ABEL, MINISTER FOR CULTURE & TOURISM & MEMBER
FOR ALOTAU**
Second Defendant

AND:

MILNE BAY PROVINCIAL GOVERNMENT
Third Defendant

AND:

MILNE BAY PROVINCIAL PHYSICAL PLANNING BOARD
Fourth Defendant

AND:

HON. PUKA TEMU, MINISTER FOR LANDS & PHYSICAL PLANNING BOARD
Fifth Defendant

AND:

PEPI KIMAS, SECRETARY FOR LANDS & PHYSICAL PLANNING
Sixth Defendant

Waigani: Salika, DCJ
2014: 21 May; 15 August

***PRACTICE AND PROCEDURE – Plaintiffs application to discontinue proceedings
granted – consideration for an award of costs on a solicitor/client basis.***

Cases cited:

Bishop Brothers Engineering Pty Ltd v Ross Bishop (1989) N705
Gulf Provincial Government v Baimuru Trading Ltd (1988) PNGLR 311
Jacob Sarapel v Fred Kulumbu (2003) N2405
Mision Asiki v Manasupe Zurenuoc (2005) SC797
PNG Waterboard v Gabriel Kama (2005) SC821,
POSF Board v Sailas Imanakuan (2001) SC677
Rex Paki v Motor Vehicle Insurance Limited (2010) SC1015
Benny Balepa v Commissioner of Police (1995) N1374
William Mel v Coleman Pakalia (2005) SC790

Counsel:

Mr S Ketan, for the Plaintiff
Mr D Liosi, for the Defendants

15th August, 2014

1. **SALIKA DCJ:** By a Notice of Motion filed on 9 May 2014 the Applicant/Plaintiff seeks orders to discontinue these proceedings pursuant to O.8 r.61 (2) of the *National Court Rules*. Order 8 Rule 61(2) says:

"A party making a claim by Originating Summons may, with the leave of the Court, discontinue the proceedings at any time so far as concerns the whole or any part of the claim. "

2. The defendants do not object to the grant of leave to discontinue the proceedings but raised the issue of costs.

The lawyer for the defendants argued that costs be awarded to them on a Solicitor/Clients basis while the plaintiffs lawyers submitted that the court award costs on a party/party basis.

The issue therefore arises as to whether the court in this case should order costs on a solicitor/client basis.

3. The defendants submitted that they have been put through these proceedings unnecessarily as it was clear from the outset that the plaintiff had no reasonable cause of action. As a result, the defendants say they have incurred unnecessary costs.

4. Amongst other orders the Originating Summons seeks a declaration that the plaintiff be declared as the registered proprietor of Allotment 5, Section 59, Alotau, Milne Bay Province. In support of the Originating Summons seeking those orders Jimmy Maladina, a Director of the Plaintiff in his affidavit filed on 18 June 2008 deposed that the plaintiff was the "registered lessee" of land Allotment 5 Section 59, Alotau, Milne Bay Province. The plaintiff purported to be the "registered lessee" of the subject land. If the plaintiff was indeed the "registered lessee" of the property, why seek a declaration from the court for that order. Was it doubtful of its own title to the land and thus required a court declaration.

5. The Director of the Plaintiff Company in his affidavit failed to disclose and described the circumstances the plaintiff became the "registered lessee" of the property.

6. I note too that the defendants filed an affidavit of Brian Aldrich on 10 October 2008. That affidavit gives the explanation of the circumstances the plaintiff purportedly became a "registered lessee". His affidavit clearly shows that the plaintiff's claim for a declaration that it be declared the registered lessee of the property could not be granted given the explanation by Brian Aldrich.

7. Order 22 of the *National Court Rules* gives the National Court spells out the court's jurisdiction to award appropriate costs.

8. The Supreme Court in *Rex Paki v Motor Vehicle Insurance Limited* (2010) SC1015 said:

"The award of costs on an indemnity basis is discretionary. An order for costs on an indemnity basis may be made where the conduct of a lawyer or a party to the proceedings is so improper, unreasonable or blameworthy that he should be so punished by such an order. The question is whether the conduct of the appellant in this matter is such that it caused the respondent to incur unnecessary costs."

9. I adopt that statement by the Supreme Court as I am of the firm view that the court should consider those circumstances to ensure parties take out or defend proceedings on proper basis.

10. The Supreme Court in the *Paki Case* identified a list of circumstances where the court has awarded costs on a solicitor-client basis and is open to the court to follow when exercising its discretion as to whether or not to award solicitor/client costs when applications are made. The following circumstances were identified:

a) Abuse of court process by invoking the courts review jurisdiction without reasonable cause and where there was no proper basis for filing such an application; and where the application is mischievous, unmeritorious and a clear abuse of process. See *PNG Waterboard v Gabriel Kama* (2005) SC821, *Gulf Provincial Government v Baimuru Trading Ltd* (1988) PNGLR 311, *Jacob Sarapel v Fred Kulumbu* (2003) N2405.

b) Running a defence case on a clear lack of defence; the claim could be settled but because of defendant's actions or inactions. The plaintiff is caused to undergo unnecessary litigation. See *POSF Board v Sailas Imanakuan* (2001) SC677; or the defendant took a position at trial when it had no basis on the fact or the law. See *Benny Balepa v Commissioner of Police* (1995) N1374; or

c) Wilful and deliberate defiance of a court order; see *Bishop Brothers Engineering Pty Ltd v Ross Bishop* (1989) N705.

d) The respondent's lawyers failed to appear at the hearing of an appeal; see *Willie Mel v Coleman Pakalia* (2005) SC790, *Mision Asiki v Manasupe Zurenuoc* (2005) SC797.

11. In this case the plaintiff was aware or ought to have been aware that the purported grant of lease over Allotment 5, Section 59, Alotau was not proper or legal in that there was never a Land Board meeting that recommended the grant of the lease. In my view therefore the matter might have been settled between but instead this protracted litigation was commenced and the defendants were put to unnecessary litigation by the plaintiff and made to incur unnecessary costs.

12. Seven (7) years on the plaintiff has now only come to its senses that it could not succeed and now this application to discontinue the proceedings. The proceedings had no merit right at the outset and yet it took some 7 years to put to bed.

13. In the circumstances, I am minded to award costs to the defendants on a Solicitor/Client basis and I so order.

Judgment accordingly,

Ketan Lawyers: *Lawyer for the Plaintiff*
Liosi Lawyers: *Lawyer for the Defendants*