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# National Court of Papua New Guinea

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## National Broadcasting Corporation v Taison [2019] PGNC 266; N8083 (28 October 2019)

[N8083](#)

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]

WS. NO.765 of 2012

BETWEEN  
NATIONAL BROADCASTING CORPORATION  
*Plaintiff*

AND  
SAM TAISON  
*First Defendant*

AND  
T.G. HOLDING LIMITED trading as FREEWAY MOTORS  
*Second Defendant*

Waigani: Kandakasi, DCJ

2016: 02<sup>nd</sup> November

2019: 28<sup>th</sup> October

***CONTRACT – Contract for supply of goods State or a public authority – Payment for goods requested before meeting public tender and contracting requirements – Whether written contract varied by conduct – Lack of essential elements of a binding contract – Effect of – Unilateral action of only one***

*of the parties - No evidence of the requirements of the [Public Finances \(Management\) Act 1995](#) met – Effect of – Illegal, void ab initio contract – Unenforceable contract – Quantum meruit claim – Need to establish innocence for breach of statutory requirements – Failure – Claim in quantum meruit not available -Evidence of some of the goods contracted for supplied – Need to allow for their value - Amount paid under illegal contract fully recoverable less the value of goods supplied to avoid unjust enrichment.*

### Cases Cited:

*Paul Busby v. Air Niugini Pty Ltd* (2001) [N2155](#)

*Nivani Ltd v. China Jiangsu International (PNG) Ltd* (2007) [N3147](#)

*Hargy Oil Palm Ltd v. Ewase Landowners Association* (2013) [N5441](#)

*Fly River Provincial Government v. Pioneer Health Services Ltd* (2003) [SC705](#)

*Panga Coffee Factory Pty Ltd v. Coffee Industry Corporation Limited* (1999) [SC619](#).

*Jack Livinai Patterson v. National Capital District Commission* (2001) [N2145](#)

*The State v. Barclay Bros (PNG) Ltd* (2002) [N2090](#)

### Legislation cited:

[Public Finances \(Management\) Act 1995](#)

### Counsel:

*P. Kup-Okut*, for the Plaintiff

*M. Kipa*, for the Defendants

**28<sup>th</sup> October, 2019**

1. **KANDAKASI DCJ:** The National Broadcasting Corporation (NBC), is seeking to recover a sum of K4, 626, 845.00 it paid to T.G. Holding Limited trading as Freeway Motors (Freeway Motors). That was for the supply initially of 27 Toyota branded motor vehicles and later 3 more such vehicles added bring the total vehicles to 30 (the 27 Vehicles) pursuant to a written Sale and Purchase Agreement (Contract) as varied. These monies were paid long before a meeting of the requirements of the *Public Finances (Management) Act 1995 (PFMA)* and signing of a formal contract. Of the amounts paid, K3, 126, 845 was the original contract price. The balance of K1.5 million was caused to be paid at the request of Freeway Motors with the approval of the then chairman of the Central Supply and Tenders Board (CSTB). That was allegedly for demurrage and storage costs.

### Parties Arguments

2. The NBC claims Freeway Motors failed to supply the 27 Vehicles in accordance with the terms of the contract despite having received the payment of K4, 626, 845.00 except for 4 Toyota branded vehicles out of the total 30 Vehicles. The NBC also claims that, Freeway Motors received the payments through fraud and misrepresentation. It reasons that Freeway Motors knew it was not going to supply the 30 Vehicles within the agreed period or at all at the agreed locations and it indeed failed to deliver the balance of 26 Vehicles. As for the additional K1.5 million payment, NBC says Freeway Motors did not incur the alleged expenses of demurrage and storage.

3. In response, Freeway Motors claims the parties varied the contract by conduct of the parties in two respects. Firstly, the parties agreed to allow for the K1.5 million additional payment for demurrage and storage. The second was for Freeway Motors to supply the balance of the Vehicles in the form of Great Wall of China, Wingles (Wingles). The conduct was in NBC failing to object or take issue with the Wingles being supplied. The NBC disputes the variation claims.

4. Being convinced that this case could easily be resolved by mediation, the Court referred the parties to mediation. Mediation did take place. Unfortunately, the parties failed to settle the matter due to Freeway Motors maintaining its position except only in respect of 10 vehicles it agreed to supply. That, it did but in the form of Wingles to various provincial locations without first informing the NBC management and not strictly in accordance with the written contract.

5. The parties through a formal statement endorsed by the Court agreed upon the relevant facts and issues for resolution. From that statement comes the foregoing summation of facts and other facts as I will refer to in the course of the judgment. For now, based on the statement, the parties agreed that the following are the issues for this Court to determine:

(1) Whether ... there was an initial variation of the contract between the State and the Defendants providing for the payment of K1.5 million for demurrage and storage costs?

(2) Whether ... there was a further variation of the contract by conduct of the Plaintiff in NBC accepting the delivery of the 13 Wingles without making any objections?

(3) Whether ... the 2009 Board decision was a variation or amendment anticipated by Clause 18(k) of the Sale and Purchase Agreement?

(4) Whether the vehicles were imported and stored in any yard by the Defendants?

(5) Whether the Sale and Purchase Agreement is void by fraud and misrepresentation?

(6) Whether ... the collection of K3, 126, 845.00 in 2007 prior to the award of the contract to Freeway Motors in 2008 amounts to fraudulent conduct?

(7) Whether ... the Plaintiff is entitled to recover its K4, 626, 845.00 with damages and costs for fraud?

(8) Whether the sum of K4, 626,845.00 was money had and collected by the Defendants for the use of the Plaintiff?

(9) Whether the Sale and Purchase Agreement was breached when the Defendant collected K3, 126, 845 and a further K1.5million but failed to deliver the promised vehicles?

(10) If so, whether the Plaintiff can recover the K4, 626,845.00 with costs and damages for breach of contract, misrepresentation and fraud?

6. Of these issues, issues 1, 2, 3 and 9 are determinative of all of the other issues. A determination of the other issues is dependent or consequential on a determination of the first three and the eighth issues. Accordingly, I will deal with these four issues first.

#### **Variation or Breach of Contract - Issues (1) - (3) and (9)**

7. The first three questions can be reframed in this way:

Whether the parties by their conduct varied the initial terms of the Contract to allow for:

(a) Freeway Motors to claim and for the NBC and the State to pay Freeway Motors the further sum of K1.5 million for demurrage and storage costs;

(b) Freeway Motors to supply the balance of 23 Vehicles (initially) in the form of Wingles in place of Toyota branded vehicles;

(c) Freeway Motors to supply an additional 3 vehicles to bring the total vehicles to 30 from the original 27 Toyota branded vehicles and hence the balance yet to be delivered is 26 vehicles?

8. Proper answers to these issues are dependent on an understanding clearly of what were the original terms of the Contract. It is also dependant on a clear understanding of the means or the process the parties used, to have the Contract varied, if indeed they had it varied by their mutual agreement. This requires a consideration of the relevant facts which are set out in the statement of agreed facts and issues and the relevant and applicable law.

9. From the agreed facts there is no dispute that the original terms of the Contract in relevant parts were as follows:

(1) The NBC required 27 Toyota branded motor vehicles comprising of 23 four-wheel 5<sup>th</sup> Element Hiluxs, one 10-seater Land Cruiser Trooper, two 15-Seater Hiace buses and one panel van;

(2) Freeway Motors bided to supply the required vehicles at a price of K3,126,845.00.

(3) The vehicles were to be supplied within 12 months of the date of the execution of the Contract; and

(4) The places at which the vehicles were to be supplied were the NBC's head office at 5 Mile, National Capital District and its 19 provincial locations.

10. Prior to a delivery of any of the Vehicles, Freeway Motors through its managing director, Mr. Sam **Tasion**, went to the then chairman of the CSTB, Mr. Brian Kummins and got him to approve its claim of K1.5 Million in demurrage and storage charges. The chairman of the CSTB granted the approval. Thereafter, Freeway Motors demanded and the NBC paid that additional amount.

11. Then contrary to the Contract, Freeway Motors delivered only four vehicles, one 10-Seater Landcruiser Trooper, two 15-Seater Hiace buses and a panel van. That left an outstanding 23 fully kitted four-wheel drive, 5<sup>th</sup> Element Toyota Hiluxs from the initial Contract yet to be delivered to the locations specified in the Contract within the agreed period of 12 months. That was despite having received the payments more than a year back. Consequently, NBC's board decided to vary the contract only in one respect, add a further 3 vehicles and increased the total vehicles yet to be delivered to 26 Vehicles. According to the agreed facts, Freeway Motors accepted this requirement. That brought the total vehicles to 30 of which only four were delivered leaving 26 yet to be delivered.

12. By August 2016, which was 9 years after Freeway Motors had received the K4 million plus payment it delivered:

- 13 Wingles, which according to the NBC's submissions (not disputed by Freeway Motors) were not fit for the purpose as they broke down within 6 months of their deliveries;
- A further 10 vehicles comprising of 6 Toyota Hilux 5<sup>th</sup> Element, 2 Toyota Landcruiser 5 doors and 1 Honda CRV.

13. There is neither any evidence, nor is there any agreement of the parties that, they agreed to a variation at the request of Freeway Motors for it to replace the 26 vehicles with Wingles instead of fully kitted, four-wheel drive, 5<sup>th</sup> Element Toyota Hiluxs. Additionally, there is neither any evidence nor is there anything in the statement of the agreed facts and issues as to when Freeway Motors requested and the NBC agreed to a variation of the original Contract for Freeway Motors to supply the balance of the vehicles in the form of Wingles. In the absence of any evidence of an agreement of the parties, it is clear that Freeway Motors decided unilaterally to supply 13 Wingles instead of the agreed, 26 fully kitted, four-

wheel drive, 5<sup>th</sup> Element Toyota Hiluxs to provincial locations. This Freeway Motors did without first informing and getting the approval of the NBC.

14. A variation of an existing contract is a contract in itself. This means the legal requirements for a legally binding and enforceable contract must exist in order for there to be a valid variation. It is settled law that, contracting parties may by their clear and unequivocal agreement, vary their contracts. Usually, the original of a contract would make provision for its variation. Where there are such provisions, its terms dictate how variations could be validly arrived at. In such a case, a valid contract variation can be brought about in accordance with the way or manner prescribed in the contract. Any departure from that which is prescribed could not amount to a valid variation of the contract,<sup>[1]</sup> unless the parties otherwise mutually agree in very clear terms. But in cases where such provisions are lacking, the parties must enter into a clearly binding agreement for the variation. In some instances, the variation of the contract may come by the conduct of the parties.<sup>[2]</sup>

15. In the present case, there is a reference to a provision in the original written contract, namely Clause 18(k) of the Contract that provides for variations. Unfortunately, its precise terms are not part of the facts the parties agreed to place before the Court. Given the position Freeway Motors has taken, in my view, it was duty bound to do two things. First produce the precise terms of the original Contract governing variation and secondly, establish by appropriate evidence a meeting of the requirements or prescription for any variation to the Contract or, if the parties departed from the terms for variation provide evidence of parties clearly agreement to the variations.

16. Additionally, I note this was a case of a contract with a public enterprise being the NBC and hence the State on the one side and a private corporate entity on the other side namely, Freeway Motors. The payment of over K4 Million came out of public funds. This, as of necessity, required formal documentation recording the parties' agreement to vary the contract, in terms of the need for the payment of the additional K1.5 million and for Freeway Motors to supply Wingles motor vehicles and not the originally agreed Toyota branded and fully kitted four-wheel drive, 5<sup>th</sup> Element, Toyota Hiluxs. The written document also needs to show that all the relevant requirements of the *PFMA* have been duly met or complied with.

17. Included in the provisions that needed to be complied with are the provisions of s. 47B which requires pre-commitments in order for a contract to be enforceable, given the provisions of s. 47C. Also, the contract variations had to come through persons who are authorized for that purpose under s. 32 of the same Act. This provision relevantly provides for variation of contracts and all variations to go through an approved officer appointed under the Act in writing. There is neither any evidence, nor is there any suggestion that an approved officer under the Act approved the alleged variations to the contract in this instance. There is a reference to the former chairman of the CSTB approving Freeway Motors's claim of K1.5 Million in demurrage and storage costs. But there is nothing to indicate he is an approved officer for the purposes of s. 32 of the *PFMA* and or he did have the authority at the relevant time to approve and require the NBC to make the payment. There is no provision authorizing the chairman of the CSTB to independently and on his own approve contracts or claims. Instead, he is the chairman of the CSTB established under s. 39 and the only authorized body to consider and make decisions on contracts for supply of goods and services is the CSTB itself. The CSTB authorized the initial Contract for the supply of 27 Toyota branded motor vehicles for a fixed price. That price changed and so did the make and model of the vehicles to be supplied. There is nothing to demonstrate that, the variations went through the correct process for approval before it could become a legally binding contract.

18. Further, it is public knowledge and I take judicial notice that the Wingle vehicles are late comers in the motor vehicles scene or industry as opposed to 5<sup>th</sup> Element, Toyota Hilux motor vehicles. Toyota is a well-established, well-known and reliable motor vehicle brand. That means prices for the Wingles would be lower than the fully kitted, four-wheel drive, 5<sup>th</sup> Element, Toyota Hiluxs. The NBC bargained for and Freeway Motors undertook to deliver to NBC within 12 months of the signing of the original Contract the 27 Vehicles. This gives rise to a number of questions, which I list below:

- (a) What was the price for each of the Wingles?
- (b) Were the Wingle vehicles able to match if not, outperform the Toyota Hilux's and if so, in what ways?
- (c) Was there a difference in the prices and if so, what was the difference for each of the vehicles?
- (d) What was the total price difference between the Toyota branded vehicles and the Wingles?
- (e) What agreement did the parties reach on what should become of the price difference, if any?
- (f) Was Freeway Motors to have the price difference reimbursed or keep them and what were the reason or factors favouring such a decision?
- (g) If the difference in the prices were to be reimbursed, when was that agreed to take place and did the reimbursement occur?
- (h) What was the reason for the variation?
- (i) Did Freeway Motors make a clear proposal for a variation of the contract?
- (j) Did NBC unequivocally accept the proposal for a variation of the contract? and
- (k) Did the parties arrive at a legally binding agreement for a variation of the Contract for the initial 27 and later increased to 30 Vehicles and did such a variation meet the requirements of the *PFMA* and if so, how was that done?

19. These and many other unanswered questions cast a serious doubt on Freeway Motors's claims of a variation of the terms of the original Contract. Obviously, there is lack of clarity in terms of how the alleged variations were negotiated, what were the precise terms of the variation, the manner and form in which the alleged variations were crystalized and a formal contract being executed by persons with the necessary authorities both for Freeway Motors and the NBC.

20. I repeat what I said earlier. An agreement to vary a contract is a legally binding and enforceable contract. As such, the essential elements of a legally binding and enforceable contract must exist to enable a finding for a variation of a contract in the event of a dispute as is the case here. Speaking in the context of a mediated agreement and for such agreements to reach the point of them becoming legally binding and enforceable contracts, I remind myself of what I said in *Hargy Oil Palm Ltd v. Ewase Landowners Association* (2013) [N5441](#):

*“All agreements arrived at mediations are legally binding and enforceable, provided the essential elements of a valid contract are present. What then are the essential elements of a valid contract? A quick perusal of the relevant authorities...reaffirms and brings out clearly the following as the essential elements of a legally binding and enforceable contract:*

- (1) *a clear offer and acceptance;*
- (2) *an intention to create a legally binding contract;*
- (3) *passage of valuable consideration each way; and*
- (4) *Each of the parties has the legal capacity to negotiate and enter into a contract.”*

21. I went on to observe that even if all of these elements exist, contracts can be invalidated or nullified in certain known circumstances and pointed out the circumstances as follows:

- “(a) there is a failure to meet statutory requirements in cases where the contracts are regulated by statute;*
- (b) the agreement is to commit a crime or commit an act that is illegal such as an agreement to carry out a bank robbery;*
- (c) there has been fraudulent misrepresentation in some material respect at the negotiations which eventually leads to an agreement;*
- (d) the terms of the contract are unreasonable and unfair; and*
- (e) there has been use of force and or duress to obtain or secure the contract.”*

22. In the present case, there is no case either from the facts as agreed to by the parties or from any material before the Court of a clear:

- (a) offer and acceptance of a proposal for a variation of the original contract between the parties;
- (b) intention to enter into a legally binding contract to vary the original Contract between the parties especially when there are more unanswered material questions;
- (c) passing of valuable consideration between the parties. Whilst valuable consideration passing from NBC to Freeway Motors was allegedly for it to supply vehicles of descriptions and specifications outside the original terms of the Contract and received an additional payment of K1.5 million, there is neither any evidence nor is there any submission pointing out to a clearly identified valuable consideration passing from Freeway Motors to the NBC and hence the State; and
- (d) evidence of Freeway Motors dealing with an approved officer and therefore a person having the necessary capacity and authority for the purposes of the *PFMA* and getting the required approval in accordance with the relevant and applicable provisions of the said Act.

23. In addition to the foregoing factors, I find there are number of other factors operating against Freeway Motors claim of the parties having validly varied the Contract. Firstly, all public contracts for goods and services are governed by a number of relevant and applicable legislation. The main one is the *PFMA*. The need to meet the requirements of the said Act and avoid adverse consequences that could follow any none compliance was emphasized by the Supreme Court in its decision in *Fly River Provincial Government v.*

*Pioneer Health Services Ltd* (2003) [SC705](#). A good summary of what the Supreme Court said in relevant parts is in the headnotes and the summary of the case in the following terms:

*“2. The requirements under ss.59 and 61 of the PF(M)A are mandatory and where a contract is entered into in breach of those requirements, it is illegal and is therefore null, void and unenforceable.*

*3. The requirements under the PF(M)A are to enable transparency in all public contracts and to safeguard against corruption and enable securing of fair contracts with public institutions and or bodies for the best services at a competitive or best price.*

*4. A person dealing with the State or any of its arm or instrumentality or a public institution to which the Act applies, is bound to comply with the requirements of the Act and every person dealing with such institutions or bodies are deemed to be aware of these requirements.*

*5. A failure to ensure compliance of the requirements of the Act operates to the detriment of the party contracting with the State or a public authority to which the Act applies.*

*6. Where an illegal contract is part performed an action for recovery or restitution is available if not already paid for in equity to avoid unjust enrichment condition (sic) on the innocence of the contracting parties.*

*7. In the present case, the contract between the Appellant and the Respondent is null and void for non-compliance of the public tender and Minister for Finance’s approval under the PF(M) A.*

*8. However, since the contract was part performed and the Appellant received goods and service from the Respondent, in equity the Respondent is entitled to pursue its claim for a recovery of the costs and expenses it has incurred by way of restitution. But this is conditional on showing its innocence in the creation of the illegal contract.”*

*(Underlining supplied)*

24. In the main part of the judgment, the Supreme Court elaborated on the innocence of a party contracting with the State or a State entity in the following terms:

*“It is trite law that an innocent party to an illegal or void contract would not be left without any remedy....*

*A bona fide contractor who has provided services of value is not left without a remedy. There is no unfairness in upholding the legislation in such circumstances and allow an innocent party to recover*

*damages on a quantum merit basis to avoid unjust enrichment by the other if the contract has been part performed.*

*Some authorities describe this principle as the right of restitution. ... Such a right is not to enforce a contract but because justice and equity demands it. A party seeking restitution must be able to establish at the least that it is not responsible for or not an equal participant in the illegality. The converse of that is that restitution is not available to a party, which knowingly or cynically entered into an illegal contract. Thus, where a Court finds willing participation in an illegal contract there will be no recovery.”*

25. In the earlier part of its judgment the Supreme Court emphasis the need for all parties contracting with the State or any State entity to ensure all of the relevant requirements of the *PFMA* are complied with and a formal contract is executed. A failure to do so renders such a contract null and void by reason of which it is unenforceable. It pointed out that a private entity like the Freeway Motors dealing with a State entity like the NBC in this case, is under an obligation to ascertain all the relevant and applicable legislation and ensure to meet all of the requirements to ensure the contract is legally valid and enforceable. Doing so, is part of a contractor’s due diligence obligation which must be discharged.

26. As the Supreme Court noted in that case, the Courts have in a number of cases, refused to uphold contracts that did not meet the requirements of the *PFMA*. This includes the decision in *Panga Coffee Factory Pty Ltd v. Coffee Industry Corporation Limited* (1999) [SC619](#). There the Coffee Industry Corporation Limited was allowed to get a contract it had with the Panga Coffee Factory Pty Ltd declared null and void and unenforceable for not having the necessary authority under its enabling statute to exempt Panga Coffee Factory from statutorily required levies. The Court has been consistently maintaining this view. One of its latest decision on that point is its decision in *NCDC v. Yama Security Services Pty Ltd* (2003) [SC707](#). There the Court spoke against a deed of release compromising an earlier proceeding without duly complying with the relevant and applicable provisions of the *PFMA*.

27. In this case the following factors are important:

(1) The NBC is a statutory corporation incorporated under the [Broadcasting Corporation Act 1973](#) as amended and is headquartered at Five Mile opposite Hubert Murray Highway, National Capital District (NCD) and has 19 Provincial radio stations nationwide in Papua New Guinea to disseminate news and information to the people nationwide;

(2) Given that NBC is part of the State, the parties had to go through the public tender process provided for under the *PFMA*, which they did for the original contract. Any variation to the original contract had to be in due compliance of the said Act. There is no evidence of the parties meeting the requirements under the Act in question;

(3) As a result of the NBC’s management’s decision to refleet its vehicles at headquarters and the 19 provincial centres, it in consultation with the CSTB, requested bids from Ela Motors and Freeway Motors for the supply of the 27 Vehicles. Freeway Motors sent its bid proposing to supply the 27 Vehicles at K3, 126, 845.00;

(4) The First Defendant Mr. Sam  **Tasion**  is the Director, Shareholder and Executive Chairman to Freeway Motors. Freeway Motors is a motor vehicles dealership which sells motor vehicles and conducts business in hire cars, motor vehicle spare parts, accessories and services in the NCD. It is controlled and managed by Mr. Tasion;

(5) During the procurement of the 27 Vehicles, Freeway Motors through Mr.  **Tasion**  made representations and gave warranties that it is a *bona fide* car dealer, had the necessary capacity and capability to sell and supply the 27 Vehicles at the specified locations for the indicated price. Based on these representations, NBC recommended to CSTB to award the contract to Freeway Motors. The CSTB issued a Certificate of Inexpediency and all relevant and required statutory approvals authorizing the NBC to procure the 27 Vehicles from Freeway Motors for the agreed price of K3, 126, 845.00. A formal contract confirmed that;

(6) Without any formal variation of the Contract, Freeway Motors got the CSTB to approve a further K1.5 Million to be paid to it by NBC. That was allegedly for demurrage and storage costs necessitated by alleged importing and storing of the 27 Vehicles from Singapore. The NBC paid the additional K1.5 Million as well as the original contract price by a number of cheques with the latest one paid on 09<sup>th</sup> September 2008. This was done a year before the supply of any vehicle;

(7) After receiving the payments, Freeway Motors delivered to NBC's head office at 5 Mile, NCD only four vehicles and failed to deliver the bulk of the agreed vehicles within the next 12 months or soon thereafter. Following a none delivery of the balance of 23 fully kitted, four-wheel drive 5<sup>th</sup> Element Toyota Hilux vehicles initially, the Board of NBC resolved for Freeway Motors to supply the 27 vehicles immediately with an additional 3 vehicles to be included with a 5 years warranty period to be formalised and signed by the parties;

(8) In 2009 Freeway Motors supplied directly to various NBC centres in Papua New Guinea 13 Wingle vehicles on various dates. Freeway Motors did not expressly request and the parties did not expressly agree to vary their contract to allow for Wingles instead of the Toyota branded vehicles. Also, Freeway Motors did not inform NBC's management and board of its delivery of the 13 Wingles;

(9) Two years later by letter dated 2 February 2011, the NBC demanded Freeway Motors to supply the outstanding Toyota branded Vehicles. Freeway Motors refused to meet the demand claiming it had supplied all of the vehicles except for a further 10 vehicles which it was ready to delivery but the NBC had not taken delivery of. In taking that position, Freeway Motors claimed the contract was varied. The variation it claimed was for the 26 fully kitted, four-wheel drive, 5<sup>th</sup> Element Toyota Hilux vehicles to be replaced by Wingles;

(10) Before the matter came back to the Court, Freeway Motors delivered 10 more Wingle vehicle by 5 August, 2016;

(11) There is no evidence of Freeway Motors formally or at all making a clear and unequivocal request for a variation for it to supply Wingles instead of fully kitted, four-wheel drive, 5<sup>th</sup> Element, Toyota Hilux vehicles. There is also no evidence of NBC accepting any such request in clear terms entered into a clear

bidding and enforceable agreement to vary the terms of the original contract in favour of Freeway Motors.

28. These factors make it clear that parties did not enter into a legally binding and enforceable agreement for a variation of the original written Contract in the terms claimed by Freeway Motors. There is however, no dispute that the variation sought by NBC's board was accepted by Freeway Motors. Hence, I find there was a variation to the original contract for Freeway Motors to supply an additional 3 vehicles, bringing the total out outstanding to 26 Toyota branded vehicles. No doubt, Freeway Motors breached the original contract by failing to deliver the agreed Toyota branded Vehicles within the agreed time and location.

29. Based on the foregoing, I answer issues 1 and 2 in the negative and issues 3 and 8 in the affirmative.

#### **Importation and storage of the Vehicles - Issue 4**

30. I now turn to the issue number 4 which concerns the importation and storage of the Vehicles by Freeway Motors. This issue has been poorly draft in that it fails to give proper context. However, given the agreed facts and the first three issues, I am of the view that this issue relates to Freeway Motors's claim of having incurred demurrage and storage costs. I will thus consider the issue in that context.

31. There is no agreement of the parties either per the statement of agreed facts and issues or any other material before the Court that deals with this issue. All we have is Freeway Motors's claim of having incurred demurrage and storage costs in the sum of K1.5 million. There is no evidence whatsoever of Freeway Motors having incurred these costs. There is also neither any evidence nor any indication elsewhere as to how such costs were not included and or built into the original Contract price of K3, 126, 845.00. Similarly, there is neither any evidence nor is there any indication of how in terms of the original terms of the Contract, Freeway Motors is entitled to claim and receive payments for these alleged costs. Further, there is neither any evidence nor is there any indication of how Freeway Motors was able to convince the then chairman of the CSTB to approve this claim and require NBC to meet these additional costs. This is critical, especially when there is no evidence of NBC agreeing, to meet these costs prior to making of the payments and an apparent failure to comply with the relevant provisions of the *PFMA*. What is very clear however, is this. Despite having received the payments a year before the actual awarding of the Contract, Freeway Motors was still not able to supply the 27 and later the additional 3 Toyota branded Vehicles, except only for four of them. The duty was on Freeway Motors to establish the foundation for its case both on the facts and as a matter of law. It failed to do so. In these circumstances, I find no case has been made out for a finding that the Vehicles were imported and stored in any yard by Freeway Motors to form the foundation for its demurrage and storage costs claim of K1.5 million. Accordingly, I answer the fourth issue in the negative.

#### **Fraud and misrepresentation - Issues 5 and 6**

32. Issues 5 and 6 are the next set of issues for us to consider. These issues raise the issues of fraud and misrepresentation by Freeway Motors at the time of the parties entering into the original Contract and Freeway Motors collecting the initial contract price of K3, 126, 845.00 prior to the award of the contract as well as the claim in receiving the additional K1.5 million.

33. The Court has already found that the parties did not arrive at a legally binding and enforceable agreement for a variation of the original Contract. The Court also found that as at the time of entering into the original Contract, Freeway Motors represented that, it had the capacity and was in a position to supply 27 Toyota branded Vehicles. I find that, Freeway Motors, made that representation when it knew very well or had reason to know that it was in no position to supply at the agreed locations the 30 Vehicles and within the agreed price and time. This was clearly confirmed and established by Freeway Motors's inability to deliver the balance of 26 Toyota branded Vehicles within the contractual period or soon thereafter. Further, the Court has also found that Freeway Motors made its claim of K1.5 million in alleged demurrage and storage costs without the support of any evidence clearly establishing the incurrance of these costs. Freeway Motors also did not seek and secure an agreement of NBC and went directly to the then chairman of the CSTB and secured approval to include those amounts to the contractual price.

34. What happened here is completely contrary to the requirements of the *PFMA*. The whole tenet of the *PFMA* is to allow for a transparent process for the State, any of its departments or agencies and or entities to seek and secure supply of goods and services from the best possible person and a best possible price. This is done through the public tender process. As I said in *Jack Livinai Patterson v. National Capital District Commission* (2001) [N2145](#), the legislative intention behind ss. 59 and 61 of the *PFMA* is:

*“...to control and manage the finances of the State, its arms, instrumentalities and any other public body. A quick perusal of the various provisions of the Act makes it clear that the Act is aimed at proper budgetary appropriations and spending according to budget. It is also to ensure the maintenance of proper records and accounts of public finances both in terms of incomes and expenditures.”*

35. I then went on to discuss the provisions of ss. 58, 61, and 48(4) of the *PFMA* and concluded at page 15:

*“These provisions were enacted, in my view to ensure transparency in all dealings with public authorities and persons or parties who is or are not the State, an agent of the State, or an arm or instrumentality of the State, approved by the Minister to provide the works, supplies or services. The benefits of these requirements is not only to ensure transparency but is more importantly, intended to ensure that all who are able to provide the kind of works, supplies or services under consideration are given the opportunity to get the best works, supplies and or services as the case may be, at the best possible price subject to its budget. A closed dealing may not necessarily provide for the best possible works, supplies and or services at a price that is reasonably justified and may facilitate fraud or corruption.*

*The intent therefore of Parliament in enacting these requirements of the Act, was in my view, to ensure that public authorities do not enter into contracts having monetary values that exceeded the limits set without first meeting the requirements for tender and approval of the Minister. In other words, Parliament by enacting the provisions of sections 59 and 61 of the Act, prohibited contracts over K100, 000.00 for some and K500, 000.00 for others with private persons with a public authority unless put through tender and approved by the Minister for Finance. It follows that, a contract that does not meet the tender and ministerial approval requirement is illegal and also because it goes against an important public policy in the vital area of public finance it is void and unenforceable.”*

36. Having regard to the provisions of the *PFMA*, I decided in the end to dismiss Mr. Patterson's claim of K4.3 million in legal fees on the basis, inter alia, that, the requirements for public tender and approval

under the *PFMA* were not met. Similarly, the Deputy Chief Justice, Sir Mari Kapi, held that a construction contract entered into with an agent of the State without complying with the *PFMA* was null and void in case of *The State v. Barclay Bros (PNG) Ltd* (2002) [N2090](#).

37. Both of these judgements went to the Supreme Court on appeal. The appeal in *Jack Patterson (supra)* was dismissed on a successful objection to competency of the appeal. The appeal against the judgement in *Barclay Bros (supra)* was also dismissed after a hearing on its merits. In so doing the Supreme said at page 7 of its judgement:

*“... a public body which includes the State cannot act or bind itself to act outside powers authorized by statute. It cannot extend its powers in contract for example by creating or attempting to condone an estoppel. Nor can anyone purporting to act as an agent bind that public body to do what is by statute ultra vires. Nor again can a public body by acting through an agent avoid duties, responsibilities and or processes prescribed by statute. That is, statutory procedures must be given legal effect, otherwise anyone could with impunity enter such contracts with full knowledge of the contravention and yet insist the contract made is valid and enforceable.”*<sup>[3]</sup>

38. The Supreme Court in the *Fly River Provincial Government v Pioneer Health Services* case, cited my decision in the *Jack Patterson* case with approval and came to a similar decision.

39. In the present case, the payment of the initial contract price and the additional K1.5 million represented a substantial amount of money going out of the public purse well before an awarding of the original Contract. These payments were made when Freeway Motors was in no position to supply the agreed Vehicles within the agreed period and at agreed locations. I further find that the payments were made when there was no contractual or other legal foundation and obligation for the NBC and hence the State to pay. Of course, subsequent to the payment, the parties did come to an agreement albeit outside the requirements of the *PFMA* fixing a contract price of K3, 126, 845.00 for Toyota branded vehicles. That formal contract was in effect an attempt at legalizing an illegal transaction that had occurred outside the *PFMA* requirements. Further, there is no evidence or agreement of the parties that a similar agreement on the claim for demurrage and storage costs which received the approval of the CSTB as opposed to its then chairman was arrived at with the mutual agreement of the parties. In either case, there is no evidence of the persons with authority to bind the NBC and the State with the ultimate authority being the Minister for Finance and or the Head of State executing the Contracts. Furthermore, I find there are a lot more questions than answers in the absences of any further evidence or agreement of the parties. Some of the questions are:

- (a) How was it possible to get Freeway Motors paid long before the awarding and execution of any formal contract either for the original or the allegedly varied contract?
- (b) What was the reason for the issuance of the certificate of inexpedience and or the justification for paying Freeway Motors well before the awarding and execution of the Contract?
- (c) Did the terms of the original Contract make provision for demurrage and storage costs and if so, did Freeway Motors claim for these costs within the terms of the agreement?
- (d) If costs for the alleged demurrage and storage were not part of the original Contract why and how was that so and how was Freeway Motors entitled to claim and have them paid outside the original terms of the Contract?

- (5) By what authority was the then chairman of the CSTB able to approve Freeway Motors's claims for demurrage and storage costs when there was no agreement by the parties for these costs to be paid and in the absence of any decision of the CSTB?
- (4) What were the prices for each of the Wingles supplied by Freeway Motors and were they the same and or similar Toyota branded Vehicles and if so how was that possible?
- (5) Did the NBC and the State receive a fair deal from Freeway Motors compared to what Ela Motors may have offered?
- (6) Was the increase of the contract price by K1.5 million fair and reasonable and how was that so?
- (7) Has Freeway Motors taken an unfair advantage over Ela Motors and consequently was Ela Motors unfairly denied the opportunity to offer a better deal to the NBC? and
- (8) How was the payment of over K4 million fair and reasonable when Freeway Motors failed to deliver all of the Toyota branded Vehicles in accordance with the terms of the original Contract?

40. If, despite these questions, there was an agreement, such an agreement was illegal and unenforceable for lack of due compliance of the relevant provisions of the *PFMA*. It is also obvious that if ever there was a variation, it was unilaterally arrived at by Freeway Motors. Further, it is crystal clear that Freeway Motors was in no position to supply the initial and later increased 30 Toyota branded Vehicles within the initially agreed period for the agreed price. Freeway Motors was in a position to know and or had reason to know and appreciate that weakness on its part if indeed it was a weakness and not a deliberate act to defraud the NBC and hence the State. If it was a weakness, it proceeded to enter into a contract of substantial value despite its' known disability.

41. In these circumstances, I find the original Contract was facilitated and arrived at by fraud, misrepresentation, dishonesty and illegality for breach of the requirements, the intents and the whole purpose of the *PFMA* by Freeway Motors through its managing director and sole shareholder Mr.  **Tasion**  with the help of the then chairman of the CSTB. These actions constitute a serious and clear corrupt deal at its worst that falls nothing short of a fraud on the statute, namely the *PFMA* and its intention and purpose, the NBC, the State and the people of PNG. I also find that, those who purported to represent the NBC at the relevant time facilitated the commission of these illegal and corrupt acts by making the payments instead of refusing to pay. They had more reason than not, to refuse to make the payments, when there was no evidence of a written contract at the relevant time and lack of evidence of the parties' agreement in terms of the original Contract and the subsequent alleged variation requiring the NBC to pay the additional K1.5 million. This factor should however, be of no relieve to Freeway Motors which initiated and committed the illegal and corrupt acts. Given that, Freeway Motors cannot gain from its own illegal and corrupt acts. Proceeding on this basis, the answers to issues 5 and 6 are in the affirmative. That is to say the Contract in this case, both in the original allegedly varied versions were *void ab initio* or were null and void from the very beginning. This in turn renders the payment of the initial K3, 126, 845.00 in 2007 and the further K1.5 million fraudulent.

### **Effect of Freeway Motors's fraudulent and illegal conduct - Issues 7, 8 and 10**

42. What then is the effect of the above findings and the answers to issues 1- 6 and 9? That question is the subject of the remaining issues, 7, 8 and 10, which I will deal with together in the following order:

(7) Whether ... the Plaintiff is entitled to recover its K4, 626, 845.00 with damages and costs for fraud?

(8) Whether the sum of K4, 626,845.00 was money had and collected by the Defendants for the use of the Plaintiff?

(10) If so, whether the Plaintiff can recover the K4, 626,845.00 with costs and damages for breach of contract, misrepresentation and fraud?

### **Effect of money paid to Freeway Motors –Issue 8**

43. Until this Court's finding and decision in the foregoing, the parties had a contract albeit illegally and corruptly arrived at. As noted, the contract was for Freeway Motors to supply Toyota branded Vehicles totaling 27 initially and later increased to 30 and the NBC was to pay the sum of K4, 626,845.00. The NBC fulfilled its part of the contract by making the payments in full long and well before the award of the contract and any delivery of the vehicles. The amounts thus paid were monies had and received in the hands of Freeway Motors for the benefit of NBC until a full discharged of its obligations under the Contract. Hence, I answer issue 8 in the affirmative.

### **Recovery of the K4, 626,845.00 - Issues 7 and 10**

44. The next question then is, did Freeway Motors discharge its obligation under the illegal and null and void contract in order to enable it to keep the K4, 626,845.00 received into its hands? As already found, Freeway Motors breached the contract by failing to supply a total of 26 Toyota branded Vehicles out of a total of 30 such vehicles. In further breach of the contract of sale in a unilateral act, Freeway Motors delivered a total of 13 Wingles, which were not fit for the purpose as they broke down within 6 months of their deliveries. Then in August 2016, about 9 years after being fully paid, Freeway Motors delivered a further 10 vehicles comprising of 6 Toyota Hilux Fifth Element, 2 Toyota Landcruiser 5 door and 1 Honda CRV. Clearly, Freeway Motors did not fully discharge its duties and obligations under the Contract within its expressed terms despite having received full payment of K4, 626,845.00, more than a year. It should follow therefore that, NBC and hence the State should be entitled to recovery of the K4, 626,845.00 they paid to Freeway Motors.

45. If no vehicle was ever supplied by Freeway Motors, the NBC should be able to recover the full K4, 626,845.00 it paid to Freeway Motors plus damages and costs. The fact of the matter however is that, Freeway Motors did supply some vehicles except for 3 additional vehicles it agreed to supply but did not. In any case, the delivery of the vehicles was completed in August 2016, which was 9 years after Freeway Motors had received the payments. The makes and models of the vehicle thus supplied were contrary to what was prescribed in the Contract with 13 of them, Wingles, not being fit for their required purpose.

45. There can be no doubt that Freeway Motors could have and in the absence of any evidence and submission to the contrary by Freeway Motors, it did made use of the K4, 626,845.00 for its own gain. Meanwhile, NBC and hence the State did not get their value for money for 9 years and were thus deprived of the full use of those funds and go without the vehicles it contracted for. Consequently, NBC would have suffered loss and damages both from not getting the vehicles it contracted for and having

parted with the K4, 626,845.00. Attempts to have the matter resolved promptly through direct negotiations and failing that by mediation failed on account of Freeway Motors refusal to reason with NBC and a good faith use of the mediation process.

46. The law on point as represented by the decision of the Supreme Court in *Fly River Provincial Government v. Pioneer Health Services Limited* is clear. A contract as in the present case, that has been arrived at in breach or without duly meeting the requirements of the *PFMA* is null and *void ab initio* and is thus unenforceable. Where such a contract has been performed in part, a claim based on the principle of *quantum meruit* may be possible, provided the private party contracting with the State or any of its entities is innocent of the breaches of the Act. In this case, the Court found Freeway Motors is not innocent of the breaches of the requirements of the Act and its intent and purpose. The Court also found that the illegal contract came into existence very much at the initiation of Freeway Motors which misrepresented and fraudulently dealt with NBC and is responsible for a breach of the requirements of the Act. That resulted in the K4,626,845.00 being paid over to Freeway Motors without its duty to supply the vehicles contracted for being completed within the agreed period of 12 months but after 9 years later. In any case, the vehicles belatedly supplied fell short by 3 and the rest where supplied way out of time and not in accordance with the contractual prescription in terms of their makes and models and were not fit for their required purposes for at least the 13 Wingles. Taking all these factors into account I find Freeway Motors has unjustly enriched itself at the expenses of the NBC and the State to the value of K4, 626,845.00 and any other losses and damages the NBC may have suffered. I would therefore order a full reimbursement of the K4, 626,845.00 together with any proven loss and damage.

47. However, in its submissions the NBC asks for a reimbursement of a total of K3, 095,295.00. This consists of K1, 595, 295.00 being for the equivalent of the value of 13 Hiluxs not supplied and the K1.5 million in demurrage and storage that has no contractual or factual foundation. This allows for Freeway Motors to keep K1, 531,550.00. That in my view would adequately cover for the value of the vehicles actually supplied in breach of the Contract and very late. I consider that more generous of NBC and in any case, it ensures there is no unjust enrichment by one against the other. Accordingly, I would order judgment against the Defendants in the sum of K3,095, 295.00 by way of reimbursement to the Plaintiff. I would also order interest at 8 % from the date of the issue of the writ to the full satisfaction of the judgement. Costs will follow the event in favor of the Plaintiff to be taxed, if not agreed.

48. Judgment in the above terms is not the end of the matter. Instead, it is only part of what the NBC is claiming in its statement of claim. The statement of facts and issues do not say anything about what becomes of the remaining parts of the claim. The parties are therefore, required to address the Court on what becomes of the remaining parts of NBC's claims. For that purpose, the parties are required to return to the Court on 05<sup>th</sup> December 2019 at 9:30am.

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Ninai Lawyers: *Lawyers for the Plaintiff*  
Fairfax Legal: *Lawyers for the Defendants*

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[1] See *Paul Busby v. Air Niugini Pty Ltd* (2001) [N2155](#)

[2] See *Nivani Ltd v. China Jiangsu International (PNG) Ltd* (2007) [N3147](#).

[3] Appearing in the *Fly River Provincial Government v. Pioneer Health Serves* case.

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