

**SC2089**

PAPUA NEW GUINEA  
[IN THE SUPREME COURT OF JUSTICE]

**SCM 25 OF 2020**

BETWEEN:  
**AMANAB FOREST PRODUCTS LIMITED**  
*Appellant*

AND:  
**PAUL SAI'I, GUNTHER JOKU, NOAH TAMBI,  
THERESA KAMU, JOSEPHINE GENIA, BOB  
TATE and JACOB AREMAN as members of the  
National Forest Board**  
*First Respondents*

AND:  
**PAPUA NEW GUINEA FOREST AUTHORITY**  
*Second Respondent*

AND:  
**THE INDEPENDENT STATE OF  
PAPUA NEW GUINEA**  
*Third Respondent*

AND:  
**PACIFIC GREEN TIMBER LTD**  
*Fourth Respondent*

AND:  
**MINEP LIMITED**  
*Fifth Respondent*

AND:  
**MIDOWA LIMITED**  
**on its own and on behalf of named 43 Incorporated  
Land Groups of Walsa FCA**  
*Sixth Respondent*

Waigani: Hartshorn, J  
2021: 18<sup>th</sup> & 19<sup>th</sup> February

***INJUNCTION - Contested application for a stay and injunctive relief - grounds for the grant of stay and injunction considered – appellant has demonstrated it has an arguable case – appellant will be prejudiced if stay order and an interim injunctive relief is not granted – interim injunction is granted to the appellant***

## **Cases Cited**

*Joshua Kalinoe v. The State* (2010) SC1024

*Kawari Fortune Resources Ltd v. Apurel* (2015) SC1614

## **Counsel:**

*Mr. R. Bradshaw*, for the Appellant

*Mr. S. Mitige*, for the First and Second Respondents

*Mr. T. Tape*, for the Sixth Respondent

## **Oral decision delivered on**

**19<sup>th</sup> February 2021**

**1. HARTSHORN J:** This is a decision on a contested application for a stay and injunctive relief. The Appellant seeks:

- a) a stay of a decision of the first respondent to excise or remove 17,000 hectares of land area (**excised land**) from a certain Forest Management Area;
- b) that the first, second and third respondents be restrained from issuing or granting any permit, licence or Forest Clearing Authority (**FCA**) over the excised land;
- c) that the respondents, their servants and agents to be restrained from engaging in any forest industry activity within or outside the excised land.

## **Background**

2. The appellant appeals the dismissal of a judicial review proceeding by the National Court.

3. The dispute concerns a timber permit and the excision of part of the land of the timber permit for an FCA.

4. The appellant holds a timber permit for the area described as Amanab-Blocks

1-4 and the Imanda Consolidated Forest Management Act at Vanimo, Sandaun Province (**Amanab FMA Area**). The Permit is for 35 years from 17<sup>th</sup> May 2012.

5. The appellant claims that 17,000 hectares of land area forming part of the Amanab FMA was excised by the first and second respondents to form part of an FCA. This excision was without the approval, knowledge or consent of the appellant, contrary to s. 90(A) (2) *Forestry Act*.

6. An FCA was granted to the fourth respondent on 28<sup>th</sup> September 2015 for 34,000 hectares and 17,000 of the 34,000 hectares is comprised of the excised land.

7. The appellant commenced a judicial review proceeding to review decisions of the first and second respondents and leave was granted. That proceeding was dismissed upon application by the sixth respondent. That dismissal is the subject of this substantial appeal.

8. The first, second and sixth respondents claim amongst others that:

a) the excised land was excised before the timber permit was issued to the appellant and so the appellant's consent was not required;

b) the FCA to the fourth respondent has been cancelled and a new FCA was granted to the sixth respondent on 2<sup>nd</sup> November 2020. The new FCA is not the subject of the National Court proceeding and this Supreme Court proceeding;

c) events have now overtaken the National and Supreme Court proceedings and a stay would affect a decision which is not the subject of this appeal. A stay would also affect the sixth respondent's rights.

## **Consideration**

9. The appellant makes application for a stay and injunctive relief pursuant to s. 5(1)(b) *Supreme Court Act* and the inherent jurisdiction of this court. Counsel for the sixth respondent objected to this on the basis that reliance upon s. 5(1)(b) *Supreme Court Act* was incorrect as it does not provide the necessary jurisdiction. The wording that was relied upon by the respondent from *Joshua Kalinoe v. The State* (2010) SC1024 does not support this proposition. Further, there are numerous Supreme Court authorities for the proposition that s. 5(1)(b) *Supreme Court Act* may be relied upon for a stay and injunction. I refer to *Kawari Fortune Resources*

*Ltd v. Apurel* (2015) SC1614 in this regard.

10. Section 5(1)(b) *Supreme Court Act* refers to an ‘interim order’ which may be granted. I am satisfied that a stay or injunction falls within these words.

11. Pursuant to the *Kawari Fortune case (supra)*, in determining whether to make an interim order pursuant to s.5(1)(b) *Supreme Court Act* to prevent prejudice to the claims of the parties, attention should be focused on the following questions:

- a) what are the claims of the parties?
- b) what is the alleged prejudice?
- c) what is necessary, pending the hearing and determination of the appeal to prevent the prejudice?

12. The Court held in *Kawari Fortune (supra)* at [26] that:

*“Identifying the claims of the parties does not entail reaching any final conclusion on the merits of the claim advanced by the applicant for the interim order, only that the applicant has an arguable case.*

*The claims are to be found in the grounds specified in the notice of appeal or, as the case may be, application for leave to appeal and in the bases upon which those grounds are contested. Where the claim of the applicant appears to be strongly arguable, even comparatively minor prejudice might warrant the making of an interim order....What is involved is the exercise of a judicial discretion in which the two considerations, strength of the applicant’s claim and nature and extent of prejudice interplay, according to the circumstances of a particular case.”*

### **Claims of the Appellant and Arguable Case**

13. As to the submission of the sixth respondent that the appeal does not involve the FCA granted to the sixth respondent, it is clear from the statement filed by the appellant in the judicial review proceeding that declarations are sought in regard to the power of the first respondent to excise land the subject of a timber permit. This concerns the land the subject of the new FCA to the sixth respondent.

14. Next, the first, second and sixth respondents claim that the FCA to the fourth defendant was granted first in time and therefore the approval of the appellant did not need to be sought. Although from the affidavits of Mr. Enda and Mr. Tape, it is apparent that an FCA was granted for 34,000 hectares before the appellant’s timber

permit was granted, when that FCA was amended on 28<sup>th</sup> September 2015, in Schedule 1 of the amendment, it specifically states that on 14<sup>th</sup> May 2012 – when the FCA was initially granted - only 17,000 hectares was granted, not 34,000 hectares. It is arguable therefore, as claimed by the appellant, that the second lot of 17,000 hectares was excised after the timber permit had been granted and so the FCA concerning the excised 17,000 hectares was not first in time. Consequently, the approval of the appellant was required under s. 90(A)(2) *Forestry Act*.

15. As to the claim of the appellant and whether it has an arguable case, without in any way considering the merits of the appeal, I am satisfied from a consideration of documents before this court, the National Court decision being appealed and the grounds of appeal, that the appellant has an arguable case on numerous grounds. These are: the judicial review proceeding not being dismissed on competency grounds; Order 16 *National Court Rules* not providing for summary disposal of proceedings as provided for under Order 12 Rule 40 *National Court Rules*; an incorrect application of the principles of issue estoppel and res judicata and in essence, the reviewing by a National Court of the grant of leave to apply for judicial review by a previous National Court.

### **Alleged Prejudice**

16. The appellant maintains that it is the holder of the timber permit for the 17,000 hectares. The appellant claims that it is entitled pursuant to the timber permit, the Forest Development Project Agreement (between itself and the second respondent) and the *Forestry Act* to undertake forest industry activities in the 17,000 hectares.

17. The 17,000 hectares was unlawfully excised from the Amanab-Imona FMA area, the appellant claims.

18. The FCA for the 17,000 hectares was granted to the fourth respondent in breach of section 90(A)(2) *Forestry Act*

19. Notwithstanding that the FCA to the fourth respondent was cancelled, on 7<sup>th</sup> October 2020, a new FCA was granted to the sixth respondent.

20. Unless restrained, the sixth respondent will undertake logging in the excised land.

21. The first, second and sixth respondents did not make submissions to the effect that the appellant would not be prejudiced if the relief sought was not granted. The first, second and sixth respondents also did not submit that interim orders were not necessary to prevent prejudice to the claims of the appellant.

22. I am satisfied that the appellant has made out that it will be prejudiced if the relief sought is not granted and it is entitled to the relief sought. In short, the appellant requires interim orders to prevent prejudice to its claims pursuant to s. 5(1)(b) *Supreme Court Act*.

## **Orders**

23. It is ordered that:

- a) The relief sought in paragraph 1(a) (i), 1(a) (ii) and 1(a) (iii) of the Application filed 16<sup>th</sup> December 2020 is granted;
- b) The costs of and incidental to the said Application are costs in the appeal.

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Bradshaw Lawyers: *Lawyers for the Appellant*

PNG Forest Authority: *Lawyers for the First and Second Respondents*

Kandawalyn Lawyers: *Lawyers for the Sixth Respondent*