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PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (JR) NO. 689 OF 2016

BETWEEN
EVERGREEN LIMITED
Plaintiff

AND
**IVAN POMALEU as Managing Director of Investment Promotion
Authority**
First Defendant

AND
INVESTMENT PROMOTION AUTHORITY
Second Defendant

Waigani: Makail, J
2019: 3rd & 8th April

JUDICIAL REVIEW – Review of decision to cancel foreign enterprise certificate – Power of Managing Director to cancel foreign enterprise certificate – Lack of power – Excess of jurisdiction – Right to be heard prior to decision to cancel foreign enterprise certificate – Duty to give reasons – No reasons given – Breach of natural justice – Constitution – Section 59 – Investment Promotion Act – Sections 6, 8, 9, 19 & 36(1)(b)

Cases Cited:

Evergreen Limited v. Ivan Pomaleu & Investment Promotion Authority: SCM No 6 of 2018 (Unnumbered & Unreported Judgment of 1st November 2018)

Counsel:

Mr. P. Tabuchi, for Plaintiff
Mr. M. Tukuliya, for Defendants

JUDGMENT

8th April, 2019

1. **MAKAIL, J:** The plaintiff was a holder of a Foreign Enterprise Certificate (“*FEC*”) issued by the second defendant under Section 29 of the *Investment Promotion Act* (“*IP Act*”) until it was cancelled on 6th June 2016.

2. However, it was not notified of the cancellation by the defendants until 11th July 2016 when its business operations in the country were disrupted and after it enquired and was informed of the cancellation.

3. It alleged that firstly, it was not given prior notice of the defendants’ intention to cancel its *FEC*, secondly, not invited or given an opportunity to be heard prior to the decision to cancel its *FEC* was made and finally, it was not given reasons for its cancellation.

4. It commenced judicial review proceedings and sought orders to have the decision by the first defendant to cancel its *FEC* quashed. On 23rd February 2018 the National Court dismissed the proceedings on the ground that it did not exhaust all other alternative remedies such as appealing the decision to cancel its *FEC* to the Minister under Section 40 of the *IP Act*.

5. It appealed the decision of the National Court to the Supreme Court arguing that the appeal envisaged by Section 40 was limited to a challenge to the merits of the decision of the defendants to cancel its *FEC*. The ground on procedural breaches such as a breach of natural justice was outside the scope of Section 40 appeal and the appropriate remedy was judicial review in the National Court.

6. On 1st November 2018 the Supreme Court upheld the appeal on this ground, quashed the decision of the National Court, reinstated the proceedings and remitted the matter to the National Court for further hearing.

7. It further noted that the second defendant may have exceeded his power when he signed off on the letter of 7th June 2016 advising the plaintiff of the cancellation of its *FEC* without approval from the Board of IPA under Sections 6 and 36 of the *IP Act*. As this point was not fully argued by the parties in the National Court and in order to give parties the benefit of a further appeal, it remitted the matter for further hearing: see *Evergreen Limited v. Ivan Pomaleu & Investment Promotion Authority*: SCM No 6 of 2018 (Unnumbered & Unreported Judgment of 1st November 2018).

8. Standing on the decision of the Supreme Court the plaintiffs argued that it

has been settled by the Supreme Court that the second defendant did not have power to cancel its FEC and further it was not given prior notice of the defendants' intention to cancel its FEC, not invited or given the opportunity to be heard prior to the decision to cancel its FEC was made and it was not given reasons for the decision to cancel its FEC.

9. The defendants pointed out that firstly, the plaintiff was given notice of their intention to cancel its FEC in a letter dated 14th April 2016 and secondly, it responded through its lawyers (Young & Williams Lawyers) in a letter dated 26th April 2016. Consequently, the plaintiff was informed of the outcome of its response by way of a letter dated 7th June 2016 through its Managing Director Mr. Koh Woo Ling. Finally, it was not necessary for them to provide reasons for the decision because they were given and adequately set out in their letter of 14th April 2016.

10. However, they conceded that the Supreme Court appeared to have settled the claim by the plaintiff that they had breach the principles of natural justice by not giving the plaintiff an opportunity to be heard prior to cancelling its FEC. Similarly, they accepted the Supreme Court's decision that the nature of the grounds alleged by the plaintiff for the cancellation of its FEC were susceptible to judicial review and an appeal under Section 40 was not appropriate.

11. On a careful consideration of the Supreme Court decision it is quite clear that the Supreme Court noted that the first defendant may have exceeded his power when he signed off on the letter of notice of cancellation without obtaining approval from the Board of IPA under Sections 9 and 36 of the *IP Act* to bring the subject decision within the scope of an appeal and jurisdiction of the Minister under Section 40. As the question of power of the Managing Director of IPA to cancel an EFC was not fully argued by the parties along with the other grounds in the National Court and in order to give parties the benefit of a further appeal, it remitted the matter for further hearing: see para. 24 & paras. 33 – 34 of the judgment in *Evergreen Limited v. Ivan Pomaleu & Investment Promotion Authority* (supra).

12. The issue before the Supreme Court for determination was whether the plaintiff did not exhaust all other alternative remedies like for instance appealing the decision to cancel its FEC to the Minister under Section 40. The Supreme Court held that the nature of the grounds alleged by the plaintiff for cancellation of its FEC were susceptible to judicial review and an appeal under Section 40 was not appropriate. Having settled that issue, the issues which were remitted for further consideration were:

- (a) whether the defendants failed to afford the plaintiff natural justice

in that they failed to give the plaintiff an opportunity to be heard before the decision to cancel its FEC was made.

- (b) whether the defendants failed to give reasons for their decision to cancel its FEC.
- (c) whether the decision to cancel the FEC is ultra vires the powers of the first defendant.

13. There is no contest between the parties that the principles of natural justice enshrined in Section 59 of the *Constitution* included the right to be heard and a duty on a public official to give reasons for its decision. If no reasons are given, it may be inferred that there are no good reasons and the decision-maker will have acted in excess of jurisdiction. First, parties have to turn to the letter by the defendants dated 14th April 2016 which the plaintiff does not deny receiving through its lawyers Young & Williams. The letter referred to “various Complaints” received by them from three different law firms about its operations but does not give details of the complaints.

14. It went on to state that the FEC was obtained by misrepresentation and or mis-statement regarding the plaintiff’s business operations, secondly, the plaintiff’s principal operating locations were the same as another company called Cakara Alam (PNG) Limited and was contradictory to the information supplied to the defendants and finally, it failed to comply with its terms and conditions, especially in relation to its proposed capital input and did not provide any investment data to verify its actual operations.

15. Based on these reasons, the defendants requested the plaintiff to apply for variation within 14 days to remove Hawaiian LFA Project in Wewak, ESP and Matawat Plantation Project in Kimbe, WNBP from its operating locations. Failure to do so would result in the cancellation of its FEC.

16. While the reference to complaints by the three law firms appear to be vague the information which has been summarised above is sufficient to put the plaintiff on notice of the defendants’ intention to cancel its FEC. It then triggered a response from the plaintiff and thus, the claim by the plaintiff that it was not given prior notice of the intention by the defendants to cancel its FEC must fail.

17. As to its response, it is relevant to note its response through its lawyers Young & Williams in their letter dated 26th April 2016 that the plaintiff disputed the claim by the defendants that it had obtained the FEC through misrepresentation and or mis-statement. Any such claim was unfounded because Mr. Peter Ling Koh Woo and Cakara Alam had agreed that to conduct such business operations. Any other claims or misrepresentation or mis-

statement should be provided to the plaintiff and it will have the opportunity to respond to them and that similar claims of fraud and misrepresentation were made in one legal proceeding against Mr. Ling and was dismissed.

18. Its lawyers went on to state in that letter that it had varied its FEC to accurately reflect the changes to its principal operating location and the records at the defendants' office should have noted those changes. Finally, an injunction granted by the Court was discharged on 20th April 2016 and paved the way for it to continue operating at Hawaiian and Matawat respectively and it was not necessary for the plaintiff to vary its FEC. The letter concluded that the information provided to the defendants may be inaccurate.

19. The information supplied by the plaintiff's lawyers was in direct response to the claims by the defendants in their letter dated 14th April 2016. It was then a case where the plaintiff was afforded an opportunity to be heard in its defence and its claim that it was not heard prior to the cancellation of its FEC will be dismissed as being misconceived.

20. Lastly, it is noted from the letter by the defendants dated 7th June 2016 that it does not contain reasons for the decision to cancel the plaintiff's FEC except to enclose a notice of cancellation dated 6th June 2016 and a reminder that it is an offence to carry on business without a valid FEC. The duty to give reasons is not an option and this is where the breach occurred in the decision-making process.

21. The first defendant, as a public official exercising statutory power was, bound by the principles of natural justice, to give reasons for the decision to cancel the plaintiff's FEC. This is because the cancellation of the FEC will have potential adverse effect on the business operations of the plaintiff in the country including the closure of its business operations. That is why the first defendant must give reasons for his decision. I add, he must spell out the reasons in his letter of 7th June 2016 and it is not sufficient to expect the plaintiff to work out the reasons or infer that it could be one or all of the reasons as stated in their earlier letter of 14th April 2016. The claim by the plaintiff that it was denied natural justice when it was not given reasons for the decision will be upheld.

22. Lastly, the comments by the Supreme Court in its judgment in *Evergreen Limited v. Ivan Pomaleu & Investment Promotion Authority* (supra) encapsulates the essence of the powers of the Managing Director as opposed to the Authority which acts on the resolutions of the Board of IPA under Sections 6, 8, 9, 19 and 36 of the *IP Act* and thus it is clear that each have distinct powers

to exercise. In the context of a cancellation of FEC under Section 36(1)(b) of the *IP Act*, the exercise of such power must be by the Authority with the approval of the Board. In other words, it is not a power conferred solely on the Managing Director to exercise. There is no evidence of an approval being granted by the Board for the Authority (second defendant) to cancel the plaintiff's FEC. This claim by the plaintiff of the first defendant acting in excess of jurisdiction or the decision being ultra vires will be upheld.

23. The plaintiff sought declarations, certiorari and mandatory injunction. They will be granted in these terms:

1. The application for judicial review is upheld.
2. A declaration that the decision of the first defendant dated 6th June 2016 to cancel the plaintiff's Foreign Enterprise Certificate is ultra vires and therefore, unlawful and void ab initio.
3. An order in the nature of a certiorari to remove into this Court and quash the decision of the first defendant dated 6th June 2016 to cancel the plaintiff's Foreign Enterprise Certificate.
4. A declaration that the plaintiff's Foreign Enterprise Certificate was, is, and remains, for all purposes, valid and lawful.
5. An order in the nature of a mandatory injunction compelling the first defendant, his servants and or agents, to reinstate forthwith on all the second defendant's records, the correct certified status of the plaintiff.
6. The defendants shall pay the plaintiff's costs of and incidental to the proceedings.

Young & Williams Lawyers: *Lawyers for Plaintiff*
Acting Solicitor-General : *Lawyers for Defendants*