

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA No. 33 OF 2019

BETWEEN
LEO PUTE, LEO AILOL, TONNY MISIKLAI & LEONARD KOLANG
in their capacity as Directors of G.R. Logging Limited
Appellants

AND:
BENSON APINANUNG, MICHAEL AVOLIO, WILLIAM BEKIO,
MICHAEL BENO, CLEMENT GLENGIO, DAVID MALAI, MICHAEL
SISIL, ANDREW TAKMAP and, ALPHONSE YAKIO
First Respondents

AND:
MICHAEL BENO AND CLEMENT KAPUN
Second Respondents

Waigani: Gavara-Nanu J, David J and Hartshorn J
2021: 28th April & 29th July

Practice & Procedure – Companies Act, 1997, ss. 70, 134 (2); Schedule 4.2 to 4.7 - Company not having Constitution – Directors’ meetings – Notice of directors’ meetings – Service of notice of meetings on directors – Appointment of company directors.

Cases Cited

Paru Aihi v. Peter Isowaimo (2013) SC1276
Nominees Niugini Ltd v. IPBC (2017) SC1646
Sir Arnold Amet v. Peter Charles Yama (2010) SC1064

Counsel:

I. Shepherd with C. Copland, for the Appellants
A. Furigi, for the First Respondents
T. Tape, for the Second Respondents

1. **BY THE COURT:** The appellants appeal against part of the decision of the National Court given on 24 April, 2020, at Waigani, in respect of proceedings OS No. 836 of 2018 and OS No. 867 of 2018, (consolidated). The two proceedings concerned control of G.R. Logging Limited (the company) by two landowner groups in the Kandrian District, West New Britain Province. One group was led by Paul Aivia and Joe Biris, who are the appellants. The other group was led by the Michael Beno, who are the respondents.

2. As the learned primary judge observed in his decision, this was a typical landowner dispute. The proceedings concerned a Timber Permit, (TP14-04) which the company held over an area of land in the Kandrian District of West New Britain Province. The company sought to renew the Timber Permit.

3. In about October or November, 2016, the National Forest Board recommended renewal of the company's Timber Permit to the Minister for Forests.

4. Despite that recommendation, the Minister granted a Timber Permit to another company, namely Pulie Anu Timber Company Limited (PATCL). This led to a series of legal proceedings being instituted including, proceeding OS (JR) No. 116 of 2017, in which the company challenged the decision of the Minister to grant a Timber Permit to PATCL.

5. The respondents' group instructed Furigi Lawyers, who were their lawyers to withdraw the proceeding while the appellants' group wanted to proceed with the proceeding.

6. This gave rise to the two groups instituting the two consolidated proceedings (OS 836 of 2018 and OS 867 of 2018).

7. Proceeding OS 836 of 2018, was filed on 14 November, 2018. By an amended originating summons, the group led by Paul Aivia, who were appointed directors in the shareholders' meeting held on 28 September, 2016, sought among others, the following orders:

- (a) *A declaration that the purported Board meeting on 19 February, 2017 and the resolutions passed at that meeting were null and void for reasons among others that the meeting was not called by the Directors of the company.*

- (b) *A declaration that a Board meeting of 3 November, 2018, was null and void, for reasons among others, that the persons who were not Directors of the Company purported to have voted as Directors and there was no quorum.*
- (c) *An order restraining the group led by Michael Beno from among others dealing with the Company's records, making decisions on behalf of the company, and in particular, purporting to appoint legal representatives for the Company in the judicial review proceedings.*

8. In proceeding OS 867 of 2018, which was filed on 19 November, 2018, the Michael Beno led group comprising Benson Apinanung and others sought among others, the following orders:

- (a) *The shareholders meeting of 28 September, 2016, which removed certain Directors of the Company and appointed others was for various reasons among others, non-complaint with the Companies Act, 1997, and that the resolutions passed at that meeting were void and of no effect and that the previous Directors be reinstated; and;*
- (b) *A Board meeting held on 17 October, 2018, was non-complaint with the Companies Act and that any resolution passed at that meeting was null and void and of no effect.*

9. This appeal is against certain orders of the National Court in proceeding OS No. 836 of 2018. There are six grounds of appeal, which can be summarized as follows:

- (i) *The trial judge erred in law or mixed facts and law in dismissing the relief sought in paragraphs (1) (a), (b), (c), 2 (a), (b), (c) and 3 (a), (b) and (c) after finding that some Directors of the Company were not given notice of the Directors' meeting held on 19 February, 2017.*
- (ii) *The trial judge erred in law and mixed fact and law in dismissing the relief sought in paragraphs mentioned in ground (i) above, which he later held that the giving of notice of the meeting of the Directors of the Company*

to all Directors in Papua New Guinea was mandatory and that the failure to give notice to all the Directors was in breach of Schedule 4.2 of the Companies Act, 1997, with the consequence that any meeting that was subsequently held would be illegal and any resolutions passed at such meeting would be null and void.

- (iii) The trial judge erred in law and in mixed fact and law in that after finding that the notice of the meeting of the Directors of the Company held on 19 February, 2017, was not given to all the Company Directors, the trial judge having found that the meeting of the Directors purportedly held on 19 February, 2017, was illegal and the resolutions passed at that meeting were null and void.*
- (iv) The trial judge erred in law and mixed fact and law in not granting the relief sought in ground (1) above, on the grounds that no notice of Directors held on 19 February, 2017, was given to some of the Directors of the Company which was contrary to Schedule 4.2 of the Companies Act, 1997.*
- (v) The trial judge erred in law and mixed fact and law by failing to find that the meeting of the Company Directors held on 19 February, 2017, was illegal for failure to give notice to all the Directors about the meeting as required under Schedule 4.2 of the Companies Act, 1997, as he found regarding the meeting held on 30 October, 2018.*
- (vi) The trial judge erred in law and mixed fact and law in failing to find that resolutions passed at the meeting of the Company Directors held on 30 October, 2018, were null and void because not all the Directors were given notice about the meeting.*

10. The relief sought can be summarized as follows:

- (i) The notice published on 13 February, 2017, regarding the Company's Board meeting be declared null and void as it was notice improperly given and was illegal.*

Furthermore, not all the Directors of the Company were served with the notice.

- (ii) The purported meeting of the Company Board held on 19 February, 2017, at Savalu Camp Site be declared null and void because the notice for the meeting was irregular and the meeting lacked quorum.*
- (iii) The purported unanimous resolution of the Company Board passed at the meeting held on 19 February, 2017, be declared null and void as it was contrary to Schedule 4, Clause 7 of the Companies Act. Furthermore, the resolution was not signed or assented to by all the Directors of the Company; thus the resolution was not unanimous.*
- (iv) The appeal be allowed.*
- (v) Costs to follow the event.*

11. Mr. Shepherd, counsel for the appellants argued that there was evidence upon which the learned primary judge could have found the meeting of the directors of the company held on 19 February, 2017, null and void, like he did with the meeting of 30 October, 2018. It was argued that this was an oversight on the part of the primary judge because the factual basis upon which the meeting of 30 October, 2018, was nullified also existed for the meeting of 19 February, 2017; in that insufficient notices were given to the directors for both meetings. It was also argued that any resolutions passed at the meetings were in breach of Schedule 4.7 of the *Companies Act* 1997, because the resolutions were not unanimous and not all the directors signed or assented to those resolutions. The notice for the 19 February, 2017, meeting was purportedly published on 13 February, 2017.

12. Mr. Furigi, counsel for the first respondent argued that the appellants are barred from raising matters in paragraph 3 (a) to (f) in the Notice of Appeal because they were not raised in the primary court. These grounds relate to the notices given for the directors' meeting on 19 February, 2017, and resolutions passed in that meeting which the appellants claim were null and void and illegal because they breached Schedule 4.2 and 7 of the *Companies Act*. It was also argued that the arguments by the appellants are not supported by evidence, especially affidavits of Paul Aivia, John Siwi and Tony Misiklai. It was submitted that the appellants had no basis to argue that even the notice for the directors' meeting on 19 February, 2017, was published by an unauthorized person. It was also argued that the appellants had no basis to

argue that there was no quorum for that meeting. A lot of emphasis was placed on what the respondents claim were matters or issues the appellants raise which it was argued were not raised in the primary court.

13. Mr. Tape, counsel for the second respondent supported arguments by Mr. Furigi that issues raised before this Court were not raised in the primary court and should not be raised. Mr. Tape submitted that although the relief sought in the appeal were also sought in the primary court, no arguments were advanced in support of them, in particular to declare the meeting of 19 February, 2017, unlawful null and void. He argued the appellants did not challenge the validity of that meeting in the primary court.

14. Both Mr. Furigi and Mr. Tape argued that the validity of the directors' meeting on 19 February, 2017, should not be raised before this Court, as it was not argued by the appellants in the primary court although there was material before the primary court. This was the overarching argument by the respondents. They argued that the appeal should be dismissed.

15. There is a cross-appeal by the respondents, which is essentially based on the respondents' arguments that the primary judge erred in declaring that meetings of 3 November, 2018 and 30 October, 2018, breached Schedule 4.2 and 4.3 of the *Companies Act* in that insufficient notices were given to the directors of the Company regarding the meetings and were therefore null and void.

16. It was argued by both counsel for the respondents that the learned primary judge erred in that, the notices were proper and Schedule 4.2 and 4.3 of the *Companies Act* were not breached. They argued that the notices were not irregular and did not breach the requirements of the Schedule 4.2 which they argued is in very general terms as it does not specify the type and nature of the notices to be given. They argued that the publication of the notices in the newspapers were proper and sufficient to meet the requirements of Schedule 4.2 of the *Companies Act*.

17. Mr. Shepherd told the Court that it is not true that the issues raised before this Court, particularly the validity of the directors' meeting of 19 February, 2017, were not argued by the appellants in the primary court. He submitted that these issues were raised and argued in the primary court. He submitted that arguments by the respondents and the respondents' cross-appeal which was grounded on these claims should be dismissed.

18. Looking at the transcript of the proceeding, we note that in the primary court the validity of the meeting of 19 February, 2017, was raised and argued by Mr. Ian Molloy, who was lawyer for the plaintiffs (appellants). Mr. Molloy

told the Court that his clients were seeking orders that the meeting of 19 February, 2017, was null and void because the meeting among others, was not called by the directors of the Company. Thus, he argued that the resolutions passed at that meeting including appointment of Furigi Lawyers as Company Lawyers were null and void. More importantly, Mr. Molloy told the primary judge that the issue was sufficiently covered by the *Companies Act* itself. (p. 1956 A/B). Mr. Molloy also argued that the respondents were directors of PATCL the rival company, thus they had a conflict of interest to be directors of the Company. It was argued that for the same reason, it was improper for Mr. Furigi who had been acting as lawyer for PATCL to act for the Company. These issues were directly related to the appointment of new Company directors and their lawyers at the 19 February, 2017, meeting (p. 1961 A/B).

19. In responding to Mr. Molloy's arguments, Mr. Furigi argued that the appointment of directors at the 19 February, 2017, meeting, was by a unanimous resolution of the directors present at that meeting. Mr. Furigi further argued that pursuant to that resolution, Furigi Lawyers acting for the Company, filed proceeding OS (JR) 116 of 2017, to maintain the *status quo* and to allow resource owners associated with PATCL to hold the Timber Permit and benefit from their recourses. He referred to the appellants as "*outsiders coming under the cover of the Company*" trying to challenge the Deed of Assignment, pursuant to which the Timber Permit was held by PATCL. (p. 1971 A/B). Mr. Furigi also denied that he had a conflict of interest in acting for the Company. (p. 1972 A/B). He argued that the Deputy Registrar of Companies also endorsed the meeting of 3 November, 2018, as well as the resolutions passed to give effect to the decisions made on 19 February, 2017, meeting. He argued that meeting of 19 February, 2017, was valid. (p. 1975 A/B).

20. Interestingly though, at the conclusion of his submissions before the primary judge, Mr. Furigi argued that there did not seem to be a challenge to the validity of the 19 February, 2017, meeting, in which Furigi Lawyers were also appointed to act for the Company and that there was no clear challenge to the validity of the 3 November, 2018, meeting. Thus, he submitted that the validity of the two meetings stood without challenge (p. 1976 A/B). However, this was immediately contradicted by Mr. Tape who in the opening part of his submissions told the primary judge that – "*They are challenging the two board meetings. And the first board meeting is the board meeting held on 19 February, 2017. And second board meeting held on 3 November, 2018*". (p. 1977 A/B).

21. Mr. Molloy in his reply to Mr. Furigi and Mr. Tape's submissions argued that the resolution of the Board meeting of 19 February, 2017, was not unanimous as claimed by the defendants (respondents) because the persons

who voted in that meeting were not directors appointed in 28 September, 2016, meeting and were not directors according to the Registrar. He argued that same could be said about the meeting of 3 November, 2018. He also argued that the records were tampered with to legitimize the persons who voted as directors in those two meetings. (p. 2000 A/B). It was further argued that the meeting of 19 February, 2017, was not attended by all the directors who were entitled to attend the meetings because like for other board meetings, notices for the meeting were not served on all the directors.

22. It can therefore be seen from the above discussions that the validity of the 19 February, 2017, meeting, was a seriously contested issue before the primary court. (p. 1975 A/B).

23. It should be noted that the validity of a Deed of Assignment relied upon by respondents was disputed by the appellants. They claimed that the purported signatures of a number of appellants in the Deed of Assignment were forged. They denied signing the Deed of Assignment.

24. His Honour, when commenting on how notices of meetings for the shareholders who came from villages should be served, said the notices should be served by physical delivery of the notices to each shareholder.

25. His Honour found that the appellants did not deny the claim by the respondents that they were not given notice of the shareholders' meeting of 28 September, 2016. This resulted in the respondents not attending the meeting. His Honour found that this was a fundamental breach of the respondents' right. His Honour said where it was proposed that persons would be appointed or removed as directors, such proposed actions had to be communicated to them in a notice and must be clearly expressed in the notices as required by s. 134 (2) of the *Companies Act*. His Honour accepted the respondents' arguments that the notice of the 28 September, 2016, meeting did not comply with s. 134 (2) because the notice did not set out in the agenda of the meeting proposed action to remove them as directors and to appoint new directors. His Honour also agreed with the respondents that the shareholders lacked authority to update the Register, his Honour said that authority was vested in the directors under s. 70 of the *Companies Act*. His Honour found that Michael Aria, Secretary of the Company called the meeting of 28 September, 2016, but he had no authority to call the meeting. Another flaw with the 28 September, 2016, meeting was that it was chaired by Mr. Victor Nape, a lawyer with the IPA, it was held that this was in breach of *Schedule 2.1* of the *Companies Act*. His Honour held that the meeting could only be chaired by the Chairman or in his absence by a shareholder appointed by the shareholders.

26. Consequently, his Honour found that the meeting of 28 September, 2016, was illegal, and all resolutions passed in that meeting were null and void and of no effect. His Honour then ordered that those persons who were removed as directors at the 28 September, 2016, meeting including Michael Beno be reinstated forthwith and the Registrar to amend its records accordingly. His Honour held that those persons appointed directors at the 28 September, 2016, meeting of the shareholders together with Paul Aivia and Joe Biris, who subsequently passed resolutions at the Board meeting of 27 October, 2018, was illegal, null and void.

27. The excerpts of the primary judge's decision which we consider pertinent, appear at pages 1912 to 1913 of the Appeal Book, where his Honour said:

“There is no dispute that after the shareholders’ meeting on 28 September, 2016, the Michael Beno led group including David Malai were adamant that they were illegally removed as Directors of the company. Skipping the board meeting of 19 February, 2017, which the (sic.) some said no notice of that meeting was given, they made representation to the Registrar who subsequently restored them on the IA records. I refer to the Company Extract of 30th October, 2018, and marked annexure “C” to the affidavit of David Malai sworn 18 November, 2018.

It was not the end of the matter because they found out later that the company records at the IPA office were changed again and they were removed as directors. I refer to the Company Extract of 6 November, 2018, and marked as annexure “D” to the affidavit of David Malai (supra). It resulted in another board meeting organized and convened by the Michael Beno led group on 3 November, 2018, at 10:00 am at Savalu Camp, Pulie Anu, Kandarian District, West New Britain Province. The board resolved to appoint Furigi Lawyers to act for G.R. Logging Limited and to withdraw the judicial review proceeding OS (JR) No. 116 of 2017.

As to notice of board meeting, Schedule 4.2 of the Companies Act states that “Not less than two days notice of a meeting of the board shall be sent to every director who is in the country.....” It does not prescribe a mode of giving the notice.

The Michael Beno group adopted the same form of giving notice by the Paul Aivia led group when they gave notice of shareholders’ meeting. They published the notice in the Post

Courier and National newspapers on 30 October, 2018. It was directed to 27 directors. According to the Minutes of Meeting only 14 directors attended. The rest did not. It highlights the potential (sic.) denying all directors to a notice if published the notice was the preferred mode.

In a country like Papua New Guinea where (sic) majority of landowners live in the villages it is never an easy task to manage a landowner company where the multitude of directors are scattered all around the villages within the project area in a geographical sense. Communication and accessibility for these directors will always remain a challenge unless a better form of communication is adopted.

Where the parties in this case have decided to form a landowner company to stand for their resource rights and interests, as the Court said in Pora Wan case (supra), if ordinary village people prefer to incorporate a company with the provisions of the Act in managing the company. This includes the giving of notice to directors of the company. It is quite difficult to be certain that publishing a notice of meeting in the newspaper will bring the notice to the attention of a villager/director who is in a village located in Kandrian. The notice of board meeting on 30 October, 2018, must suffer the same fate as the notice of shareholders' meeting. I find it is in breach of the requirement to give notice under Schedule 4.2 of the Companies Act. The consequences of that is, the meeting is illegal and the resolutions passed in the meeting of 3 November, 2018, are illegal, null and void.” (Our underlining).

28. His Honour went on to dismiss the relief sought for a declaration that a notice published on 13 February, 2017, purportedly giving notice of a board meeting of the company on 19 February, 2017, was null and void, and or alternatively was of no force or effect, on one or more of the following grounds:

- (i) The person who published the notice of the meeting purporting to be directors were not directors of the Company.*
- (ii) The person who published the notice of meeting purporting to be directors were not employees of the Company doing so on request by a director of the Company.*

(iii) *The notice was not sent to every director of the Company who was in the country.*

29. The primary court refused the relief orders sought to declare the meeting of directors on 19 February, 2017, was irregular pursuant to Schedule 4.2 (3) of the *Companies Act*, because there was no waiver of such irregularity in the notice of meeting as not all the directors entitled to receive notice of the meeting attended the meeting without protest as to the irregularity, or because not all directors entitled to receive notice of the meeting had agreed to the waiver and that there was lack of quorum. His Honour also refused to declare that the purported resolution of the directors' meeting of 19 February, 2017, was not unanimous and contrary to Schedule 4 Clause 7 of the *Companies Act*; and further that the resolution was not signed or assented to by all directors then entitled to receive notice of a board meeting.

30. The similar relief sought to declare the directors' meeting of 3 November, 2018, held at Savalu Logging Camp null and void, was refused for similar reasons as those relating to the directors' meeting of 19 February, 2017.

31. From the foregoing observations, it is clear that the validity of the directors' meeting of 19 February, 2017, was before the primary court. The issue was argued by counsel for appellants and respondents and the primary court made a determination, in which it ruled against the appellants by refusing to grant the principal relief sought, which was to declare the meeting of 19 February, 2017, null and void and of no effect.

32. We therefore reject the arguments by both Mr. Furigi and Mr. Tape that the validity of the meeting of 19 February, 2017, was not argued by Mr. Molloy in the primary court.

33. But even if the validity of the meeting of 19 February, 2017, had not been argued by Mr. Molloy, whether the meeting was valid or not raised the issue of compliance with Schedule 4.2 and 4.7 of the *Companies Act*. That was a legal issue which the Court could by its own motion consider and determine. Whether proper notices were issued regarding the meeting and whether the resolutions passed in the meeting were unanimous and whether the resolutions were signed or assented to by all directors who were then entitled to receive notice of the meeting are all requirements of Schedule 4.2 and 4.7 of the *Companies Act*. There was affidavit evidence given by witnesses in support of the appellants in the primary court that the notice of the meeting of 19 February, 2017, and the meeting itself did not comply with Schedule 4.2 and 4.7. Such evidence automatically raised the issue of

compliance with Schedule 4.2 and 4.7. This Court therefore had inherent power to determine whether the requirements of Schedule 4.2 and 4.7 were complied with, irrespective of whether the appellants' lawyers raised the issue in their submissions. See, *Sir Arnold Amet v. Peter Charles Yama* (2010) SC 1064; *Paru Aihi v. Peter Isowaimo* (2013) SC 1276 and *Nominees Niugini Ltd v. IPBC* (2017) SC 1646.

34. As can be noted from the excerpts of the primary Judge's judgment, there was no dispute that the notices of the meetings were only published in the National Newspaper. Notices were not served personally on the directors. This was the basis upon which the primary judge made practical suggestions on how notices of meeting should be served on shareholders or directors, as the case may be, in Papua New Guinea. His Honour said there should be personal service of the notices of meetings on the directors. We agree entirely with the learned primary judge because as directors it is their duty to attend meetings. This relates directly to a directors' duty to the shareholders. Furthermore, it is the right of a director to be heard, if the meeting is proposing to remove him.

35. There is undisputed evidence that not all the directors were served or made aware of the meeting of 19 February, 2017. The direct consequence of this was that Schedule 4.2 was breached and because the resolutions passed in the meeting could not be unanimous, since not all the directors received the notice as a result the resolution could not be signed or assented to by all the directors.

36. Consequently, in our view it follows that the only finding open for the learned primary judge to make was to declare that the meeting of 19 February, 2017, was null and void and of no effect. Since his Honour made a finding that is to the contrary, we respectfully find that his Honour fell into an error.

37. We therefore allow the appeal and grant orders in terms of paragraph 4 of the Notice of Appeal.

38. The respondents' cross-appeal is dismissed.

39. The respondents will pay the appellants' costs of and incidental to the appeal and cross-appeal, which if not otherwise agreed are to be taxed.

Simpsons Lawyers: *Lawyers for the Appellants*

Furigi Lawyers: *Lawyers for the First Respondents*

Kandawalyn Lawyers: *Lawyers for the Second Respondents*

