

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

OS (JR) NO 10 OF 2009

MUSA VALLEY MANAGEMENT COMPANY LIMITED
First Applicant

MUSA CENTURY LIMITED
Second Applicant

V

**PEPI KIMAS, SECRETARY,
DEPARTMENT OF LANDS AND PHYSICAL PLANNING**
First Respondent

**HON DR PUKA TEMU CMG MP
MINISTER FOR LANDS AND PHYSICAL PLANNING**
Second Respondent

MUSIDA HOLDINGS LIMITED
Third Respondent

Waigani: Cannings J
2009: 16, 17 June
2010: 22 January

JUDGMENT

LAND – customary land – acquisition of customary land by the State for lease-leaseback purposes – Land Act, Sections 10 and 11 – whether agreement of all customary landowners necessary – grant of leases for special agricultural and business purposes – agreement of customary landowners necessary – Land Act, Section 102.

JUDICIAL REVIEW – whether Secretary for Lands failed to act in accordance with statutory preconditions for acquisition of customary land by the State and for granting of lease for special agricultural and business purposes – whether decisions under Land Act, Sections 10, 11 and 102, subject to principles of natural justice.

A tract of customary land was acquired by the State by lease under Sections 10 and 11 of the *Land Act* 1996. The land was later leased back by the State to a company representing a group of customary landowners under Section 102 of the *Land Act*. A rival group of customary landowners who had formed a company applied for judicial review of the decisions of the Secretary for Lands regarding both leases on grounds that: (1) the preconditions under Sections 10 and 11 and under Section 102 had not been satisfied; (2) they were denied natural justice; and (3) the decisions were unreasonable.

Held:

- (1) The procedures for acquisition of the land by the State under Sections 10 and 11 and for granting of the lease under Section 102 were not complied with as the customary landowners or at least a substantial majority of them did not agree to either process. The first ground of judicial review was upheld.
- (2) There was no breach of the principles of natural justice. The second ground of judicial review was dismissed.
- (3) The Secretary for Lands did not act unreasonably. The third ground of judicial review was dismissed.
- (4) The errors of law were significant. The acquisition by the State of customary land, by lease, under Sections 10 and 11 of the *Land Act* and the subsequent granting of a lease by the State to a lessee can only proceed lawfully if a substantial majority of customary landowners agree. There was a lack of agreement in this case at both stages of the process.
- (5) The Secretary's decisions were seriously flawed and therefore his decisions were quashed and the leases declared null and void.

Cases cited

Papua New Guinea Cases

Dale Christopher Smith v Minister for Lands (2009) SC973
Isaac Lupari v Sir Michael Somare (2008) N3476
Paul Saboko v Commissioner of Police (2006) N2975

Overseas Cases

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Counsel

C Raurela, for the applicants
S Sukwianomb, for the 1st & 2nd respondents
D D Kombagle & S Tohui, for the 3rd respondent

22 January, 2010

1. **CANNINGS J:** This case concerns a tract of customary land in the Ijivitari District of Oro Province called Musa-Baregi. It is 211,600 hectares in area and formally described as Portion 16C, Milinch Gona, Fourmil Tufi. It is located 200 km south-west of Popondetta. It has been earmarked as an agro-forestry area for development under the National Government's Export Driven Economic Strategy.

2. In December 2008, the Secretary for Lands, the first respondent Mr Pepi Kimas, a delegate of the Minister for Lands, made various decisions regarding the land, which

resulted in two leases being executed:

- first, on 19 December 2008, the land was acquired by the State, through a 99-year lease from the customary landowners to the State, executed under Sections 10 and 11 of the *Land Act* 1996.
- secondly, on 23 December 2008, the land was leased by the State to the third respondent, Musida Holdings Ltd, through a 99-year lease from the State to Musida Holdings Ltd, executed under Section 102 of the *Land Act*.

3. Musida Holdings Ltd is a company owned and controlled by some of the customary landowners of Portion 16C.

4. There is another company, the first applicant, Musa Valley Management Company Ltd, owned and controlled by another group of customary landowners of Portion 16C, which is aggrieved by the decisions made by the Secretary. It says that the preconditions under Sections 10 and 11 and under Section 102 had not been satisfied, that they were denied natural justice and that the decisions were unreasonable.

5. Musa Valley Management Company Ltd and the company which it is promoting as the preferred developer of the agro-forestry project – the second applicant, Musa Century Limited – have been granted leave to seek judicial review of the Secretary's decisions. This is a trial of the substantive application for judicial review.

GROUNDINGS OF REVIEW AND RELIEF SOUGHT

6. The applicants' statement under Order 16, Rule 3(2)(a) of the *National Court Rules* – the document which is supposed to concisely state the decisions to be reviewed, the grounds on which the plaintiff relies and the relief being sought – sets out seven grounds of judicial review. No 1 has been abandoned. It argued that the Secretary exercised powers that could only be exercised by the Minister; however, it has since been realised that the Secretary has been delegated all of the Minister's powers under the *Land Act* that are relevant to this case. The other grounds are repetitious or overlap and can be reduced to three:

- that the Secretary failed to follow proper procedures under the *Land Act*, in particular by failing to secure the agreement of the customary landowners to the acquisition of the land by the State and to the lease-back to Musida Holdings Ltd (paragraph 5(4) of the Order 16, Rule 3(2)(a) statement);
- that the Secretary acted unfairly and contrary to the principles of natural justice.
- that the Secretary acted unreasonably.

7. The applicants want the court to quash the decisions of the Secretary and to make consequential orders that would prevent Musida Holdings Ltd from being regarded as the lessee of the land and that would compel the Minister to grant a lease to Musa Valley Management Company Ltd.

ISSUES

8. The issues necessary for determination boil down to these:

- 1 Did the Secretary breach the procedures in the *Land Act*?
- 2 Did the Secretary act unfairly and contrary to the principles of natural justice?
- 3 Did the Secretary act unreasonably?
- 4 What declarations or orders should the Court make?

1 DID THE SECRETARY BREACH THE PROCEDURES IN THE LAND ACT?

9. The applicants argue that the procedures in the *Land Act* were breached on two occasions. First, on 19 December 2008 when the land was acquired by the State under Sections 10 and 11 of the *Land Act*. Secondly, on 23 December 2008 when the land was leased by the State to Musida Holdings Ltd under Section 102 of the *Land Act*. The nature of the alleged breach of the Act – the error of law allegedly committed by the Secretary – was the same in each instance: the customary landowners did not agree to what happened.

The first alleged breach: Sections 10 and 11

10. These are the provisions under which the State acquires customary land, by lease, for the purpose of granting a special agricultural and business lease of the land.

11. Section 10 (*acquisition of customary land by agreement*) states:

- (1) *Subject to Section 11, customary land shall be acquired in accordance with this Section and shall be authenticated by such instruments and in such manner as are approved by the Minister.*
- (2) *The Minister, on behalf of the State, may acquire customary land on such terms and conditions as are agreed on between him and the customary landowners.*
- (3) *Subject to Subsection (4), the Minister shall not acquire customary land unless he is satisfied, after reasonable inquiry, that the land is not required or likely to be required by the customary landowners or by persons on whom the land will or may devolve by custom.*
- (4) *Where the Minister is satisfied, after reasonable inquiry, that any customary land is not required or likely to be required for a certain period but is of the opinion that the land may be required after that period, he may lease that land from the customary landowners for the whole or a part of that period.*

12. Section 11 (*acquisition of customary land for the grant of special agricultural and*

business lease) states:

(1) *The Minister may lease customary land for the purpose of granting a special agricultural and business lease of the land.*

(2) *Where the Minister leases customary land under Subsection (1), an instrument of lease in the approved form, executed by or on behalf of the customary landowners, is conclusive evidence that the State has a good title to the lease and that all customary rights in the land, except those which are specifically reserved in the lease, are suspended for the period of the lease to the State.*

(3) *No rent or other compensation is payable by the State for a lease of customary land under Subsection (1).*

13. It will be observed that – as contended by the applicants – agreement of the customary landowners is an essential precondition to the acquisition by the State, by lease, of customary land under Sections 10 and 11. The key provisions are Section 10(2) – which requires that the land may only be acquired on such terms and conditions "as are agreed on" between the Minister and the customary landowners – and Section 11(2) – which requires that the lease to the State must be "executed by or on behalf of the customary landowners".

Applicants' arguments

14. The applicants submit that though the Department of Lands and Physical Planning carried out two land investigation reports in 2008, not all the customary landowners agreed on the terms and conditions on which the land would be acquired by the State. The applicants assert that both land investigation reports were defective and that explains why, of the 62 incorporated land groups that should be regarded as customary landowners of portion 16C, the representatives of only 10 of them signed the instrument of lease dated 19 December 2008. The applicants acknowledge that there was a meeting of customary landowners at Embassa village on 12 December 2008 but say that no agreement was reached at that meeting as to the terms and conditions on which the land would be acquired by the State.

Respondents' arguments

15. The respondents do not dispute that, as a matter of law, agreement of the customary landowners was required but argue that there was, in fact, agreement in this case, which is evidenced by the following matters:

- the land investigation report dated 16 May 2008 showed a majority of representatives of the 62 ILGs signed an agency agreement agreeing to lease the land to the State;
- the meeting of 12 December 2008 concluded that the decision about which company should ultimately be granted a lease-back from the State should be made by the Department of Lands and Physical Planning;
- the Secretary made his decisions in good faith based on all the documents

before him;

- the company extracts of Musida Holdings Ltd show that it has always had a larger and more representative shareholding, representing a majority of the customary landowners of Portion 16C, than Musa Valley Management Company Ltd and it is doubtful whether the latter can be regarded as a legitimate landowner company.

16. The respondents argue that the applicants have failed to present any direct evidence of a lack of agreement. Mr Kombagle, for Musida Holdings Ltd, submitted that the applicants had to prove the total number of landowners of Portion 16C including their names, clans and villages, and prove who agreed and who disagreed and prove the dates and places of meetings at which the issue of the lease to the State was discussed.

Determination re alleged breach of Sections 10 and 11

17. I do not accept Mr Kombagle's contention about the failure of the applicants to present sufficient evidence. They have adduced evidence that the land is, in effect, owned by customary landowners represented by 62 ILGs and that the representatives of only 10 ILGs signed the instrument of lease dated 19 December 2008 and that there is no instrument or other document under which those 10 ILG representatives were authorised to sign on behalf of the other 52. The evidence adduced by the applicants is sufficient to give rise to a presumption that there was no agreement by all the customary landowners or even by a majority of them.

18. I am not satisfied that the evidence adduced by the respondents shows that there was at any time agreement as required by Sections 10(2) and 11(2) of the *Land Act*. The land investigation report does not make it clear that there was agreement by all or even a majority of the landowners. The evidence surrounding the 12 December 2008 meeting at Embassa is vague. It appears that it was only a short meeting and that it was not attended by a majority of the customary landowners and a majority of the customary landowners present agreed only to leave the question of the terms and conditions of the lease to the State, to the Department of Lands and Physical Planning to sort out.

19. The *Land Act* is silent on how the agreement of the customary landowners required by Sections 10(2) and 11(2) is to be effected and evidenced. I suggest that the minimum requirement would be that a substantial majority of the customary landowners indicate their agreement by signing the lease under which the land is acquired by the State.

20. Here, the customary landowners are represented by 62 ILGs, but the representatives of only 10 ILGs signed the lease. On the assumption that the 62 ILGs had an equal share in the customary land, this means that only 16% of the customary landowners agreed. 84% of the customary landowners did not agree. The Court would need to be persuaded that the assumption underlying that calculation is without any basis or that the 16% of the ILGs who signed were actually representing a substantial majority of landowners, to prevent the conclusion being reached that there was no agreement in this case. However, I have not been persuaded.

21. The lease asserts that the ten customary landowner signatories are "the appointed/nominated agents on behalf of the landowners" but does not cross-refer to any document

by which they have been appointed or nominated as agents.

22. I conclude that the customary landowners of Portion 16C did not agree to the terms and conditions on which the land would be acquired by the State and that the instrument of lease was not executed by or on behalf of the customary landowners. Sections 10(2) and 11(2) of the *Land Act* were breached.

23. The Secretary for Lands committed an error of law by deciding to execute the lease and by executing the lease without those preconditions being complied with.

The second alleged breach: Section 102

24. This is the provision under which the State, having acquired customary land by lease under Section 11, leases it to a lessee for special agricultural and business purposes. It is the so-called lease-back part of the lease and lease-back process.

25. Section 102 (*grant of special agricultural and business leases*) states:

(1) *The Minister may grant a lease for special agricultural and business purposes of land acquired under Section 11.*

(2) *A special agricultural and business lease shall be granted—*

(a) *to a person or persons; or*

(b) *to a land group, business group or other incorporated body,*

to whom the customary landowners have agreed that such a lease should be granted.

(3) *A statement in the instrument of lease in the approved form referred to in Section 11(2) concerning the person, land group, business group or other incorporated body to whom a special agricultural or business lease over the land shall be granted, is conclusive evidence of the identity of the person (whether natural or corporate) to whom the customary landowners agreed that the special agricultural and business lease should be granted.*

(4) *A special agricultural and business lease may be granted for such period, not exceeding 99 years, as to the Minister seems proper.*

(5) *Rent is not payable for a special agricultural and business lease.*

(6) *Sections 49, 68 to 76 inclusive, 82, 83, 84 and 122 do not apply to or in relation to a grant of a special agricultural and business lease.*

(7) *Notwithstanding anything in this Act, a special agricultural and business lease shall be effective from the date on which it is executed by the Minister and shall be deemed to commence on the date on which the land subject to the lease was leased by the customary landowners to the State under Section 11.*

26. It will be observed that – as contended by the applicants – agreement of the customary landowners is an essential precondition to grant of a special agricultural and business lease under Section 102.

27. The key provision is Section 102(2), which requires that the lease may only be granted to a person or persons or to a land group, business group or other incorporated body "to whom the customary landowners have agreed that such a lease should be granted."

Applicants' arguments

28. The applicants acknowledge that the instrument of lease dated 19 December 2008 provides that the State, having acquired the customary land, is obliged to lease it to the third respondent, Musida Holdings Ltd. However, they argue that there was no agreement to that arrangement for the same reasons advanced in relation to the acquisition under Section 11.

Respondents' arguments

29. The respondents assert that the customary landowners agreed as early as May 2008 that the land, once acquired by the State, would be leased to Musida Holdings Ltd. They rely on the same evidence adduced in relation to Sections 10 and 11 to support that proposition and they argue the same point of law raised by Mr Kombagle about the applicants failing to prove that there was no agreement.

Determination re alleged breach of Section 102

30. My determination of this issue is the same as in relation to Sections 10 and 11. I do not accept Mr Kombagle's contention about the failure of the applicants to present sufficient evidence. I am not satisfied that the evidence adduced by the respondents shows that there was at any time agreement as required by Section 102(2) of the *Land Act*. The land investigation report does not make it clear that there was agreement by all or a majority of the landowners that the lease would be granted to Musida Holdings Ltd. The evidence surrounding the 12 December 2008 meeting at Embassa is vague.

31. The *Land Act* is silent on how the agreement of the customary landowners required by Section 102(2) is to be effected and evidenced. As I suggested in relation to Sections 10 and 11, the minimum requirement should be that a substantial majority of the customary landowners indicate their agreement by:

- signing the lease under which the land is acquired by the State (if that lease indicated the person to whom the special agricultural and business lease will be granted); or
- signing a separate document (if that lease did not indicate the person to whom the special agricultural and business lease will be granted).

32. Here, the customary landowners are represented by 62 ILGs, but the representatives of only 10 ILGs signed the lease. I am not satisfied that the ten customary landowner signatories represent a substantial majority of the customary landowners.

33. I conclude that the customary landowners of Portion 16C did not agree that the special agricultural and business lease be granted to Musida Holdings Ltd. Section 102(2) of the *Land Act* was breached. The Secretary for Lands committed an error of law by deciding to execute the lease and by executing the lease without that precondition being complied with.

Conclusion re first ground of review

34. This ground of review is upheld. The *Land Act* was breached in the two respects contended for by the applicants.

2 DID THE SECRETARY ACT UNFAIRLY AND CONTRARY TO THE PRINCIPLES OF NATURAL JUSTICE?

35. I dismiss this ground of review. The applicants have failed to prove that as a matter of law the Secretary was bound to comply with the principles of natural justice or that if he was so bound that he failed to conduct a proper hearing or acted unfairly or that there was any reasonable apprehension that he was biased.

3 DID THE SECRETARY ACT UNREASONABLY?

36. The argument that an administrative decision is unreasonable under the *Wednesbury* principles is based on the principles laid down in the classic case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The test to apply is: is the decision that has been made so unreasonable or absurd, having regard to all the circumstances, no reasonable decision-maker would have made the decision? (*Paul Saboko v Commissioner of Police* (2006) N2975.)

37. If the answer is yes, the decision involves an error of law, the decision-maker will have exceeded his jurisdiction and the decision is susceptible to judicial review. If the answer is no, there is no error of law, no excess of jurisdiction and this ground of review will fail. The decision will be lawful unless it is infected by some other error of law or procedure.

38. I am not satisfied that the Secretary's decision was so unreasonable or absurd that no reasonable decision-maker would have made the decision. I am satisfied that the Secretary made his decision in good faith based on poor information and advice from officers of his Department.

39. The decision appears to have been rushed and inadequate efforts were made to secure the necessary agreement of a substantial majority of the customary landowners. Mistakes were made and there were errors of judgment but the applicants have fallen short of proving unreasonableness. I dismiss this ground of review.

4 WHAT DECLARATIONS OR ORDERS SHOULD THE COURT MAKE?

40. It is now time to consider the consequences of the finding that the decision to acquire the land by the State and the decision to grant a lease to Musida Holdings Ltd were affected by errors of law.

41. In any judicial review the court's determination of the review proceeds in two stages: (a) determining whether the plaintiff has proven one or more grounds of review and if it has (b) deciding as a matter of discretion what remedy, if any, should be granted (*Dale Christopher Smith v Minister for Lands* (2009) SC973; *Isaac Lupari v Sir Michael Somare* (2008) N3476).

42. I have upheld one of the three grounds of judicial review. Errors of laws were committed by the Secretary. They were not minor errors. They were significant errors. The acquisition by the State of customary land, by lease, under Sections 10 and 11 of the *Land Act* and the subsequent granting of a lease by the State to a lessee can only proceed lawfully if a substantial majority of customary landowners agree. There was a lack of agreement in this case at both stages of the process.

43. The Secretary's decisions were seriously flawed and I am satisfied that his decisions must be quashed and that the leases dated 19 and 23 December 2008 must be declared null and void.

44. I would suggest that the parties need to go back to the drawing board and engage the services of a mediator to resolve this dispute.

COSTS

45. The usual practice is that the Court orders that the losing parties pay the costs of the successful parties. This case has been defended by all three respondents. I see no reason that the usual practice should not apply. The respondents will pay the applicants' costs.

ORDER

- (1) The application for judicial review is granted.
- (2) The decision of the Secretary for Lands dated 15 December 2008 to facilitate the issue of "lease-lease back" title to Musida Holdings Ltd is quashed.
- (3) The instrument of lease dated 19 December 2008 by which the State acquired Portion 16C, Milinch Gona, Fourmil Tufi, Oro Province, is declared null and void and is quashed.
- (4) The Special (Agricultural and Business) Purpose Lease to Musida Holdings Ltd dated 23 December 2008 is declared null and void and is quashed.
- (5) The Secretary for Lands and the Registrar of Titles shall within 21 days amend all records of the State under their control to reflect the orders of the Court.
- (6) Costs of these proceedings shall be paid by the respondents to the applicants on a party-party basis, to be taxed if not agreed.
- (7) Time for entry of the order is abridged to the date of settlement by the Registrar which shall take place forthwith.

Elemi Lawyers: *Lawyers for the Applicants*

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