N9170

Papua New Guinea
[IN THE COURT COURT OF JUSTICE AT WAIGANI]
OS (JR) 35 OF 2021

HON. GINSON GOHEYU SAONU in his capacity as Governor of Morobe
Plaintiff

AND
MOROBE PROVINCIAL GOVERNMENT
Second Plaintiff

AND
HON WERA MORI ***in his capacity as*** **MINISTER FOR ENVIRONMENT AND CONSERVATION AND CLIMATE CHANGE**
First Defendant

AND
GUNTHER JOKU in his capacity as the Managing Director of Conservation and Environment Protection Authority
Second Defendant

AND
HON. JOHNSON TUKE in his capacity as Minister for Mining and Geohazards Management
Third Defendant

AND
INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Defendant

POPONDETTA: KANDAKASI DCJ,

2021: 22nd June
10th and 20th September

PRACTICE & PROCEDURE – Application for stay of decision pending substantive judicial review – relevant principles – principles governing interim injunction applications and stay pending appeal appropriate – combination of – Applicant meeting all requirements – Stay granted.

CLIMATE CHANGE – relevant facts – climate change, global warming and consequential effects – contributing factors - only point of focus discussion and action required – mitigation and adaptation – impact of human activity – mining activities – Environment Act 2000 - its objects and purpose – protection of the environment – duties of managing director of Conservation and Environment Protection Authority (CEPA) and relevant minister of state – object and purpose of the Environment Act needs to be upheld – serious question raised – stay of decision approving environment impact statement and the subsequent grant of environment permit.

STATUTORY INTERPRETATION – Environment Act 2000 – amendments to – grant of environment permits based on environment impact statement (EIS) – review and consultation on EIS – key factors and requirements – arguable case for determination at substantive hearing – stay of decisions to accept the EIS and grant of environment permit warranted and granted – Constitution s. 255 – Organic Law on Provincial and Local-level Governments ss. 115 and 116, and Environment Act ss. 51, 53. 54, 55, 63, 65, 66, 133, Environment Act (Amendments) 2014, s. 24 and Environment (Permits) Regulations 2002, s. 16

Facts

The State through the Minister for Environment and Conservation and Environmental Protection Authority (Minister) and the Managing Director of the Conservation and Environment Protection Authority (MD of CEPA or CEPA) as Director under the *Environment Act 2000* (*EA2000*) respectively approved an Environment Impact Statement (EIS) submitted by the Joint Venture developers of the proposed Wafi-Golpu Gold/Copper Mine and granted based on the EIS, an environment permit under *EA2000*. The Morobe Provincial Government on its own behalf and on behalf of the people of Morobe took issue with the decisions on grounds that (1) the decisions were arrived at ultra vires the provisions of ss. 51, 53, 54, 55, 63, 65 and 66 of the EA2000 and regulations thereunder; (2) denial of natural justice in that the Minister and MD of CEPA failed to allow for proper review and consultation as required by s. 255 of the *Constitution*, ss. 115 and 116 of the *Organic Law on Provincial and Local-level Governments* (OLPLG) and s. 55 of the *EA2000*; (3) apprehended bias on the part of Minister and the MD of CEPA in that they advocated for the EIS and Deep Sea Tailings Placement (DSTP) which part of the EIS during the review and consultations and other occasions instead of maintaining their impartiality and independence as regulators and decision makers; (4) and that the decisions were unreasonable. Leave for a review of the decisions was granted. Following that, the plaintiffs' applied for a stay of the decisions pending a hearing and determination of the substantive review claiming the grounds for review presented an arguable case, a case of irreparable damages in the form of likely environmental damages unless the decisions were stayed and that the balance of convenience and interest of justice warrant a stay of the two decisions. The defendants disputed the plaintiffs' claims, raising issues of the plaintiffs failing to plead with particulars pleading the

specific subsections of each of the provisions of the *EA2000* they were relying upon, the approval of the EIS and the grant of the Permit were in accordance with the relevant provisions of the *EA2000*; the plaintiffs were given the opportunity and they did give their feedbacks on the EIS and he DSTP; what the Minister and the MD of CEPA alleged to have said were merely statements of the relevant science and did not amount to any advocating for the proponents, did not compromise their impartiality and independence as regulators and decision makers and for these reasons, the plaintiffs did not present any arguable case; there would be no irreparable damages and a stay would unnecessarily delay the next lot of statutory process for the grant of a Special Mining Lease paving the way for the mining project to enter construction. Hence, the defendants argued the balance of convenience and interest of justice did not warrant any stay of the decisions. Proceeding on that basis the defendants argued for a dismissal of the application for stay.

Held:

1. The relevant principles governing stay applications pending hearing and determination of a substantive application for judicial review are those applicable to applications for interim injunctive orders and stay pending Supreme Court appeals or reviews and these are:

    (1) The grant or refusal of stay is discretionary, and it is exercised on proper principles and proper grounds.

    (2) The onus is on the applicant for stay to persuade the Court to exercise its discretion in his favour.

    (3) The onus could be discharged by the applicant by clearly demonstrating or establishing that:
    (a) the decision sought to be stayed was a decision made by a public authority and is reviewable;
    (b) the decision the subject of the judicial review application is incorrect or was wrongly arrived at and cannot be allowed to take its normal course;
    (c) leave has been sought and granted;
    (d) the application is made promptly;
    (e) there is an arguable case or a serious question to be determined on the substantive merits is presented because for example:
    (i) a preliminary assessment of the case demonstrates an apparent error of law, fact or procedure; or
    (ii) on the face of the record, there is an indication of an apparent error of law, fact or procedure;
    (f) there is a likelihood of irreparable damage which cannot be adequately remedied by any damages order;
    (g) the balance of convenience favours a grant of stay to avoid possible hardships, inconveniences or prejudices to either party;
    (h) the overall interest of justice warrants a stay; and
    (i) an undertaking as to damages is given in the appropriate form.

2. Applying these principles, factors under (3) (a) – (d) and (i) were not in issue and were found in favour of the plaintiffs and for the factors (e) to (h) the Court found the plaintiffs meet each of those factors in that:

(1) there was an arguable case of the Minister and the MD of CEPA acting ultra vires the *EA2000* in that:

(a) the Permit's was granted for a period of 50 years, 20 years more than the estimate life of the mine of 30 years when there was no expressed statutory authorisation and or clear policy or reason for such a grant.

(b) the EIS was accepted, and the Permit was issued without fully meeting good practice requirements and for proper review of the EIS with the plaintiffs and members of the public because the documents and information constituting the EIS were not fully disclosed for the purposes of the review under s. 55 of the *EA2000* which are to:

(i) assess the quality of information contained in the EIA report;
(ii) determine how stakeholder concerns have been addressed;
(iii) determine if the information in terms of:
- description of the project proposal and activities;
- description of the baseline environmental conditions;
- identification, quantification and evaluation of impacts;
- identification and evaluation of the full range of reasonable alternatives; and
- description of mitigation measures,

is adequate for decision making;
(iv) identify information gaps and deficiencies; and
(v) improve the quality of the EIS through the meaningful participation and contribution of the public who would have knowledge of the natural environment, resources, wildlife, and historical monuments and what is in the environment that a project stands to affect and would be better placed to make informed suggestions for items to be incorporated or excluded or given more emphasis in an EIS report and thereby make the project a better sustainable one that is environmentally friendly.

(c) also, the Minister and the MD of CEPA did not demonstrate that the required information was in easily comprehendible or understandable, accessible, and readable report form for the public to better understand and meaningfully respond.

(d) consultation with the plaintiffs and the landowners of the land where the natural resource development is situated as contemplated by s. 255 of the *Constitution* and ss. 115 and 116 of the OLPLG which s. 55 of the *EA2000* practically provides for appeared not to have taken place in the absence of any evidence of meeting world best practice key factors for consultations in terms of:

(i) stakeholder identification;
(ii) planning and preparation for a consultation process;
(iii) prior dissemination of all relevant information;
(iv) incorporating feedbacks and share results;
(v) commitment to maintaining continuous stakeholder engagement and easy access to a grievance mechanism.

(e) In view of (b), (c) and (d) above and in particular a failure to provide fully the information required and requested in easily understandable language and incorporate the matters raised at the various consultation or review meetings suggested the plaintiffs' and other members of the public, the plaintiffs were arguably denied natural justice

(f) apprehended bias against the decision makers being the Minister and the MD of CEPA who conceded to attending public reviews and making statements at those reviews and elsewhere without pointing to any specific statutory authoristation for them to be so involved given their role as regulators and independent decision makers.

(2) The enactment of the *EA2000* was influence by the global focus and efforts on climate change and its associated risks with the Acts purpose and its object clearly stipulated in its preamble and ss. 4 to 6. Sections 54, 55, 63, 65 and 66 are very important and are at the heart of the *EA2000*. They are the mechanics or the practical ways in which the objects and purpose of the *EA2000* is to be achieved. As a sensible and responsible global citizen, PNG through the Minister and the MD of CEPA, should stay guided by the objects and purpose of the *EA2000* and ensure that their decisions in respect of any EIS or EIA or responding to any activity that has an impact on the environment deliver on the stated objects and purposes of the *EA2000* as outline in its preamble and ss. 4 - 6. This is necessitated and or dictated by the challenges that are facing our country and the world today due to climate change and its many adverse consequences.

(3) A possible irreparable damage beyond any damages order was presented because there was no demonstration to the Court as to:
(a) how the EIS and the Permit meet all the important requirements and the objects and purpose of the Act by pointing out to details of all relevant and necessary research and baseline and other studies carried out including the impact of use of DSTPs by the existing mines of Simberi, Lihir, Ramu and the closed Misima mine and lessons learnt;
(b) the potential risks are identified in the EIS and Permit and how those risks will be better managed with the specifics of the programs incorporated into the EIS and Permit for the propose Wafi-Golpu mine clearly;
(c) the ongoing monitoring and review programs that have been built into the EIS and the Permit and how effective will they be for the Wafi-Golpu mine given passed experience; and

(d) identification of possible climate change related impacting activities and how they will be better managed or avoided.

(4) The lack of pleading the particular subsections of the various provisions of the *EA2000* the plaintiffs relied upon was not a serious defect compared to the likely irreparable damages risk presented and in any case the defects can be cured by amendment prior to trial. Besides, some of the defendants and the Court were able to easily identify the relevant subsections. Hence, the defects in the pleading were not detrimental.

(5) Based on the arguable case and irreparable damages presented, the balance of convenience favoured a grant of stay to avoid possible hardships, inconveniences, or prejudices to all parties, pending the hearing of the substantive review.

(6) Given the arguable case and irreparable damage presented, the overall interest of the justice warranted a stay of the decisions the subject of the review application.

3. Accordingly, the application for stay of the two decisions the subject of the proceeding was granted.

PNG Cases Cited:

Gelu & Ors v. Somare & Ors (2008) N3526
Golobadana No. 35 Limited v. Bank of South Pacific Limited (2002) N2309
Chief Collector of Taxes v. Bougainville Copper Ltd; Bougainville Copper Ltd v. Chief Collector of Taxes (2007) SC853
Behrouz Boochani v. The State (2017) SC1566
Gary Mc Hardy v. Prosec Security and Communication Ltd (2000) PNGLR 279
Special Reference pursuant to Constitution s19(1) Special Reference by the Ombudsman Commission of PNG (2019) SC1879
PNG Power Ltd v. Ian Augerea (2013) SC1335
Nominees Niugini Ltd v. IPBC (2017) SC1646
In Special Reference by the Attorney-General pursuant to Constitution, Section19 & Makail and Higgins JJ (2016) SC1534
Lima Dataona & Paul Tohian v. Moses Makis & The State (1998) N1797
Alex Bernard v. Nixon Duban (2016) N6299,
Rimbunan Hijau (PNG) Ltd v. Ina Enei (2017) SC1605
Covec (PNG) Ltd v. Kama (2020) SC1912
PNGBC v. Jeff Tole (2002) SC694
Komboro George v. MVIT [1993] PNGLR 477
New Guinea Co Ltd v. Thomason [1975] PNGLR 454
PNG Pipes Pty Limited & Venugopal v. Sefa, Globes Pty Limited & Macasaet (1998) SC592
Boateng v. The State [1990] PNGLR 342

Overseas Cases Cited

Baker v. Medway [1958] 1 WLR 1216
R v. Liverpool City Justices; Ex parte Topping [1983] 1 WLR 119

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20th September 2021

1. **KANDAKASI DCJ**: On 10th September 2021, I deliver my decision orally with the reasons in brief and promised to deliver my reasons and decision in full today. This I now do.

Introduction

2. The plaintiffs are applying for a stay of an Environment Permit (Permit) issued by the Managing Director of the Conservation and Environmental Protection Authority (MD of CEPA or CEPA) for the Wafi-Golpu Mining Project (Wafi-Golpu). The permit was granted to Wafi Mining Limited and Newcrest PNG 2 Limited, in their several capacities as participants in the unincorporated Wafi-Golpu Joint Venture (the Joint Venture) under section 65 of the *Environmental Act 2000* (*EA2000*) on 18th December 2020.

3. The application follows grant by this Court leave for judicial review of two decisions. The decisions are:

(1) A decision of the Minister for Environment and Conservation and Climate Change, Honourable Wera Mori (the Minister) approving in principle the grant of the Permit for the EIS for Wafi-Golpu under section 59 of the *EA2000* on 19th November 2020; and

(2) A decision of the MD of CEPA in approving the issuance of the Permit for Wafi-Golpu to the Joint Venture under section 65 of the *EA2000* on the 18thDecember 2020.

(Hereinafter the "two decisions")

The plaintiffs' claims

4. An environmental permit is a condition precedent for the issuance of a Special Mining Lease (SML) under the Mining Act. The plaintiffs wish to prevent that from happening claim serious flaws in the Permit and the process leading to it in that:

(1) There is no power under the *EA2000* to issue an environment permit for 50 years, when the proposed mine life as submitted in the EIS is for no more than 30 years. Hence the grant of the Permit for a period excessively greater than the projected life of the mine, is ultra vires the *EA2000.*

(2) CEPA failed to disclose to the plaintiffs and the people of Morobe (when requested) the relevant technical documents or studies forming the basis for the EIS without which they were not able to and could not properly, adequately, and meaningfully respond to the EIS as required by ss. 54, 55, 65 and 66 of the *EA2000*.

(3) The MD of CEPA wrongfully disregarded all objections against Deep Submarine/Sea Tailings Placement (DSTP) made by the affected communities including the numerous objections and scientifically backed presentations made against DSTP by the plaintiffs by failing to include in the Permit conditions or caveats submitted by them on behalf of the people of Morobe.

(4) The plaintiffs and the people of Morobe were denied natural justice when they were not accorded a fair hearing and/or a fair and meaningful hearing in that:

(a) Failing to disclose without any good reason requested pertinent and relevant information pertaining to the EIS. The requested information included scientific reviews, documents and related information pertaining to the DSTP constituted a breach of statutory duty under s. 55 of the *EA2000* by CEPA;

(b) The failure to provide the requested information prevented meaningful consultation on the DSTP; and

(c) The failure by the CEPA to furnish the requested information denied the plaintiffs opportunity to make submissions based on or required by Reg. 9, 10 and 11, prior to approval of the Permit

in principle and ss. 54 and 55 of the *EA2000*, to the detriment of the plaintiffs and the people of Morobe.

(5) The Minister and the Managing Director of CEPA as regulators, who were duty bound under the *EA2000* to act impartially and independently in dealing with the assessment of the DSTP failed to do so and breached their duties and role as regulators, in that:

(a) Throughout 2020, CEPA conducted itself as if it were the agents of the proponent by advocating for DSTP on behalf of the proponent, throughout the alleged consultative workshops and other alleged consultations; and

(b) The Minister acted contrary to his statutory role as the Minister for Environment and Conservation and Climate Change and political head of CEPA when he:

(i) personally, on various occasions went to affected communities amongst others at Wagang, Labuta villages and Salamau;

(ii) attended various forums in Port Moresby and Lae where he publicly advocated for DSTP on behalf the proponent of the EIS;

(iii) allowing himself to personally vouch for and promote the DSTP proposal and thereby become a salesman for the proponent of DSTP and not the neutral, impartial political head envisaged by the Regulatory regime established under the *EA2000*; and

(iv) made a press release in October 2020, in which he personally declared that: *"If DSTP is not granted, I will ask Prime Minister James Marape to decommission me as Environment Minister."*

(c) The Minister was biased because:

(i) despite agreeing to accept submissions made by the plaintiffs as to environmental conditions to be attached to the Permit, he failed to do so because he had already

made up his mind not to include them as conditions of the Permit;

(ii) in a Forum in Lae in August 2020, publicly announced that he supported DSTP and that it was the best method of tailings disposal, well before and prior to the Environment Council having had any opportunity to receive and assess various submissions and objections by stakeholders including, those of the plaintiffs;

(iii) the biased pre-disposition of the Minister and the MD of CEPA, resulted in them failing to appropriately receive, address and deal with the environmental concerns of the people of Morobe (acting through the plaintiffs), in a manner consistent with the discharge of their statutory duties as set out in the *EA2000* generally, but in particular Section 54 and 55 of the Act*;*

(iv) having involved himself in the consultation process and having advocated for DSTP on behalf of the proponents of the EIS, the Minister was personally committed to approving DSTP prior to the Environment Council making its recommendations to him that he was no longer the fair and independent regulator as envisaged under the *EA2000*, when he made the decision to approve *"in principle"* the EIS on 19th November 2020;

(v) having involved himself as head of CEPA, in the consultation process and having advocated for DSTP on behalf of the proponents of the EIS, the MD of CEPA and CEPA, were committed to approving DSTP prior to the Environment Council making its recommendations, that they were no longer the impartial, independent regulators envisaged by the regulatory regime under the *EA2000*, when the MD of CEPA made the decision to issue the Permit;

(vi) in all these circumstances, there is clear and unequivocal evidence of the *Apprehension of Bias* which resulted in the granting of the Permit and/or the omission of the agreed caveats and conditions to be noted in the Permit.

The defendants' response

5. The defendants dispute and take issue with these allegations. They also submit that the process leading to a grant of a SML is a long one which necessarily takes a longer time. This case is no exception. The grant of the Permit was the beginning of a process, and it will take some time before a SML is granted for Wafi-Golpu. Hence, a stay is not warranted.

Issues for determination

6. The main issue for this Court to determine is whether the plaintiffs have established a case for a grant of stay of the two decisions pending a determination of the substantive review. To determine that issue, it will be necessary to consider each of the requirements that an applicant for stay which are like those applicable to interim restraining orders must meet to get such a relief from the Court. As we get to dealing with the issues I will elaborate and deal with each of the issues.

Relevant factual background

7. The relevant facts emerge from the various affidavits filed for or against the application for stay. Omitting the various parts of the affidavits on grounds of hearsay, opinions and others, the relevant facts are clear. As already noted, this proceeding concerns the Wafi-Golpu Mining Project. The Court granted leave for a review of the two decisions concerning Wafi-Golpu.

8. In 2005, Wafi Mining Limited completed a pre-feasibility study for developing Wafi Golpu as a mine. The company then went into a 50:50 joint venture with Newcrest PNG 2 Limited.

9. In 2008, the Joint Venture proposed to develop an underground copper/gold mine in the Morobe Province. The plan comprises the development of underground block cave mine, ore processing facilities, tailings management infrastructure and concentrate transport and handling facilities, with the DSTP proposed to be located at Wagang Village, just outside Lae City.

10. The Wafi-Golpu is located approximately 300km north-west of Port Moresby and 64 km southwest of Lae. The mine and processing facility infrastructure, camp facilities for employees and other support infrastructure will be located closer to the mine site on the Watut plains. However, the copper

concentrate handling, storage and shipment facility is proposed to be located near the Lae Marine Port.

11. The Joint Venture formally registered its intention to carry out a Level 3 Activity under the *EA2000* in June 2015, which CEPA subsequently approved. Following that approval, the Joint Venture submitted an Environment Inception Report (EIR) dated 9th May 2017, which CEPA also approved. Based on that approved EIR the Joint Venture conduct the EIS. Over a course of about 12 months, the Joint Venture conducted an Environment Impact Assessment (EIA) culminating in the compilation of the EIS. The EIS is a massive document comprising of 5600 pages consisting of 24 chapters of main report and 24 appendages containing supporting technical information.

12. In the EIS the Joint Venture proposed to pipe mine tailings from the mine (over approximately 65 kilometers) into the sea at a place called Wagang, several kilometers west of Lae city using the DSTP method. It is proposed in the EIS that approximately 16 – 20 million metric tons of mine tailings will be deposited into the Wagang DSTP Outfall.

13. On 18th July 2018, CEPA formally accepted the EIS from the Joint Venture. It is alleged that between 21st and 23rd August 2018, the MD of CEPA caused both soft and hard copies of EIS to be delivered to the Morobe Provincial Government, the PNG Forest Research Institute, PNG University of Technology and UPNG Team, all the LLGs within the project footprint and other stakeholders including the three (3) principal landowner groups of the Impact area namely Bubuafs, Yantas and Hengambus. There is however no clarity on when, how and on whom exactly were these deliveries made.

14. Apart from the stakeholder consultations, the MD of CEPA says he carried out his own review of the EIS to inform himself of the adequacy of the EIS in describing the existing environment and the potential environmental impacts that may arise from the activity and what mitigation measures were being proposed by the Joint Venture to minimize or eliminate the environmental risks of the proposed activity. He decided to engage external scientific and organisation including Erias PNG Ltd of Melbourne, Australia and British Geological Survey (BGS) of Scotland.

15. Erias PNG Ltd was tasked with the scope of reviewing the terrestrial component of the EIS which covered the environment between the mine site and the Wagang village. The final peer review report from Erais was submitted on the 30th of September, 2019. BGS was also engaged in a separate contract to review

the marine and DSTP aspect of the EIS. The BGS Team have been provided and these are scientists and experts who reviewed DSTP aspect of the EIS. The final peer review report (207 pages) from BGS was submitted to CEPA on 6th April, 2020.

16. Further, CEPA says it engaged the Mining Department of the PNG University of Technology (Unitech) to conduct review of the entire EIS. It was eventually decided that a team of PNG National scientists and engineers were to be banded together under a single Consultancy contract between PNG Unitech and CEPA and they also did a review of the EIS and submitted their report to CEPA. The defendants claim after receiving all the reports from the three independent experts engaged to review the EIS and comments from all stakeholders including the plaintiffs, the EIS and all the comments and reports were then tabled before the Environment Council on 31st August 2020.

17. The defendants claim the Environment Council deliberated on the reports and all comments submitted and made their recommendation to the Minister on 10th September 2020. Based on the recommendations, the Minister, decided to approve "in principle" the Level 3 Activity proposed by the Joint Venture on 19th November 2020. Based on approval by the Minister, the Joint Venture then applied for a Environment Permit whereupon CEPA granted the Permit on 18th December 2020.

18. The people of Morobe have publicly opposed and protested the disposal of mine tailings into the Huon Gulf through the DSTP method. They maintain that position to date.

The relevant law on stay

19. With this factual background in mind, I now turn to a consideration of the relevant and applicable law. The starting point is Order 16 r.3 (8) (a) of the *National Court Rules*, which reads:

> "Where leave to apply for judicial review is granted, then… if the relieve sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders."

20. The principles upon which the Court can grant a stay order under this provision are well settled. Cannings J in *Gelu & Ors v. Somare & Ors* (2008) N3526, succinctly stated the principles in the following terms from the head notes:

> "(1) As the applicants are ultimately seeking orders of prohibition and certiorari, the granting of leave for judicial review operates by virtue of Order 16, Rule 3(8)(a) of the *National Court Rules* as a stay of proceedings to which the application for judicial review relates – if the court so directs.
>
> (3) A direction for a stay is not automatic. It is, rather, a matter of discretion to be exercised according to normal principles for granting interim injunctions.
>
> (4) It is accordingly incumbent on the applicant to show that:
> (a) there are serious questions to be tried and that an arguable case exists;
> (b) an undertaking as to damages has been given;
> (c) damages would not be an adequate remedy if a stay is not granted;
> (d) the balance of convenience favours the granting of a stay; and
> (e) the interests of justice require that there be a stay of proceedings.
> (*Chief Collector of Taxes v Bougainville Copper Ltd* (2007) SC853 applied.)"

21. As for the normal principles for granting interim injunctions, I considered all the cases on point and summed up the principles in *Golobadana No. 35 Limited v. Bank of South Pacific Limited* (2002) N2309 in the following terms:

> "A reading of these authorities show consistency or agreement in all of the authorities that the grant of an injunctive relief is an equitable remedy and it is a discretionary matter. The authorities also agree that before there can be a grant of such relief, the court must be satisfied that there is a serious question to be determined on the substantive proceedings. This is to ensure that such a relief is granted only in cases where the Court is satisfied that there is a serious question of law or fact raised in the substantive claim. The authorities also agree that the balance of convenience must favour a grant or

continuity of such a relief to maintain the status quo. Further, the authorities agree that, if damages could adequately compensate the applicant, then an injunctive order should not be granted."

22. The Supreme Court decisions in *Chief Collector of Taxes v. Bougainville Copper Ltd; Bougainville Copper Ltd v. Chief Collector of Taxes* (2007) SC853, *Behrouz Boochani v. The State* (2017) SC1566 and many other decisions of both the Supreme and National Courts have endorsed and applied this summation of the principles. In its decision in the *Chief Collector of Taxes v. Bougainville Copper Ltd* (supra) the Supreme Court added:

> "In addition to the above [summation of the principles], there is ample authority in our jurisdiction that, before the Court could grant an interim injunctive relief, the applicant must provide an undertaking as to damages."

23. For the purpose of the present case, it is also important that, regard must be had to the principles that govern stay applications pending hearing of substantive appeals or review in the Supreme Court. The leading authority on that is the decision in *Gary Mc Hardy v. Prosec Security and Communication Ltd* (2000) PNGLR 279. In summary the Court held:

(1) The grant or refusal of stay is discretionary, and it is exercised on proper principles and proper grounds.

(2) The onus is on the applicant for stay to persuade the Court to exercise its discretion in his favour.

(3) The relevant factors or considerations are as follows:
(a) the principle that the judgment creditor is entitled to the benefits of the Judgment;
(b) whether leave is required and whether it has been obtained;
(c) whether there has been a delay in making the application;
(d) possible hardship, inconvenience or prejudice to either party;
(e) the nature of the judgment sought to be stayed;
(f) the financial ability of the applicant;
(g) preliminary assessment about whether the applicant has demonstrated an apparent error of law or procedure;
(h) whether on the face of the record, there may be indicated an apparent error of law or procedure;
(i) the overall interest of justice; and
(j) the balance of convenience.

24. Combing the above principles with those governing interim injunction applications, I consider the principles which should govern an application for stay of an administrative decision pending a substantive judicial review are as follows:

(4) The grant or refusal of stay is discretionary, and it is exercised on proper principles and proper grounds.

(5) The onus is on the applicant for stay to persuade the Court to exercise its discretion in his favour.

(6) The onus could be discharged by the applicant by clearly demonstrating or establishing that:
   (j) the decision sought to be stayed was a decision made by a public authority and is reviewable;
   (k) the decision the subject of the judicial review application is incorrect or was wrongly arrived at and cannot be allowed to take its normal course;
   (l) leave has been sought and granted;
   (m) the application is made promptly;
   (n) there is an arguable case or a serious question to be determined on the substantive merits is presented because for example:

      (i) a preliminary assessment of the case demonstrates an apparent error of law, fact or procedure; or

      (ii) on the face of the record, there is an indication of an apparent error of law, fact or procedure;

   (o) there is a likelihood of irreparable damage which cannot be adequately remedied by any damages order;

   (p) the balance of convenience favours a grant of stay to avoid possible hardships, inconveniences or prejudices to either party;

   (q) the overall interest of justice warrants a stay; and

   (r) an undertaking as to damages is given in the appropriate form.

Applying the law to the present case

25. Applying these principles to the present case, I note there is no dispute that the decision sought to be stayed was a decision made by a public authority and is reviewable. Leave for review of that decision was sought and granted. There is also no issue on the timing of the application for stay and the plaintiffs giving an undertaking as to damages in the required form. This leaves the rest of the factors in issue for this Court to determine. Hence, the issues the Court must determine are:

(a) Is there an arguable case or a serious question to be determined on the substantive merits?

(b) Is there a likelihood of irreparable damage which cannot be adequately remedied by any damages order?

(c) Does the balance of convenience favour a grant of stay to avoid possible hardships, inconveniences, or prejudices to either party?

(d) Does the overall interest of justice warrant a stay?

(a) Is there an arguable case or a serious question to be tried?

26. I will deal firstly with the question of arguable case or a serious question to be tried being presented. To determine that issue, it is necessary to consider what the plaintiffs claim per their Order 16, r.3 (2) (a) Statement as verified by the verifying affidavit. As briefly noted in the early part of this judgment, the grounds pleaded in the plaintiffs' O 16 r 3(2)(a) Statement can be categorized into 4 broad categories. They are:

(1) ultra vires or an error of law;

(2) denial of natural justice;

(3) apprehension of bias; and

(4) unreasonableness

27. These are well known grounds for judicial review. For the stay application, I need to consider if a preliminary assessment of the evidence before the Court discloses an existence of all or any of these grounds. I will thus turn to a consideration of each of them.

Ultra vires or an error of law

28. Under this ground, the plaintiffs have pleaded in their verified O.16, r.3(2)(a) Statement that the Minister and CEPA have acted ultra vires and or have committed an error of law because they:

(a) issued a Permit for 50 years when the proposed life of the Mine as submitted in the EIS is for 30 years;

(b) breached the provisions of ss. 54, 55, 65 and 66 of the *EA2000* and ss. 9, 10, 11 and 15 (1) of the Regulations under *EA2000,* by not allowing for meaningful consultation by a failure to disclose to the plaintiffs the relevant technical documents or studies forming the foundation for the EIS to enable them to respond to the EIS properly, adequately and meaningfully as required by these provisions;

(c) wrongfully disregarded all the objections against DSTP made by the affected communities including the numerous objections and scientifically backed presentations against DSTP by the plaintiffs;

(d) did not include in the Permit conditions or caveats submitted by the plaintiffs on behalf of the people of Morobe

29. The process of assessing an EIS to then lead to the issuance of an environment permit is set out in s. 51 of the *EA2000* in the following terms:

"51. Environmental impact assessment.
(1) An environmental impact assessment shall involve the following: -
(a) submission of an inception report in accordance with Section 52 setting out the issues to be covered in the environmental impact statement;
(b) submission of an environmental impact statement in accordance with Section 53 setting out the physical and social environmental impacts which are likely to result from the carrying out of the activity
(c) assessment and public review of the environmental impact statement in accordance with Sections 54 and 55;
(d) acceptance of the environmental impact statement by the Director in accordance with Section 56;
(e) referral of the environmental impact statement, assessment report and other material to the Council in accordance with Section 57;

(f) recommendation by the Council to the Minister in accordance with Section 58;

(g) where the Minister has received a recommendation from the Council under Section 59 an approval in principle by the Minister.

(2) Subject to this Division, the Regulation may prescribe in further detail the process of undertaking environmental impact assessment."

30. In my view, this provision sets out the complete process leading up to an EIS being approved in principle. Included in that process is the requirement that after a project proponent submits an EIS to CEPA in accordance with s.53, it must undergo assessment and public review in accordance with ss. 54 and 55 of the *EA2000*. To assist with his assessment of the EIS, s.54 (4) of *EA2000* requires the Director who according to its definition in s.2 and s. 15 of the *EA2000* is the MD of CEPA to take several actions which includes requiring any person to provide him with information and undertake such other investigations and inquiries as are necessary to make an informed assessment. Then under s. 55 the Director or the MD of CEPA is expressly obligated to provide the information provided to him to the public for public review and to determine the period within which, the extent to which and the way in which governmental authorities or persons may make submissions to him or the Council in respect of that information or report.

31. Relevantly s. 55 stipulates:

"55. Public review and submissions.

(1) The Director shall cause—

(a) any information provided in compliance with a requirement under Section 54(2)(a) to (d) inclusive; or

(b) any environmental impact statement submitted under this Division,

to be made available for public review and shall determine the period within which, the extent to which and the manner in which governmental authorities or persons may make submissions to the Director or the Council in respect of that information or report.

(2) The Director may give directions to the proponent requiring the proponent to—

(a) at his expense and to the satisfaction of the Director, make copies of any information or statement and advertise its availability for public review; and

(b) provide copies of that information or statement to such public authorities and persons and members of the public as the Director determines, at such price (if any) as the Director determines; and

(c) make a public presentation to persons who are likely to be affected by the carrying out of the activity.

(3) For the purposes of complying with this section, the Director may require the proponent to submit a proposed programme of public review for approval by him.

(4) The proponent may meet the cost of persons (including persons representing the Director) attending a public presentation in relation to the proposed activity, but the fact that a proponent has met such costs shall not place any obligation on a person to form a particular view of the proposal.

(5) Where any information relating to a manufacturing or industrial process or trade secret used in carrying on or operating any particular undertaking or equipment or information of a business or financial nature in relation to the proposed activity which is confidential to the applicant (in this section called "the confidential information") is contained in any statement or report which is to be made available for public review under this section, the Director shall, before causing the statement or report to be made available for public review under Subsection (1), exclude the confidential information from that statement or report.

(6) The Director may, at any time prior to accepting the environmental impact statement, refer any issues raised during the assessment and public review of the environmental impact statement back to the proponent and require the statement to be amended to address those issues."

32. The plaintiffs claim the MD of CEPA breached his obligations under s. 55 of the *EA2000* by failing to:

(1) provide to the plaintiffs, other stakeholders and the general public relevant information provided under s.54 for public review and submissions and the manner in which governmental authorities including the plaintiffs and persons may make submissions to him or the Environment Council in respect of that information or report;

(2) give any direction to the proponent requiring it to make copies of any information or statement available for public review and advertise the availability of such information to the public for public review and submissions;

(3) provide statements and information to public authorities including the plaintiffs and persons and members of the public for public review and submissions; and

(4) require the proponent to satisfactorily address red flagged issues in the independent peer review conducted by Professor Ralph Mana and his team as well as others and other issues and concerns that were raised by the plaintiffs and the general public.

33. Further, the plaintiffs submit that, s.55 obligates the MD of CEPA to provide to the plaintiffs and the public generally the relevant information for public review of the EIS and submissions without the need for the plaintiffs to request for them. In this case, however, the plaintiffs on numerous occasions requested the relevant information such as, the technical documents, scientific studies and data, reviews, reports, and others forming the foundation for the EIS without which the plaintiffs and other members of the public could not properly, adequately, and meaningfully respond to the EIS. But the Minister and the MD of CEPA refused to provide the relevant information including copies of the peer reviews of the EIS that were conducted for CEPA.

34. Turning then to the alleged breaches of ss. 65 and 66 of the *EA2000* the plaintiffs plead in their verified Statement that the Minister and the Director breached these provisions when they failed to consider the views expressed and submissions made by them and members of the public. This includes the Minister and the MD of CEPA's failure to include in the Permit caveats and conditions that they requested to be included. Specifically, they claim they had an understanding with the Minister and the Hon. Prime Minister, James Marape, that a yet to be issued environment permit would cater for caveats and conditions relating to environmental protection, mine waste management and disposal, as well as ensuring environmental standards and guidelines are complied with. However, the plaintiffs claim these caveats and conditions have not been included in the Permit that was issued on 18th December 2020.

35. Furthermore, the plaintiff's claim certain critical conditions that are specifically provided for under section 66 of the *EA2000* such as the need for conducting proper baseline studies or surveys and reporting the results prior to

commencing operations were not provided for in the Permit. The lack of baseline studies was a critical red flag raised by Professor Ralph Mana in his independent peer review of the EIS and was one of the key caveats that was supposed to be included in the Permit but was not.

36. Based on the foregoing, the plaintiffs submit they are presenting a strong arguable case of the defendants breaching the provisions of ss.54, 55, 65 and 66 of the *EA2000* and the relevant provisions of the regulations promulgated under the *EA2000*. Consequently, they acted ultra vires the relevant provisions in questions.

37. The defendants in opposing the application take issue with all the plaintiffs' claims, through their separate submissions. However, their position is almost the same. I will therefore address them as one and where necessary refer specifically to the submissions of a defendant. The correct way to consider the plaintiffs' claims on the ground of *ultra vires* is the way in which the MD for CEPA addresses those claims.

38. Firstly, in relation to the grant of the Permit for 50 years, 20 years more than Wafi-Golpu's estimated life, the MD of CEPA with the support of the other defendants submit the grant was in line with CEPA's practice. Reliance is placed on s. 16 (1) (c) of the *Environment (Permits) Regulation 2002* (*EPR2002*). That provision reads:

> "16. Publication of grant of permit.
> (1) The Director shall upon grant of a permit under Section 65 of the Act….. and
> (c) specify the duration of the permit, being—
> (i) in the case of Level 2 (Category B) activity or Level 3 activity, at least 25 years unless a shorter period is requested by the applicant; and
> (ii) in any other case, not exceeding 10 years…"

39. The effect of the MD of CEPA's argument is, since Wafi-Golpu is a Level 3 activity, the provisions of s. 16 (1) (c) applies. This provision fixes the minimum period without specifying the maximum limit. That being the case, it was open to him to fix the duration of the Permit up to 50 years. This argument with respect does not address the issue being raised by the plaintiffs that if the estimated life of Wafi-Golpu is 30 years, logically, the Permit should not exceed by a substantial period of 20 years more. The MD of CEPA's submissions do not elaborate in any respect as to the purpose or object and other reasons, if any, for CEPA's claim of having a practice of issuing environmental permits going beyond the estimated life of a mining project and the benefits of such a practice. In the absence of such

elaboration and an expressed authorisation to issue a permit beyond the estimated life of a project, in my view, presents an arguable issue of whether the MD of CEPA is empowered by the provisions of s. 16 of the *EPR2002* to issue environmental permits beyond the life of a project? If the answer is yes, the next arguable question of what is the purpose and or object with which such durations should be granted, is also presented? Hopefully at the substantive hearing these questions will be answered. Until then, it appears the MD of CEPA may have acted ultra vires s.16 of the *EPR2002*. This alone should be sufficient for the purposes of presenting an arguable case to warrant a stay pending the substantive review hearing and determination. For completeness however, I will consider each of the grounds relied upon by the plaintiffs and responded to by the defendants.

40. Secondly, in relation to the plaintiffs' reliance upon the provisions of s. 55 of the *EA2000*, the defendants have taken the position that the provision was repealed and replaced, by the *Environment Act (Amendment) 2014* (*EA(A)2014*), certified on 30 May 2014. Only the Minister assisted with the relevant provisions. The old provision is as reproduced at paragraph 31 above. The replacing provision reads:

> "55. PUBLIC REVIEW AND SUBMISSIONS
>
> (1) <u>The Director shall cause an environment impact statement submitted under this Division to be made available for public review</u> and for this purpose may give directions to the applicant requiring the applicant to-
> (a) submit a proposed programme for public review for approval by him; and
> (b) at his expense and to the satisfaction of the Director, make copies of any information or statement and advertise its availability for public review; and
> (c) provide copies of that information or statement to such public authorities and persons and members of the public as the Director determines; and
> (d) make a public presentation to persons who are likely to be affected by the carrying out of the activity; and
> (e) meet the costs of persons (including persons representing the Director) attending a public presentation in relation to the proposed activity.
>
> (2) Where any information –
> (a) relating to a manufacturing or industrial process or trade secret used in carrying on or operating any particular undertaking or equipment; or

(b) of a business or financial nature in relation to the proposed activity which is confidential to the applicant,

is contained in any statement or report which is to be made available for public review under this section, the Director shall, before causing the statement or report to be made available for public review under Subsection (1), exclude the confidential information from that statement or report."

41. There are two problems with defendants' submissions. Firstly, I note the amending legislation says in its preamble that the *EA(A)2014* is to come into operation in two parts. The first part which includes s. 24 of the amending Act which repeals and replaces s. 55 of the *EA2000*, is to come into operation "*in accordance with notice in the National Gazette by the Head of State acting with and in accordance with, the advice of the Minister*." The defendants did not assist the Court with any evidence of a gazettal as prescribed. Hence, this argument fizzles out on that basis in the absence of any evidence to the contrary.

42. Secondly, a closer look at the old and the new provisions, clearly reveals the new provisions has only redraft the full text of the old provision. The matters required by subsections (1), (2), (3) and (4) in the old version are now incorporated into subsection (1) (a) to (e) in the new provision. Subsection (5) in the old is now subsection (2) reworded without losing the essence of what was provided for in the old provision. In the end therefore, it does not make much of a difference on what is required by s. 55 of the *EA2000* as the Directors duty to disclose.

43. Following on from their second argument, the defendants thirdly argue the plaintiffs are not entitled under s.55 to the information they have requested. The Director is therefore not obliged to provide such information to the plaintiffs. The Mining Minister adds to that argument by arguing a privilege is vested in the developer to release privilege and confidential information relevant to its business, operations and interest to third parties. These arguments cannot be correct. The provisions of the section in question be it the older or the newer version are clear. Going by the older version, subsections (1) (5) are relevant. These provisions once again state:

"**55. Public review and submissions.**

(1) The Director shall cause—

(a) any information provided in compliance with a requirement under Section 54(2)(a) to (d) inclusive; or

(b) any environmental impact statement submitted under this Division,

to be made available for public review and shall determine the period within which, the extent to which and the manner in which governmental

authorities or persons may make submissions to the Director or the Council in respect of that information or report.

…

(5) Where any information relating to a manufacturing or industrial process or trade secret used in carrying on or operating any particular undertaking or equipment or information of a business or financial nature in relation to the proposed activity which is confidential to the applicant (in this section called "the confidential information") is contained in any statement or report which is to be made available for public review under this section, the Director shall, before causing the statement or report to be made available for public review under Subsection (1), exclude the confidential information from that statement or report."

(Underlining mine)

44. The wording of these provisions is so plain and clear that no art of interpretation is required.[1] They clearly spell out that the Director:

"shall cause—

(a) any information provided in compliance with a requirement under Section 54(2)(a) to (d) inclusive; or

(b) any environmental impact statement submitted under this Division,

to be made available for public review and shall determine the period within which, the extent to which and the manner in which governmental authorities or persons may make submissions to the Director or the Council in respect of that information or report."

45. It's clear to me that the Director has no discretion whether to make available the various information covered by this provision. He is obliged to make available the information in question. The only exception to that is any confidential information caught by subsection 5. Contrary to the defendants' submissions, it is the Director who decides whether to exclude any information of the type provided for under that subsection from public review. It is not for the proponent or a developer to decide.

46. The audience to whom the information must be made available is also clear. That includes the public at large and other governmental authorities. That appears clearly from the phrase "*governmental authorities or persons may make submissions*". Section 63 (1) (d) of the *EA2000* itself makes that clear in the

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[1] See for examples of authorities on point: *Special Reference pursuant to Constitution s19(1) Special Reference by the Ombudsman Commission of PNG* (2019) SC1879 at [90] and *PNG Power Ltd v. Ian Augerea* (2013) SC1335

context of the procedure of an environment permit application that, "*governmental authorities*" includes provincial governments in these terms:

> "(d) the requirements for service of the application on other governmental authorities - including provincial government;"

47. Section 133 (3) (d) of the *EA2000* adds to that by clearly pointing out that Provincial and Local-level Governments are included as "*governmental authorities*". The provision relevantly stipulates:

> "(3) Without limiting the generality of Subsection (1), but subject to this Act, the Regulations may prescribe, in relation to noise –
> ….
> (d) making provision for officers of other governmental authorities including Provincial Governments and Local-level Governments, to enforce provisions of this Act in relation to noise; and"

48. No doubt, therefore, the Director is obliged by the use of the word "shall"[2] to provide the information covered by s.55 (1) to the relevant provincial and local-level governments who stand to be affected by a project. The provisions of s. 55 (1) are consistent with best world practices on the requirement for environmental impact assessments (EIA) and EIS before any project can be given the approval to proceed. Public review of an EIS is an integral part of assessing an EIS. It is part of the overall review of an EIS. It is the process used to assess and determine the adequacy of the process and quality of the EIS report and add value to it. Such a review is conducted against the relevant legal requirements and good industry and environmental best practices. These are consistent with the key objectives of an EIS review which are to:

(s) assess the quality of information contained in the EIA report;

(t) determine how stakeholder concerns have been addressed;

(u) determine if the information in terms of:
   (a) description of the project proposal and activities;
   (b) description of the baseline environmental conditions;
   (c) identification, quantification and evaluation of impacts;
   (d) identification and evaluation of the full range of reasonable alternatives; and

[2]See for example of cases on point: *Nominees Niugini Ltd v. IPBC* (2017) SC1646 at [22] and *Special Reference by the Attorney-General pursuant to Constitution, Section19 & Makail and Higgins JJ* (2016) SC1534 at [125].

(e) description of mitigation measures,
is adequate for decision making; and

(v) identify information gaps and deficiencies.

49. The task of a review is also to determine if the information has been communicated in a comprehensible or easily understandable, accessible, and readable report. The ultimate objective of review is to improve quality and EIS best practice. The public review process in that way plays an important role because it comes with the potential to contribute to a better sustainable project that is environmentally friendly. The public would have knowledge of the environment and what is in it that a project stands to affect and would be better placed to make informed suggestions for items to be incorporated or excluded or given more emphasis in an EIS report. Often, the public are usually concerned with the social and environmental aspects of a project and how it affects the natural resources, wildlife, and historical monuments if any and will meaningfully comment upon and contribute to the review of the EIS. Hence, the public's meaningful participation in this way in the review process would enable the public to be a partner in the project.

50. At the highest the provisions of s. 255 of the *Constitution* and ss.115 and 116 of the *Organic Law on Provincial and Local-local Level Governments* (*OLPLG*) provide for consultation between Provincial Governments and Local-level Governments and then those three arms of government with the landowners of the land upon which the natural resource development is located.

51. These provisions stipulate:

Constitution

"**255. Consultation**.

In principle, where a law provides for consultation between persons or bodies, or persons and bodies, the consultation must be meaningful and allow for a genuine interchange and consideration of views."

OLPLG

"**115. Control of natural resources**.

(1) Where there is a proposal to develop a natural resource in a province or provinces, the appropriate National Minister designated by the National Executive Council shall consult with the Provincial Government in the province or provinces where the natural resource is situated.

(2) The National Government, and the Provincial Governments and the Local-level Governments in the province or provinces where the natural resource is situated, shall liaise fully with the landowners in relation to the development of the natural resources.
(3) In this section, unless the contrary intention appears, "natural resource" has the same meaning as it has in Section 98.

116. Resource development process.
(1) For the purposes of Section 115, an Act of the Parliament shall make provision for—
(a) the type or types of development to which Section 115 applies; and
(b) the consultation process; and
(c) the establishment of natural resource development forums and the procedures of the forums; and
(d) the extent to which the parties may participate in the development of the natural resources; and
(e) such other matters relating to the subject as are necessary."
(All underlining mine)

52. The defendants submit these provisions do not provide a primary right or remedy for the plaintiffs. The applicable law is s. 55 of the *EA2000* which is the law referred to or contemplated under s. 255 of the *Constitution* and ss. 116 of the OLPLG. The process for consultation then is as provided for by ss. 55, 65, 66 of the *EA2000*. They submit these provisions were complied with.

53. I accept the submissions that the provisions for review under s. 55 and the other provisions of the *EA2000* referred to at least provides a practical way for the National Government to meaningfully consult with a provincial governments and local-level governments and the landowners where the resources development is to be located and thus stand to be affected by a natural resource development in their areas pursuant to ss. 115 and 116 of the *OLPLG*. In *Special Reference by the Attorney-General pursuant to Constitution, Section19 & Makail and Higgins JJ* (2016) SC1534, the concept of consultation under s. 255 of the *Constitution* came up.

54. In my judgment with agreement of Salika DCJ (as he then was), Mogish and Kassman JJ, I opinioned as follows:

"From its own wording, it is clear that this provision is a general provision intended to cover all cases in which there is a requirement 'for consultation between persons or bodies or persons and bodies'. This is apparent from

the use of the phrase 'In Principle'. In other words, this provision is saying, generally where there is a requirement for consultation without more, this provision applies. This in turn means, where a law providing for consultation is specific, that should take priority over s. 255. Some law for example, s. 115 (1) of the Organic Law on Provincial Governments and Local-level Governments (OLPLG) provides for consultation in specific terms and use the word 'shall' instead of the term 'may' or the phrase 'in principle…'
…

The wording in s. 255 uses the words 'in principle' while the wording in s. 115 of the OLPLG uses the word 'shall'. They are not one and the same thing. The consultation provided for in s. 255 is 'in principle' while the requirement for consultation is in mandatory terms by the use of the word 'shall' in s.115 of the OLPLG."

55. Only through a full disclosure of all relevant information about a project in a language that is easy to read and understand can there be a meaningful consultation as I tried to describe earlier. A proper consultation or review process necessarily for the purposes of s. 255 of the *Constitution* and ss.115 and 116 of the *OLPLG* requires therefore a two-way dialogue with interchange of information and views[3] in clearly understandable language instead of a one-way dissemination of selective information only or not at all in complicated technical or difficult language. Clearly, it is a process rather than a standalone event. This is important because, all three arms of government, the National and Provincial and Local-level Governments need to consult with local landowners and or communities who stand to be affected and other relevant stakeholders.

56. World best practice on proper consultation wherever that is required involves at least five key features or essential factors These are necessary for consultations generally that must be met to meet the requirement for a meaningful consultation. The factors include:

(1) stakeholder identification;

(2) planning and preparation for a consultation process;

(3) prior dissemination of all relevant information;

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[3] See: s. 255 *Constitution* and *Lima Dataona & Paul Tohian v. Moses Makis & The State* (1998) N1797, per Woods J.

(4) incorporating feedbacks and share results;

(5) maintain continuous stakeholder engagement and easy access to a grievance mechanism

57. Stakeholder identification is a process in itself. It requires an identification of the categories and subcategories of the different stakeholders, whether they will perceive the project positively or negatively, their key characteristics, that is social, and economic situations, cultural factors, location, size, organizational capacity and degree of influence, vulnerability, or social exclusions. How the project will affect each of the different groups is also an important factor in this process.

58. In relation to the next aspect of preparing a consultation plan, the ready availability of beneficiaries and affected people is always important and is often a top priority. Included in that is the important aspect of accessibility to the site where the consultation will be held, and the time of the consultation to ensure maximum participation. Also, the format of the consultation which would give the stakeholders the best opportunity to ask questions and interact, should there be one event or multiple events, are stakeholders at risk and how can anonymity be protected, if need be, are all important questions which informs planning and execution of a consultation plan.

59. The third essential factor of prior disseminating of all relevant information before the actual consultation meetings, is one of the most critical factors. This is the case because, to promote better and meaningful participation in a consultation, stakeholders must understand how they will be impacted by the proposed project, how their environment as defined by s.2 of the *EA2000* will be affected, how that is proposed to be managed, whether there will be any risks and if so, how will that be managed and reduced or minimised. Informing stakeholders on the project's possible environmental and social impacts is part of starting a meaningful dialogue. It is at this point that the stakeholders must be fully informed of all the possible impacts and how that will be reduced or minimise to safe levels. Given the importance of this factor, project proponents must use all available means to disseminate the relevant information to all the stakeholders. The information must be packaged in language that is easy for everybody to understand with lesser or no use of technical jargons and languages which has the tendency of rendering understanding impossible or difficult.

60. From the consultation meetings, there will no doubt be comments and inputs from the stakeholders. The dialogue will allow stakeholders to voice their concerns, ask questions and make suggestions to improve the EIS. The

consultations should always be followed by an activity that summarizes the results of the process, provides answers to pending questions and explains how the feedback collected will influence the EIS and environmental management design. The same channels that were used for the initial dissemination of information efforts should be used to share the summary. The final version of the environmental and social impact assessment must also be made accessible. In this true spirit of consultations and for the stakeholders to give the proponents of a project and the State their social license to operate or otherwise known as "SOL".

61. In *Alex Bernard v. Nixon Duban* (2016) N6299 I discussed and attempted to define the concept of "social license to operate" at [30] – [31]. The Supreme Court in its decision in *Rimbunan Hijau (PNG) Ltd v. Ine Ibi & Ors* (2017) SC1605, referred to the relevant part of the judgment and noted as follows:

> "50. His honour was in fact striking a now well recognized cord in doing or conducting business ethically. Businessmen and businesses, domestic or international, who mean well and want to succeed often pay a lot of attention and invest quality time and resources to seeking out and securing the endorsement and approval of the community in which they wish to set up and operate. The technical term used to describe this is "social license to operate". …Kandakasi J., in his decision in *Alex Bernard & P'Nyang Resources Association Inc. v. Hon. Nixon Duban*, … defined "social license" in the following terms:
>
> ''Social license'' generally refers to a local community's acceptance or approval of a company's project or ongoing presence in an area. It is increasingly recognized by various stakeholders and communities as a prerequisite to development. The development of social license occurs outside of formal permitting or regulatory processes and requires sustained investment by proponents to acquire and maintain social capital within the context of trust-based relationships. Often intangible and informal, social license can nevertheless be realized through a robust suite of actions centered on timely and effective communication, meaningful dialogue, and ethical and responsible behaviour."
>
> (Emphasis supplied)
>
> 55. Good governments and or States make the need to seek and secure the social license to operate a condition precedent for any major development."[4]

[4] See also *Covec (PNG) Ltd v. Kama* (2020) SC1912 per Kandakasi DCJ at [36].

62. The key to a successful program is not only to keep stakeholders informed but also to keep them engaged throughout the life of a project. That is the final but on-going stakeholder engagement process for the good of a project. Platforms created for program disclosure and consultation is used throughout the project cycle from preconstruction activities to construction, and operation. Again, the channels used to disseminate information at pre review stage remain accessible to stakeholders throughout the life of the project. Information gathered for the consultation, that is languages of the participants, availability of stakeholders, and such other factors must also be considered in the development of a grievance mechanism that is easily accessible.

63. In the present case, the position taken by the Minister and the Director as confirmed by their learned counsels' submissions appears to go against the purpose and intend of s. 55 of the *EA2000*, and generally world best practice which is an important and critical part and process leading to a grant of an environment permit. Given their submissions, counsel for the defendants were not able to assist the Court by pointing out to clear evidence of real and meaningful public review or consultation being facilitated and there being real and meaningful public review with the involvement of the public generally and in particular with the Morobe Provincial Government and the relevant Local-level Governments who stand to be affected by the Wafi-Golpu mine. Specifically, the defendants had the obligation to point out to whom, when, where and how were the relevant information were delivered. Also, the defendants needed to show when, where, and how did the consultations and reviews take place, who attended, what were the public's feedback and how were those accommodated in the EIS that was subsequently accepted. Additionally, given the thickness of the EIS and the highly technical nature of it, the defendants were obliged to demonstrate to this Court how and when they assisted each member of the public to properly understand what was in the EIS and amongst others, demonstrate how they made the EIS easy to read and understand and thus enable the public to make informed feedbacks. Of particular mention in this regard should have been, how did the consultations and reviews take place with the ordinary villagers of the several villages who stand to be affected as well as with the ordinary members of the public and members of the Morobe Provincial Government and the Local-Level Governments that also stand to be affected who may not be educated well enough to properly read and understand the contents of the EIS.

64. Instead of addressing any of these aspects, the defendants are attacking the basis for the plaintiffs claim of an agreement being reached to incorporate caveats and conditions in the EIS. Whether there was such an agreement is only part of the overall obligation that is in the Director to address the issues of what were the

stakeholder's feedbacks and how those were incorporated into the EIS. If anything is clear from their submissions, the defendants hold the view contrary to the clear provisions of s. 55 of the *EA2000* that Director is not obliged to fully disclose all the relevant information. Given the importance of public review, the importance of our environment and the importance of an EIS, the defendants had the obligation to demonstrate clearly how the EIS meets all the requirements under the *EA2000* and the whole purpose and object for public reviews. Unfortunately, they have not yet done so. Maybe they will do that at the substantive review hearing. In these circumstances, I find the plaintiffs present an arguable case for the purposes of the application for stay.

65. Finally, in relation to the alleged breaches of ss. 54, 55, 65 and 66 as well as the alleged failure to include conditions or caveats in the Permit, failure to disclose scientific and technical information and a failure to meaningfully consult with the plaintiffs before accepting the EIS and issuing the Permit, the defendants submit the allegations are too general. This argument in essence is, since the various provisions in question have several subsections, it was incumbent on the plaintiffs to specifically plead the relevant subsections to bring out clearly the issues to be answered. As for the other allegations the argument is they lack particularly and clarity. Citing my decision in *PNGBC v. Jeff Tole* (2002) SC694 and *Covec (PNG) Ltd v. Kama* (2020) SC 1912, the Director submits it is not for the Court and the opposing parties to work out the correct subsections. Instead, the onus was on the plaintiffs to plead with clarity.

66. To better understand and deal with the issues presented, it is necessary to see each of the provisions in question in full. Section 55 has already been reproduced above at paragraph 43. The other provisions of ss. 54, 65 and 66 state as follows:

> "**54. Assessment**.
> (1) On receipt of an environmental impact statement, the Director shall cause the statement to be assessed.
>
> (2) Within 30 days of receipt of an environmental impact statement, the Director shall notify the proponent in writing of the period the Director will require to assess the environmental impact statement and to decide whether or not to accept the environmental impact statement under Section 56.
>
> (3) At any time during the period notified to the proponent under Subsection (2), the Director may notify the proponent in writing that the Director requires a further period, such period and the reasons necessitating

such period to be specified in the notice, in which to assess and make a decision regarding the environmental impact statement.

(4) The Director may for the purposes of assessing a proposed activity under this section—

(a) require any person to provide him with such information as is specified in that requirement; or
(b) call a conference of interested persons to discuss the application; or
(c) refer the environmental impact statement to the Environment Consultative Group; or
(d) appoint a committee to conduct a public inquiry and report its findings to the Director; or
(e) take any or all of the courses of action set out in Paragraphs (a) to (d) inclusive or take such other investigations and inquiries as he thinks fit.

(5) Where a Provincial Environment Committee has been established for any Province to which the environmental impact statement relates, the Director shall, before completing his assessment, refer the environmental impact statement to that committee for its comments.

…

65. Criteria for grant and conditions of permit.

(1) Subject to this section and Section 66, the Director may grant a permit where he is satisfied that—

(a) the activity which is the subject of the permit will be carried out in a manner which is consistent with all relevant Environmental Policies and the Regulations; and
(b) all reasonable steps will be taken to minimise any risk of environmental harm as a result of the activity; and
(c) the activity will not contravene any relevant environmental obligation under any international treaty, convention or instrument to which Papua New Guinea is a party and which has been ratified by the Parliament or any law of Papua New Guinea; and
(d) the applicant will abide by the conditions of the permit.

(2) In granting a permit under Subsection (1), the Director shall specify the conditions to which the permit is subject.

(3) In determining—
- (a) whether or not to grant a permit; and
- (b) the conditions to attach to the permit,

the Director shall have regard to—
- (c) the objects of this Act; and
- (d) the matters of national importance; and
- (e) the general environmental duty; and
- (f) any relevant Environment Policy; and
- (g) any relevant environmental impact statement, assessment, report, public submission or other information in relation to the proposed activity; and
- (h) any information provided with the application; and
- (i) *where relevant, the Minister's approval in principle*; and
- (j) any public submission made, or views expressed at a presentation, hearing or conference; and
- (k) the suitability of the applicant to hold a permit; and
- (l) the character, resilience and beneficial values of the receiving environment; and
- (m) best practice environmental management for the activity in question; and
- (n) public interest in the proposed activities.

66. Conditions of permits.

(1) A permit may be issued subject to such conditions the Director considers are necessary or desirable, including but not limited to conditions containing requirements to do all or any of the following—
- (a) installation and operation of certain plant or equipment within a certain time;
- (b) the taking of certain action to minimise the risk of environmental harm;
- (c) at the cost of the permit holder, installation of monitoring equipment, carrying out a specified monitoring programme and reporting on its progress;
- (d) preparation and carrying out an environmental management programme;
- (e) provision of reports on any matter specified by the Director;
- (f) submission for approval and carrying out of an Environmental Improvement Plan;
- (g) undertaking an audit at periodic intervals;

(h) preparation and lodgement of a plan for emergency response in relation to accidental release of contaminants or risk of other emergency;
(i) provision of information reasonably required by the Director for the administration and enforcement of the Act;
(j) lodgement of an environmental bond consistent with requirements established under Section 103;
(k) conducting baseline studies or surveys and reporting the results prior to commencing operations;
(l) rehabilitation of the affected area.

(2) In issuing a permit and fixing conditions, the Director shall ensure that the permit will require compliance with all relevant Environment Policies except where—
(a) the activity which is the subject of the permit is an existing activity; and
(b) the applicant for the permit has submitted an environmental improvement plan and the plan has been approved by the Director; and
(c) the Director is satisfied that the environmental improvement plan contains measures and a programme of attainment that will ensure compliance with any Environment Policies and the Regulation within a reasonable time; and
(d) compliance with the approved environmental improvement plan is a condition of the permit.

(3) Operational Procedures may specify the manner and form of any information or report required to be submitted under a condition fixed in accordance with this section."

67. In my view, very important requirements are captured in each of these sections and each of their respective subsections. They are in my view, at the heart of the *EA2000*. They are the mechanics or the practical ways in which the objects and purpose of the *EA2000* are to be achieved. The preamble and ss. 4 – 6 of the *EA2000* clearly point out the purpose and or objects of the Act. In this respect, the preamble stipulates:

"Being an Act to provide for and give effect to the National Goals and Directive Principles and in particular—

(a) to provide for protection of the environment in accordance with the Fourth National Goal and Directive Principle (Natural Resources and Environment) of the Constitution; and

(b) to regulate the environmental impacts of development activities in order to promote sustainable development of the environment and the economic, social and physical well-being of people by safeguarding the life-supporting capacity of air, water, soil and ecosystems for present and future generations and avoiding, remedying and mitigating any adverse effects of activities on the environment; and

(c) to provide for the protection of the environment from environmental harm; and

(d) to provide for the management of national water resources and the responsibility for their management; and

…

and for other related purposes,"

68. Sections 4 – 6 then state as follows:

"**4. Objects**.

The objects of this Act are—

(a) to promote the wise management of Papua New Guinea natural resources for the collective benefit of the whole nation and ensure renewable resources are replenished for future generations; and

(b) to protect the environment while allowing for development in a way that improves the quality of life and maintains the ecological processes on which life depends; and

(c) to sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations, and safeguard the life-supporting capacity of air, water, land and eco-systems; and

(d) to ensure that proper weight is given to both long-term and short-term social, economic, environmental and equity considerations in deciding all matters relating to environmental management, protection, restoration and enhancement; and

(e) to avoid, remedy or mitigate any adverse effects of activities on the environment by regulating in an integrated, cost-effective and systematic manner, activities, products, substances and services that cause environmental harm; and

(f) to require persons engaged in activities which have a harmful effect on the environment progressively to reduce or mitigate the impact of those effects as such reductions and mitigation become practicable through technology and economic developments; and

(g) to allocate the costs of environmental protection and restoration equitably and in a manner that encourages responsible use of, and reduced harm to, the environment; and

(h) to apply a precautionary approach to the assessment of risk of environmental harm and ensure that all aspects of environmental quality affected by environmental harm are considered in decisions relating to the environment; and

(i) to regulate activities which may have a harmful effect on the environment in an open and transparent manner and ensure that consultation occurs in relation to decisions under this Act with persons and bodies who are likely to be affected by them; and

(j) to provide a means for carrying into effect obligations under any international treaty or convention relating to the environment to which Papua New Guinea is a party.

5. Matters of national importance.

All persons exercising powers and functions under this Act shall recognise and provide for the following matters of national importance:—

(a) the preservation of Papua New Guinea traditional social structures; and

(b) the maintenance of sources of clean water and subsistence food sources to enable those Papua New Guineans who depend upon them to maintain their traditional lifestyles; and

(c) the protection of areas of significant biological diversity and the habitats of rare, unique or endangered species; and

(d) the recognition of the role of land-owners in decision-making about the development of the resources on their land; and

(e) responsible and sustainable economic development.

6. How the object of this Act is to be achieved.

(1) The protection of Papua New Guinea's environment is to be achieved by a process of setting environmental objectives and providing the means to encourage and ensure their observance.

(2) The process described in Subsection (1) is to be achieved by—

(a) determining environmental objectives by researching the state of the environment and identifying the beneficial values which are important to the community of Papua New Guinea and which require protection from environmental harm in the formulation of Environment Policies through a process of consultation; and

(b) applying the environmental objectives to level 1 activities by means of Environmental Codes of Practice, Environment Protection Orders, Clean-up Orders and Emergency Directions; and

(c) applying the environmental objectives to level 2 and level 3 activities by means of conditions in environment permits, and the negotiation of environmental improvement plans and environmental management programmes; and

(d) requiring proposed activities involving matters of national importance to undergo a process of public and detailed consideration of environmental implications through a process of environmental impact assessment; and

(e) enforcement of the protection of beneficial values through preventative measures described above as well as through prosecutions for the offences of causing environmental harm."

(All underlining mine)

69. The intend and or purpose of these provisions are obvious. They are consistent with current global best practices for the protection of what is left in our environment as broadly defined by the *EA2000* itself from further harm or damage. In my humble view, our global village is facing the next possible pandemic, namely climate change and its many associated adverse consequences caused mainly by global warming due to increased levels of greenhouse emissions, unless all countries and all persons meaningfully take mitigation and adaptation measures in earnest. Human activity since the industrial revolution in 1770s which has and is continuing to adversely impact upon the environment is contributing substantially to greenhouse gas emissions. Serious global concern over this likely next pandemic has given rise to several international protocols such as the Kyoto Protocol which operationalises the United Nations Framework Convention on Climate Change by committing industrialized countries and economies in transition to limit and reduce greenhouse gases emissions in accordance with agreed individual targets. I am thus, of the view that, these international developments influenced the legislature in PNG to enact the *EA2000*. It follows therefore that, as a sensible and responsible global citizen, PNG through the Minister and the MD of CEPA, should stay guided by the objects and purpose of the *EA2000* and ensure that their decisions in respect of any EIS or EIA or responding to any activity that has an impact on the environment deliver on the stated objects and purposes of the *EA2000* as outline in its preamble and ss. 4 - 6. This is necessitated and or dictated by the challenge that are facing our country and the world today due to climate change and its many adverse consequences.

70. Whilst I agree that the law is clear on pleadings. The question of proper pleading and amendment of pleadings is open even after a trial has been concluded but before final judgment. The decision of Woods J in *Komboro George v. MVIT* [1993] PNGLR 477 is instructive. His honour correctly noted:

> "The National Court Rules O 8 r 50 quite clearly allows a court to amend the pleadings at any stage of a trial. The practice is quite clear that leave to amend a pleading should be sought as early as possible after the need has arisen. It is not unusual for a party to apply to amend pleadings during the hearing, especially when the evidence may indicate certain difficulties. However, it is well established that a court will allow pleadings to be amended if the other party is not prejudiced and if it is necessary to amend the pleading to accord with the issues. Sometimes an amendment may be crucial to the success of the plaintiff at the trial. If the evidence and the pleadings are out of step, and at the end of the trial the plaintiff is not entitled to judgment on the pleadings, he may fail unless he can secure an amendment."

(Underlining mine)

71. Other cases allowing amendments after the trial as noted by Woods J at the time, included the decision in New *Guinea Co Ltd v. Thomason* [1975] PNGLR 454. In that case and the case before Woods J, amendments to their respective pleadings were allowed at the end of the evidence or trial. They both relied upon the following passage from the decision in *Baker v. Medway* [1958] 1 WLR 1216:

> "It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.... I know of no kind of error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."

(Underlining mine)

72. In the present case, the Court is dealing with an application for stay of an administrative decision. This is a preliminary application made well before the

matter is listed for a hearing of the substantive review application, trial, and final decision. There is ample time and opportunity for the parties to revisit the pleadings and effect any changes that are necessary to do real justice on the substantive merits of the case. That can happen any time after a decision on the application presently before the Court is delivered and before the hearing of the substantive review.

73. Obviously, the argument on lack of proper pleading is a technical issue against a cause of action for judicial review pleading alleged breaches of certain specified provisions of the *EA2000* that are at the heart of the Act. From the arguments of the plaintiffs, it is possible to work out what subsections of these provisions would be the most relevant provisions that are alleged to have been breached. This is not a hopeless case of the parties or this Court not being able to work out without more just what is the plaintiffs' claim. Some of the defendants have in fact been able to zero down to the relevant subsections.

74. If indeed the EIS and the Permit that was granted based on the EIS was in due compliance of the law, no stay would be warranted. Hence, it was incumbent upon the defendants to point to evidence of due compliance of the relevant provisions of the *EA2000* and point out clearly to that and establish to the satisfaction of this Court, there is no cause for concern. These they failed to do. That failure is more serious compared to the defects in the pleadings without specifically mentioning the relevant subsections which can be cured by an appropriate amendment to the statement under O.16, r.3 (2) (a). In these circumstances I find for the purpose of the stay application, that the plaintiffs have pleaded and have presented an arguable case of possible breaches of the relevant provisions of the *EA2000*.

Denial of natural justice

75. I now turn to a consideration of the arguments on the second ground for review, namely denial of natural justice. This ground follows on from the first ground of *ultra vires* and or errors of law. Logically, therefore the discussions and the courts view on that ground equally applies here.

76. For completeness, I note the plaintiffs argue that the Minister and the Director failed to observe the principles of natural justice. This was through their failure to comply with the provisions of ss.54 and 55 of the *EA2000* and ss. 9 to 11 of the *EPR2002*, prior to the grant of the Permit. The plaintiffs point to their requesting CEPA and the Minister in writing in mid-2020, to disclose certain relevant information which the plaintiffs required. The requested information

included scientific reviews, documents and related information pertaining to DSTP. The plaintiffs refer to s. 55 (1) of the EA2000 and submit that the Director or CEPA had a general duty to disclose that information, as a matter of course, which he failed to do and that amounts to a breach of his statutory duty.

77. The defendants point to the affidavits of a Robert Siune and a Dr. Pangum and submit the plaintiffs were provided with copies of the EIS and that consultation conferences and meetings were held on 13th and 22nd October 2020. They go onto submit that the plaintiffs were given the opportunity to make their comments and inputs and they did raise several objections as confirmed by the Hon. Governor's affidavit.

78. With respect, the defendants' arguments do not specifically address the issues raised by the plaintiffs under this ground. The provision of a copy of the EIS is one of several documents and or information the plaintiffs requested from the relevant defendants. Submissions of the defendants do not address and disclose the names of the members of the public including the names of affected Local-level Governments, their relevant officers aside from the Morobe Provincial Government officials, servants and agents that were consulted and how that was done. There is no detail on when and how all the required information under s. 55 (1) were delivered to the Morobe Provincial Government, the relevant and affected Local-level Governments, members of the various villages and communities including the members of the public in the City of Lae. Also, the submissions do not disclose or address:

(1) the language in which the information was presented, the comprehension or understanding of the same by those consulted.

(2) how much lead time was given to the consultees to digest the EIS and supporting documents and other materials constituting the basis for the EIS before the actual review or consultation meetings?

(3) how were the consultation meetings structured?

(4) how were the members of the public given adequate and complete freedom and encouraged to air their views without fear or favour?

(5) what became of their views, whether there was a production of a summary of the views expressed for certainty and endorsement by the consultees?

(6) whether the EIS was revised after the consultation to incorporate the views and comments of the public and if so, in what way? and

(7) if the EIS was revised, when and how was a copy of that delivered or made available to the consultees?

79. Submissions on these points with reference to the relevant evidence on point by the defendants would have sufficiently address the plaintiffs' claim that, they were denied natural justice and that their comments and input are not reflected in Permit. The lack of such submissions renders support for the plaintiffs' claim that the documents and information forming the foundation for the EIS that needed to be disclosed to the plaintiffs and other members of the public for them to be better informed and enabled to make meaningful and properly informed inputs or feedback on the EIS were not given them despite their requests. These had to happen prior to the review consultations and meetings. Then after such consultations and meetings, a revised EIS had to be produced and a copy send or made available to those who were consulted using the same communication modes and methods that were used during pre-consultation stages. Going by the arguments of the defendants, it appears the Minister and the Director did not fully disclose all the relevant information to the plaintiffs. Also, it appears the plaintiffs' input were not considered and incorporated into the EIS in the true spirit and purpose of public reviews or consultation as I tried to elaborate earlier.

80. At the hearing of the substantive review application, the defendants will have the opportunity to fully address the plaintiffs' claims and the Court will come to a final decision on this ground. For now, I am satisfied, based on all the foregoing that, the plaintiffs have disclosed an arguable case under the second ground of denial of natural justice to warrant a stay pending a hearing and determination of the substantive review application.

Have the plaintiffs made a case for apprehended bias against the Minister and the Director of CEPA?

81. This leads us to the third ground for review, namely apprehension of bias. The plaintiffs' claim the Minister and the MD of CEPA individually and collectively were duty bound under the *EA2000* to act impartially and independently in dealing with the assessment of EIS and especially the DSTP proposal because they have the critical function as regulators and not as proponents or supporters of the Joint Venture to discharge on behalf of the people of the country. The plaintiffs point to their allegations reproduced at para 4 (5) above in

support of this ground. Their arguments in effect are for the Minister and the MD of CEPA to only play the parts required of them by ss. 54, 55, 65 and 66 and avoid advocating or speaking for a proponents' proposal in an EIS. Given the need to protect the environment domestically and internationally the need to maintain the impartiality and independence of the office of the Minister and the MD of CEPA as regulators is critical and most important. They need to make their respective decisions in the best interest of protection of the environment and ultimately the best interest of the country and the global village independently, impartially and without fear or favour, based entirely on all information presented to them under the *EA2000*. In the present case, the plaintiffs' arguments claim the Minister and the MD of CEPA compromised their position and role as regulators in conducting themselves in the way alleged.

82. In support of their arguments the plaintiffs cited the Supreme Court decision in *PNG Pipes Pty Limited & Venugopal v. Sefa, Globes Pty Limited & Macasae*t (1998) SC592, which enunciated the test for apprehension of bias in a context of a judicial officer. The test is whether, upon an examination of the surrounding facts:

> "an objective observer would be left with an apprehension, not a conviction, that the judicial officer was predisposed, by matters extraneous to a proper adjudication, to reach a particular conclusion."

83. The Supreme Court went on to add:

> "It is therefore open to the parties as well as to a member of the public, to entertain the reasonable apprehension, in the light of all the circumstances, including statements made at the time when the judicial officer refuses to disqualify him or herself. The suspicion or apprehension must be reasonable and not fanciful."

84. The Supreme Court adopted this test from the decision in *Boateng v. The State* [1990] PNGLR 342. There the Court adopted as the test what was stated in *R v. Liverpool City Justices; Ex parte Topping* [1983] 1 WLR 119. The Court in that case stated as the test:

> "Would a 'reasonable and fair-minded person sitting in a court and' knowing all the relevant facts have a 'reasonable suspicion that a fair trial for' the appellant 'was not possible'?"

85. Against the plaintiffs' arguments and or allegations, the defendants argue firstly that the plaintiffs have not produced any admissible evidence establishing

each of the allegations. Secondly, they argue that the plaintiffs have taken what the Minister and the MD of CEPA did or said out of context. They then go on to submit that, what these defendants said were only indicating the science underpinning the DSTP.

86. In my view, these submissions of the defendants admit in part what the plaintiffs are claiming, namely, that the Minister and the MD of CEPA attended the consultation or review meetings and made statements. The defendants' arguments do not seriously take issue with the plaintiffs' arguments on the respective roles of the Minister and the MD of CEPA as regulators, by reason of which, they should avoid conducting in a manner that gives rise questions of their impartiality and independence. The defendants have also not pointed to the Court any provision in the *EA2000* that empowers or authorises the Minister and the MD of CEPA to be involved in the process especially the review and consultation leading up to a revised EIS and ultimately its and the eventual issuance of an Environment Permit.

87. The arguments of all the parties present a serious and an important question regarding the Minister and the MD of CEPA's role as regulators and therefore important decision makers in the acceptance of, acting upon an EIS and the ultimate issuance of environment permits. The question is what role the Minister and the MD of CEPA as regulators should play in the formulation, presentation, review, and finalisation before accepting an EIS and based on an EIS the issuance of an environment permit. One view would be that, as regulators they should play no part until an EIS which has gone through all the process including a meaningful public consultation and review and until the final EIS is presented for their respective considerations, at the respective stages resulting in an acceptance and issuing based on an IES an environment permit. This would be consistent with the generally accepted principle in law that regulators and decision makers should be independent and impartial. Following on from that, unless there is a specific provision for each of them to be personally involved in the review process, attending, and making comments and advocating or speaking for a proposal by a proponent, would in my view amount to either an interference in the process by them or a compromising of their respective roles or both.

88. Section 55 (1) (a) only obligates the MD of CEPA to "*cause…any information provided in compliance with a requirement under Section 54(2)(a) to (d) inclusive*", including any environmental impact statement submitted to him to be made available for public review purpose. Other than that, the decisions he must make, and the steps he must take, he is not authorised to be involved in the conduct of the actual review and consultations meetings or make statements in support of an EIS that is yet to be accepted.

89. The Minister does not come to play any part in the process until the Environment Council has arrived at a decision and a recommendation is presented to him under s. 59 (1) of the *EA2000*. This provision clearly states:

> "Subject to this section, where the Minister has received a recommendation from the Council under Section 58 in relation to the proposed activity, he shall within 28 days of such receipt, either—
> (a) issue an approval in principle for the activity; or
> (b) in any other circumstance—refuse to approve the activity."

90. At the substantive hearing the issue of the Minister and the MD of CEPA's respective roles under the *EA2000* will be carefully considered and a decision on that will be arrived at. The substantive hearing will be the place to test the evidence of the parties, their credibility, their competing arguments, and a decision will be arrived at after a careful consideration of all the evidence. The Court will then be well placed to determine if the Minister and the MD of CEPA did in fact conduct themselves in the way alleged and therefore breached their respective duties under the *EA2000* as independent and impartial regulators. For the stay application before me, upon a consideration of all the evidence before the Court and the parties' submissions I find an arguable case of possible apprehension of bias and the decisions of the Minister and the MD of CEPA being tainted thereby is presented.

Whether the Minister and the MD of CEPA's decisions were unreasonable?

91. This leaves us to deal with the next ground, namely unreasonableness. The plaintiffs failed to cover this ground in their submissions. The defendants have also not addressed this issue. It is therefore not necessary for this Court to deal with this ground at this point. It may be a subject for consideration at the substantive hearing.

Other requirements for grant of stays

92. Having found there is an arguable case on the first three grounds of the review, I now turn to a consideration of the other requirements for grant of stays pending a substantive review hearing. I will deal first with the issue of whether damages will be adequate remedy.

Whether damages are an adequate remedy?

93. The plaintiffs submit damages will be an inadequate remedy. In support of that argument, they advance three main grounds. Firstly, they submit, without a stay of the Permit, an SML will be issued. That will pave way for the Joint Venture to spend substantial amounts of money in the actual construction of the mine. If this Court nullifies the Permit, it will also affect the legality of the SML. With this possible outcome, it is prudent to allow the status quo to remain rather than complicating matters by allowing for the issuance of the SML and commencement of construction. Also, any orders for alternative tailings management options or for the DSTP outfall location to be relocated may be practically difficult to implement if the project proponent is allowed to construct the DSTP pipeline to Wagang before the outcome of this proceeding.

94. Secondly, the plaintiffs submit that the environmental harm posed by the proposed DSTP method are very, very serious. It will greatly affect the marine life of the Huon Gulf and the people who depend on it and their way of live. All the mining developments in PNG have shown that the lives of the local people are still dependent on their natural environment even after full operation of a mine. Thus, the present and future generations stand to suffer if the environment that their livelihood depends on is damaged or destroyed. Given that, damages would inadequately remedy any such damage or harm.

95. Thirdly, there is a serious environmental damages threat posed to the Lae city. Any environmental harm to Lae city has the potential to disrupt the city including causing serious social and law & order problems. If such occur, it will not only affect Lae city, but it will also affect the 5 highlands provinces. Hence, damages is not an adequate remedy.

96. The first defendant agrees with the plaintiffs that damages would not be an adequate remedy. The third defendant does not answer the question directly. Instead, he submits that the mine construction has not yet begun. Several regulatory steps and process will need to be completed before any construction takes place. He says that might happen in 2 to 3 years' time after the grant of a SML. He therefore, argues that, the plaintiffs will suffer no prejudice if the stay application is not granted.

97. The Supreme Court at the highest in our jurisdiction pertinently observed in the context of environmental damage on land at [38] in *Rimbunan Hijau (PNG) Ltd v. Ina Enei* (supra) that:

> "When the original state of the land is changed with its natural habitat and vegetation and other natural properties lost, it becomes totally useless ...

Depending on the size of the land and the nature and extend of the damage done, the landowner will no longer be able to hunt, gather, garden or otherwise use his land in the same way before. These cannot be re-established easily within a short space of time or at less costs and in any case if possible, not back to its original position. This is why we say damages for such land is immeasurable and might be continuous for many generations to come for the landowners.

(Underlining mine)

98. As already mentioned, presently, apart from the covid-19 pandemic there is another global issue, which if not properly addressed and mitigated against, could turn out to be the next pandemic. The issue in question, is the issue of climate change and its associate problems. According to the United Nations official website:

> "Climate Change is the defining issue of our time and we are at a defining moment. From shifting weather patterns that threaten food production, to rising sea levels that increase the risk of catastrophic flooding, the impacts of climate change are global in scope and unprecedented in scale. Without drastic action today, adapting to these impacts in the future will be more difficult and costly."

99. In 2013, the World Bank's report headed "Turn Down the Heat: Climate Extremes, Regional Impacts and Case for Resilience"[5] highlighted a serious risk. The risk is our global village could potentially be 4ºC warmer by the end of the century if the world fails to act on global warming and climate change. That meant devastation in many regions, but more pronounced for the Pacific Island Countries along with other small island countries who are on the front line of climate change and natural hazards.

100. As of August 2017, 10 countries globally have been forecast to sink due to climate change and rising sea levels.[6] On that list are 6 Pacific Island Countries, namely Tonga, Palau, Nauru, Kiribati, Federated States of Micronesia, and Tuvalu. Papua New Guinea as a country is not on that list but that is no good news, we are

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[5] By the Potsdam Institute for Climate Impact Research and Climate Analytics for the World Bank; Copy at https://www.worldbank.org/content/dam/Worldbank/document/Full_Report_Vol_2_Turn_Down_The_Heat_%20Climate_Extremes_Regional_Impacts_Case_for_Resilience_Print%20version_FINAL.pdf

[6] Pariona, Ameber. "10 Countries That Could Disappear With Global Warming." WorldAtlas, Aug. 1, 2017. The 10 countries are Bangladesh, Comoros (East Coast of Africa), Tonga, Seychelles (Caribbean West Indian Ocean), Palau, Nauru, Kiribati, Federated States of Micronesia, Tuvalu (all in the Pacific Ocean) and Maldives.

seeing some of our smaller islands like Carteret that are on the verges of sinking and or are not able to sustain live in those islands.

101. In its publication referred to earlier, the World Bank says the Pacific Island Countries vulnerability is exacerbated by poor socio-economic development planning with poor governance and enforcement issues for some. It then forecasts that climate change will worsen the magnitude of natural disasters like, cyclones, droughts, and flooding in the Pacific Island Countries.

102. All the known science around us is pointing us to only one conclusion, namely, global warming and climate change is real and is not a science fiction or theory anymore. The focus has therefore shifted to what adaption and mitigation efforts, must we urgently take not only for the sinking countries and cities, but the whole world.

103. Global warming is attributable to greenhouse gas emissions. Greenhouse gas is a gas that absorbs and emits radiant energy within the thermal infrared range, causing the greenhouse effect.[7] The primary greenhouse gases in Earth's atmosphere are water vapor (H2O), carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), and ozone (O3). Without greenhouse gases, the average temperature of Earth's surface would be about −18 °C (0 °F),[8] rather than the present average of 15 °C (59 °F).

104. There is no debate that, human activities since the beginning of the Industrial Revolution increased the atmospheric concentration of carbon dioxide by almost 50%, from 280 ppm in 1750 to 419 ppm in 2021.[9] The last time the atmospheric concentration of carbon dioxide was this high was over 3 million years ago.[10] This increase has occurred despite the absorption of more than half of the emissions by various natural carbon sinks in the carbon cycle.[11] According to the United Nations' Intergovernmental Panel on Climate Change (IPCC), at current greenhouse gas emission rates, the globe's temperature could increase by

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[7] G. P Asner, PhD, *Measuring Carbon Emissions from Tropical Deforestation: An Overview*, Department of Global Ecology, Carnegie Institution for Science: Department of Geological and Environmental Science, Stanford University. See also *"IPCC AR4 SYR Appendix Glossary" PDF). Archived from the original (PDF) on 17 November 2018. Retrieved 14 December 2008* in Wikipedia at https://en.wikipedia.org/wiki/Greenhouse_gas. *"IPCC AR4 SYR Appendix Glossary" (PDF). Archived from the original (PDF) on 17 November 2018,* found at https://en.wikipedia.org/wiki/Greenhouse_gas

[8] *"NASA GISS: Science Briefs: Greenhouse Gases: Refining the Role of Carbon Dioxide". www.giss.nasa.gov. Archived from the original on 12 January 2005.*

[9] Calma, Justine (7 June 2021). "CO2 levels are at an all-time high — again". *The Verge*.

[10] *"Climate Change: Atmospheric Carbon Dioxide | NOAA Climate.gov". www.climate.gov.*

[11] *"Frequently asked global change questions". Carbon Dioxide Information Analysis Center.*
ESRL Web Team (14 January 2008). "Trends in carbon dioxide". Esrl.noaa.gov. Retrieved 11 September 2011.

2 °C (3.6 °F), which is the upper limit to avoid "dangerous" levels by 2050.[12] Without question, mining significantly contributes to greenhouse gas emissions and has adverse impacts on the environment.

105. All parties did not assist the Court with any information on whether the EIS factors in the level of CO2 emissions and its impact on our local and global environment and proposed measures to minimise such emissions. Parties did however focus on the proposed DSTP but without specifics apart from the summary of what the DSTP is about and where it is intended to be located. As noted, the Joint Venture for Wafi-Golpu has included in its EIS a proposal to pipe mine tailings from the mine (over approximately 65 kilometers) into the sea at a place called Wagang, several kilometers west of Lae City using the DSTP method, with a proposal to place approximately 16 – 20 million metric tons of mine tailings into the Wagang DSTP Outfall.

106. Mine tailings are a growing concern in many parts of the world, more so with the increase in the number of mines worldwide.[13] Historically, short-term profit was higher interest than long-term solutions to tailings containment and management.[14] Economic, environmental, and social considerations are now part of the reporting process for may mining operations.[15] This requires stronger legislative frameworks and enforcement of the same. Where such is lacking profiteering is always of high interest and focus. For mine developers but more so for government regulators, mine tailings management or disposal options is one of the critical considerations during the EIS approval process as discussed in the earlier part of this judgment. That necessarily requires a consideration of what is an acceptable level of environmental impact as may be informed and shaped by a proper community engagement through the review and consultation process. Each location for the proposed tailings disposal comes with different constraints and or challenges. These includes the physical and chemical nature of tailings, the mine topography, climatic conditions socio-economic considerations, and each of the different disposal options' advantages and disadvantages. These factors influence decisions on the tailing options available and which is the most suitable.

107. The commonly used option is on land or underground base tailing storage facilities (TSFs) which usually takes the form of dams or ponds. These facilities hold either wet or partially dewatered pastes. They are not without controversy or

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[12] "Global Greenhouse Gas Emissions Data". U.S. Environmental Protection Agency. 12 January 2016.
[13] Dold, B. (2014). Submarine tailings disposal (STD) – a review. Minerals 4, 642–666. doi: 10.3390/min4030642.
[14] Palkovits, F. (2007). *Thickened tailings offer effective disposal alternatives*. Engineer. Mining J. 208, 62–67
[15] L.L. Vare, MC Baker & Ors, (2018). *Scientific Considerations for the Assessment and Management of Mine Tailings Disposal In the Deep Sea*, Frontiers in Marine Science, Feb 2018, Vol. 5 Article 17. Unless otherwise indicated most of the discussions that follow are based on and from this article.

issues. The issues include the size of the TSFs, loss of land that could be used for other purposes, potential contamination of surface waters and underground waters with short and long-term safety and integrity issues. With the advancement in technology combination of disposal and storage techniques which allow for the reuse and backfilling as become priorities. Geochemical developments that aim to change character of tailings are making substantial headway in the mining industry process to better manage acid generation and development of tailings pastes.[16] There is also the potential for reprocessing the tailings for minerals previously discarded but with advancement in technology they become valuable, provided the tailings are properly stored.

108. Only a few countries in the world are using the DSTP system of mine tailings disposal. Those countries are Norway, PNG, Philippines, Indonesia, France, Turkey and Chile.

109. No doubt, DSTPs can impact ocean ecosystems in addition to other sources of stress, such as from fishing, pollution, energy extraction, tourism and climate change. Given that risk, environmental management of DSTPs may be most effective when drawn from and contributed to by a broader team of expertise, data and lessons collected from multiple sectors, academia, government, society, industry and engaging with international deep ocean observing programs and databases.[17]

110. Papua New Guinea has been using DSTPs or DSTDs for its Misima, Simberi, Lihir and Ramu mines (DSTP Mines). Misima is now an officially closed mine, while the others are in operation. The area of operation for these mines is in the Bismarck and Solomon Seas which are next two each other. All their tailings went to and go into these seas from their respective DSTPs. The Court has not been assisted with any submissions on any studies conducted with data collected from these mines' DSTPs and the impact of their tailings in these immediate and surround sea and land areas since their commencement of operations to date and since closure of the Misima mine. This is relevant and necessary and must have information before advocating for and resolving to use DSTPs as opposed to land based TSFs or other options.

111. Given that mine tailings do contain metal and chemical substances, our experiences based on scientific research and or studies and data thus collected from our DSTP Mines should be on the table to better inform us on what if any

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[16] Palkovits, F. (2007). *Thickened tailings offer effective disposal alternatives*. Engineer. Mining J. 208, 62–67
[17] *Ibid.*

significant adverse impacts they have had or not at all on the marine ecosystem from within the vicinity of DSTP outfall in form of:

(1) quality of seawater due to elevated turbidity and dissolved metal and metalloid concentrations and chemicals?

(2) marine plant, fish and other organisms and their habitat?

(3) rate of recovery or improvement to (1) and (2) above at each event of DSTP ceasing operations at each stage of ore processing and in the case of official and permanent closure of Misima?

(4) certainty and safety of the engineering of the DSTPs such that the disposed fallings all remain within the expected save levels with no escape of tailings plume or fine tailings particles?

(5) the level of impact against a vulnerable ecosystem, chemical reactivity, and any disturbances of disposals after the closure of operations?

(6) locations of the DSTPs at locations confirmed as having an absence of upwelling of events or seasonal mixing? and

(7) confirmation of locations of the DSTPS in truly unproductive areas.

112. Also based on our DSTP Mines experience there should be evidence on what particular technology processes and guidelines have we developed to improve research, gathering and interpretation of data, monitoring and evaluating regularly the performance of the DSTPs. This kind of technology and experience would greatly contribute to good industry practice supporting DSTPs. Such good practice involves three stages. The learned scientists L.L. Vare, MC Baker & Ors, in their paper "*Scientific Considerations for the Assessment and Management of Mine Tailings Disposal In the Deep Sea*" speak of the three stages in this way:

> "The first requirement for good practice concerns the completion of comprehensive, high-quality baseline studies that provide information on the receiving environment: detailed bathymetry and physical oceanography (e.g., local and seasonal information on frequency and intensity of currents and current shearing, upwelling and downwelling, storms), sedimentology, and ecosystem (e.g., coastal and deep-sea community structure, function,

connectivity, and resilience). To achieve suitable levels of background information on the dynamics of the abiotic and biotic systems, studies will generally need to be conducted over many years. A limited number of studies have addressed interactions and connections among abiotic and biotic systems, and new methods and approaches are needed. There are many knowledge gaps, for example, how the daily vertical migrators and benthopelagic coupling of living organisms are influenced by tailing plumes (Morello et al., 2016)."

113. As for the second stage:

> "…involves the engineering and modeling. Engineering aspects include: design, quality, and operational management for the life of the DSTD. These elements will include the de-aeration of the tailings and other conditioning to achieve the desired density and rheology, the tailing pipe network, materials, maintenance, stability of the optimal outfall depth, and quality controls for detection of leakage. A suitable level of understanding and monitoring of residual process chemicals (e.g., xanthates for floatation, lime for pH control, or specialized flocculants) is also needed. The engineering may need frequent adaptions to cope with changes in ore processing that may influence the environment downstream of the DSTD. The behavior of the tailings is modeled and takes into account oceanographic conditions, tailings volume and composition to predict the behavior of the discharge (direction, rates of transport and deposition) in relation to the bathymetry to estimate the tailings footprint. Based on this, ecological models could be developed outlining the estimated main and potential areas of impact to the water column and benthos.…"

114. The third and final stage is based on the uncertainty surrounding predicted environmental risks of DSTPs, which dictates a need to undertake extensive monitoring, ongoing review, and evaluation programs. The purpose of such a program is to:

> "…provide information that enables issues to be rapidly identified (e.g., extremes such as pipe breakages or surfacing tailings), and allows continuous improvement to the management and monitoring programs. This is detailed in the OEMP and is a requirement of the environment permit.
>
> …
>
> The monitoring program should be designed to provide transparent evidence that the environmental management objectives are being met, e.g., demonstration of minimal impacts to the biologically productive surface

waters (e.g., the surface mixed layer and photic zone), of no tailings deposition in near-shore coastal environments, and for impacts from the deep-sea deposition to be occurring in the predicted area. The tailings management systems and monitoring programs should span the processes from the mine to the sea, starting with the upstream management of ores and mine water on site and in the processing plant, then proceeding to tailings management via controls relating to engineering (e.g., tailings rheology, integrity of land seabed pipes) and tailing quality (e.g., quantities of oxidized forms), possible treatment options (e.g., re-sulfidization), and finally to monitoring of tailings disposal impacts within the marine environment.

…

Routine monitoring should include a network of stations both within and beyond the predicted DSTD impact zone (encompassing the full water depth range of the receiving environment). The monitoring should include: the volume, physical and chemical characteristics of the tailings prior to discharge (e.g., crucial parameters monitored daily, and other parameters weekly to monthly).

115. After carefully covering most aspects DSTP or DSTD, the learned scientists conclude:

> "Although some of these aspects of reducing the risk of environmental impacts from DSTD outlined above are considered and incorporated within the approval and permitting processes, it is important that all are fully addressed. <u>Owing to the numerous unavoidable uncertainties, it is recommended that permits are not issued for the entire mine life, but instead are for limited terms (e.g., 3–5 years) with thorough scrutiny of compliance and all operating procedures that may influence the environmental management objectives. This review process should enable clarification or improvements to be made to the objectives and permit requirements.</u>
>
> (Underlining mine)

116. It should necessarily follow therefore that, a well-considered DSTP proposal would incorporate most if not all the aspects and factors pointed out above to enable meaningful and proper understanding and reduction of risks of environmental impacts by or from DSTPs. In the present case, as noted the EIS is a massive document comprising of 5600 pages with 24 chapters for the main report and 24 appendages containing supporting technical information. Obviously, that is a hard and difficult document to go through and understand. The duty was on the

defendants through their learned counsels to help this Court to properly understand just what is in whole of the EIS by demonstrating clearly in plane language what is in it and the DSTP proposed by demonstrating amongst others:

(1) What possible environmental impacts and risks have been identified and how will those be properly address and managed to acceptable levels?

(2) What were the views of the public through the EIS review and consultation process and where and how have they been accommodated?

(3) What models, templates, or guidance for world best industry practice for EIS and DSTPs has been used?

(4) What baseline studies have been carried out and what are their findings or results?

(5) What are the impacts on the environment both land and marine including deep sea from the current existing mines of Ramu, Lihir and the officially closed Misima mines all dumping their tailings through their respective DSTPs into the Bismarck and Solomon Seas?

(6) What studies if any has been carried out to establish the level of any long-term environmental impact and or recovery from tailings using the DSTP from the Misima mine after its official closure as a guide for Wafi-Golpu and the other existing mines?

(7) What lessons has the State through the Minister and CEPA have learned from our DSTP Mines and how are they reflected in the EIS and the Environment Permit in the present case?

(8) What levels of contaminates are present in the Huon Gulf, the Bismarck and Solomon Seas and how will the proposed DSTP for Wafi-Golpu negatively or not at all impact on the contaminates that may be present?

(9) What systems, process or programs of proper, efficient, and effective monitoring and reviewing are in place to monitor and review the operations of the Ramu, Simberi and Lihir and before its closure, what

was the monitoring program for the Misima mines in general and specifically their respective DSTPs?

(10) How efficient and effective has been the monitoring and review programs as against what may have been proposed for or by the DSTP Mines and how well did they achieve the objectives set in their respective EIS and Environment Permit?

(11) When was the last detailed monitoring and review carried out for the now operating Ramu, Simberi and Lihir Mines and the closed, Misima mines' DSTPs and what are their results?

(12) Is the DSTP proposed for Wafi-Golpu any better than those employed by our DSTP Mines and if so, where and how is that reflected in the EIS and DSTP for Wafi-Golpu.

(13) What climate change related risks have been identified and what adaption and mitigation programs if any have been built into the EIS and the DSTP and how will that be monitored and reviewed and enforced?

117. With respect, none of the defendants learned counsel assisted the court with any specific submissions on any of these important questions. Hopefully, they will do that at the hearing of the substantive review. Until then, in the absence of any satisfactory answers to any of the questions raised, presents the risk of serious environmental impact and damage which may not be satisfactory managed to acceptable levels is present. Neither an order for damages for any such damages nor will any order for restoration will be adequate. Some of the damages unless properly managed and mitigated against will be permanent and irrecoverable or irreparable. In these circumstances the test of irreparable damage is met.

118. This leaves us to turn to a consideration of the two remaining tests for a grant of stay. The first of the two remaining issues is, does the balance of convenience favour a grant of stay to avoid possible hardships, inconveniences, or prejudices to either party. I consider that first.

Does the balance of convenience favour a grant of stay?

119. This test is about maintaining the status quo. This follows on from or is part of the test of irreparable damage. In *Golobadana No 35 Ltd v. Bank of South Pacific Ltd* (supra), I made that point in this way:

> "The question of whether or not the balance of convenience favours the grant or continuity of an interlocutory injunction incorporates the question of irreparable damage which an injunctive order or relief is sought to prevent. I will, therefore, consider the issue of irreparable damage in the context of whether the balance of convenience favours a continuity of the injunctive orders."

120. I am not surprised therefore that the plaintiffs make submissions that go into the question of irreparable damage. They submit along the lines of irreparable damage covered in the foregoing discussions to submit that the balance of convenience warrants a stay. Additionally, they submit that if no stay is granted an SML will be issued, and the Joint Venture will proceed to construction of the pipeline and other works which will cost the project proponents billions of Kina. These may not be recoverable or removed easily given the level of investment.

121. The defendants submit to the contrary. In support of his submissions, the Minister submits a stay of the decisions will result in a delay of statutory process for the eventual grant of a SML. The MD of CEPA submits there is no real likelihood of success on the substantive review. Given that the submission is a stay is not warranted. Additionally, he submits all statutory process have been followed culminating in the acceptance of the EIS and grant of the Permit which paves the way for the next lot of statutory process for grant of an SML to take place. The Mining Minister adds, the solution lies in an expedited hearing of the substantive review and not a stay of the two decisions the subject of this proceeding. Finally, based on evidence produced by the plaintiffs, the Mining Minister further adds in his supplementary submissions that these proceedings are being employed to advance an hidden agenda. That agenda is the plaintiffs' commercial interest under the guise of their arguments under the label "caveats and conditions". The commercial interest lies in the plaintiffs wanting to explore with the Prime Minister the prospects of remining from the tailing's disposals with an estimated yield of 30% minerals.

122. I addressed the plaintiffs' submissions going into irreparable damage or harm under that test or heading in the plaintiffs' favour. Similarly, I address all the defendants' submissions and decided against them for the reasons given in the context of the grounds for review and the test of irreparable damage for the grant of a stay. The defendants' arguments for an expedited hearing may be a factor but

the reality is even an expedited hearing may not result in an expedited decision. That process will still take some time. Hence, this factor comes with the risk of the defendants progressing with the next steps in the absence of any undertaking or commitment by them not to take any of those steps pending a hearing and determination of the substantive proceedings. Only a stay order will prevent the defendants from taking those steps pending a hearing and determination of the substantive proceedings.

123. In relation to the Mining Ministers submissions on the disguised commercial interest of the plaintiffs, I find this is not an effort in competition of the Wafi-Golpu project and the State parties but an enhancement. I did touch on the possibility of remining if the tailings are land based, which may be difficult if the tailings are DSTP. Hence, if the remining is a serious proposition, it adds value to the total gain from the Wafi-Golpu project. Given that, in my view this proposal adds to the reasons to stay the two decisions so that the current status quo is maintained and all options on tailings and maximizing returns out of the project is fully explored and informed decisions are arrived at. A refusal of the stay application will rule out such opportunities being considered, and decisions arrived at on their merits.

124. Turning then to the only new argument by the plaintiffs that the current status quo of no grant yet of SML, the project not progressing to construction and no outlay of substantial funds relative to a mine with the DSTP construction yet, favours a grant of stay. This is a factor that works for all parties including the people of Morobe and the country. A stay will ensure this current status quo is maintained and the serious issues raised in this proceeding are properly and fully consider and a decision is arrived at on the substantive merits.

125. Based on my decision on the grounds for judicial review on question of irreparable harm or damage and the observations I have just made above, I find that the balance of convenience favours a grant of stay to avoid possible hardships, inconveniences, or prejudices to all parties.

Does the interest of justice warrant a stay?

126. Finally, I now turn to a consideration of the remaining requirement of whether the interest of justice warrants a stay of the two decisions. In respect of this requirement, all the parties make their respective submissions based on their earlier arguments going into the grounds for review and those going into the question of irreparable harm or damage. Proceeding on that basis, the plaintiffs

submit that, an overall interest of justice favours a grant of stay. On the other hand, the defendants make submissions to the contrary.

127. A consideration of the Court's decision or view on the plaintiff's grounds of review and the issue of irreparable harm or damage and the other factors discussed above, I am persuaded that the overall interest of justice favors a grant of the stay application.

Decision and orders

128. Accordingly, I order a stay of the two decisions the subject of this proceeding, pending a hearing and determination of the substantive review. Costs will follow that event in favour of the plaintiffs to be taxed, if not agreed with time for the entry of the orders abridged.

Saulep Lawyers: *Lawyers for the Plaintiffs*
Gileng & Co Lawyers: *Lawyers for the First Defendants*
Chillion Lawyers: *Lawyers for the Second Defendants*
Holingu Lawyers: *Lawyers for the First Defendants*
Solicitor General: *Lawyers for the Fourth Defendants.*