

## CHAPTER 38: Unlawful Cancellation of Adventure Kokoda Tour Operators License

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### Prelude to Licence Cancellation

On 14 February 2022, In the lead-up to the resumption of trekking post-Covid, the Acting CEO of the PNG Kokoda Track Authority(KTA), Mr. Julius Wargari, advised:

*'The campsites and guesthouses have not been used for almost two years now and most have become very run down because they are only made from bush materials. The KTA rangers and TPA guesthouse accreditation team will be carrying out a survey of these places on the Track very soon and we will have a good ideal of which places need assistance to fix up their toilets and showers and other buildings before the trekkers come. I will give you a short report in a few weeks' time.'*

His 'short report' was never published!

I then led our first trek group since 2019 across the Trail in July 2022. We found that nothing had been done to improve the campsites, most of the toilets were putrid, and virtually no work had been carried out to improve the condition and safety of the Trail.

As we approached the 2023 Anzac trekking period I was concerned because the KTA seemed to have gone into a coma during the Covid period and we had not heard from them for almost 6-months.

I was also concerned because I had committed to lead a group of 35 trekkers supported by almost 100 guides, porters, and advance campsite parties during the peak Anzac period in April.

So, on 2 February 2023 I wrote to Mr. Wargirai, expressing my concerns over having to pay K52,000 in trek fees for our scheduled treks in April as we had not received any information from him regarding '*the condition of campsites, toilets, or the Trail itself*'.

I reminded him that Adventure Kokoda had paid a total of K292,500 for trek permits prior to Covid in 2019 and immediately after in 2022 but there was *'no evidence of any of these funds being invested to improve campsites or even provide hygienic facilities for the trekkers who pay their fees in the expectation that adequate facilities will be provided to meet their needs across the Trail.'*

I also advised that there had been *'no investment to improve safety in some of the dangerous sections of the Trail'* and that we had no idea what the KTA had done with the funds as he had not published a financial report, as he is required to do so, since he was seconded to the office in 2018.

I was also concerned that there was no evidence of any work being done in the KTA office as we had not had a newsletter or any form of update over the previous five months.

As our company has a duty of care for the safety and welfare of our trekkers, I suggested that we be permitted to pay our trek permit fees directly to campsite owners to provide them with an incentive to have their sites ready to meet the needs of our trekkers.

There was a precedent for this proposal as trekking companies who have committed to improving facilities across the Trail in the past had received exemptions for their trek permit fees from the former PNG CEO of the KTA.

Mr. Wargirai, a former Deputy Secretary with the Department of Provincial and Local Level Government Affairs, who was seconded to the KTA as CEO in an 'acting' capacity five years earlier, rarely responds to emails that require a decision – and this was no exception.

I then followed up with an email to him on 10 February and advised that on my last trek in July 2022 *'we had to engage additional porters to carry canvas tarps so the guides and porters would have some form of shelter to sleep under – as well as providing shelter for the trekkers to eat their meals.'*

I also advised him that we had *'no word from the KTA since then regarding the adequacy of campsites across the Trail to accommodate the large number of trek groups expected during the Anzac trekking period in April 2023'*.

I reminded him of the duty of care the KTA has to their paying customers regarding the adequacy of campsites, the condition of toilets, and the safety of the Trail.

I advised him that the only option we had to meet our duty of care to our trekkers was to pay our trek permit fees directly to campsite owners and that all payments would be receipted for his records.

I also advised him that if we did not receive a response *'we will assume that you concur with our proposal to pay our trek permit fees directly to the campsite owners'*.

He failed to respond again.

On 3 March 2023 I reminded him that *'we are less than 4 weeks away from the peak Anzac trekking season and the situation is now urgent'*.

I reminded him that *'campsite owners have been unable to improve their sites as they have earned virtually no income over the past three years due to Covid.'*

I also informed him that, as a result of his failure to respond to our two previous emails *'we now have to make a commercial decision to employ additional campsite crews to work ahead of our groups to prepare the sites we will be camping at as best they can', and that 'we would also have to purchase additional tarpaulins for our guides and carriers to sleep and cook under'*.

I advised that *'if I have not received any notification from you within 48 hours I will assume that you concur with our proposal'*.

He failed to respond for the third time.

On 20 March 2023 Mr. Wargirai finally broke his silence and advised:

*'KTA's Constitution in Clause 3 (2)(a)(b), which empowers KTA to impose fees on Tourist Operators and Trekkers and issuance of Trekking Permits to Tourism Operators and Trekkers using the Track (refer to Attachment) in light of these provisions, your intention not to pay Trek Fees direct to KTA and instead distribute them direct to the campsite owners through other interest groups not legitimised by law to administer these powers and functions would constitute a breach of these provisions, and considered an illegal act on your part. Further, as foreigner investing in PNG, you are subject to abide by PNG Laws, and NOT undermining them as you intentionally threatened in your article.'*

There was no assurance that the Trail would be safe for trekkers or that campsites and toilets would be adequate to meet the needs of their paying customers. It was simply a bureaucratic warning to pay the amounts due even though he has since acknowledged that his office now absorbs 100% of trek permit fee income administering itself and nothing gets through to the village communities who were the intended recipients when it was first established. We are not aware of the details as he has never published a financial report since he was seconded in 2018

On 14 April 2023 I arrived with a group of 35 trekkers at Owers Corner. Our porters backpacks were duly weighed by the KTA rangers who then asked for a copy of our trek permit.

I advised them that the Acting CEO had not responded to my requests for information on the safety of the Trail and the adequacy of campsites to meet the needs of our group. I further advised that I was carrying extra cash to pay directly to the campsite owners we planned to use to assist them to carry out the necessary improvements. We then departed on our trek.

The following day, Saturday, 15 April 2023, Mr. Wargirai finally extracted himself from his swivel chair and drove to Owers Corner with a police contingent to stop any further Adventure Kokoda treks from proceeding.

### Payment of Trek Permit Fees

On arrival he met with our Adventure Kokoda manager, Mr. Donald Watson, who agreed to pay trek permits for the two treks led by myself and Reg Yates. He then presented Mr. Wargirai with cheques for the following:

- Charlie Lynn's Group: 14-23 April – 36 trekkers and 76 guides and porters: K12,425.00; and
- Reg Yates Group: 15-24 April – 28 trekkers and 59 guides and porters: K9,800.00.

Mr. Wargari then visited the TropicAir terminal the next morning (Sunday) where our Adventure Kokoda Logistics Manager, Mr. Tau Maguli, paid him for the following groups leaving from Owers Corner and Kokoda later that day:

- Scott Babbington's Group: 16-24 April – 25 trekkers and 49 guides and porters: K8,575.00;
- Peter Morrison's Group: 16-24 April – 30 trekkers and 61 guides and porters: K10,325.00.

All cheques were dated 11 April 2023 as part of normal logistic planning and preparation by Donald Watson for the Anzac trekking period.

The payments were in accordance with Section 9 of the Koiari and Kokoda Local Level Government Trek Permit Law 2005 which state:

*'A trekker without permit shall be required to return to the office of the Kokoda Track Authority or approved licensee or authorized agent or officer of the Authority and make arrangement for payment of such permit, plus any imposed penalty.'*

No penalty was levied by Mr. Wargari for my group which had departed the previous day when he accepted the cheque for his trek permits.

## Threats of Violence

Around the same time Mr. Watson had submitted the cheques to Mr. Wargari the Oro Provincial Governor, Gary Juffa MP, contacted the Charter Manager for TropicAir and threatened the airline with possible violence at Kokoda if they allowed aircraft chartered by Adventure Kokoda to land at Kokoda airfield.

On Monday morning (17 April 2023) the Adventure Kokoda Logistics Manager, Mr. Tau Maguli, visited Mr. Wargari's KTA office and received receipts for all of our payments.

In addition to paying all trek fees due for the Anzac trekking period, we paid an extra K13,000 to campsite owners across the Trail to assist them in developing their sites sufficiently to meet the needs of their following groups.

On 19 April, Oro Provincial Governor, Gary Juffa MP threatened the TropicAir Charter Manager if he flew Pam Christy's groups from the Australian High Commission into Kokoda. Pam is the owner of PNG Trekking Adventures which is a licensed Kokoda tour operator. She often co-ordinates backloading arrangements with Adventure Kokoda to minimise costs for both companies.

Pam was then required to verify with TropicAir that they were a registered company with the KTA - an unusual request as the KTA had been renewing her annual tour operators licence for more than 20 years.

On 20 April the Charter Manager for TropicAir, Matthew Brutnall, advised Pam Christy:

*'KTA can't dictate what we can do and where we can fly, although the governor is the one he has threatened us if we don't comply we will face consequences. This could be limiting our use of the airport in the province at worsted although best we comply.'*

*'PNG Trekking is not on the approved list they provided us as well as many others. Between Kila, KTA and Trekking companies please provide a list with up-to-date companies.'*

*'If this all gets to hard we will cease operating into Kokoda as we have alternative work sources for the Twin otters around the country. '*

Later in the morning he further advised:

*'I can't see and issue with the flight on the 22nd as it is booked by the Aussie High Comm and funded by them as a charter as you have 2x passengers and cargo.'*

*'There need to be clarification on other operators booking and operating under other licenses etc, as well. Throwing out threats for us basically to now monitor what they are paid to do which I will be refusing to do. Just had that 2 gentlemen come in, they are going back to KTA to sort it out. '*

Pam Christy responded:

*'I honestly did not think it would be legal for an MP to dictate to an airline where and who they should allow on their planes.'*

*'I am absolutely gob smacked about the entire situation.'*

*'They really are basically black mailing Tropic Air.'*

*'It's all getting too hard isn't it. If you stopped flying into Kokoda Juffa and co would look stupid then.'*

## On the Trail

During my trek I was not surprised to find that sections of the Trail were dangerously unsafe and had to be negotiated with great care; that the campsites were not adequate to meet the needs of our group; and that nothing had been done to improve the toilets which are a 3rd World disgrace.

Our leadership group inspected each site with each landowner and advised what needed to be done to meet the basic needs of trekkers. We then paid each one K1200 for the nights' accommodation then added an additional 'incentive donation' of K2000 each for them to get to work on their sites. They advised they had not received a single kina from the KTA since Australian officials took control of it in 2009. They were obviously grateful and promised to start immediately to improve their sites.

Former NBN television presenter, Ms. Henna Joku, who was trekking with us witnessed all the payments and co-signed each receipt.

### Cancellation of Licence

On 26 April 2023 we were advised the Hon Simon Kilepa MP, Minister for Environment, Conservation, and Climate Change had cancelled our Adventure Kokoda tour operators license.

The Minister, who is Chairman of a Kokoda Initiative Committee (KIC)[1] advised:

*'The committee heard very disturbing reports from the Acting CEO of the KTA, Mr. Julius Wargirai, that on four occasions recently Adventure Kokoda deliberately attempted to evade payment of trekking permit fees to the KTA as required under PNG law.'*

It seems Mr. Wargari forgot to advise the Minister and his committee that Adventure Kokoda had paid all trek fees owing directly to him the previous week. The Minister continued:

*'The Committee further heard that a trekking group arrived at Owers Corner on Friday 14<sup>th</sup> this month without any application for permits, or any notification to the KTA. Mr. Lynn announced to the KTA ranger that they would trek to Kokoda without the lawful KTA trekking permits. Despite being previously warned in writing by the CEO, and again advised by the KTA ranger at Owers Corner, Mr. Lynn lead (sic) the trek onto the Kokoda Track after continual refusals to pay KTA trekking permit fees.'*

The Minister, and his Kokoda Initiative Committee, seemed to have been misled by Mr. Wargari who was aware that we had been communicating with him for two months prior to our trek to seek an assurance that the trek would be safe, and campsites would be adequate to meet the needs of our trekkers who paid for trek permits in good faith.

The Minister further advised:

*'This action was attempted again over the next three days by the same company, resulting in more than 100 tourists trekking without a valid permit from KTA. It is reported that cheques were eventually paid to the KTA after the groups had commenced trekking.'*

This is simply untrue. The Minister and his committee were obviously misled by Mr. Wargari who had received cheques for all trek permits due for the Anzac trekking period at Owers Corner on 15 April 2003, and at the TropicAir terminal the following day on 16 April 2003.

According to our Adventure Kokoda bank statements the cheques were not deposited into the KTA bank account for a further two months – until 13 June 2023!

We would now hope the Minister will seek to ascertain why Mr. Wargari withheld these cheques for two months before depositing them in the KTA bank account – and why he misled his Ministerial committee.

### The Kokoda Initiative Committee

The Kokoda Initiative Committee (KIC) was established by the former Minister for Environment, Conservation and Climate Change, The Hon John Pundari MP<sup>i</sup> on 9 December 2013:

*'to improve the governance system of the Kokoda Initiative by way of a ministerial committee supported by an advisory panel to take submissions from and provide advice and strategic direction to stakeholders and ensure that agencies were properly resourced to carry out the mandate under the Kokoda Initiative. 'Its membership comprises the first respondent as Minister of the lead department, other relevant Ministers and the Governors of Oro and Central Provinces.'*

*'The KIC meets quarterly and reports to the Prime Minister.'*

The establishment of the committee seemed to be at odds with the role of the KTA Board of Directors appointed by the Minister for Provincial and Local Level Government in 2004 to manage the emerging Kokoda tourism industry.

The DFAT Kokoda Initiative Strategic Advisor, Mr. Mark Nizette MBE, was appointed Secretary to the committee. His title was upgraded to 'Strategic Management Advisor' around this time.

This placed Mr. Nizette in an influential position as he was the only member of the committee to have trekked across the Trail with a small group of eco-trekkers back in 2004.

Nizette was a former Assistant Secretary for International Heritage at the Department of Sustainability, Environment, Water, Population and Communities (DSEWPC) in Canberra<sup>ii</sup> before being appointed as a 'Management Advisor' to the DFAT Kokoda Initiative within the PNG Conservation Environment Protection Authority (CEPA). He was well suited to the role as he had spent some time as a child with his family in PNG and was fluent in *Tok Pisin*.

The 'Kokoda Initiative Committee' is essentially an environmental advisory group with no legal jurisdiction over the management of the Kokoda Trail or Kokoda tourism.

Its establishment created an aberration which saw legal responsibility for Kokoda tourism remain with the Minister for Provincial and Local Level Government while management responsibility was assumed by the Minister for Tourism, Arts and Culture and political influence was assumed by the Minister for Environment, Conservation and Climate Change.

It's a veritable 'dog's breakfast' which should have been sorted by the DFAT Kokoda Initiative to provide clarity for Kokoda tour operators and traditional landowners after Australia took control of the Kokoda Trail in 2009.

The Minister's Conservation Environment Protection Authority emerged as the most influential group due to the assignment of senior bureaucrats such as Mark Nizette to their office and the flow of significant foreign aid-funding for environment and climate change .

Our arguments for the Trail to be managed as a tourism enterprise responsible to the Minister for Tourism, Arts and Culture and not as an environment issue responsible to the Minister for Environment, Conservation, and Climate Change has put us at odds with the well-resourced DFAT Kokoda Initiative.

Mr. Nizette is a shrewd bureaucrat with an environmental agenda which has led to the drafting of a Bill for a new 'Kokoda Track Management Authority' to be legislated within CEPA.

A brief on his era of influence in the Kokoda Initiative from 2011 until now is detailed in Chapter 17.

It has also been revealed that Julius Wargari who was seconded as Acting CEO to the KTA had been secretly assigned to support him in the development of the Bill by the National Executive Council in 2019. This probably explains why nothing has been done to improve the management of PNG's most popular tourism destination, the Kokoda Trail, since then.

### Mr. Julius Wargirai - Acting KTA CEO

On 20 April 2018, the Australian High Commission advised that Minister Pundari *'urged the KTA Board to move quickly to appoint a temporary CEO to replace Enage and suggested that a senior PNG official might be a suitable candidate. A permanent replacement would be recruited following the review into the KTA.'*

We were then advised that Mr. Julius Wargari, a former bureaucrat with the Department of Provincial and Local Level Government Affairs (DPLGA) had been seconded to the KTA in an 'Acting' capacity. It was later revealed he did not have any qualifications or experience in commercial business management, military heritage, or pilgrimage tourism.



We were also advised that Mr. Mark Nizette had relocated into the KTA office after a 4-year standoff with the former PNG CEO who had declared him '*persona non-grata*'.

Under normal circumstances the CEO would report to the KTA Board of Directors but they had not met since early 2018 and were then defunct due to allegations of corruption and a lack of Government support.

The role of the KTA Board was then unofficially transferred to the Kokoda Initiative Committee.

Since Mr. Wargirai's secondment, in an Acting capacity, he has failed to introduce any management protocols for Kokoda tourism, has not published any financial reports or newsletters, and rarely responds to emails.

We initially tried to assist him by submitting ideas aimed towards improving the management system but we never received any response.

During Covid we learned he had been directed to devote his time to assisting in the drafting of an Act for the establishment of a new Kokoda Track Management Authority (KTMA) which would be embedded within CEPA (NEC Directive #123/2019 refers)

We also learned the proponent of the new KTMA Bill was Mr. Mark Nizette - we therefore assumed Mr. Wargari was reporting directly to him.

We also deduced that income from trek permit fees, which originally required 20 percent to be retained for administration with 80 percent allocated towards community benefits, was now fully absorbed in administrating the KTA office.

It is not possible to confirm this however as Mr. Wargari has refused to publish an Annual Financial Report since he was seconded to the position in 2018. We therefore have no idea where the money goes. This makes a mockery of the charter of the Kokoda Initiative Committee established in 2013 '*to improve the governance system of the Kokoda Initiative*'.

Our criticism of the dysfunction of his office has resulted in the KTA blocking us on Facebook and refusing to respond to our email requests for information. This is despite the fact that Adventure Kokoda is the only company to fully comply with the IPA Act since 2004, has provided more philanthropic support to Kokoda villagers than all other Kokoda tour companies combined, and is the major provider of trek permit fee income.

After the cancellation of our licence in April we then sub-contracted our treks to a licenced PNG Kokoda tour operator.

When Mr. Wargari became aware of this he joined the fray initiated by the Oro Provincial Governor and threatened TropicAir against using a charter aircraft to fly an Adventure Kokoda group which had just completed their trek, from Kokoda back to Port Moresby. The TropicAir Charter Manager advised, '*We have been instructed by KTA not to uplift you - We will seek approval to get your current trackers out tomorrow, although at this point unless you can show me their current permits we are not permitted to fly.*'

### **The Australian Kokoda Tour Operators Association**

The Kokoda Tour Operators Association (KTOA) is an Australian lobby group established in November 2015 to protect the business model of its members operating on the Kokoda Trail.

The Association is registered as a Travel Company in Australia – it is not registered as either a Foreign Enterprise or Association with the PNG Investment Promotion Authority (IPA).

The KTOA Mission Statement advises it is '*a representative member driven collective that unifies operators and upholds the professional standards of the industry*'.

The KTOA was initially established with 12 Australian eco-tour operators and claimed to lead 75 percent of trekkers across the Kokoda Trail.

Since then, five have resigned and one has been added. – today they represent just 8 of the 37 Commercial Tour Operators (22 percent) licensed by the PNG Kokoda Track Authority (KTA).

According to KTA records for 2016-2018 KTOA members led just 30 percent of trekkers across the Trail – a far cry from the 70 percent they claim to have led!

According to PNG Investment Promotion Authority (IPA) records none of the eight (8) remaining members of the KTOA has ever paid any tax on the millions of kina they have generated from their operations across the Kokoda Trail in PNG.

Nor have any complied with the IPA Act in regard to filing Annual Returns as required. They could therefore be deemed to have operated illegally in PNG.[i]

The influence of the KTOA has been facilitated by their aggressive attitudes, the weak management structure of the KTA, and weak enforcement from the IPA.

Their *modus operandi* has been exposed in the following articles:

- [The Battle for Kokoda;](#)
- [Australian Kokoda Tour Operators Association \(KTOA\) Review](#)

### **Alleged Collusion against Adventure Kokoda**

There are indications of collusion between the KTA, KTOA and the Kokoda Initiative in the lead-up to the cancellation of our Adventure Kokoda tour operators licence.

The KTOA has remained committed in their stand against our call for improved transparency, compliance, and our commitment to the welfare of guides and porters engaged in Kokoda tourism.

Mr. Wargirai's decision to provide advance warning of the cancellation of our license to the KTOA suggests there may have been some prior collusion with KTOA President, Mr. Mick O'Malley in the lead up to the Minister's announcement.

It is highly probable that Mr. Wargirai would have also discussed the issue with Mr. Mark Nizette given their proximity to each other in the KTA office.

Prior to formal notification of the cancellation of our licence the KTOA posted the following notification at 1.40 pm on 26 April advising:

*'It has come to the KTOA's attention that Adventure Kokoda has had its trekking license revoked (or soon will have) and will soon be fined by the respective authorities. The KTOA fully understands the actions of the Kokoda Track Authority on this matter. The KTOA understands that as operators, we all have an obligation under PNG Law, to abide by that law and to ensure that the people of the Kokoda Track are never robbed of the money they deserve.*

*'We will continue to update the industry on this and other important matters as they come to hand!'*

Thirty minutes later, at 2.10 PM, a KTOA member, David Howell, posted:

*'Finally this bully has been dealt with.*

*'We must report the misconduct of one of the largest Kokoda Tour companies on the Kokoda Track. Adventure Kokoda, who had over 120 trekkers on the Kokoda Track decided to defy PNG Law and take matters into their own hands, refusing to pay trekking permits and as such, started walking the Track illegally and without permits. They did this covertly and when approached by Kokoda Track Authority Rangers, they did it aggressively.*



At the same time as David Howell was informed, and 30 minutes after the KTOA was advised, Tracie Watson, General Manager of Adventure Kokoda, received the following email from Mr Julius Wargirai:

'From: Julius Wargirai [mailto:jwargirai62@gmail.com]  
Sent: Wednesday, 26 April 2023 2:10 PM  
To: Tracie Watson <tracie@kokodatreks.com.au>  
Cc: Mark Nizette <mark.nizette@kokodapartnership.org>  
Subject: Re: CANCELLATION OF ADVENTURE KOKODA KTA TOUR OPERATORS LICENSE''

I attach a letter to you signed by the Minister for Environment and Conservation and Chair of Kokoda Initiative Ministerial Committee on the above subject matter.

The letter is self explanatory and would require Adventure Kokoda to satisfy a number of requirements for the company to be granted a new trek license by KTA.

Please contact me should you require further confirmation.

Thank you,

Julius Wargirai

We noted that Mark Nizette was copied in on the above email.

The KTOA, and two of its members, Mick O'Malley, President of the KTOA and owner 'Australian Kokoda Tours' along with David Howell, owner of 'Kokoda Historical', then launched a flurry of defamatory Facebook posts against Charlie Lynn and Adventure Kokoda. These have since been placed in the hands of our solicitors.

A review of IPA records has revealed that both Australia Kokoda Tours and Kokoda Historical are 'Business Names' who have operated illegally across the Kokoda Trail between 2006 and 2022. Both were therefore able to avoid paying tax in PNG on the profits they earned during this period. The KTA was advised but chose to ignore the information provided to them.

We were therefore surprised at the Minister's intervention because a quick review of the PNG Investment Promotion Authority's (IPA) website would have revealed that Adventure Kokoda is the only Australian Kokoda tour company to have fully complied with the provisions of their Act since 2004 and to have paid tax since 2004.

There is also evidence of collusion between the DFAT Strategic Management Advisor, Mr. Mark Nizette; the Governor of Oro Province, Gary Juffa MP, and Mr. Julius Wargirai

Juffa and Nizette are close to each other. Their relationship is most likely enhanced by the flow of Australian aid-funded projects related to environment, climate change, and community development in Oro Province.

Under normal circumstances Governor Juffa would not be aware of charter flight schedules to Kokoda but on this occasion it is assumed he was advised of our Adventure Kokoda schedule by either Julius Wargirai or Mark Nizette – or both!

The process leading to the Minister's decision appears to have been influenced by Governor Juffa's input and the presence of Mr. Mark Nizette during the conduct of the committee meeting.

The apparent collusion between the DFAT Kokoda Initiative, KIC, KTA and KTOA gave a strong indication of a conscious bias against myself and Adventure Kokoda.

The Minister's cancellation of our license along with the KTOA Facebook posts led to stories in all Australian media outlets resulted in serious reputational damage to Adventure Kokoda and led to cancellations and a drop-off in enquiries.

However, it seems they were a bit overzealous in their bid to put us out of business and may have ejaculated prematurely.

It's now time to call them to account.

## Our Kokoda Objectives

Our long-term objective for the Kokoda Trail has been clear and unambiguous i.e., *'to protect, honour and interpret the military heritage of the Kokoda Trail for the economic benefit of traditional landowner communities across it'*.

I have always been motivated by my belief that the Kokoda Trail has the potential to be a world class pilgrimage destination for the economic benefit of the traditional landowner communities.

The following key facts provide a summary of our motives and achievements across the Kokoda Trail since I first trekked it in 1991:

- Prior to my involvement with the Kokoda Trail there was no Kokoda tourism industry and no income for traditional landowner communities.
- Since then, because of the positive publicity we generated, it is now PNGs most popular tourism destination – the following links provide examples of the media we generated:
  - <https://blog.kokodatreks.com/category/our-media/>
  - <https://www.kokodatreks.com/treks/why-adventure-kokoda/videos/>
  - <https://www.kokodatreks.com/treks/why-adventure-kokoda/media-articles/>
- [Trip Advisor](#) has rated Adventure Kokoda as the best trekking company on the Kokoda Trail every year since it began its ratings more than 10 years ago.
- In 2012 we developed a proposal to proclaim '[Kokoda Day](#)' to honour the legacy of PNGs wartime carriers who have never been officially acknowledged by the PNG Government.
- In 2022 we developed a unique '[Kokoda Scholarship](#)' initiative linking names in PNGs war cemeteries to local scholarships to reflect the spirit of Rudyard Kipling's quote on all Stones of Remembrance that '*Their Names Shall Live Forever More*'.
- We established [Network Kokoda](#) as a philanthropic body to support villagers across the Trail more than 10 years ago – since then we have generated more philanthropic support than all other Kokoda tour operators combined.
- In 2015 I was inducted as an Officer of the Logohu in the annual Honours and Awards List '*for service to the bilateral relations between Papua New Guinea and Australia and especially in the development of the Kokoda Trail and its honoured place in the history of both nations*' over the past 25 years.
- I was also inducted as a Member of the Order of Australia in the Queen's Birthday Honours and Awards list in 2019 for my services to the Parliament of New South Wales.

## Government Failures

Since the Australian Government assumed responsibility for the Kokoda Trail in 2009, I have been highly critical of the 'management system' they imposed on the Kokoda Track (Special Purpose) Authority (KTA).

Over the years I have submitted many papers to them on how to improve Kokoda tourism for the benefit of trekkers and local village communities. All have been ignored!

I have therefore used my blog as a platform to express my views. Some of the articles I have published include:

- [Kokoda Trail: Chronology of Mismanagement: 2009-2019](#)
- [Kokoda: A Trail of Bureaucratic Woe 80 years on!](#)
- [Shameless Hijack of Kokoda Trek Permit Fees](#)
- [Kokoda: The Enemy Within!](#)

I believe the decision to cancel our licence was motivated by malice from within the KTA due to my criticism of their failure to:

1. account for the income they receive from trek permits;
2. give an assurance that the Trail would be safe;
3. ensure campsites and toilets would be adequate for trekkers who had paid their fees in good faith;
4. protect the welfare of their guides and porters; and
5. ensure all licensed tour operators have public liability insurance and comply with the legal requirements of the PNG Investment Promotion Authority.

### Our Application for an Injunction

We immediately engaged our PNG lawyers to file an injunction against the cancellation of our licence as we believed it was related to our criticism of their neglect of our military heritage across the Trail along with our advocacy for Kokoda tourism to be transferred from the Minister for Environment, Conservation and Climate Change to the Minister for Tourism, Arts and Culture to tourism to arrest the dramatic fall in trekker numbers since the DFAT Kokoda Initiative assumed responsibility for its management in 2009.

I was then approached by a local MP to see if I would be interested in doing a deal which involved a third party paying the fine on our behalf that had been levied against me as long as I signed a document to say I would not criticize them again. I advised him I had no intention of paying any fine, or having it paid on my behalf, or signing any document.

My objective was simply to clear my name against the false accusation that I had broken the law by attempting to evade paying for trek permits on behalf of our trekkers.

The injunction process was drawn out from May through to November due to 'legal' delays initiated by the lawyers representing the Minister and the KTA.

### PNG National Court Hearing

Our application for an injunction was finally listed for a hearing in the PNG National Court on 22 November 2023 before Justice Sally Purdon-Sully.

Justice Purdon-Sully's judgement, handed down on 14 December 2023, found that Minister Simon Kilepa's decision to cancel our Adventure Kokoda license was unlawful.

Her Honour also declared the Kokoda Initiative Committee (KIC) meeting convened on 21 April 2023 was not free from bias and conflicts of interest given the presence of the DFAT Strategic Management Advisor for their Kokoda Initiative and Secretary to the KIC, Mr. Mark Nizette MBE along with Oro Governor Gary Juffa MP.

Mark Nizette MBE failed to declare a conflict of interest over his current defamation litigation against Charlie Lynn. The court also noted he had neglected to sign the Minutes of the meeting included in the affidavit submitted by the Acting CEO of the Kokoda Track Authority (KTA), Mr. Julius Wargirai, which led to the cancellation of our Adventure Kokoda licence.

Governor Juffa MP, who is closely associated with Nizette through DFAT funded aid projects in Oro Province, had threatened violence against our charter airline if they flew Adventure Kokoda groups into Kokoda at the start of the Anzac trekking period. His threats as an MP would seem to be a breach of the PNG Ministerial Code of Conduct.

Justice Purdon-Sully found that the KIC meeting convened to consider the cancellation of our Adventure Kokoda license was invalid and the Minister's decision to cancel it was unlawful.

Her Honour awarded costs to Adventure Kokoda.

Whilst we are happy with the outcome of the National Court hearing the information in the affidavit

submitted by Julius Wargari raises serious questions which should be addressed by the relevant PNG authorities associated with Kokoda tourism,

Wargirai, who has been engaged in an ‘Acting’ capacity for more than 5-years, should be called upon to explain:

- why did he not advise the committee that Adventure Kokoda had paid for all trek permit fees owing in accordance with the Koiari and Kokoda Local Level Government ‘Kokoda Track Trek Permit Fee Act 2005’ a week prior to the meeting?
- why did he not circulate a copy of the ‘Kokoda Track Trek Permit Fee 2005’ to members of the committee which clearly show that Adventure Kokoda had complied with the provisions of the Act?
- why were the cheques paid for by Adventure Kokoda and presented to Mr’ Wargari on 15 and 16 April not presented to the KTA bank for a further two months after payment? and
- which PNG law did Adventure Kokoda not comply with as he alleged?

*Mr. Wargirai affidavit refers to ‘Kokoda Tour Operators License Conditions 2014’ however his KTA website refers to ‘Commercial Operations License Conditions 2012’.*

His affidavit also referred to ‘Koiari Rural Local Level Government Kokoda Track Trek Permit Law 2009’ which, according to Wargari, is ‘*the area specified as being between ‘Kokoda Airstrip in the Kokoda Sub-District of the Sohe District of Northern Province and Depo Village of the Sogeri Sub-District of the Kairuku-Hiri District of Central Province’*. This raises a number of questions:

- When was the ‘Kokoda Tour Operators License Conditions 2014’ reference approved and published?
- Why was the Kokoda Local Level Government excluded from the ‘Koiari Rural Local Level Government Kokoda Track Trek Permit Law 2009’? and
- Why does his KTA website still reference the ‘Commercial Operations License Conditions 2012’?

Mr. Wargirai advised the KIC meeting that ‘*in the past some of the PNG tour operators had attempted to trek without permits, and he had taken action directly with them to ensure fees were paid and the situation was not repeated. Mr Wargirai further informed the Committee that he had referred the Adventure Kokoda situation to the Criminal Investigation Division of the RPNGC for investigation.*’

Mr. Wargari should be called upon to:

- Identify the tour operators concerned and advise why he did not revoke their tour operators license?
- Explain why he granted these unidentified tour operators a second chance but denied Adventure Kokoda the same privilege?
- Why he has issued Kokoda Tour Operators Licenses to Australian tour companies who do not comply with the provisions of the IPA Act as he is required to do in accordance with his own ‘Commercial Tour Operators License Conditions 2012’?
- Why has he failed to take any action against illegal Australian tour operators after the matter was brought to his attention on numerous occasions? and
- Did he refer the situation regarding the tour operators who had avoided paying for their trek permits to the Criminal Investigation Division of the RPNGC for investigation as he did for Adventure Kokoda – and if not, why not?

It’s now time to call Mr. Julius Wargari to account.

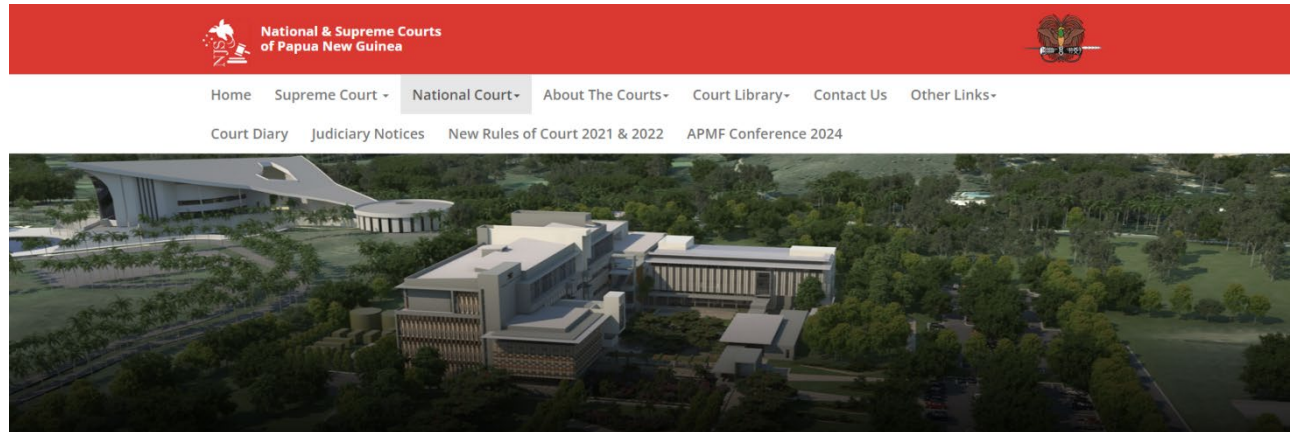
### **Time to call the DFAT Kokoda Initiative and KTA to account**

Justice Perdon-Sully’s judgement should now be the catalyst for PNG to reclaim ownership of the Kokoda Trail from the influence of the DFAT Kokoda Initiative, CEPA, and their surrogate KTA.

It is time for them to have Kokoda tourism managed as a commercial tourism enterprise for the economic benefit of traditional landowner communities across the Trail rather than as a socio-environment experiment

for the benefit of foreign aid-funded environmentalists, anthropologists, archaeologists, social engineers and overpaid government officials.

## Full Transcript of PNG National Court Judgement



PAPUA NEW GUINEA [IN THE NATIONAL COURT OF JUSTICE]  
OS (JR) NO. 43 OF 2023 (IECMS)

BETWEEN:

ADVENTURE KOKODA PNG LIMITED

Plaintiff

AND:

HONORABLE SIMON KILEPA in his capacity as Minister for Environment Conservation and Climate Change

First Defendant

AND: JULIUS WARGIRAI in his capacity as Acting Chief Executive Officer of Kokoda Track Local-Level Government Special Purposes Authority

Second Defendant

AND:

KOKODA TRACK LOCAL-LEVEL GOVERNMENT SPECIAL PURPOSES AUTHORITY

Third Defendant

### **Waigani: Purdon-Sully J 2023: 22 November**

JUDICIAL REVIEW - Practice & Procedure - Judicial review - where grounds of breach of natural justice and ultra vires upheld - where ground based on Wednesbury principles of unreasonableness dismissed - where proportionality raised - where tour operator licence reinstated- where plaintiff was successful-where plaintiff attempted to resolve matter prior to hearing - costs on solicitor and own client basis

Legislation:

Constitution

Order 16 Rule 1 of the National Court Rules

Cases Cited:

#### **Papua New Guinea Cases**

Gima v Culligan [2015] N5989

Gobe Hongu Ltd v National Executive Council [2000] PNGLR 372 (16 July 1999)

Iambakey Okuk v Fa/sheer [1980] PNGLR 274 Jiau v Somare [2007] PGNC 265; N5511

Jpatas v Somare [2010] N4190

Kaiya v Pawa [2015] SC1469

Kamuta v Sode [2006] N3067

Hagoria v Ombudsman Commission of Papua New Guinea [2003] N2400

Kekedo v Burns Philp (PNG) Ltd [1988-89] PNGLR 122

Koki v Inguba [2009] N3785

Kuntun v Junias [2006] SC929  
Malloch v Aberdeen Corporation [1971] 2 All ER 1278  
Marat v Hanjung Power Ltd [2014] SC 1357.  
Nanan v Maru and Police Commissioner [1997] PGNC 6; N1507  
Nilkare v Ombudsman Commission (1996) SC498 Ombudsman Commission v Donahoe [1985] PNGLR 348 Ombudsman Commission v Yama [2004] SC747  
Re Mopio [1981] PNGLR416

### **Overseas Cases**

Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation [1948]1 KB 223  
Council of Civil Service Unions v Minister for Civil Service [1985] AC 374  
Loyd v McMahon [1987] AC 625  
R v Barnsley Metropolitan Borough Council exp Hook ([1976] 1 WLR 1052; [1976] 3 All ER452  
R v Home Secretary; Ex parte Daly [2001] 1 AC 532  
Secretary of State for Education and Science -v- Tameside Metropolitan Borough Council [1977] AC 1014  
Counsel

B. Sinen for the Plaintiff  
T Cooper for the First Defendant  
B. Kulumbu for the Second and Third Defendants

**DECISION: 14 December 2023**

### **INTRODUCTION**

1. This is a substantive application for judicial review made pursuant to a Notice of Motion filed 27 June 2023 pursuant to leave to apply for judicial review granted on 8 June 2023.
2. The plaintiff seeks the following orders:
  - a) An order in the nature of Certiorari pursuant to Order 16 Rule 1(I) of the National Court Rules, to remove into the National Court and quash the decision of the first defendant on 24 April 2023 to cancel plaintiffs Commercial Tour Operator's License KTA. 019.
  - b) An order in the nature of Declaration pursuant to Order 16 Rule 1(2) of the National Court Rules that the meeting convened by the Kokoda Initiative Committee of 21 April 2023 to consider the proposal to cancel the plaintiffs Commercial Tour Operator's License KTA. 019 is invalid and void ab initio and is of no effect.
  - c) An order in the nature of Declaration pursuant to Order 16 Rule 1(2) of the National Court Rules that the decision of the First Defendant of 24 April 2023 to cancel plaintiffs Commercial Tour Operator's License KTA. 019 is invalid and void ab initio and is of no effect.
  - d) An order in the nature of a Mandamus pursuant to Order 16 Rule 1(2) of the National Court Rules directing and compelling the second defendant and the third defendant to take all steps necessary to restore the plaintiffs Commercial Tour Operator's License.
  - e) Such further or other orders as this Honorable Court deems appropriate.
  - f) The defendants pay the plaintiffs costs of an incidental to these proceedings on a solicitor - client basis.
  - g) The time for entry of these orders be abridged to the date of settlement by the Registrar, which shall take place forthwith.
3. During the course of oral submissions the first defendant made a number of material concessions which supported the making of the orders sought by the plaintiff save for Order



(d) on the basis that the plaintiffs licence would have lapsed on 21 June 2023, and the plaintiff should reapply for a new licence. The first defendant further opposes the making of a costs order, other than on a party and party basis.

4. The second and third defendants seek the dismissal of the plaintiffs application for judicial review with costs.

5. At all material times:

a) The plaintiff was a company duly incorporated since 1 June 2018 with the Investment Promotion Authority conducting the business of trekking expeditions along the Kokoda Track.

b) The first defendant was the Minister for Environment, Conservation and Climate Change and Chair of the Kokoda Initiative (Ministerial) Committee (KIMC, later called the Kokoda Initiative Committee (KIC)), established by decision number 445/2013 of the National Executive Council to oversee the strategic direction of the Kokoda Initiative under a bilateral relationship between Australia and Papua New Guinea.

c) The second defendant was the Acting Chief Executive Officer of the third defendant.

d) The third defendant (referred to in evidence before the court as KTA) was the authority, established pursuant to section 42 of the Local-Level Government

Administration Act 1997, responsible for preserving the legacy of the Kokoda Track and promoting trekking and tourism related activities along it.

6. The fourth defendant, the State, did not participate at the substantive hearing.

#### **MATERIALS RELIED UPON**

7. The plaintiff relies upon:

- a) Notice of Motion filed 27 June 2023
- b) Affidavit verifying Statement pursuant to Order 16 Rule 3(2)(b) of the National Court Rules (NCR) of Charlie Stuart Lynn filed 12 May 2023
- c) Affidavit in Support of Charlie John Stuart Lynn filed 12 May 2023
- d) Affidavit of Charlie John Stuart Lynn filed 15 May 2023
- e) Affidavit of Charlie John Stuart Lynn filed 15 September 2023
- f) Affidavit of Charlie John Stuart Lynn filed 20 November 2023
- g) List of Materials and Authorities dated 21 November 2023
- h) Written submissions.

8. The first defendant did not file an affidavit, relying upon the affidavit of the second defendant filed on 21 June 2023 and written submissions (as amended orally during the course of the hearing).

9. The second and third defendants rely upon the affidavit of Julius Wargirai sworn and filed on 21 June 2023 together with written submissions.

10. I have considered the submissions, oral and written, relied upon. I do not propose to respond to each and every submission made, the parties' submissions fulsomely canvassed over the course of a day's hearing. However, in reaching a decision on the issues I am required to determine, I have considered all submissions.

#### **BACKGROUND**

11. The Kokoda Track (the Track) is a walking track located along the Owen Stanley Range that borders Central Province and Oro Province of Papua New Guinea.

12. It is a place of historical significance for the people of Papua New Guinea and Australia because of the events that took place during the Kokoda campaign in World War 2.

13. It has been described by the first defendant as 'our most popular tourist destination'<sup>1</sup> and by the third defendant as 'a powerful symbol of the enduring relationship between the two countries'.<sup>2</sup>

14. The Kokoda Initiative is a partnership between the governments of Papua New Guinea and Australia to sustainably develop and protect the Track, the surrounding Owen Stanley Range, and the local communities along it.

15. The five key goals of the joint understandings that underpinned the vision of the Kokoda Initiative are:<sup>3</sup>

- A safe and well managed Track which honours its wartime historical significance and protects and promotes its special values
- Enhanced quality of life for landowners and communities through improved delivery of basic services, income generation and community development activities
- The wise use and conservation of the catchment protection area, including the Track and its natural and cultural resources and values
- Building the national and international tourism potential of the Owen Stanley Range and Kokoda Track region, supported by a possible future World Heritage nomination.
- Working with communities, landowners, industry, and all levels of government to ensure that activities established under the Kokoda Initiative are sustained into the future.

16. The governance structure of the Kokoda Initiative includes the KIC and the third defendant.<sup>4</sup>

17. The KIC (then known as the KIMC) was established on 9 December 2013 to improve the governance system of the Kokoda Initiative by way of a ministerial committee supported by an advisory panel to take submissions from and provide advice and strategic direction to stakeholders and ensure that agencies were properly resourced to carry out the mandate under the Kokoda Initiative. Its membership comprises the first respondent as Minister of the lead department, other relevant Ministers and the Governors of Oro and Central Provinces.<sup>5</sup>

18. The KIC meets quarterly and reports to the Prime Minister.

1 Annexure C to the affidavit of the second defendant filed 21 June 2023.

2 Commercial Operations Licence Conditions 2012 at (1.1]

3 Annexures H & K to the affidavit of the second defendant filed 21 June 2023

4 Annexures K to the affidavit of the second defendant filed 21 June 2023 at [9]

5 Ibid Terms of Reference Attachment A Duties and Governance Structure

19. The governance structure of the third defendant involves the second defendant as CEO undertaking the day to day operations of the third defendant. Management oversight is to be provided by the third defendant's Management Committee or Board which is required to meet quarterly, have a Chair, Deputy Chair and at least three (3) members to constitute a quorum (none of whom can be an employee of the third defendant). That body may include a tourism operator on nomination by the Chair. It is unchallenged that there is no functioning board or committee in existence. It is unclear on the evidence whether one was ever established and if it was, when it last met and consequently who, in its absence, provides oversight of the operations of the third defendant or the second defendant as its Acting CEO. It presents as a lacuna in the governing structure as outlined.

20. Sections 2 and 3 of the Kokoda Track Local-Level Government Special Purposes Authority Constitution details the functions and powers of the third defendant as follows:

## 2. Functions of the Authority

"Without limiting any functions of the Authority set out in the Proclamation, the Authority may perform the following additional functions:

- (a) To preserve the legacy of the Kokoda Track;

- (b) To promote tracking and tourism related activities along the Kokoda Track;
- (c) To consult with the landowner and Local Level Government on their needs and priorities in relation to distribution of any benefits arising from trekking and other tourism related activities on the Kokoda Track;
- (d) To collect and manage trekking fees and permits;
- (e) To oversee and regulate the conduct of tour operators to ensure the sustainable management of the Kokoda Track and respect for local culture and way of life;
- (f) To administer, facilitate, oversee and assist the implementation of community development projects along the Kokoda Track corridor, either alone, through government agencies or in collaboration with philanthropic organizations, donor agencies and other interested persons;
- (g) To work in close cooperation and consultation with the Papua New Guinea and Australian Governments for the implementation of the Second Joint Understanding between Papua New Guinea and Australia on the Own Stanley Ranges, Brown River Catchment and Kokoda Track Region.
- (h) Any other functions authorized by the Koiari Rural Local-Level Government or the Kokoda Rural Local-Level Government from time to time.

### 3. Powers of the Authority

(1) In accordance with Section 44 of the Local Level Government Act 1997, the Authority has the power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

(2) Without limiting subclause 1, the Authority may-

- a. Set and impose fees on tourism operators and trekkers using the Kokoda Track;
- b. Issue trekking permits for the Kokoda Track;
- c. Enter into agreements and commercial arrangements; and
- a) Acquire, hold, and dispose of real and personal property.

21. It is a specific responsibility of the third defendant to regulate trekking operations on the Track and to provide a safe and well managed Track with trekking fees to be used in part to undertake safety and track maintenance works.<sup>6</sup>

22. Under the Kokoda Track Permit Law 2005 any individual or company who wants to walk the Track is required to obtain a trek permit. Pursuant to that law:

- a) permit fees are as prescribed in section 6;
- b) a trekker without a permit shall be required to return to the office of the third defendant or approved licensee or authorised agent or officer of the second defendant and make arrangements for the payment of such a permit, "plus any imposed penalty" (s 9);
- c) subject to sections 6 and 9 a person without a permit who attempts to walk the Track is guilty of an offence (Penalty: a fine not exceeding K1 00).

23. The published guidelines for trekking the Track provide, amongst other things, that it is a legal requirement that prior to trekking, all trekkers have a valid permit obtained from the second defendant or tour operator.

24. Trek permits are available on application to the third defendant.

25. Trek permits will only be issued to tour operators who have a licence, variously called a Commercial Operator's Licence or Tour Operator's Licence (licence).

26. The Kokoda Track Authority Commercial Operators License Conditions 2012 and 2014 provide that the power to grant and cancel tour licences is vested in the second and third defendants.

27. The licence is signed by the second defendant. It must be renewed annually on application to the third defendant.

28. Tour operators agree to a Code of Conduct which is annually reviewed and monitored by the third defendant. The Code inter alia requires tour operators to adhere to second defendant's rules, guidelines and procedures, support local communities, promote excellence in terms of the trekkers experience and exercise a duty of care to clients and staff.

29. The plaintiff has held a licence since 23 August 2018. Mr Charlie Lynn OAM, a Director of the plaintiff company, deposes to having first trekked the Track in 1991 and, as a tour operator, having led 600 Kokoda expeditions and 7,000 trekkers over the Track.

6 Sees 2 Constitution of KTA; s 16 of the KTA Proclamation; Clauses 1.1, 1.2 and 1.3 of the Tour Operator's licence Conditions 2014 (Tabs, I, 2, 6 of plaintiff's list of materials; Annexures M of affidavit of the second defendant filed 21 June 2023).

30. On 21 June 2022 the plaintiff was issued its annual licence with an expiry date of 21 June 2023. 7

31. On 21 April 2023 the KIC convened a meeting at the Hilton Hotel following a request of the second defendant. On the evidence of the second defendant he sought advice from the KIC 'on my intention to exercise my powers under the KTA Constitution to cancel the plaintiff's tour operator 's licence.' 8

32. The purpose of the meeting as recorded in the Minutes of the meeting in evidence was to consider inter alia illegal trekking conducted by the plaintiff.9

33. The plaintiff was not informed of the meeting, nor the intention of the second defendant prior to the meeting, to exercise his powers to cancel the plaintiff's licence.

34. By letter dated 24 April 2023 addressed to Ms Tracie Watson, the plaintiff's General Manager, the plaintiff was notified by the first defendant as Chair of the KIC that its licence was cancelled.10 Relevantly the letter said:

Given the evidence presented at the meeting by Mr Wargirai the Kokoda Initiative Committee has instructed the KTA CEO to cancel Adventure Kokoda's Tour Operator licence effective from the date of this letter.

35. The first defendant went on to outline the conditions the plaintiff would be required to meet for the granting of a new licence.

## **EVENTS PRECEDING CANCELLATION OF LICENCE**

36. On 2 February and 10 February 2023, Mr Lynn sent several emails to the second defendant raising safety concerns about the Track noting inter alia that:

- the plaintiff had 150 confirmed bookings for the month of April 2023, bookings that would generate K52,000 in trek fees which the plaintiff was expected to pay to the second defendant
- the plaintiff had always paid its fees to the third defendant the quantum of those fees, totaling K292,000 pre Covid, however little work had been done to improve dangerous sections of the Track or facilities
- the significant safety risks he viewed this posed to trekkers and its staff including the poor state of campsites, kitchen and ablution facilities.

- the plaintiffs duty of care to trekkers and support crews and the enormous responsibility that rested on it to ensure their safety

7 Tab 12 of plaintiff's list of materials

8 Affidavit of the second defendant filed 21 June 2023 at [29]

9 Tab 14 of plaintiff's list of materials

10 Tab 15 of plaintiff's list of materials

37. It was his proposal that, to ensure the readiness of the Track to accommodate the large number of confirmed bookings during the approaching peak Anzac season, his trekking fees be redirected to the campsite owners to enable them to prepare and effect improvements to the campsites to meet the basic hygiene and safety needs of its trek groups and that the plaintiff provide the third defendant with a detailed record of its expenditure.

38. The plaintiff received no response to these emails and its concerns, from its perspective, remained unresolved.

39. By further email dated the 13 March 2023 the plaintiff again raised its concerns with respect to inter alia:11

- the second defendant's lack of response
- the approaching peak Anzac trekking in 4 weeks and the urgency of the situation, the plaintiff with 7 trek groups of about 130 trekkers the following month all of whom expected a safe track, adequate campsites, and hygienic toilets
- the plaintiff had made a commercial decision to employ extra crews to prepare the camp sites and purchase extra equipment.

40. The plaintiff again proposed that it use a portion of its trek fees, normally payable to the third defendant, to offset the additional expenses with the balance to be paid to campsite owners as per a list provided so they could undertake necessary improvements for the benefit of the plaintiff and their clients. The penultimate paragraph of the email concluded that if the plaintiff did not receive a response within 48 hours it would assume that the third defendant agreed with its proposal and act accordingly.

41. On 20 March 2023, the second defendant responded by letter as follows:12

*Dear Charlie*

*Ref: Probe Kokoda Trail Claims, says Former Australian Soldier*

*I refer to your article in The National and Post Courier Publications dated 13th March 2023.*

*From the outset, let me remind you that Kokoda Track Authority is a legal Authority established by the Government of Papua New Guinea under Section 42 of the Local Level Government Administration Act 1997 (refer to attachment). KTA's statutory mandate is to manage the Kokoda Track as a commercial asset for both local and international tourists on behalf of Koiari and Kokoda Local Level Governments.*

*Also, let me draw you to KTA's Constitution in Clause 3 (2)(a)(b), which empowers KTA to impose fees on Tourist Operators and Trekkers and issuance of Trekking Permits to Tourism Operators and Trekkers using the Track (refer to Attachment). In light of these provisions, your intention not to pay Trek Fees direct to KTA and instead distribute direct to the campsite owners through other interest groups not legitimized by law to administer these powers and functions would constitute a breach of these provisions and considered an illegal act on your part. Further, as foreigner investing in PNG, you are subject to abide by PNG Laws, and NOT undermining them as you intentionally threatened in your article.*

*KTA is the legitimate Authority and I suggest you adhere to the legal requirements in making proper payments of Track Fees to it, just as you always do in past years. On the track facilities*

*and improvement of welfare of Porters and Guides, I do agree with specific concerns of your claims, however some of these responsibilities are outside KTA's core functions. It is therefore important for KTA to work together with relevant agencies, Guest House Owners and Tour Operators to ensure we achieve better outcomes in the short and long term according to expected requirements.*

*You are therefore invited to be part of this effort instead of merely talking from the side and publicly making misleading allegations on KTA and partner agencies on the issues.*

*Thank you Julius Wargirai*

*Acting Chief Executive Officer Kokoda Track Authority*

11 Annexure CL9 and CLIO to Affidavit of Mr Lynn filed 12 May 2023

12 Annexure CLI I to Affidavit of Mr Lynn filed 12 May 2023

42. On 27 March 2023, Mr Lynn sent a further email to the second defendant reiterating his concerns noting that:<sup>13</sup>

- Mr Lynn had given an interview to a newspaper about his urgent concerns because 'you never answer your emails '
- the high degree of financial risk assumed by the plaintiff and its duty of care to trekkers in a rugged environment to ensure their safety and adequate campsite facilities to meet their needs
- its concerns about decisions made by the second and/or third defendant.

43. Mr Lynn concluded by seeking the third defendant's 'endorsement' to the plaintiff paying one half of its trek permit fees for the Anzac trekking period in April to the Kokoda Trail Tourism Development Association which represents landowners on the track to assist them in protecting the rights of the traditional village communities and half to the campsite owners to provide them with the funds to meet the basic needs of trekkers in the short time available.

44. The plaintiff received no response to that communication.

13 Annexure CL12 to Affidavit of Mr Lynn filed 12 May 2023

45. Seemingly undaunted, on 9 April 2023, Mr Lynn sent a follow up email to the second defendant again raising earlier safety concerns, this time supported by a report he had received from the plaintiffs track leader regarding the condition of the Track including rotting bridges, bridges over main creeks washed away necessitating the use ropes, campsite owners having received no financial assistance to prepare campsites including toilets and enclosing photographs of dangerous sections on the northern descent from Brigade Hill.<sup>14</sup>

46. He concluded as follows:

We would therefore appreciate your approval for the Kokoda Trail Tourism Development Association (KTTDA) to be the management body responsible for the receipt and expenditure of the trek permit fee including as a matter of urgency....

The President of the KTTDA... will then be in a position to allocate some funding for urgent trail maintenance and give the campsite owners a ray of hope.

47. The plaintiff received no response to that communication.

48. On Friday 14 April 2023, a trekking group led by Mr Lynn arrived at Owers Corner for a scheduled trek to Kokoda. Mr Lynn gives evidence that he informed the third defendants' rangers who were on site that payment of the trek permit fees would be made directly to the campsite owners to enable them to carry out maintenance on the trail and the campsites. It is



clear he had no authority to do that. It is unchallenged that he then led a trek without having paid the trekking fees.

49. On Saturday 15 April 2023, the second defendant arrived at Owers Corner and requested that the permit fees be paid to him. The plaintiffs Manager, Mr Donald Watson, met with the second defendant and presented him with two cheques, totalling K22,225, being the trek permit fees for two trekking groups on 14 and 15 April 2023.

50. On Sunday 16 April 2023, the plaintiffs Logistics Manager, Mr Tau Magui, presented the second defendant with two more cheques, totalling K18,900, for the two trekking groups of the 16 and 17 April. All four cheques were dated 11 April 2023. They were not banked until Monday 17 April 2023 at which time the plaintiff was issued four receipts dated 17 April 2023 totaling K41,125 being the payments of the trek permit fees for the 14, 15, 16 and 17 April.

51. Four days later the KIC convened its meeting at the request of the second defendant. On 26 April 2023, the plaintiff received an email from the second defendant attaching the letter dated 24 April 2023 from the KIC notifying the plaintiff of the cancellation of the plaintiff's licence effective as at the date of the letter. 15

14 Annexure CL13 to Affidavit of Mr Lynn filed 12 May 2023

15 Annexure CL15 to Affidavit of Mr Lynn filed 12 May 2023

The letter is outlined hereunder in full, with underlining added for discussion purposes:

*Dear Ms Watson*

*CANCELLATION OF ADVENTURE KOKODA KTA TOUR OPERATORS LICENCE*

*I am writing to you as the Chairman of the Kokoda Initiative Committee which is invested by the PNG Government to oversee the strategic direction of the Kokoda Initiative and PNG's bilateral relationship with Australia under this Initiative. On Friday 21st April I called a meeting of the Committee to consider reports of four treks conducted by your company Adventure Kokoda.*

*My Committee heard very disturbing reports from the Acting CEO of the Kokoda Track Authority, Mr. Julius Wargirai, that on four occasions recently Adventure Kokoda deliberately attempted to evade payment of trekking permit fees to the KTA as required under PNG Law. The treks in question were:*

*Friday 14th April trek from Owers Corner to Kokoda lead by Mr. Charlie Lynn and Mr. Graig Moffat,*

*Saturday 15th April trek from Owers Comer to Kokoda lead by Mr. Reg Yates,*

*Sunday 16th April trek from Kokoda to Owers Comer lead by Mr. Scott Babington, and Monday 17th April trek from Kokoda to Owers Corner lead by Mr. Peter Morrison.*

*The Committee heard that prior to these treks in February this year Mr. Lynn wrote to the KTA informing the CEO that Adventure Kokoda would refuse to pay the trekking permit fees to KTA. Mr. Wargirai informed us that he replied to Mr. Lynn in writing and informed him that to do so would be considered unlawful, as the KTA is mandated under law as the rightful authority to which trekking permit fees must be paid.*

*The Committee further heard that the first trek headed by Mr. Lynn arrived at Ower's Comer without any prior application for permits, or any prior notification to the KTA, and announced to the KTA ranger that they were about to depart for Kokoda without the lawful KTA trekking permits. The ranger was informed that permit fees would be paid to another organization, the Kokoda Trail Tourism Development Authority (KTTDA), which is not authorized under law to charge or collect trekking permit fees for the Kokoda Track.*

*Despite being previously warned in writing by the CEO, and again by the KTA ranger at Ower's Comer, the Mr. Lynn lead the trek onto the Kokoda Track after continual refusals to*

*pay KTA trekking permit fees. This action was attempted again on further three occasions as noted above. The Committee acknowledges that eventually and after much confrontation Adventure Kokoda did pay KTA through the issuance of cheques, but the fact remains that all four groups commenced trekking without the requisite trekking permits, despite repeated warnings.*

*The Kokoda Initiative Committee is very disturbed by these deliberate and calculated actions to contravene PNG Law. Adventure Kokoda is registered as a foreign entity by the Investment Promotion Authority and we are disturbed that a foreign company has openly declared in writing and in its actions that they were willing to take unlawful acts. The Committee was further disturbed to hear that Adventure Kokoda was attempting to operate business with the KTTDA, knowing that the KTTDA has no legal authority over the Kokoda Track.*

*There was a very vigorous discussion within the Committee of the pre-meditation of these actions and the disregard of PNG's sovereignty, with consideration given to precedents being set that would totally disrupt and undermine the Kokoda trekking industry. Given the evidence presented at the meeting by Mr. Wargirai the Kokoda Initiative Committee has instructed the KTA CEO to cancel Adventure Kokoda's tour operator licence effective from the date of this letter.*

*Please therefore be informed that as of this date, Adventure Kokoda is not licenced to operate any trekking business on the Kokoda Track. Should Adventure Kokoda wish to continue to do business in this country, your company may apply for a new licence to be granted on the following conditions;*

- 1. Adventure Kokoda must pay a fine of K1 00 per trekker to the KTA as required by law.*
- 2. Adventure Kokoda must agree in writing that they will abide by all PNG laws, and follow all lawful directions by KTA officers and other PNG officers,.*
- 3. Adventure Kokoda must provide assurances that they will not get involved in local PNG politics or to incite local political action.*

*The Kokoda Initiative Committee has asked to be kept informed of the situation, and have instructed the KTA CEO that no new licence will be issued to Adventure Kokoda until instructed by my Committee. I have been informed that the Royal PNG Police have been notified of this situation, and I expect that Adventure Kokoda and the trek operators named above will cooperate fully with the investigation.*

*The Committee acknowledges the contribution Adventure Kokoda makes to the local economy through employment and other works, and also acknowledges previous remarks and comments from Mr. Charlie Lynn and his views on how the trekking industry could be improved. But the Committee was firmly of the view that these things gave no justification for Adventure Kokoda to evade paying trekking permit fees in contravention of PNG sovereign law.*

53. The letter was signed by the first defendant and copied to all members of the KIC, the second defendant, Mr Eric Mossman, CEO of IPA, Mr Jude Tukuliya, Acting MD CEPA and Hon John Philips, Australian High Commissioner.

54. The plaintiff denies there was an attempt to evade the payment of trekking fees.

55. The plaintiff contends that the first defendant's decision to cancel its license was unlawful, unreasonable and in breach of the principles of natural justice.

56. On 12 May 2023 the plaintiff initiated proceedings for leave for judicial review. Leave was granted by a Judge of this court on 8 June 2023.

57. On 27 June 2023 the plaintiff filed its substantive Notice of Motion. The matter proceeded to a hearing on 22 November 2023.

## **THE ISSUES**

58. The issues for determination are:

- a) whether the plaintiff's license was unlawfully cancelled and, if so, whether the court should in addition to an order quashing the decision to cancel the license, grant the declarations sought and make an order in the nature of mandamus for the second and third defendants to reinstate the licence; and
- b) what costs order should be made, the plaintiff seeking an order on a solicitor and own client basis and the first, second and third defendants seeking the order be made on a party and party basis.

## **GROUND**

59. The plaintiff seeks review of the decision of 24 April 2023 to cancel its licence on four grounds:

- a. Beach of Natural justice
- b. Ultra vires
- c. Wednesbury principles of unreasonableness
- d. Breach of s 41 of the Constitution.

## **LEGAL PRINCIPLES**

60. Order 16 Rule 1 of the National Court Rules provides:

- (1) As application for an order in the nature of mandamus, prohibition, certiorari or quo warrant shall be made by way of an application for judicial review in accordance with this Order.
- (2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -
  - (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari; and
  - (b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and
  - (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

61. Judicial review is a process that is available to hold public officials accountable for the correct use of their powers. It is not concerned with the decision itself but with the integrity of the decision-making process.<sup>16</sup>

62. Judicial review is available where the decision-making authority exceeds its powers or lacks jurisdiction, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable authority would have reached (Wednesbury principles) or abuses its powers.<sup>17</sup>

63. Breach of natural justice is a common law ground as well as a constitutional law requirement. Section 59 of the Constitution allows for the consideration of the principles of natural justice in judicial and administrative proceedings, with the minimum requirement of natural justice stated to be "the duty to act fairly and in principle to be seen to act fairly" (s 59(2)).

64. In *Koki v Inguba* [2009] N3785 Yalo AJ said at [4]

It is quite unique in our jurisdiction as to how we have valued and recognized the importance of fairness or the principles of natural justice. Firstly, we have adopted the common law principles of natural justice as our underlying law. Secondly, the principles of natural justice are ensured all throughout our statutes. As if these were inadequate, we have provided for it in

our Constitution at section 59. Above all these, the Constitution has laid down the minimum standard of the principles of natural justice. We have provided for fairness at all levels of the hierarchy of laws in our jurisdiction. So, there is an onerous obligation to observe the minimum standard of the principles of natural justice.

65. What is fair will differ from case to case, the principles of natural justice "not engraved on tablets of stone".<sup>18</sup> The principles have a broad expanded meaning, and the scope and ambit of the principles are never limited.<sup>19</sup>

66. The duty to act fairly and be seen to act fairly requires the decision-making process to be procedurally fair to the person whose rights, interests and legitimate expectations are affected by its decision.<sup>20</sup>

16 Hagoria v Ombudsman Commission of Papua New Guinea [2003] N2400

17 Kekedo v Burns Philp (PNG) Ltd [1988-89] PNGLR 122 at [4]

18 Loyd v McMahon [1987] AC 625

19 Nilkare v Ombudsman Commission (1996) SC498

20 Ombudsman Commission v Donahoe [1985] PNGLR 348; Re Mopio [1981] PNGLR 416

67. The ultra vires grounds of judicial review are found in Order 16 Rule 13 of the NCR. If the decision-maker's power is not properly exercised inter alia by reason of a lack of jurisdiction then the exercise may be struck out because it is unlawful.<sup>21</sup>

68. Whilst as noted earlier, judicial review is not concerned with the decision, but the decision-making process, the exception, referred to as the Wednesbury principle, is where the decision is so unreasonable or absurd having regard to the circumstances, that no reasonable decision maker could have made the decision. <sup>22</sup>

69. Proportionality is a requirement that a decision be proportionate to the aim it seeks. It does not question the objective, or the end sought, rather it alleges that the means of achieving the objective was in excess of what was necessary to bring the intended result.<sup>23</sup> It has a constitutional mandate under s 41(1)(b) of the Constitution, which says amongst other things an act is unlawful if it is disproportionate to the circumstance of the case. There is an issue however whether s 41 only affects private rights and not public rights and interests.

## **DISCUSSION**

70. Based on the above principles I shall now address the four grounds raised by the plaintiff as a basis for the relief sought.

### **Natural Justice**

71. It is submitted on behalf of the plaintiff that the decision to cancel its licence breached the principles of natural justice because:

- a) In breach of s 59(2) of the Constitution, the first defendant failed to provide an opportunity to the plaintiff to answer the allegations raised against it by the second defendant, the deliberation and decision to cancel the plaintiff's license based solely on the second defendant's account.
- b) The track permit fees the subject of the second defendant's allegations were already paid in full and further to that, there were no penalty fee imposed by the second defendant at the time when he accepted the payments.
- c) The KIC Meeting convened on 21 April 2023 was not free from bias and conflicts of interest given the presence of Hon Gary Juffa and Mr Mark Nizette, the latter, at the time engaged in defamation litigation involving the plaintiff's director Mr Lynn.

72. It is submitted on behalf of the second and third defendants that there was no breach of the principles of natural justice prior to the licence cancellation, that it would be absurd and ridiculous to assert that the plaintiff was not afforded an opportunity to be heard when the

plaintiff was very much involved in the events leading up to the cancellation of its licence as there was ongoing communication between the plaintiff and the defendants concerning the issue of trekking permit fees, the decision to cancel the licence did not come as an abrupt shock to the plaintiff as the plaintiff was engaged in an ongoing dispute with the defendants over the payment of fees and had been informed of the legal requirement to pay trekking fees to the third defendant which it ignored by knowingly contriving to take four separate trekking groups onto the Kokoda Track without paying the lawful trekking permit fees to the third defendant, its actions premeditated in that it had been planned for at least two months.

73. The submissions on behalf of the second and third defendants, respectfully, conflate two different issues. The dispute over how trekking fees were to be paid and the plaintiffs failure to pay trekking fees (on the case of the second and third defendants) was one issue. The plaintiffs right to be forewarned and heard prior to the cancellation of its licence, was another issue.

74. The first issue did not entitle the defendants to ignore affording the plaintiff procedural fairness in the decision-making process to cancel its licence, which included the right of the plaintiff to be heard unless the rules of court or express provision of an Act of Parliament excluded that right.

75. The KIC was at liberty to take submissions from a range of stakeholders, including licenced tour operators, to ensure that 'considered advice' was passed onto relevant agencies such as the third defendant (see Policy Submission to Cabinet at [17] and Terms of Reference of KIC at page 8 being Annexure K to the affidavit of the second defendant filed 21 June 2023). It did not invite those submissions from the plaintiff before it made the decision that cancellation was the proper course of action.

76. It may be that had the plaintiff been afforded that opportunity that the outcome would have been the same, that is cancellation of the licence. However, the right to prior notification, the right to be heard, the right to try and reach consensus if possible as part of the right to be heard, is a fundamental right the plaintiff was denied. It included, but was not limited to:

- the right to bring to the attention of the KIC correspondence passing between it and the second defendant raising safety concerns;
- any potential conflicts that may affect a fair deliberation by the KIC;
- the right to be heard on the death of a trekker, a serious matter which on submission of Counsel for the second and third defendants was a significant contributing factor to the decision to cancel, in circumstances where there had been no coronial inquest, no evidence that the trekker had died as a result of the actions of the plaintiff and the trekker's heart attack was not the result of a pre- existing health issue; 24
- the right to be heard on the non-payment of trekker fees as a purported attempt to defraud the third defendant of fees, an allegation that carries with it the notion of an attempt on the part of the plaintiff to gain a pecuniary advantage for itself-,25
- the right to be heard on the matters underlined (above) in the letter of the KIC to the plaintiff which the plaintiff either disputed or went to context, merits and penalty including the allegation that the plaintiff had engaged in conduct that amount to a blatant disregard of PNG laws.

77. The communications between the parties and the interchange on the Track on or about 15 April 2023 do not lead to a contrary conclusion. The one and only letter sent by the second defendant to the plaintiff on 20 March 2023 concluded by urging cooperation through joint effort. The plaintiff could not have reasonably drawn from it or the April exchanges with the second defendant and/or the third defendant's agents that cancellation of its licence was under active consideration or a likely consequence of the dispute, a view likely underscored by the failure of the second or third defendant to impose a pecuniary penalty on the plaintiff

following its trek of 14 April.<sup>26</sup> Even if it was reasonable to draw that inference it did not disentitle the plaintiff from being heard between 17 and 21 April 2023 when the decision to cancel was made.

78. The unsigned KIC Meeting Minutes dated 21 April 2023 annexed and marked as Annexure "I" to the Affidavit of the second defendant filed on 21 June 2023 reveal inter alia that:

- a) none of the plaintiffs representatives were present at the KIC meeting when the second defendant raised allegations of attempted evasion of trek permit fees, an allegation denied by the plaintiff;
- b) the second defendant did not provide a written submission to the KIC outlining his allegations against the plaintiff, nor any of the written communications passing between the plaintiff and second defendant to provide some contextual background to the dispute;
- c) the KIC and the first defendant failed to consider that the trek permit fees were paid in full, or, at best on the defendant's case, four days late.

79. There is no provision under the Constitution of the third defendant or the Proclamation establishing the third defendant which expressly states or excludes the principles of natural justice. The court is thus at liberty to supply the principles by implication.<sup>27</sup>

<sup>24</sup> see [25] of written submissions; Affidavit of second defendant filed 21 June 2023 at [26] [27]

<sup>25</sup> see [155] of written submissions on behalf of the second and third defendants.

<sup>26</sup> see ss 9 and 14 of the Track Permit Law

<sup>27</sup> *lambakey Okuk v Fa/sheer* [1980] PNGLR 274; *Nanan v Maru and Police Commissioner* [1997] PGNC 6; N1507

80. The right to be heard is a fundamental right, one enshrined in s 59(2) of the Constitution.<sup>28</sup> The actions of the defendants deprived the plaintiff of its right to defend itself against the complaints raised, before the decision was made to cancel its licence. The KIC only heard one side of the story, as recounted to it by the second defendant. It did not in its deliberations ascertain the objective facts and fairly listen to both sides of the argument. That failure represented a serious breach of the principles of natural justice. <sup>29</sup>

81. The submissions on behalf of the second and third defendants that the plaintiffs complaint in this regard was inter alia absurd, ridiculous, or trivial cannot, respectfully, be accepted.

82. In *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278, Lord Reid said at [p1282j]:

The right of a man to be heard in his defence is the most elementary protection of all....

83. In *Jiau v Somare* [2007] PGNC 265; N5511 Canning J echoed those sentiments when he said at [66]:

The right to be heard of any person is special - something to be cherished in a society built on principles of fairness, decency, and democracy. That is the sort of society PNG is supposed to be. That is what the National Goals and Directive Principles are all about.

84. During the course of submissions Counsel for the first defendant effectively conceded that the plaintiff was not afforded an opportunity to be heard. It was the defendants' individual and collective failure to afford the plaintiff that right and, as a consequence, a process of inquiry and consideration that was fair, just and reasonable that individually and collectively amounted to a fundamental error of law. It was a serious breach of the principles of natural justice entitling the plaintiff to succeed on its application on that ground alone.

## **Bias**

85. The duty to act fairly and to be seen to act fairly as provided by s 59(2) of the Constitution, implies an absence of bias on the part of the decision-making body. If the decision-making



process is tainted in some way by a lack of independence or impartiality or bias, then it may amount to a breach of the principles of natural justice.

86. The duty to act fairly includes declarations of any conflicts of interest, where necessary, to uphold that duty

28 *Kaiya v Pawa* [2015] SC1469

29 *Gimav Culligan* [2015] N5989

87. On the evidence of the plaintiff, a member of the KIC, the Governor of the Northern Province Hon Gary Juffa, and the Secretariat, Mr Mark Nizette, both of whom were present at the meeting on 21 April 2023, were in a position of conflict.

88. On the evidence of Mr Lynn there had been an earlier dispute with Mr Juffa over a charter plane. Further, on his evidence, Mr Nizette had instituted defamation proceedings against him on 21 December 2022 in an Australian court. That evidence was not challenged by the second defendant or by an affidavit from Mr Juffa or Mr Nizette.

89. On the evidence of the second defendant Mr Juffa had sent a message to Mr Lynn on 15 April 2023 advising him to comply with PNG laws and not walk the Track, which Mr Lynn then purportedly ignored, denied by Mr Lynn.

90. There is no evidence before the court that either Mr Juffa or Mr Nizette declared to the Chair of the KIC that their involvement in the meeting may give rise to a potential conflict of interest. The Minutes of the meeting do not disclose any such declaration. The Minutes evidence an active involvement of Mr Juffa in the discussion. They also evidence Mr Nizette being invited to provide an overview of the history of the Kokada Initiative and its funding.

91. Further, the letter from the KIC signed by the first defendant and conveyed through email dated 26 April 2023 from the second defendant to the plaintiff was copied to Mr. Nizette. That may be because he was the Secretariat, however it is trite law to say that a failure to declare a conflict of interest may give rise to a reasonable apprehension of prejudice, partiality, or prejudgment and that any person who is part of a decision-making process must not have any personal interest in the outcome of the decision.<sup>30</sup>

92. It is also trite to observe that it would offend the principle of fairness and amount to a breach of natural justice if a person who was engaged in litigation against a director of the plaintiff company did not disclose that interest before participating in any decision that may adversely impact the interests of that person.

93. Whilst the court does not suggest that either the involvement of Mr Juffa or Mr Nizette suggested actual bias by either, bias does not have to be real or actual. It can be imputed or apparent. Given the state of the evidence, the lack of any declaration of a potential conflict in the Minutes thus enabling the KIC to determine how that should be addressed, amounted to a lack of fair treatment to the plaintiff. It is a duty that is constant, one that in the circumstances tainted the advisory process thus amounting to a breach of natural justice.

30 *Gabe Hongu Ltd v National Executive Council* (supra)

### **Ultra Vires**

94. It is contended on behalf of the plaintiff that in addition to the breach of the principles of natural justice, the first defendant acted ultra vires in exercising a discretionary power that was exclusively vested in the third defendant pursuant to sections 2 and 3 of the third defendant's Constitution. In acting outside its powers, its decision to cancel the plaintiffs licence should be declared invalid.

95. It is contended on the part of the second and third defendants that the decision cancelling the plaintiffs licence was not made ultra vires as the KIC was permitted to be involved in the

decision-making process relating to the license cancellation matters and, in this instance, it was permitted to advise the second defendant to cancel the plaintiffs license.

96. The court agrees that the second defendant on behalf of the third defendant had the authority to seek advice. It also agrees that the first defendant had the authority to provide that advice. The first defendant, however, had no authority to cancel the plaintiffs licence. That authority rested with the third defendant.

97. The fact that at the relevant time the third defendant did not have a functioning board or management committee to provide advice and make a decision is, respectfully, irrelevant to the issue of the first defendant's authority to cancel and set the terms for future renewal. It was a circumstance that did not create or transfer to the first defendant the authority of the third defendant.

98. The decision of the first defendant to cancel the licence and then impose conditions for its renewal, including the requirement of approval by the KIC and first defendant of any renewed application, a power and function that vested lawfully elsewhere, was ultra vires its authority.

99. This ground is upheld.

### **Wednesbury Principles of unreasonableness**

100. It is contended on behalf of the plaintiff that the first defendant's decision was unreasonable in the Wednesbury sense for the following reasons:

- The first defendant overlooked the plaintiffs written correspondence to the second defendant between 2 February - 9 April 2023 including its safety concerns and accepted the alleged non-payment of trek permit fees conveyed by the second defendant when in fact, the plaintiff had always been compliant and did comply with the payment of trek permit fees at the material time. The plaintiff paid over K40,000 for the trek permit fees.
- The first defendant failed to consider that the plaintiffs initial reluctance to pay the trek permit fees was the direct result of the second and third defendants' failure to provide a response to the safety concerns and maintenance issues raised by the plaintiff.
- The plaintiff has always complied with PNG Laws and is one of the longest operating tour operators in PNG.
- The plaintiff's concerns aligned with the Kokoda Track Code of Conduct 2009 which imposes a duty on tour operators to support local communities and promote excellence.
- The first defendant's decision was so unreasonable that no reasonable person would have reached that decision.

101. Based on the forgoing, the plaintiff submits that the first defendant's decision was unreasonable in the Wednesbury sense.

102. Counsel for the second and third defendant did not address this ground in any detail, the thrust of its submissions being that the plaintiff is not entitled to any of the equitable reliefs sought as it does not come to court 'with clean hands', by reason of its illegal and improper conduct leading up to the cancellation of its licence, such that the court should scrutinize that conduct as the plaintiff is not an innocent party.<sup>31</sup>

103. The principle of reasonableness of the decision was developed in the English case of *Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation* [1948] 1 KB 223 at [230], the principle enunciated by Lord Greene MR in the frequently quoted passage:

The exercise of a discretion must be real, matters which ought to be considered must be conversely irrelevant collateral matters must be disregarded. Where the discretion is exercised within the ambit of considering what is relevant the court cannot intervene, except where the conclusion nevertheless reached is so unreasonable, "... in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether.

104. In *Council of Civil Unions v Minister of Civil Service* [1985] AC 374 Lord Diplock classified unreasonableness under irrationality saying that the decision would be irrational if it was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to it could have arrived at it."

105. The test under the *Wednesbury* principle is a high one and it will apply to only a limited class of cases.<sup>32</sup> It is a test, respectfully, that the plaintiff has not met on the facts of this case. In so concluding I acknowledge that the question can be one of degree and that in the exercise of its function to advise, the first respondent did not accord the plaintiff natural justice and exceeded its powers which raise considerations of reasonableness. However, the facts of this case do not permit a conclusion that the decision of the first respondent was so outrageous as to defy logic such as to meet the test of unreasonableness in the *Wednesbury* sense.

31 Written submissions of second and third defendant at [IO]-,11]

32 *Kamuta v Sode* (2006] N3067

106. This ground is not upheld.

### **Breach of s 41 of the Constitution**

107. With respect to this ground, whilst the courts in England have adopted proportionality as an independent ground of review and have found that the court can interfere by certiorari if a punishment is altogether excessive and out of proportion to the occasion,<sup>33</sup> in this jurisdiction there is a controversy on the authorities as to whether proportionality is an independent ground of judicial review and whether s 41 only affects private rights and not public rights and interests.

108. Counsel for the plaintiff referred the court to the decision of the Supreme Court in *Marat v Hanjung Power Ltd* [2014] SC 1357. Counsel for the defendants advanced no submissions to assist the court. In *Marat* there was no conclusion on the matter. In light of my earlier findings which uphold two grounds of review, it is controversy on which I need not engage.

### **CONCLUSION**

109. I am satisfied that the decision of the first defendant of 24 April 2023 to cancel the plaintiffs Commercial Tour Operator's License KTA. 019 was made ultra vires such that the decision should be quashed.

110. I am further satisfied that it would be just and convenient for the reasons given that the declaratory orders sought by the plaintiff be granted, namely:

- a) that the meeting convened by the Kokoda Initiative Committee of 21 April 2023 to consider the proposal to cancel the plaintiffs Commercial Tour Operator's License KTA. 019 is invalid and void ab initio and is of no effect; and
- b) that the decision of the first defendant of 24 April 2023 to cancel plaintiffs Commercial Tour Operator's License KTA. 019 is invalid and void ab initio and is of no effect.

111. With respect to whether the court should make Order 4 in the Notice of Motion, namely an order in the nature of mandamus compelling the second and third defendant to

restore the plaintiffs license, I propose to make that order. The plaintiffs licence was cancelled unlawfully. It occurred in the context of an appreciation on the part of the first defendant and the second defendant acting on behalf of the third defendant, of the importance of upholding the laws of Papua New Guinea. The defendant's breach of the principles of natural justice in their dealing with the plaintiff was a serious breach of principles that find their expression in the country's Constitution. The principles are not feel-good platitudes. They are principles upon which a democratic society such as Papua New Guinea conducts its affairs, and which the framers of the Constitution viewed as sufficiently important to include in the country's founding document. They are principles to which all citizens and government authorities must adhere.<sup>34</sup> The evidence, and the submissions advanced on behalf of the second and third defendants, suggest a lack of appreciation of the importance of adherence to a basic principle of fairness, namely the right to be heard. The cancellation of the plaintiffs licence, one that had been renewed annually by the third defendant since 2018, directly impacted the plaintiffs right to conduct its business, a circumstance clear on the second defendant's own evidence.<sup>35</sup> It is not an answer on the part of the second defendant that the plaintiff had demonstrated an ability to make alternative arrangements for its prior bookings by way of transfers to other trekking companies. The plaintiffs efforts to deal with the consequences of the abrupt cancellation of its licence, without being heard, may have had no impact on the 126 trekkers who continued to walk the Track or the continued employment of 306 porters. It did however result in the 126 trekkers doing so with a tour operator they had not selected and, by reasonable implication, a resultant loss of revenue to the plaintiff from the eight (8) treks so transferred.

112. With respect to costs, the defendants should pay the plaintiffs costs on a solicitor client basis. The plaintiff has been wholly successful in the orders it sought. It sought to resolve this matter by letter to the Office of the Solicitor General dated 28 August 2023 on the basis that it would abandon the orders by way of mandamus and certiorari in its Notice of Motion if there was agreement to the declaratory relief with respect to the issues of ultra vires and natural justice, grounds on which it was ultimately successful. The lawyer for the first defendant was copied in on the letter. The plaintiff deposes to receiving no response at the date of the swearing of Mr Lynn's further affidavit on 5 September 2023. There is no evidence to the contrary. Further, following the concessions made at trial on behalf of the first defendant - a circumstance that presented an obvious difficulty for the case the second and third defendant sought to maintain, the court suggested the matter be stood down for discussions. That was rejected by Counsel for the second and third defendants who requested that the court hand down a decision.

## **ORDERS**

113. I make the following orders:

a. An order in the nature of certiorari pursuant to Order 16 Rule 1(1) of the National Court Rules, to remove into the National Court and quash the decision of the first defendant on 24 April 2023 to cancel plaintiffs Commercial Tour Operator's License KTA. 019.

34 See for example Preamble to Constitution

35 Affidavit of second defendant filed 21 June 2023 at [31]-[34]; [43]-[44]

b. An order in the nature of a declaration pursuant to Order 16 Rule 1(2) of the National Court Rules that the meeting convened by the Kokoda Initiative Committee of 21 April 2023 to consider the proposal to cancel the plaintiffs Commercial Tour Operator's Licence KTA. 019 is invalid and void ab initio and is of no effect.

c. An order in the nature of a declaration pursuant to Order 16 Rule 1(2) of the National Court Rules that the decision of the first defendant of 24 April 2023 to cancel plaintiffs Commercial Tour Operator's Licence KTA. 019 is invalid and void ab initio and is of no effect.

- d. An order in the nature of a declaration pursuant to Order 16 Rule 1(2) of the National Court Rules directing and compelling the second defendant and third defendant to take all steps necessary to restore the plaintiffs Commercial Tour Operator's Licence.
- e. The defendants pay the plaintiffs costs of and incidental to these proceedings on a solicitor-client basis.
- f. The time for entry of these orders be abridged to the date of settlement by the Registrar, which shall take place forthwith.

**Leahy Lewin Lowing Sullivan Lawyers: Lawyers for the Plaintiff**

**Cooper Lawyers: Lawyers for the First Defendant**

**Solicitor General: Lawyers for the Second and Third Defendants**

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<sup>i</sup> See Chapter 17: The Mark Nizette Era of Influence: 2011-2023.

<sup>ii</sup> Ibid