

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS NO. 1292 OF 2016 (COMM)

BETWEEN:
BANI INVESTMENT LIMITED
Plaintiff

AND:
**HON. POWES PARKOP as Governor for National Capital District
and Chairman of the National Capital District NCDC**
First Defendant

AND
NATIONAL CAPITAL DISTRICT COMMISSION
Second Defendant

AND:
INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Defendant

Waigani: Shepherd, J
2019: 7th & 14th March
2021: 19th May

CONTRACT – elements required for formation of contract – failure by public body to comply with public tender and procurement requirements of former ss. 59 and 61 of Public Finances (Management) Act 1995 – illegal contracts - delegation of powers by National Capital District Commission to its subordinate agencies – ss. 16, 17 and 18 of National Capital District Commission Act 2001.

QUASI-CONTRACT – equitable remedies of restitution, quantum meruit and unjust enrichment – when available – plaintiff must be innocent of circumstances resulting in illegality of contract or non-existence of purported contract.

EVIDENCE – failure of plaintiff to adduce credible evidence in support of claims – failure to take reasonable steps to obtain banking records – failure to obtain claim documentation by discovery under Order 9 of National Court Rules.

Held:

1. A contract which is void for illegality is void *ab initio* and is unenforceable as to its terms and conditions.
2. Where an illegal contract has been performed in part, a remedy for goods supplied or services rendered by a party under the void contract may be available to that party based on the principle of *quantum meruit*, provided that party is innocent of the cause of the illegality of the contract.
3. Where a party has a mistaken but genuine belief that a contract exists and has supplied goods or rendered services to another party under that misapprehension, a remedy by way of unjust enrichment is available to that party, provided that the first party is innocent of the cause of the non-existence of the contract.
4. Innocence or otherwise of the cause of the illegality or non-existence of a contract is in each case a matter for evidence on the civil standard of proof.
5. Although the plaintiff in this instance was innocent of the illegality of one contract and of the non-existence of the other contract, the plaintiff failed to adduce evidence to substantiate its claims for damages except that the second defendant was required to account for withholding tax which it had retained pursuant to a deed of release entered into by the parties in part settlement of the plaintiff's claim.

Cases Cited:

Papua New Guinea Cases

Evaluation Consult (New Zealand) Ltd v The State (2016) N6219
Fly River Provincial Government v Pioneer Health Services Ltd (2003) SC705
Gene v Motor Vehicles Insurance (PNG) Trust [1995] PNGLR 344
Goria v National Parks Board [1982] PNGLR 364
Kewa v Minister for Community Development (2019) N773
Manwau v Trawen (2009) SC1034
Naki v AGC (Pacific) Ltd (2005) N2782
National Broadcasting Corporation v Sam Tasion & T.G. Holding Ltd trading as Freeway Motors (2019) N8083
National Capital District NCDC v Yama Security Services Pty Ltd (2003) SC707
Panga Coffee Factory Pty Ltd v Coffee Industry Corporation Ltd (1999) SC619
Papua New Guinea Banking Corporation Ltd v Tole (2002) SC694
Patterson v National Capital District Interim Commission (2001) N2145
Teine & Gute Security Service Ltd v University of Goroka (2019) SC1881

Overseas Cases

Credit Suisse v Allerdale BC [1966] 4AER 129

Counsel:

Ms G. Kubak, for the Plaintiff

Mr B. Boma, for the First and Second Defendants

DECISION

19th May, 2021

1. **SHEPHERD J:** The plaintiff company is claiming liquidated damages of K12,204,465.62 for amounts it says it is owed in respect of road construction services it carried out for the second defendant in 2013. The plaintiff is also claiming general damages for breach of two roading contracts, the cost of equipment mobilisation, statutory interest and legal costs.

2. The plaintiff, Bani Investment Limited (**BIL**), contends that there are two roading contracts which the National Capital District Commission (**NCDC**) entered into with it in 2013. The first of these contentious contracts relates to road works near the Police Training College at Bomana, National Capital District (**NCD**), referred to by BIL and the NCDC as the Bomana Road Upgrading and Rehabilitation Project (**Bomana Road Project**). The second contentious contract relates to road works for the feeder road which connects the main road at Sogeri Plateau to the Crystal Rapids recreation area at Laloki River, Central Province (**Crystal Rapids Road Project**). BIL claims that it sustained substantial financial losses as a result of alleged breaches by the NCDC of both contracts.

3. The State as third defendant is not an active party to this proceeding.

4. Mr Onne Bani is the managing director of BIL. Mr Bani says that he was known to the late Mr Thomas Mauwe, who was the former Project Coordinator with the Office of the first defendant, the Hon Powes Parkop, Governor and Chairman of the NCDC (**Governor Parkop**). Mr Bani asserts that it was the late Mr Mauwe who was the primary facilitator of the NCDC's approvals and contracts for BIL to undertake the two Projects.

5. The NCDC denies that it ever entered into binding contracts for the two Projects with BIL, alternatively it says that if the evidence were to establish that contractual relations arose between the parties, then any contracts which came into

existence were void and unenforceable for non-compliance with the then applicable public tender requirements of the *Public Finance (Management) Act 1995*.

Bomana Road Project

6. Mr Bani deposes in his affidavit filed on 15 May 2018 (Exhibit A) that on 13 March 2013 Mr Mauwe invited BIL to lodge a bid with the NCDC for the Bomana Road Project. Shortly thereafter BIL lodged its formal bid with the Chairman of the NCD Joint District Planning and Budget Committee to carry out the works for the Bomana Road Project at a cost of K10,721,372.82. There were two other bidders for the same Project, whose bids were higher than BIL's bid.

7. On 9 April 2013 Certificate of Expediency No. 027/2013 was issued on the NCDC's letterhead in connection with the proposed contract for the Bomana Road Project. The COE was signed and "submitted" by Simon Vai, Deputy City Manager (Engineering), signed and approved by Leslie Alu, A/City Manager and signed and endorsed by the first defendant, Governor Parkop. The COE stated that its purpose was "to seek NCDC Board's approval to engage Bani Investment Limited to carry out road upgrading and rehabilitation works at Bomana Police Training College Road, Bomana."

8. The COE for the Bomana Road Project contained the following information:

4. *VOTE & DESCRIPTION*

This amount of K10,721,372.82 will come under the Settlement Road Upgrading Vote.

5. *FACTS AND CONSIDERATION*

5.1 *The Road is serving the Bomana Training College Staff and Students and including the residence [sic] of Bomana who are experiencing the poor condition of existing roads resulting from inadequate drainage system.*

5.2 *The current status of the road is in dire bad condition and requires urgent rehabilitation to improve the present condition of the road.*

5.3 *The project is part of the Settlement Road Upgrading Development Project initiated by the Honourable Governor of National Capital District.*

5.4 *The scope of works include for the contractor to provide: labour, materials, plant equipments to carry out road upgrading and rehabilitation and to also provide adequate drainage to protect the road surface when the construction is completed.*

5.5 *The scope of works, cost estimates, obtaining of quotations and contract analysis were prepared in-house by NCDC Engineering Technical Staff.*

6. FINANCIAL IMPLICATION

Funding will be sourced from the Settlement Road Upgrading Development Program under Hon. NCD Governor's Projects.

7. LEGAL IMPLICATION

Nil – Approved road development program

8. STAFF IMPLICATIONS

Through Honourable Governor's Project Coordinator in liaison with NCDC Engineering's Engineers and staff.

9. POLITICAL IMPLICATION

Achievement for NCDC as a metropolitan Authority.

10. REASONS FOR EXPEDIENCY

The Settlement Roads are in dire need for rehabilitation in preparation for 2015 Pacific Games and they need to be also improved together with the major road rehabilitation program.

9. Mr Bani states in paragraph [8] of his affidavit with reference to this COE that it was approved "at a meeting on the 9th April 2013". He does not identify in his affidavit if it was the NCDC's Board or some other agency of the NCDC which he says approved the COE.

10. Mr Bani says that soon after BIL had lodged its bid, Mr Mauwe asked Mr Bani to attend at Mr Mauwe's office. This would have been a date in mid-April

2013. Mr Mauwe informed Mr Bani that BIL had been awarded the Bomana Road Project. Mr Mauwe gave Mr Bani a copy of the COE and requested Mr Bani to submit an invoice to the NCDC for mobilization and to get the site ready for a ground-breaking ceremony to be conducted by Governor Parkop.

11. Mr Bani asserts that following his meeting with Mr Mauwe in mid-April 2013, he mobilized machineries for the Bomana Road Project by moving them to the yard for the Police Dog Unit at Bomana Police College. The mobilization exercise took about two weeks, during which time Mr Bani says the NCDC's Senior Engineer (Works), Mr Joe Oapaisa, informed him that he, Mr Oapaisa, would be the supervisor for the Bomana Road Project. A site inspection was done by Mr Oapaisa with Mr Bani to inspect the deteriorated condition of the Bomana road preparatory to tar sealing and to confirm that BIL's machineries were ready to commence the remedial roading work.

12. According to Mr Bani, BIL's machineries for the Bomana Road Project thereafter remained on site for a period of two weeks, this would have been until late April 2013, waiting for the NCDC's authorisation for BIL to commence the roading works and for Governor Parkop to attend the ground-breaking ceremony. However, Mr Bani says the ground-breaking ceremony never eventuated and that in or about early May 2013 Mr Mauwe notified Mr Bani to demobilize BIL's machineries as the Bomana Road Project could not go ahead due to unavailability of funds.

13. Mr Bani alleges that BIL sustained serious disruption to its business operations and substantial economic losses because of the NCDC's cancellation of the Bomana Road Project. Mr Bani says that BIL submitted an invoice to the NCDC for its mobilization and demobilization costs but that when the NCDC did not promptly pay that invoice, BIL was unable to pay rent and other outgoings, which resulted in the company being locked-out of its leased office premises. Mr Bani says that when BIL was denied access to its office premises, the company lost many of its financial records, including copies of invoices and other important documentation in connection with the Bomana Road Project.

14. Mr Bani did not produce in evidence a copy of the invoice to the NCDC for mobilization and demobilization of machineries and equipment for the Bomana Road Project which he says BIL lodged with the NCDC. If such an invoice was in fact delivered by BIL to the NCDC, this would have been during May 2013.

Crystal Rapids Project

15. Mr Bani deposes in his affidavit that only months after the failure of the

Bomana Road Project in May 2013, BIL became involved with another road rehabilitation project with the NCDC.

16. Mr Bani does not explain in his affidavit how negotiations for this next road project were initiated. However, annexed to Mr Bani's affidavit and marked "D" is a copy of a letter dated 8 August 2013 on the NCDC's letterhead for the Office of Governor Parkop. The letter is addressed to BIL and states that its subject is "Engagement – Patrol Grading to Sealing of Crystal Rapid Feeder Road". Reproduced below without editorial correction is the main content of this letter:

The NCDC wishes to engage your company to do patrol grading of crystal rapid feeder road starting from park area to PNG Power (Rouna Dam) access road.

Following the conversation between the office of governor and the Commissioners, we now engage you to carry out the civil work on the following terms.

- 1. Implementation of the project without mobilization fund.*
- 2. NCDC will release fund on a monthly bases based on invoices after completion of work each month certified by the project office.*
- 3. BI Ltd is responsible for all labor it engages, machineries and other sub-contractors besides the insurance etc to its employees.*
- 4. The job includes clearance, surveying, Grading and associate civil works to be within K1.5 million.*

If you agree to the above terms; please sign and forward this letter together with an invoice for the first month to our finance section.

Thank you.

Offered by:

*[signature]
Hon Powes Parkop LLB, LLM, MP*

*[signature]
Leslie Alu*

Accepted:

*[signature]
Onne Bani*

17. Mr Bani says in paragraph [18] of his affidavit to the effect that he counter-signed the engagement letter on 8 August 2013 on behalf of BIL and that he returned that letter the same day to Governor Parkop's Office. This was after the terms and conditions set out in the letter of engagement for the Crystal Rapids Project had been explained to him by NCDC's Project Coordinator Mr Mauwe.

18. According to Mr Bani, BIL commenced mobilization for the Crystal Rapids Project as soon as Mr Bani signed BIL's acceptance of the content of the Governor's letter of engagement on 8 August 2013.

19. BIL submitted its first and only account for the Crystal Rapids Road Project, namely invoice no. BIL2013-0002 dated 23 August 2013, to the Works Division of the NCDC under cover of a letter from BIL of the same date. The invoice was for a total of K375,000 and was addressed to the "Office of the Governor NCDC". Despite the terms of engagement for this Project clearly stating that the work was to be implemented without any mobilization fund, BIL's description in its invoice BIL2013-0002 for the work it claimed it had performed up to 23 August 2013 included an unspecified amount claimed by BIL for its mobilization costs for the Project.

20. BIL's invoice was certified for payment in the sum of K375,000 by the NCDC's Joe Oapaisa and Simon Vai. A copy of the payment certificate is annexure "G" to Mr Bani's affidavit and appears to be dated 23 August 2013. It certifies that the value of work done by BIL between 12 August 2013 to 20 August 2013 towards the total sum of K1.5 million for the Crystal Rapids Project was for the full amount of K375,000 claimed in BIL's invoice.

21. The payment certificate is supported by annexure "I" to Mr Bani's affidavit. Annexure "I" is an *unsigned* document titled "Accomplishment Report For Services". The Report is dated 23 August 2013 and states that it was prepared by Yori Maraga, NCDC's Works Engineer (Roads) and "noted" by Joe Oapaisa, NCDC's Senior Works Engineer. The unsigned Report indicates that the work for the Crystal Rapids Road Project carried out by BIL was as at that date 25% completed and that the value of that work was said to be K375,000, being 25% of the Bomana Road Project amount of K1.5 million.

22. A Submission to validate payment by the NCDC to BIL for work undertaken in connection with the Crystal Rapids Road Project was belatedly prepared by the NCDC Engineering Works Department for consideration by NCDC Assembly Services in late August 2013. A copy of this Submission is annexure "E" to Mr Bani's affidavit. The Submission was prepared by Simon Vai, Deputy City Manager (Engineering), approved by Leslie Vai, Acting City Manager and endorsed by

Governor Parkop. The Submission bears their respective signatures, with Governor Parkop having endorsed his approval at the foot of the Submission on 28 August 2013.

23. The text of Mr Vai's Submission is set out below, without editorial amendment:

1. PURPOSE

The road leading to Crystal Rapids Park is in dire need of urgent repair to provide a better road surface for the tourists and the general public who commute frequently for picnic and leisure during weekends or for site seeing.

2. PROJECT DESCRIPTION

The Crystal Rapids Road Patrol Grading works was awarded to Bani Investments Limited to carry out Patrol Grading and Associated Minor Civil Works to improve the deteriorated road condition.

The Hon. NCD Governor seeing the potential of this road that will generate revenue to NCD, Central Province and PNG this tourist attraction road access required urgent maintenance works which Bani Investment Ltd was given the signed and approved letter to start the works per the contents of the letter to the Contractor.

The Contractor has already started the works and the project is now progressing as anticipated. Approximately 50% of the work is completed to date.

3. PUBLIC TENDERING

Because of the emergency and urgent cases for the access road to be upgraded for the general public convenience the contractor commenced the works as per the approved letter.

There was no Public Tender in this Contract but a letter of approval for the work to commence immediately.

NO.	CONTRACTOR	BID (KINA)	B	I	D	REMARKS
			EVALUATION			

<i>1</i>	<i>Bani Investment LTD</i>	<i>1,500,000.00</i>	<i>ACCEPTED BID</i>	<i>Recommended</i>
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AMOUNT OF THIS CONTRACT

The amount of this contract is for One Million Five Hundred Thousand (K1,500,000.00)

4. VOTE CODE & DESCRIPTION

Since approval was granted by means of approved and signed letter of engagement funding should be sourced and to pay the Contractor for the work the company is already undertaking.

5. FACTS AND CONSIDERATION

5.1 This ROAD is serving the tourist and business communities and the general public of approximately who frequent this picnic attraction venue.

5.2 This project is the initiative of Honourable Governor of National Capital District who is fighting to change the peoples mindset and ring them closer to the environment outside of the city for their personnel inner friendly developments.

5.3 The scope of works include for the contractor to provide: labour, materials, plant & equipments to carry out patrol grading and associated minor civil works.

5.4 The scope of works, cost estimates, obtaining of quotations from one contractor which the Contractor who started the specified works as per the letter of engagement.

6. FINANCIAL IMPLICATION

This is an emergency work therefore Funding to be sourced to pay the contractor who has commenced the works at Crystal Rapids Feeder Road Sogeri.

7. LEGAL IMPLICATION

Nil

8. STAFF IMPLICATIONS

Through Honourable Governor's Project Coordinator in liaison with NCDC

Engineering's Engineers and staff.

~ *Achievement for NCDC as a metropolitan Authority.*

10. REASONS FOR SUBMISSION

The Sogeri Crystal Rapids Feeder road upgrading was in very bad condition and needed urgent patrol grading to provide access to the tourists and the general public who frequent this area during weekends.

24. The copy Submission has the stamp of the NCDC Assembly Services endorsed at its top right-hand corner of page 1. The stamp indicates that the Submission was allocated certificate of expediency COE No. 150/2013 on 24 September 2013. I observe that the stamp has the discernable signature of a person having the surname "Denagi", but the date for the meeting convened by NCDC Assembly Services or by some other agency of the NCDC which did not in fact approve that COE has been left blank by use of handwritten dashes "MTG DATE: ~/~/~".

25. Mr Bani then deposes at paragraph [21] of his affidavit:

21. On the 25th September 2013, the late Mr Thomas Mauwe came to the project site and delivered the Crystal Rapids Project road project document. This document clearly states how much work was carried out and yes 50% of the work was completed at that time and yet no payment was done by NCDC. This clearly breached the engagement terms and conditions all parties agreed upon and signed for.

26. The document referred to by Mr Bani in paragraph [21] of his affidavit is obviously the Submission which was stamped COE No. 150/2103 for the Crystal Rapids Road Project, a matter which was confirmed by Mr Bani during his cross-examination. It is immediately apparent that as that Submission was prepared by Mr Vai who dated the Submission on 25 August 2018, Mr Vai was purporting to persuade the NCDC's Assembly Services that 50% of the work for the Crystal Rapids Project had already been carried out by BIL, not the lesser amount of 25% certified by him in the payment certificate which he signed on 23 August 2018 and which had been approved by Acting City Manager Mr Alu. Yet Mr Bani asserts in paragraph [21] of his affidavit that 50% of Crystal Rapids Road Project had been completed by 25 September 2013, although there is no evidence to suggest that BIL carried out any further work at all on the Project between the date of BIL's invoice on 23 August 2013 and the date of his next meeting with Mr Mauwe on 25

September 2013.

27. BIL's invoice dated 23 August 2013 for the Crystal Rapids Road Project had still not been paid by the NCDC by mid-October 2013. This prompted Governor Parkop to send an inter-office memo dated 16 October 2013 to the NCDC's Finance Department for the attention of Augustin Ravi, NCDC's Financial Advisor and Barnabas Kini, NCDC's Management Accountant and Acting Financial Controller. The memo stated:

I am aware that most of the relevant votes for [jobs in progress] for these works committed by NCD or my office have been exhausted, nevertheless some relevant votes do have surplus and therefore I direct that they be used to pay these out as soon as possible. ...

Bani Investment Limited Crystal Rapid Road work to sealing K375,000 initial payment ...

I now direct that you source all relevant funds from the engineering votes or tax rebate trust account which I believe have sufficient funds to sort this out. Ensure that these payments are made within this month of October 2013. Let's not prolong the wait for these payments any longer!

28. Non-payment by the NCDC of BIL's invoice no. BIL2013-0002 and certain other contractors' claims by early November 2020 prompted a further memo dated 13 November 2013 from Governor Parkop to Mr Ravi and Mr Kini. The second memo was in even more terse terms. This memo directed the NCDC's Finance Department to immediately pay BIL's mobilisation expenses for the Crystal Rapids Road Project, then said by Governor Parkop to be 40% of the project cost, that is to say K600,000, as well as the claims of other named contractors, and that all of those claims were to be settled before the end of the 2013 financial year.

29. The intervention by Governor Parkop achieved a major result in that on 24 December 2013 BIL received a cheque dated 21 December 2013 for K350,000 from the NCDC's Regional PSIP Account via the Office of Governor Parkop. However this cheque was K25,000 short of the K375,000 claimed in BIL's invoice. The cheque was not accompanied with any certification documentation from the NCDC's Engineering Division.

30. Progress on the Crystal Rapids Road Project continued to be at standstill throughout most of 2014 because BIL refused to do any further work on the Project until the outstanding balance of K25,000 on its invoice no. BIL2013-0002 dated 23

August 2013 was paid.

31. The next event of significance occurred when NCDC's Senior Engineer (Works) Mr Oapaisa revisited the Project site at Crystal Rapids in early November 2014 and prepared an inspection report. Annexure "N" to Mr Bani's affidavit is an internal memo dated 2 December 2014 from Mr Oapaisa to the NCDC's Deputy City Manager (Engineering), Mr Vai. Mr Oapaisa's memo contains a surprising revelation:

SUBJECT : BANI INVESTMENT – CRYSTAL RAPIDS CLAIM

This is to advise you of the claim submitted by BANI INVESTMENT LIMITED for a total amount of K375,000. The claim was referred to Senior Engineer Design & Planning by NDCD Financial Controller for verification and then to provide a report on this Project, so that the claim can be certified upon completion of the progress report.

The claim was then passed to Mr Dion Tulo from Ravu Frank, to provide same, and then was finally referred to me to provide the project report as I was the Engineer, this project was first referred to from Hon. NCD Governor's office by Mr Thomas Mawve in August 2013. (Refer to approval signed letter attached to the Contractor's claim). ...

I revisited the project site again in early November 2014 and confirmed that approximately 14% of the work has been done from the total project value of K1,500,000.00 as per the approved letter project amount.

32. Mr Oapaisa's report, which is attached to his memo dated 2 December 2014 and forms part of annexure "N" to Mr Bani's affidavit, contains photographic material and commentary by Mr Oapaisa of the work done by BIL on the Crystal Rapids Road Project. Based on Mr Oapaisa's report, the value of the work carried out by BIL as inspected by Mr Oapaisa in early November 2014 was only 14% completed, not 25% as earlier certified.

33. However, Mr Oapaisa's memo to Deputy City Manager Mr Vai dated 2 December 2014 goes on to say that Mr Oapaisa had recently done a bill of quantities for completion of the Project. Mr Oapaisa gives two estimates: one for K2,026,321 on the notional basis that BIL complete the Project with priming of the graded road surface and two coats of tar seal; the other estimate was for K806,938 on the notional basis that BIL complete the Project but excluding priming of the graded road surface and any tar sealing. Mr Oapaisa then states in item 3 on page 2

of his memo to Mr Vai dated 2 December 2014 that the value of the work carried out by BIL when it was inspected by him in early November 2014 was K214,698. As this figure was inclusive of 10% GST, it came to approximately 14% of the initial overall value of the Project which had been estimated in August 2013 to be K1.5 million.

34. Mr Oapaisa categorically states in his memo dated 2 December 2014 that BIL should be paid an amount of K214,698 for work previously performed by BIL on the Project. However, by this time BIL had long since received the proceeds of NCDC's cheque dated 21 December 2013 for K350,000 from the NCDC in settlement of most of BIL's invoice no. BIL2013-0002 for K375,000. This earlier payment direct to BIL from the NCDC Governor's PSIP account was presumably unknown to Mr Oapaisa when he prepared his report and memo to Mr Vai dated 2 December 2014.

35. Mr Oapaisa does not explain in his memo or elsewhere why he had earlier signed an NCDC order requisition form on 27 September 2013, authorised by Deputy City Manager Mr Simon Vai, requesting that an order to BIL be raised for K375,000 for "payment for patrol grading to sealing of Crystal Rapids Feeder Road." This order requisition form is annexure "O" to Mr Bani's affidavit.

36. In any event, it is clear from Mr Bani's evidence that the NCDC paid BIL, in addition to the first payment of K350,000 received by BIL on 24 December 2013 from Governor Parkop's Office, a further amount of K193,228.20 by cheque a year later on 24 December 2014. This second cheque represented Mr Oapaisa's estimate of the value of work performed by BIL in connection with the Crystal Rapids Road Project as at November 2014 of K214,698 less the NCDC's 10% retention of an amount of K21,469.80 for withholding tax pending delivery by BIL to the NCDC of BIL's Certificate of Compliance for the Tax Reporting System of the Internal Revenue Commission (IRC) under the *Income Tax Act*. This meant that by the end of financial year 2014 BIL had received two NCDC cheques to a total value of K518,228.20 for the Crystal Rapids Project for mobilization costs and initial roading work which BIL claimed it had performed for the NCDC, assessed by Mr Oapaisa in November 2014 to at that stage have only had an invoice value of K214,698, inclusive of 10% GST.

37. Mr Bani deposes at paragraph [25] of his affidavit to the effect that when BIL received the second cheque from NCDC at the end of December 2014, the company was prepared to resume work on the Crystal Rapids Road Project. However, Mr Bani also says that NCDC's Deputy City Manager Mr Vai told him at about that time to obtain a purchase order from NCDC for the Project before doing any further work. As it transpired, no further work at all was thereafter ever done by BIL on the Crystal Rapids Road Project prior to the issue of its writ for this proceeding on 11

October 2016. On receipt of the NCDC's second cheque of K193,228.20 on 24 December 2014, BIL effectively abandoned the Project for good, arguing that the NCDC should not have withheld 10% or K21,469.80 from the second cheque.

38. When nothing further eventuated from the NCDC by way of a purchase order for the resumption of the Crystal Rapids Road Project and after BIL had abandoned the Project, Mr Bani laid a complaint with the Director of the National Fraud & Anti Corruption Unit at Police Headquarters at Konedubu, NCD in or about May 2015. This was because Mr Bani says that NCDC's Mr Mauve had been corruptly extorting bribes from him, which Mr Bani paid. Mr Bani's letter of complaint to the Director refers to both the Bomana Road Project and the Crystal Rapids Road Project. Mr Bani says in his undated complaint, which was printed on BIL's letterhead:

... I gave Thomas Mauve [sic] K10,000.00 hard cash. He promised me that Projects would be implemented. [O]ver a period of time Mr Thomas Mauve would request for lunch and flex monies. I do not have the records of how much money I have already given him, but the bigger amount is K10,000.00 as stated above and I may predict that I must have given him well over K15,000.00 – K20,000.00 promising me to fast track the remaining balance to complete the work.

I then realized that when things were not going right as it should be, because I have valid and legitimate Contract with NCD. Mr Thomas Mauve was just using his position to gain money from me and is suppressing my legitimate contract and therefore could not complete my projects at Bomana and Sogeri.

39. No evidence was given by Mr Bani for BIL as to the date of death of Mr Mauwe. The Court can only infer that Mr Mauwe was already deceased by the time Mr Bani lodged his complaint with Police Headquarters in or about May 2015.

40. Chief Superintendent Mathew Damaru, Director of the National Fraud & Anti Corruption Directorate wrote to the NCDC's Deputy City Manager Mr Vai on 2 June 2015 and requested copies of contract and other documentation for the two Projects undertaken by BIL as well as a copy of a Deed of Release which Mr Bani had apparently signed by that stage with the NCDC in connection with the Crystal Rapids Road Project. Mr Vai, in his capacity at the NCDC's Deputy City Manager-Engineering, replied to Chief Superintendent Damaru by letter dated 31 July 2014. Mr Vai stated in his letter of reply that the Crystal Rapids Road Project was an initiative between the office of NCDC's Governor and BIL. The text of Mr Vai's reply is reproduced below, without editorial correction:

Cristal Rapid access road – Sogeri

The contractor upon receiving the endorsement from the office of the Hon. Governor proceeded with the works up at the Cristal Rapids access road, Sogeri. We the Engineering Division of the NCDC got involve[d] in the project when the contractor came to our aid because no payment was done and the office of the Hon Governor need a verification on what was carried out on site.

With this our Senior Engineer (Works) Mr Joe Oapaisa with his team and the contractor arrange for a site inspection and to assess what work was done. All this was carried out and the report and claim were forwarded to the Office of the Hon Governor for payment. What amount paid the contractor was not made known to our division.

The project is located outside the boundaries of NCD.

Bomana Police Training College access road

This project also came from the office of the Governor. What work carried out on this particular road is not known to this office, which I cannot elaborate on. I advise that additional information can be obtained from the Office of Senior Engineer (Works) Mr Joe Oapaisa at of Engineering Division. (4 Mile)

...

Copy of the Deed of Release (DOR) for the Cristal Rapid access road should be enquired from the Office of the Hon Governor.

41. The parties' Deed of Release is actually titled "Deed of Consent". It is dated 15 December 2014. A copy of the Deed is annexure "K" to Exhibit C, which is Mr Vai's affidavit filed on 15 June 2018 in support of NCDC's defence of BIL's claim for relief in this proceeding. The full text of the Deed, without editorial correction, is as follows:

DEED OF CONSENT

Claimant : Bani Investment Ltd

Nature of Claim : Road Work

Amount of Claim: : K375,000.00

I, Onna Bani of Bani Investment Ltd, P.O. Box 514, Waigani hereby agree to the following to National Capital District NCDC (NCDC) relating to the above claim:

I agree that my claim did not meet with the NCDC's documentary requirements. Therefore, in consideration of the one and only final payment for the sum of K214,698.00 (Kina only) paid by NCDC to me in full satisfaction and I hereby release and discharge NCDC from all actions, suits, causes of action, claims and demands whatsoever which I now have or at time hereafter may have but for the execution of this Deed could or might have had against NCDC.

I accept that there will be no further payment for any reason other than this one and only final payment of K214,698.00. I further consent to NCDC that I do not have any other outstanding claims at the date of this deed apart from the one stated above.

I also agree to indemnify NCDC if my claim is proved to be incorrect.

I further agree to provide valid Certificate of Compliance or concur to have the agreed sum above taxed for business payment tax.

I also declare that I am familiar with English language and understood fully the contents of this Deed.

Dated at Port Moresby on this 15 day of Dec 2009 2014

*SIGNED [signature of Onne Bani]
Atai]*

WITNESS [signature of Allan

NAME: ONNE BANI

NAME ALLAN ATAI

AGREED FOR AND ON BEHALF OF NCDC

*[signature].
FC/DEA/CM*

42. Nowhere in Mr Bani's affidavit material does he mention that he signed a Deed of Consent on behalf of BIL which released the NCDC for all claims which he or his company had or might have against the NCDC in connection with BIL's invoice no. BIL2013-0002 dated 23 August 2013 for K375,000. The existence of

the Deed of Consent only came to light at the end of Mr Vai's affidavit, where at paragraph [26] Mr Vai deposes:

26. I am aware, BIL abandoned the Crystal Rapid road works project long before the second payment was received. There is no agreement for BIL to receive payments before it starts work. The Bill of Quantities prepared by Mr Oapaisa lays [down] the segments of work he had to complete before he was to ask for the corresponding payments. BIL did not do the work and therefore, did not submit further invoices. Finally, before BIL was paid its final payment of K193,228.20 ... BIL signed a Deed of Consent or Release not to make further claims.

Annexed hereto and marked with the letter "K" is a true copy of that Deed of Consent or Release.

Issues

43. The issues for determination in this case, based on the parties' Statement of Agreed and Disputed Facts and Legal Issues, which I accept with some modification, can be summarised as follows:

- (1) Did the NCDC or any lawful authority within the NCDC enter into contracts with BIL for the Bomana Road Project and the Crystal Rapids Road Project?
- (2) Were the public tender requirements of the *Public Finance Management Act 1995* (PFMA) for the Bomana Road Project and the Crystal Rapids Road Project complied with by the NCDC?
- (3) If there was non-compliance with the public tender requirements of the *PFMA* for the two Projects by the NCDC, is BIL nevertheless *prima facie* entitled to any damages for works or services it performed for those Projects?
- (4) In view of the Deed of Consent executed by the parties on 15 December 2017, is BIL entitled to any damages from the NCDC in respect of work performed by BIL for the Crystal Rapids Road Project?
- (5) What damages if, any, is BIL is entitled to for work it performed in connection with the two Projects?

Consideration

Issue 1: Did the NCDC enter into contracts with BIL for the Bomana Road Project and the Crystal Rapids Road Project?

44. It is fundamental law that for a contract to exist, the parties must intend to create legal relations. Usually the presence of consideration will provide evidence of this. In determining if there is contractual intent an objective approach is taken.

45. A useful checklist of the elements necessary to determine the existence of a contract is contained in *Naki v AGC (Pacific) Ltd* (2005) N2782 per Cannings J at p. 24:

Essential elements

The underlying law of Papua New Guinea treats an arrangement between two or more parties as a contract when three essential elements exist:

- *agreement between the parties;*
- *an intention to create legal relations; and*
- *support of the agreement with consideration.*

(See generally A.G. Guest, Chitty on Contracts, 27th edition, Sweet & Maxwell, 1994), pp 89-90).

Agreement

Tests to apply

To work out whether there is agreement between the parties the conventional test to apply is:

- *Has one party made an offer, clear and precise in its terms, which has been accepted by the other party?*

The test is an objective one.

- *Would a reasonable person, having the been fully informed of the actions of the parties, conclude that the plaintiff and the defendant had reached agreement on their arrangement?*

Putting it as Frost CJ did in Seafreight Pty Ltd v Bishop Shipping Services Pty Ltd 1976 PNGLR 22:

- *Have the parties to the negotiations given their final consent to terms by which they were content to be bound as a complete and exhaustive statement of their rights and liabilities:*

If the answer to all of the above questions is yes, then the Court should give effect to the outward appearance of agreement and not be concerned with whether one of the parties might have some unexpressed qualification or reservation about that has been agreed on (See generally Chitty on Contracts, supra, at pp 89-163).

The Bomana Road Project:

46. As to the Bomana Road Project, I find that the evidence adduced by BIL at trial falls far short of what is required on the civil standard of proof to establish that any contract came into existence between the NCDC and BIL for this Project.

47. BIL's Bid for the NCDC's Bomana Road Project SRP 03-Bomana-03/2013 was lodged by Mr Bani with the NCDC on an undisclosed date in or about March 2013. The Bid was for the very substantial amount of K10,721,372.82.

48. A *pro forma* blank copy of a Letter of Acceptance in respect of NCDC's proposed Contract SRP 03-Bomana-03/2013 is to be found at page 3 of the copy of BIL's Bid, which is annexure "A" to Mr Bani's affidavit. Had there been a contract awarded by the NCDC to BIL for the Bomana Road Project, I would have expected BIL or the NCDC to produce in evidence the formal contract for this Project, including a copy of a duly completed Letter of Acceptance for that contract signed by Mr Bani on behalf of BIL. No such signed Letter of Acceptance or indeed any signed Contract was adduced in evidence for BIL.

49. In lieu of such evidence, BIL relied instead on two assurances and Submission/COE No. 027/2013 given to Mr Bani by NCDC officials to endeavour to substantiate that a contract for the Bomana Road Project had come into existence between the NCDC and BIL in April 2013.

50. The first assurance which BIL relied on its endeavour to establish at trial that the NCDC had entered into contractual relations with BIL for the Bomana Road Project was Mr Bani's evidence to the effect that he had been called to attend at Mr Mauwe's office at the NCDC on a date in early April 2013, at which time Mr Mauwe apparently gave Mr Bani a copy of the Submission dated 9 April 2013 headed "Certificate of Expediency" dated 9 April 2013 and allocated COE No. 027/2013. According to Mr Bani, it was on that occasion that Mr Mauwe told him to immediately mobilise the site for the Bomana Road Project, to submit an invoice to the NCDC for mobilization and to get ready for a ground-breaking ceremony, which in fact never eventuated because Governor Hon. Powes Parkop failed to turn up on the appointed day. Two weeks after that meeting between Mr Bani and Mr Mauwe, the Project was terminated when Mr Mauwe informed Mr Bani at the end of April 2013 or early May 2013 that the NCDC had no funding for the Project.

51. The second of the assurances relied on by BIL that it had a contract with the NCDC for the Bomana Road Project was A/City Manager Mr Alu's representation to Mr Bani given some time in April 2013 that the Submission dated 9 April 2013 marked COE No. 027/2013 had been signed by Mr Alu, approved by Mr Vai and endorsed and signed by Governor Parkop, and that the Submission had recommended that BIL be awarded the contract for the Bomana Road Project. BIL's evidence at trial did not disclose which agency within the NCDC may have considered and approved that Submission. The Submission is annexure "C" to Mr Bani's affidavit. The Submission is headed "Certificate of Expediency" and although it does state at its foot that it was for use by "Assembly Services", no evidence was adduced by BIL as to what the status of Assembly Services was at the material time or if Assembly Services or the Board of the NCDC or some other entity within the NCDC had ever approved the Submission to operate as a Certificate of Expediency, or indeed what the legal status of a Certificate of Expediency was supposed to be.

52. An attempt to explain the legal status of Submission/COE No. 072/2013 for the Bomana Road Project is however contained in the affidavit of Mr Vai, Deputy City Manager of the NCDC which was filed in this proceeding on 15 June 2018 (Exhibit C) in support of NCDC's defence of BIL's claims. Mr Vai conceded in his affidavit that the Submission/COE for the award of the contract for the Bomana Road Project to BIL had been endorsed by himself as NCDC Deputy City Manager in charge of Engineering and signed by Leslie Alu, then City Manager for the NCDC, and by NCDC Governor Parkop. Mr Alu then continues at paragraphs [6] to [8] of his affidavit as follows:

6. *However, we endorsed the CEO only as authorities who would ensure the other bidders were rejected and the bid of Bani Investment went to the NCDC full board for deliberation on whether to accept it or not. We did*

not award the contract for the Bomana Road Works Project to BIL. In fact, the CEO dated 9th April 2013 is very clear in itself at the very first paragraph where says and I quote:

Purpose

“The purpose is to seek NCDC Board’s approval to engage BANI INVESTMENT LIMITED to carry out road upgrading and rehabilitation works at Bomana Police Training Collect Road Bomana”

- 7. I have been in the business of road works while attached to NCDC engineering division for so long and I am aware of the legal requirements involved in awarding road works projects to contractors to carry out. In the case of the Bomana road work project, I am fully aware that the CEO endorsed was to ensure the bid by BIL would go before the full NCDC board who would then decide whether or not BIL shall be awarded contract or whether or not it is a proper bidder to be referred further to the Central Supply and Tenders Board to consider whether to engage BIL to carry out the Bomana Project.*

- 8. However, in this instance, the Bomana Road work Project was valued in excess of K10 million. As such, the power was ultimately with the Board to decide on whether the other bidders, including Bani Investment, were the proper bidders to be referred to the Central Supply and Tenders Board to award the Bomana Project ... That never happened. As such, there was no legal binding contract in place for BIL to commence the Bomana road works and complete the same.*

53. Mr Vai’s explanation as to the legal status of Submission/COE No. 027/2013 for the Bomana Road Project is somewhat ambiguous. However, what is clear from Mr Vai’s evidence is that the document was intended for submission to and consideration by the full Board of the NCDC. In any event, the NCDC Board did not get to consider the Submission/COE at all, presumably because the NCDC no longer had funding for the Bomana Road Project to proceed. Even if the Submission/COE had gone to the full Board of the NCDC, the most that the Board could legally have done, according to Mr Vai, was to recommend BIL and the other bidders to the Central Supply and Tenders Board for that Board’s consideration for the award of a roading contract which exceeded K10 million.

54. BIL’s contention that there was a valid contract between itself and the NCDC for the Bomana Road Project accordingly fails. I find that no contract between BIL and the NCDC for the Bomana Road Project ever existed.

The Crystal Rapids Road Project:

55. As to the Crystal Rapids Road Project, I am satisfied on the evidence adduced by BIL at trial that contractual relations between the NCDC and BIL in connection with the Crystal Rapids Road Project did in fact exist and that a contract for this Project came into existence on 8 August 2013. This is the date when Mr Bani signed acceptance on behalf of BIL of NCDC's offer of engagement for the Crystal Roads Road Project as set out in the letter of the same date from the Office of Governor Parkop and addressed to BIL. The contract is evidenced by the copy of NCDC's letter of engagement of BIL which is annexure "D" to Mr Bani's affidavit filed on 15 May 2018.

56. NCDC's letter of engagement dated 8 August 2013 contains all of the elements required in law for creation of a contract, as outlined in cases such as *Noki v AGC (Pacific) Ltd* (supra).

57. In the present case the terms of the NCDC's offer contained in Governor Parkop's letter dated 8 August 2013 to engage BIL to undertake the Crystal Rapids Road Project were clear. The letter expressly stated, without editorial correction:

*The Commission wishes to engage your company to do patrol grading to sealing of crystal rapid feeder road starting from part area to PNG Power *Rouna Dam) access road.*

Following the conversation between the office of governor and the Commissioners, we now engage you to carry out the civil work on the following terms:

- 1. Implementation of the project without mobilization fund.*
- 2. NCDC will release fund on a month bases based on invoices after completion of work each month certified by the project office.*
- 3. BI Ltd is responsible for all labor it engages, machineries and other sub-contractors beside the insurance etc to its employees.*
- 4. The job includes clearance, surveying, Grading and associated civil*

works to be within K1.5 million.

58. The terms of the NCDC's offer to engage BIL to undertake the Crystal Rapids Road came from Governor Parkop and from NCDC's A/City Manager Mr Alu. Whether the Governor and Mr Alu had actual authority from the Commission of the NCDC to convey the terms of this offer of engagement to BIL is not demonstrated on the evidence, but there can be no doubt that the Governor and Mr Alu as A/City Manager had ostensible authority to make the offer.

59. Acceptance by BIL of the NCDC's offer of terms of engagement for the Crystal Rapids Road Project is evidenced by the signature of its managing director Mr Bani where his signature appears on the right-hand side at the foot of the NCDC's letter of 8 August 2013 under the typed word "Accepted."

60. From an objective standpoint, I am satisfied that the NCDC by Governor Parkop and its A/City Manager Lesley Alu intended that the NCDC create legal relations with BIL in connection with the Crystal Rapids Roads Project on the terms set out in the Governor's letter dated 8 August 2013 and that BIL correspondingly intended and agreed to be bound by those terms.

61. As to consideration, term 4 of the NCDC's letter to BIL of 8 August 2013 stipulated that the value of the civil works for the Crystal Rapids Road Project was to be "within K1.5 million".

62. I reject the NCDC's submission that it was not bound by the letter dated 8 August 2013 by which the Office of the Governor on behalf of the NCDC engaged BIL to carry out stipulated works for the Crystal Rapids Road Project. I accept BIL's evidence that this letter and BIL's acceptance of its contents on 8 August 2013 constituted a valid contract between those parties. The enforceability of that contract and the effect of the Deed of Consent which the NCDC entered into with BIL on 15 December 2014 are of course separate issues, and these are issues which are addressed below.

Issue 2: Were the public tender requirements of the *Public Finance Management Act 1995* for the Bomana Road Project and the Crystal Rapids Road Project complied with?

63. It has long been held by our Courts that contracts which fail to comply with statutory requirements are illegal and therefore void and unenforceable: see *Goria v National Parks Board* [1982] PNGLR 364 per Bredmeyer J at pp 368-369.

64. In *Panga Coffee Factory Pty Ltd v Coffee Industry Corporation Ltd* (1999) SC619 the respondent corporation relied on its own lack of power to have entered into a contract to exempt the appellant from paying levies. The Supreme Court (Woods, Sheehan, Sawong, JJ) said at p.4:

The Corporation is a public authority with a power to deal in monies for which it has obligations to the members of the public engaged in the Industry. It can only enter into arrangements and contracts in accordance with its powers under its enabling legislation as referred to above. There was a clear lack of capacity to enter into the arrangement set out in Clause 3(a). See Credit Suisse v Allerdale BC [1966] 4AER 129.

The appellants are claiming enforcement of a contract under deed which purports to acknowledge the appellants' claim for compensation and stipulates its mode of payment. Clearly that mode of payment is illegal and unenforceable.

65. In *Credit Suisse v Allerdale BC* (supra), the English Court of Appeal held that a contract of guarantee entered into by a local authority was void and unenforceable. Hobhouse LJ said at p.165:

Where a statutory corporation purports to enter into a contract which it is not empowered by the relevant statute to enter into, the corporation lacks the capacity to make the supposed contract. This lack of capacity means that the document and the agreement it contains does not have effect as a legal contract. It exists in fact but not in law. It is a legal nullity. The purported contract which is in truth not a contract does not confer any legal rights on either party. Neither party can sue upon it.

66. In *Patterson v National Capital District Interim Commission* (2001) N2145 Kandakasi J (as he then was) observed at p.13:

... where a contract is prohibited by reason of not being made in accordance with the provisions of a relevant and applying legislation, there is no discretion whether to enforce it or not. It is simply void and unenforceable.

67. The relevant public procurement provisions for public tender for the supply of goods and services to public bodies such as the NCDC as those provisions stood in 2013 were ss. 59 and 61 the *Public Finances (Management) Act 1995 (PFMA)*:

59. *Contracts for works and services.*

- (1) *Subject to Subsection (2), tenders shall be publicly invited and contracts taken by a public body to which this Act applies for all works, supplies and services the estimated cost of which exceeds such sum as is specified in its constituent law or declared by the Minister.*
- (2) *Subsection (1) does not apply to any works, supplies and services –*
 - (a) *that are to be executed, furnished or performed by the State, or an arm, agent or instrumentality of the State approved by the Minister for the purposes of this subsection; or*
 - (b) *in respect of which the public body certifies that the inviting of tenders is impracticable or inexpedient.*

...

61. *Approval required for certain contracts.*

- (1) *The provisions of this section apply to and in respect of all public bodies notwithstanding any provision to the contrary in any other law and notwithstanding and without regard to any exceptions, limitations, conditions, additions or modifications contained in any other law.*
- (2) *Subject to Subsection (3), a public body shall not, except with the approval of the Minister; enter into a contract involving the payment or receipt of an amount, or of property to a value, (or both) exceeding –*
 - (a) *K100,000.00; or*
 - (b) *In the case of a public body declared by the Head of State, acting on advice, by notice in the National Gazette, to be a public body to which this paragraph applies – K500,000.00.*
- (3) *The provisions of Subsection (2) do not apply to a contract relating to investment by a public body (including a subsidiary corporation) the subject of a declaration under Section 57(3).*

68. Sections 59 and 61 *PFMA* were extensively considered by Kandakasi J in *Patterson v National Capital District Interim Commission* (supra). His Honour concluded at p.15 that:

These provisions were enacted in my view to ensure transparency in all

dealings with public authorities and persons or parties who is or are not the State, an agent of the State, or an arm or instrumentality of the State, approved by the Minister to provide the works, supplies or services. The benefit of these requirements is not only to ensure transparency but is more importantly intended to ensure that all who are able to provide the kind of works, supplies or services under consideration are given the opportunity to get the best works, supplies and or services as the case may be, at the best possible price subject to its budget. A closed dealing may not necessarily provide for the best possible works, supplies and or services at a price that is reasonably justified and may facilitate fraud or corruption.

The intent therefore of Parliament in enacting these requirements of the Act was, in my view, to ensure that public authorities do not enter into contracts having monetary values that exceed the limits set without first meeting the requirements for tender and approval by the Minister. In other words, Parliament, by enacting the provisions of sections 59 and 61 of the Act, prohibited contracts over K100,000 for some and K500,000 for others with private persons with a public authority unless put through tender and approved by the Minister for Finance. It follows that a contract that does not meet the tender and ministerial approval requirement is illegal and also unenforceable because it goes against an important public policy in the vital area of public finance.

69. It is not disputed by BIL in the present case that the NCDC is a public and statutory body, established by s.4 of the *National Capital District Commission Act 2001 (NCDC Act 2001)*, and that at all material times in 2013 the Commission which constitutes the NCDC was subject to the then applicable public procurement requirements set out in ss. 59 and 61 of Part VIII of the *PFMA*.

70. Section 4 of the *NCDC Act 2001* as it stood in 2013 was as follows:

4. National Capital District Commission

(1) The National Capital District Commission is hereby established.

(2) The Commission –

(a) is a corporation; and

(b) has perpetual succession; and

(c) shall have a seal; and

(d) may –

(i) acquire, hold and dispose of land, interest in land and property;

(ii) sue and be sued in its corporate name; and

(iii) enter into contracts; and

and

(v) *subject to the prior written approval of the Minister, conduct business enterprises.*

[underlining added]

71. Section 5 of the *NCDC Act 2001* provided at the material time that the membership of the Commission of the NCDC consisted of 10 members, including the Governor and Deputy Governor of the National Capital District.

72. Section 41(2)(1) of the *NCDC Act 2001* granted to the Commission power to legislate in respect of “roads, drains, bridges, street lighting and traffic control”. This is related to s.40(1)(d) of the *NCDC Act 2001* which provided that one of the primary responsibilities of the Commission was physical planning.

73. Section 16(1)(h) of the *NCDC Act 2001* stated:

16. Powers of the Commission

(1) *Subject to this Act, the Commission has, for the purpose of fulfilling its functions, power –*

...

(h) *to do such other matters and things as seem to it necessary or desirable for carrying out and performing its powers, functions, duties and responsibilities and any other ancillary or incidental matters or things.*

74. To assist the Commission to perform its statutory powers and functions, s. 17(1) of the *NCDC Act 2001* conferred on the Commission the power to establish Committees or Boards. However, s.17(2) circumscribed this power of the Commission in the following manner:

17. Committees and Boards

(2) *A Committee or Board established under Subsection (1) shall –*

(a) *be established in the prescribed manner; and*

(b) *have such functions as are prescribed; and*

(c) *consist of a number of members as prescribed of whom less than one half shall be members of the NCDC, and the remainder of whom shall be persons ordinarily resident in the National Capital District and broadly representative of the Community; and*

(d) include persons having technical expertise on the subjects to be dealt with by the Committee or the Board.

(3) The NCDC shall delegate to each Committee or Board established under this section such powers (other than this power of delegation) as are necessary to enable such Committee or Board to carry out its functions.

75. Section 18 of the *NCDC Act 2001* then stipulated:

18. Powers To Be Exercised By The NCDC Etc.

The powers conferred on the NCDC by this Part shall be exercised only by resolution of the Commission or by a Committee or Board in accordance with a delegation under Section 17(3) and no power shall be vested in an individual member of the NCDC or of a Board or Commission.

[underlining added]

76. Part 5 of the *NCDC Act 2001* at the material time in 2013 related to the finances of the NCDC. Section 23 in Part 5 of the Act provided in clear terms:

23. Part VIII of the Public Finances (Management) Act 1995 applies to and in relation to the Commission, subject to such modifications as are contained in this Part as are permitted by Part VIII of the Public Finances (Management) Act 1995.

77. Notwithstanding that there is no dispute on the part of BIL that the public procurement and public tender provisions in Part VIII *PFMA* applied to the NCDC as a public body in 2013, it was argued for BIL at trial that s.59(2)(b) of the Act enabled the NCDC to exempt itself from requiring that the two Projects should go to public tender. It was submitted for BIL that the Court should “infer” that the COEs for the two Projects were sufficient compliance with s.59(2) *PFMA* because although the COEs were not termed Certificates of Inexpediency, they amounted to the same thing.

78. Counsel for BIL Ms Kubak put the argument this way at para. [25] in her written submissions:

25. When considering the provisions of the PFMA, we submit that both projects were initiated through the Governor’s office due to reasons of urgency and this is confirmed by clause #10 of the Bomana Project COE and

clause 3 of the Submission for the Crystal Rapids Project. In situations of practicability or inexpediency this is covered under s.59(2)(b) of the PFMA. However, in the present case the Defendants used the concept of COEs as opposed to COI (Certificate of Inexpediency) which is the normal process used previously by the NCDC and by the Department of Works.

79. In my view, there are serious flaws with this argument.

80. Firstly, for the exception allowed by s.59(2)(b) *PFMA* to apply which would have exempted the NCDC from the otherwise mandatory requirement under s.59(1) that tenders “be invited and contracts taken” for the two Projects, the Commission of the NCD would itself, as a public body, or the Board or a committee of the NCDC, duly authorised by written resolution of the Commission under s.17(3) of the *NCDC Act* 2001, have been required by s.59(2)(b) to *certify* whether tenders for a project were in fact “impracticable or inexpedient” and therefore exempt from the public tender process.

81. No evidence was given of a Commission resolution which delegated *to* the NCDC’s Board or to any committee of the NCDC any power or authority to determine matters such as the awarding of contracts for roading projects and/or to determine whether the particular circumstances of such projects were such that it would be “impractical or inexpedient” to refer those projects to the public tender process via the Central Supply and Tenders Board under the *PFMA*.

82. No evidence was adduced of any resolution *by* the NCDC’s Board or *by* any committee of the NCDC certifying for the purposes of s.59(2)(b) *PFMA* that the NCDC should award contracts for the Bomana Road Project and the Crystal Rapids Road Project direct to BIL on the grounds that it was “impractical or inexpedient” for the otherwise mandatory public tender process under the *PFMA* to be observed by the NCDC.

83. No evidence was adduced or other material produced to the Court to support the contention of counsel for BIL and of counsel for the NCDC during submissions that the NCDC had an internal procurement process such that awards of contracts having a value below K10 million could be internally dealt with by the NCDC but that contracts having a value of more than K10 million had to go to the Central Supply and Tenders Board under the public tender regime then governed by the *PFMA*. If the NCDC did at the material time in 2013 have such an internal procurement process, no statutory or other basis for that process was ever presented or explained to the Court.

84. There is no evidence before the Court that the Minister for the Department of

Works had ever specifically approved any contracts for the two Projects under s. 59(2)(a) *PFMA* or that the NCDC was at the material time a gazetted public body declared by the Governor General as Head of State, acting on the advice of the National Executive Council, to be a public body for the purposes of s.61(2)(b) *PFMA* and therefore permitted at the material time to enter into contracts having a value beyond K500,000.

85. I find on the evidence adduced that there is no proof at all of any proper certification by the Commission of the NCDC, or by the NCDC's Board or by any of the NCDC's committees duly authorised for the purpose, that the inviting of tenders for the Bomana Road Project and the Crystal Rapids Road Project was in each case "impracticable or inexpedient" under s.59(2)(b) *PFMA*.

86. The reasons for "expediency" given in item 10 of COE No. 027/2013 dated 9 April 2013 in respect of the Bomana Road Project prepared for use by NCDC Assembly Services and signed by Deputy City Manager Mr Vai, A/City Manager Mr Alu and Governor Parkop were that the roads at Bomana were said to be "in dire need for rehabilitation in preparation for 2015 Pacific Games and they need to be also improved together with the major road rehabilitation program". As this COE was prepared at least two years before the 2015 Pacific Games were due to begin and as major road rehabilitation for the NCDC is a perpetually ongoing feature of the NCD's roading works, these two reasons to my mind could hardly be objectively described as of sufficient urgency to warrant departure from the NCDC's statutory obligation to observe the otherwise mandatory requirements of ss. 59 and 61 *PFMA*. COE No. 027/2013 in respect of a proposed contract for the Bomana Road Project having a value of K10,721,372.82 was clearly designed with the view to purportedly validate the bypassing of inconvenient public tender and public procurement requirements of the *PFMA*.

87. Item 10 of the Submission marked COE No. 150/2013 dated 24 September 2013 in respect of the Crystal Rapids Road Project prepared for use by NCDC Assembly Services, signed and authorised by Deputy City Manager Mr Vai, A/City Manager Leslie Alu and Governor Parkop, states that the reason for the "expediency" was because the "Sogeri Crystal Rapids Feeder road upgrading was in very bad condition and needed urgent patrol grading to provide access to the tourists and the general public who frequent this area during weekends". My immediate response to this Submission and purported COE is that no justification was given in that document or elsewhere in evidence to explain why the NCDC should be legally liable or responsible to undertake the upgrading at its expense of a road in Central Province. The feeder road to Crystal Rapids on the Sogeri Plateau is a road leading to a scenic venue and recreational facility which is not within the boundaries of the National Capital District. Furthermore, this was clearly not a project for minor remedial roading works. It was a K1.5 million project which involved surveying,

grading and associated civil works for the upgrade of a substantial length of road which is not within the territorial boundaries and jurisdiction of the NCDC.

88. A second reason for rejecting the submission for BIL made at trial that the two COE's could be accepted by the Court as being sufficient evidence of the NCDC's compliance with the public tender and public procurement requirements of the *PFMA* is because it is common knowledge that over the years following the coming into operation of that Act in 1995, the exemption under s.59(2)(b) *PFMA* had resulted in a proliferation of "certificates of inexpediency" which allowed public bodies and their contractors to abuse and bypass the requirements under the *PFMA* for the awarding of high value contracts for goods and services by the Central Supply and Tenders Board.

89. This issue was addressed by Kandakasi J (as he then was) in *Evaluation Consult (New Zealand) Ltd v The State* (2016) N6219 where his Honour observed that there had been a trend for parties to contracts rendered illegal for failure to comply with the public tendering requirements of the *PFMA* to seek to intentionally gain from their non-compliance by relying on the equitable doctrine of *quantum meruit*. His Honour stated at para. [34]:

These days, the instance of contracts failing to meet the requirements of the Public Finances (Management) Act and such other relevant and applying legislations are more in number, with some, if not all of them deliberate. In my view, this is possible because contractors and those in positions of decision making at the national and provincial levels of government and public authorities know that they can easily avoid meeting the requirements of the Public Finances (Management) Act, and other relevant and applicable legislation and still gain through the quantum meruit principle. Given that, they are readily getting into contracts committing the State or other public authorities into thousands and millions [of Kina] of public funds deliberately outside the requirements of the Public Finances Management Act. In this way the contractors and those on behalf of the State or public authorities are bypassing the intent and purpose of the Act.

90. I find that the observations of Kandakasi J in *Evaluation Consult (New Zealand) Ltd v The State* on the abuse of the public procurement regime under the *PFMA* to be of particular relevance to the present case. The two COEs produced to the Court in this instance, which purported to be the equivalent of legally competent certificates of inexpediency under s.59(2)(b) *PFMA*, which they most certainly were not, are classic examples of that abuse, irrespective of whether that abuse was knowingly or unwittingly committed by officials of the NCDC. And in each instance, no proof was adduced at trial that the two COEs were ever approved by the Commission itself, or by the Board of the Commission or by a committee of the

Commission duly authorised by Commission to deal with COEs under s.59(2)(b) *PFMA*.

91. For these reasons I hold that the public tender requirements of the *PFMA* for the Bomana Road Project and the Crystal Rapids Road Project were not complied with by the NCDC. This finding has no adverse civil consequence for the NCDC for the Bomana Road Project because I have already found that no contract came into existence for that Project. NCDC's non-compliance with the public procurement regime under the *PFMA* for the Bomana Road Project could not in law nullify arrangements which had not resulted in a contract. However, as I have found that a contract between the NCDC and BIL did exist for the Crystal Rapids Road Project by virtue of the arrangements set out in the Governor's letter of 8 August 2013 and accepted by Mr Bani on behalf of BIL, the NCDC's non-compliance with applicable public tender requirements of the *PFMA* for its contract with BIL for that Project, supposedly evidenced by COE No. 150 /2013 disguised as a certificate of inexpediency under s.59(2)(b) *PFMA*, rendered that contract illegal *ab initio* and therefore void and unenforceable.

Issue 3: If there was non-compliance with the public tender requirements of the *PFMA* for the two Projects by the NCDC, is BIL nevertheless *prima facie* entitled to any damages for works or services it performed for those Projects?

92. As there was no contract between BIL and the NCDC for the Bomana Road Project and as I have found that BIL's contract with the NCDC for the Crystal Rapids Road Project was illegal, void and unenforceable, what then is BIL able to *prima facie* claim, if anything, for works or services it performed for the NCDC for those Projects? Are claims against the NCDC available to BIL under any of the equitable doctrines of restitution, *quantum meruit* or unjust enrichment?

93. The leading case on these equitable principles is *Fly River Provincial Government v Pioneer Health Services Ltd* (2003) SC705 where it was held by the Supreme Court (Amet CJ, Sawong and Kandakasi, JJ) that if an illegal contract is part performed, the action in equity developed by the English common law known as restitution based on *quantum meruit* is available in PNG by way of remedy for a contractor so as to avoid unjust enrichment by the party who has benefited from the services performed or goods delivered by a contractor in genuine but mistaken reliance on the illegal contract, but this is conditional on the contractor being innocent of the illegality of the contract.

94. The essential facts in that case were that Pioneer Health Services Ltd (**PHS**) entered into a contract with the Fly River Provincial Government (**FPG**) for the supply of certain medical goods and services. The contract between the parties was

found by the Court to be void and illegal because of its non-compliance with then applicable public tender requirements under the *PFMA*, including the statutory requirement under that Act that the contract obtain the approval of the Minister for Finance. The contract involved payment by the FPG of amounts exceeding well over K500,000. It was not in dispute that those payments were in breach of s.61 of the *PFMA*. Furthermore, it was conceded by the parties that no public tender for the supply contract had been called. Notwithstanding that the contract was void and illegal, the Court ruled that PHS was not without a remedy. The Court held that because the contract had been part-performed by PHS before the FPG realized it had run out of funds to pay for goods and services already received and had raised the issue of the contract's non-compliance with the procurement provisions of the *PFMA*, PHS was nevertheless entitled by way of the equitable action of restitution based on *quantum meruit* to pursue its claim for recovery of the costs and expenses it had actually incurred for the goods and services it had supplied to the FPG. This was however conditional on PHS showing that it was innocent in its participation in the creation of the illegal contract. The Supreme Court explained its reasons for this finding at pages 32 to 33 of its judgment in this way:

... the FPG gained substantially from the part performance of the illegal contract in terms of goods and service(s) to the people in its Province in the field of mobile health services. Invoices were rendered for goods and services supplied by PHS under the illegal contract and were part paid. No issue was taken on the non-compliance or otherwise of the provision of the PF(M)A, until it became apparent that the FPG did not have the money or could secure the necessary finance to meet the invoices in full and allow for a completion of the contract.

In these circumstances, we consider it inequitable and unfair that PHS should be left with no remedy subject to a determination of the issue of whether it is an innocent party to the illegal contract and what steps if any it took to ensure compliance [with] the requirements of the PF(M)A. We consider the provisions of s.155(4) of the Constitution are wide enough to enable this Court and the National Court to do what is equitable in the circumstances to do justice. A failure to do so will sanction an unjust enrichment by the FPG in terms of goods and services it has received from PHS which have not been paid for in full. We therefore consider it appropriate that PHS should be allowed to proceed with its claim against the FPG seeking a recovery of the costs and expenses it has incurred but only for the part performed of the illegal contract for which it has been paid in full. This is conditional on PHS establishing by appropriate evidence that it is innocent of the breaches of the PF(M)A and that it did what it could to ensure compliance [with] the Act. In any case, [PHS] has no right to any claim in respect of the balance of the illegal contract, which is null and

void.

95. In the later case of *National Broadcasting Corporation v Sam Tasion & T.G. Holding Ltd trading as Freeway Motors* (2019) N8083, Kandakasi J (as he then was) observed at paragraph [46]:

The law on point as represented by the decision of the Supreme Court in Fly River Provincial Government v Pioneer Health Services Limited is clear. A contract, as in the present case, that has been arrived at in breach or without duly meeting the requirements of the PFMA is null and void ab initio and is thus unenforceable. Where such a contract has been performed in part, a claim based on the principle of quantum meruit may be possible, provided the private party contracting with the State or any of its entities is innocent of breaches of the Act.

However, His Honour then went on to find in that case that Freeway Motors had dealt fraudulently in its contractual relations with the National Broadcasting Corporation (NBC) and that the company was itself responsible for initiating breach of the public tendering requirements of the *PFMA*. The company was not innocent of the illegal nature of its contract to supply vehicles to the NBC. His Honour ordered judgment in favour of the NBC in the sum of K3,095,295 to avoid unjust enrichment on the part of the defendants. Interest at 8% per annum was awarded on that amount from date of issue of the proceedings to date of full satisfaction of the judgment.

96. *Kewa v Minister for Community Development* (2019) N773 (Dingake, J) is a further National Court decision on point. The background facts were that the plaintiff had executed a contract for the provision of hire car services to the Department of Community Development. The evidence established that the plaintiff had complied with its obligations under the contract and had hired a number of vehicles to the Department. The plaintiff submitted invoices totalling K855,000 to the Department, of which K36,000 was paid but the balance of K818,000 remained outstanding. The Department refused or declined to pay the balance outstanding on a number of grounds, including that the contract was void on account of alleged breaches of the public tender requirements prescribed in ss. 59 and 61 of the *PFMA*.

97. His Honour Dingake J ruled that the critical question which fell for determination was whether the plaintiff was entitled to payment for hire car services rendered, based on the equitable principle of unjust enrichment: His Honour held that in order to succeed on a plea of unjust enrichment, a plaintiff must in effect prove the following:

1. The defendant has been enriched by the receipt of a benefit;
2. The defendant has been enriched at the plaintiff's expense; and
3. It would be unjust to allow the defendant to retain the benefit.

98. His Honour went on to say at paragraph [8]:

It was authoritatively held in the case of Fly River Provincial Government v Pioneer Health Services Limited (2003) SC705 that despite the illegality of the contract for breach of Section 59 and 61 of the Public Finance (Management) Act, the plaintiff should still be paid for services if it is established that the plaintiff was unaware of the contravention and was an innocent party.

99. His Honour was satisfied on the evidence in *Kewa v Minister for Community Development* that the Department had been enriched by the benefit of the plaintiff's hire car services at the plaintiff's expense, that the plaintiff was innocent of the breach of the public tender requirements of the *PFMA* and that it would be unjust in the circumstances for the Department not to pay the balance of what was owed for invoices rendered under the illegal contract.

100. In the subsequent Supreme Court decision of *Teine & Gute Security Service Ltd v University of Goroka* (2019) SC1881 (Cannings, Tamate, Dingake, JJ), a similar scenario was presented. The facts in that case were that the second appellant, a company owned and controlled by the first appellant, had entered into a contract with the respondent University to provide security services for a term of 3 years. The company performed services under the contract for the first 10 months of the 3-year term but the University then terminated the contract on the grounds that the contract was illegal because it had been entered into by its Vice-Chancellor without the authority of the Council of the University, which was contrary to the *University of Goroka Act* and other University statutes, and because the contract was in breach of the public tender requirements of the *PFMA*. The University commenced two separate proceedings in the National Court against Mr Teine and his company seeking recovery of all monies paid under the contract. After a joint trial of the two proceedings, the National Court upheld the University's claim and ordered Gute Security Service Ltd to repay K418,120 which it had received from the University under the contract, which was ruled by the National Court to be an illegal contract.

101. The primary ground of appeal in *Teine & Gute Security Service Ltd v University of Goroka* was that the trial judge had erred in law by treating Gute

Security Service Ltd as not having been an innocent party to the illegal contract and by not recognizing that the company had satisfactorily performed services under the contract and was entitled under *quantum meruit* principles to retain money paid to it for those services. The illegality of the contract was not in dispute. Rather, the appeal centred on the issue of whether money paid under the illegal contract could lawfully be recovered by the University.

102. The Supreme Court in *Teine & Gute Security Service Ltd v University of Goroka* held that the trial judge had erred when he misapplied *Fly River Provincial Government v Pioneer Health Services Ltd* as authority for the proposition that a person dealing with a public institution is *deemed* to be aware of the public tender requirements of the *PFMA* and by then finding that Gute Security Service Ltd had constructive knowledge of those requirements and was therefore not innocent of the illegality of its contract with the University. The Supreme Court held on appeal that no such “deeming” of knowledge of illegality was sanctioned by the decision in *Fly River Provincial Government v Pioneer Health Services Ltd*. Instead this is what the Court ruled at paragraph [9]:

We do not consider that the Supreme Court in Fly River v Pioneer laid down a hard-and-fast rule that all persons dealing with public institutions will be deemed to be aware of the public tender requirements of the Public Finances (Management) Act, so that in each and every instance of an illegal contract, the parties to the contract will be deemed to have knowledge of its illegality. The better view is that any dicta to that effect is confined to the facts of that particular case. It remains important that the evidence in each case be assessed on its merits. Though it might be appropriate to presume knowledge of illegalities, such a presumption can on a proper assessment of the evidence be rebutted. We consider that the trial judge erred by regarding dicta of the Supreme Court in the Fly River Provincial Government case about the parties being deemed to have knowledge of an illegality as a hard-and-fast rule and applying it against the appellants without adequate assessment of the evidence, leading to them being labelled without justification as ‘not innocent’.

103. The Supreme Court in *Teine & Gute Security Service Ltd v University of Goroka* continued at paragraph [11]:

The proper approach can be summarized in these terms:

- *the question whether one party to an illegal contract can recover money paid to the other party to the illegal contract is governed by the maxim in pari delicto (a situation in which the parties are equally at fault);*

- *if the parties are in pari delicto, money paid under the illegal contract is not recoverable;*
- *if one party can be described as innocent, in comparison with the other party, money paid by the innocent party to the other party is recoverable.*

104. And relevantly at para. [13]:

13. ... *We adopt the elements of a cause of action in quantum meruit set out by Cannings J in Steven Turik v Mathew Gubag (2013) N5132:*

- *A has done something of benefit for B;*
- *the thing done by A relates to an arrangement of some sort with B (the arrangement might be but is not necessarily a contract, and might be an illegal contract);*
- *it would be unjust to allow B to retain the benefit without some remuneration or reward for A.*

105. In the result, the Supreme Court in *Teine & Gute Security Service Ltd v University of Goroka* quashed that part of the decision of the trial judge which had entered judgment requiring the company to repay to the University the monies which it had received under the illegal contract. The company was entitled to retain those monies. This was because the Supreme Court was satisfied that the evidence before the trial judge “adequately demonstrated that the appellants entered into the contract without actual knowledge of its illegality, in good faith, and performed services under it satisfactorily without complaint and would in all likelihood have been able to sustain a *quantum meruit* claim if they had not been paid anything by the University”. The Supreme Court also found on the evidence that the University had similarly entered into the contract without knowledge of its illegality and paid the money to Gute Security Service Ltd in good faith for services actually rendered. The Court held that the parties were *in pari delicto*, which meant that the parties were on equal footing when assessing the evidence as to the issue of their collective innocence of illegality of their contract. The University was therefore unable to recover monies it had paid under the illegal contract for services already performed by Gute Security Service Ltd.

106. In my view the principles established in the foregoing cases dealing with the equitable principles of restitution, *quantum meruit* and unjust enrichment governing the right of a contractor to be paid a reasonable amount for services rendered by a contractor to a principal under a mistaken but genuine belief that a contract exists or where a contract exists but is void for illegality are clear. I summarise those

principles as follows:

- A contract which is void for illegality is void *ab initio* and is unenforceable as to its terms and conditions.
- However where such a contract has been performed in part, a remedy for goods supplied or services rendered by a party under the void contract is available to that party based on the principle of *quantum meruit*, provided that party is innocent of the cause of the illegality of the contract.
- Where a party has a mistaken but genuine belief that a contract exists and has supplied goods or rendered services to another party under that misapprehension, a remedy by way of unjust enrichment is available to that party, provided that the first party is innocent of the cause of the non-existence of the contract.
- Innocence or otherwise of the cause of the illegality or non-existence of a contract is in each case a matter for evidence on the civil standard of proof.

107. I now apply these principles to the facts of this case.

The Bomana Road Project

108. It was submitted for the NCDC that as there was no contract between NCDC and BIL for the Bomana Road Project, there was no obligation on the part of BIL to mobilize or to later demobilize and that therefore BIL is not entitled to claim for the costs of mobilization or demobilization. Counsel for the NCDC states in paragraph [21] of his written submission:

21. We therefore submit that the Plaintiff merely mobilised and demobilised machineries and equipment at his [sic] own wish and in doing so to its own peril. Relying on the principle in the FRPG case that a person who is guilty or negligent in failing to comply with the requirement of the PFMA ..., he cannot be allowed to claim damages that he may suffer as a result, we submit that the Plaintiff's claim for mobilisation and demobilisation be dismissed for being unfounded in law.

109. In support of this submission, counsel for the NCDC argued at paragraph [52] of his written submission that Mr Bani failed to take “all necessary steps that a prudent and reasonable businessman should have taken to comply with the requirements of the PFMA”. It was said to the effect that Mr Bani should have been

aware of the public tender and public procurement requirements of the *PFMA* in relation to both Projects, but that as Mr Bani failed to ensure that those requirements were complied with by the NCDC, BIL could not claim for the company's mobilization and demobilization expenses for the Bomana Road Project.

110. Against this position, counsel for BIL stressed that Mr Bani and his company were unaware of the *PFMA* requirements for public tender and public procurement and that they were therefore innocent of the NCDC's failure to ensure that the public tender process was properly complied with under the *PFMA*. The transcript of the proceedings for 14 March 2019 shows at page 75 that counsel for BIL Ms Kubak made this submission:

MS KUBAK: We submit your Honour that [the Fly River Provincial Government v Pioneer Health Services' case] is applicable to the present case because the plaintiff was an innocent party. This was his first year venturing into the area of civil works. He did not have the sufficient experience to fully appreciate and understand the process at that relevant time. He was shown a certificate of expediency and other internal documents and verbally instructed to commence work by someone [Mr Mauwe] who the plaintiff genuinely believed had the requisite authority to issue instructions in his capacity as the then project coordinator employed in the NCDC Governor's office. All this is borne out by the evidence before the Court.

111. On balance, I accept that Mr Bani had little or no experience when dealing with the NCDC for road projects and other civil works. Mr Bani gave evidence that BIL was incorporated on 31 May 2011. His company commenced operating in 2012. The company was initially involved in the buying and export of rubber. It then expanded in 2012 into the area of civil construction when it undertook a modest roading project at Abau, Central Province after obtaining a contract from the Department of Works. It seems that Mr Bani thereafter became acquainted with the NCDC's Mr Mauwe, who was the Project Coordinator for projects initiated through the office of the NCD's Governor Parkop. It was Mr Mauwe who in March 2013 encouraged Mr Bani to lodge BIL's bid for the Bomana Road Project with the NCDC. It was Mr Mauwe who then erroneously informed Mr Bani in early April 2013 that BIL's bid for the Bomana Road Project had been successful. I accept that Mr Mauwe managed to persuade Mr Bani that this was so by giving to him a copy of the unapproved COE No. 027/2013 and telling him that BIL had to mobilise immediately in readiness for a ground-breaking ceremony to be conducted by Governor Parkop in several weeks' time.

112. Mr Bani was cross-examined by counsel for NCD Mr Boma as to how BIL came to be involved with the Bomana Road Project. Mr Bani's oral evidence on

this issue is set out at page 9 of the transcript for the proceedings which were heard by the Court on 7 March 2019:

XXN: MR BOMA

Q: ... Mr Bani, you just told this Honourable Court that you have been involved in the Central Province in Abau and you have now come to NCDC. Is the normal thing to do to have a contract properly awarded under the relevant regulations before you do your mobilization and demobilization whatever or you do those things ahead of the contracts being granted to you - to the plaintiff or to you for that matter?

A: We started road construction in 2012 in Abau in the Central Province. That contract was awarded through Works [Department] through *pro forma* contract. After one year we [were] engaged in NCDC by Governor's office - through Governor's office. So they invited us to bid, which we did and all we know was we bid for the project and after we were informed by the Project Coordinator that we were awarded the project at Bomana and he advised us by giving us the COE - copy of the COE - to immediately mobilize because the project was in line with the Pacific Games in 2015 so we had no time to waste and that was our golden opportunity. As a local company we [had] just registered and one year on we were in the stage where we want to prove to NCDC that we can do a job, so we had no time. And ... we went ahead [and] mobilized as per instructions from - verbal instructions from the Project Coordinator.

113. I further accept Mr Bani's affidavit evidence that it took two weeks during April 2013 for BIL to mobilize its machineries on site at the Bomana Police College waiting for the ground-breaking ceremony to be conducted by Governor Powes Parkop, but that the ground-breaking ceremony never took place because it was Mr Mauwe who advised Mr Bani in early May 2013 that the NCDC had no funding for the Bomana Road Project, that the roading works there could not go ahead and that BIL had to demobilize. Mr Bani's evidence in this regard is largely corroborated by oral evidence which was given at trial by NCDC's Mr Oapaisa during cross-examination. Mr Oapaisa gave evidence that he is and was at the material time in 2013 the Senior Engineer for the Works, Roads and Drainage Division of the NCDC. Mr Oapaisa was careful in his affidavit filed in this proceeding on 15 June 2018 (Exhibit D) and in his oral evidence to stress that from his perspective the NCDC had never entered into any contract with BIL for the Bomana Road Project. However the transcript shows at pages 45 and 46 that Mr Oapaisa did confirm that he was personally aware that BIL had mobilized in readiness for commencement of work for the Bomana Road Project. Mr Oapaisa said this in answer to cross-

examination by counsel for BIL Ms Kubak:

MS KUBAK:

Q: ... the question I would like to ask the witness is whether you supervised the Bomana Project as well as the Crystal Rapids Project in your capacity as the senior engineer of NCDC?

MR OPAPAIISA:

A: Yes.

Q: So you confirm that you did supervise those two projects?

A: That is right.

Q: Mr Oapaisa, in relation to the Bomana Road Project, did you ever go and inspect the site?

A: In relation to the Bomana Project, the project is over 10 million. And my Division, I do not have the capacity to do that project because it goes through the proper vetting by means of proper tendering are followed. In this case these proper procedures were not followed and I did not know who was doing these things. I was only asked to go and – they only asked me to go and see it – see the Project. But there were no documents available for this Bomana project.

...

Q: But you would agree with me that you did go up and you did see machinery on the ground at Bomana?

A: For the Bomana Project, I know – only the time that they asked me to go and see the project site and that is the time I saw the machinery and I was surprised that these people, how they got the machines there, I do not know.

114. Given this evidence by Mr Bani and Mr Oapaisa, I find that BIL did in fact mobilize its equipment for the Bomana Road Project for a two-week period during April, at the end of which it had no option but to demobilize in May 2013 after Mr Mauwe informed Mr Bani that the NCDC could not proceed with the Project because there was no funding for it.

115. I also find that BIL, through its managing director Mr Bani, was innocent of the circumstances which gave rise to the NCDC's inability to pursue consideration of BIL's bid for the Bomana Road Project due to the magnitude of the funding issues, the amount of the proposed Project being in excess of K10 million, and that BIL had no actual or constructive knowledge at the time that COE No. 027/2013 was no proof that the NCDC had complied with the statutory processes for the public procurement requirements of the *PFMA* in connection with the Bomana Road Project.

116. I therefore rule that BIL is *prima facie* entitled to be compensated for the costs it incurred for its mobilization and demobilization for the Bomana Project in view of the representations made to Mr Bani by NCDC's Mr Mauwe, there being no evidence adduced to suggest that there was any collusion between Mr Bani and Mr Mauwe regarding the Bomana Road Project prior to the NCDC's cancellation of the Project at the end of April 2013. The corrupt payments which Mr Bani says he made to Mr Mauwe and which are referred to in Mr Bani's letter of complaint delivered to the National Fraud and Anti-Corruption Directorate at Police Headquarters in or about May 2015 occurred well after that initial period.

117. As to the remainder of BIL's claim, I find that BIL is not entitled to any liquidated or general damages for breach of the contractual relations which it pleaded in its amended statement of claim it had with NCDC as it is clear on the evidence and findings I have made that no contract ever came into existence between BIL and the NCDC for the Bomana Road Project.

The Crystal Rapids Road Project

118. I have found that a contract for the Crystal Rapids Road Project did come into existence when BIL, by its managing director Mr Bani, accepted the terms of NCDC's offer to BIL as set out in the Governor's letter dated 8 August 2013 to engage the services of BIL for this Project. I have also found that this contract was illegal, void and unenforceable for non-compliance by the NCDC with the public procurement requirements of the *PFMA*. The issue which then arises is whether BIL is entitled to any damages against the NCDC based on the equitable remedies of restitution, *quantum meruit* and/or unjust enrichment.

119. However, having made these findings, consideration as to what damages in equity, if any, which BIL may be entitled to against NCDC for the failure of the Crystal Rapids Road Project becomes academic if the Deed of Consent, in reality a deed of release, which BIL entered into with NCDC on 24 December 2014 effectively settled all claims which BIL might otherwise have had against the NCDC for that Project. I therefore pass to that issue before making any ruling at

this juncture on BIL's claim for damages against the NCDC in connection with the Crystal Rapids Road Project.

Issue 4: In view of the Deed of Consent executed by the parties on 15 December 2014, is BIL entitled to any damages from the NCDC in respect of work performed by BIL for the Crystal Rapids Road Project?

120. According to the parties' Statement of Agreed and Disputed Facts and Issues certified by each counsel on 19 July 2018 and filed on 24 July 2018 (**Statement**), one of the issues agreed by the parties for the Court to determine in this suit is whether the BIL is "estopped from claiming anything further from the NCDC by virtue of the Deed of Consent executed on the 15th of December 2014".

121. I note that the Deed of Consent was not pleaded in BIL's amended statement of claim, nor was it pleaded in the NCDC's defence.

122. Were it not for the Statement, the usual rules of pleading would prevent this Court from considering an issue not pleaded. Unless there is foundation in the pleadings of a party, the general rule is that no evidence and no claim for damages or other relief not pleaded can normally be allowed: *Papua New Guinea Banking Corporation Ltd v Tole* (2002) SC694.

123. The object of pleadings was well stated in *National Provident Fund Board of Trustees v Maladina* (2003) N2486 where it was held by Kandakasi J (as he then was), reading from the headnote:

The object of pleadings is to enable the parties to fully disclose in fairness the basis of their claim or a defence with particulars to avoid delay, trials by ambush, evasion and or attrition. They also enable the opposing party to know precisely the claim he or she is to meet and if need be, enable an out of Court settlement or a payment into Court. At the same time, pleadings enable the Court to know exactly what are the issues between the parties and what it is required to hear and determine...

124. However I am also mindful of what was said by Injia CJ in *Manwau v Trawen* (2009) SC1034 as to the role which the Court attributes to a statement of agreed and disputed facts and legal issues. His Honour said this at para. [7]:

... it is a matter in the entire discretion of the Court to admit or adopt the agreed Statement and whether the trial should be conducted in the manner outlined by the parties in the Statement. The Statement is merely to assist the

Court in identifying the facts and legal issues in dispute, to alert the judge to those matters so that the trial is conducted in a focused, expeditious and less costly manner. The facts and legal issues agreed to or dispute by parties as set out in a formal statement or orally presented by the parties at the trial, whether or not agreed to at the directions hearing do not remain so admitted for purpose of the trial unless the Court in the course of the trial so directs or orders.

125. In the present case, the issue of the legal effect of the Deed of Consent was raised as the last of the issues which BIL and the NCDC had agreed in the Statement should be determined at trial by the Court. This issue was addressed in the written and oral submissions made by counsel for BIL, and, after questioning by me, by counsel for the NCDC in his oral submissions.

126. The transcript for the trial shows that counsel for BIL Ms Kubak expressly referred to the issue of the validity or otherwise of the parties' Deed of Consent. This issue was mentioned by Ms Kubak in her oral submissions for the BIL, recorded at lines 35 to 37 on page 68 of the transcript. Ms Kubak then extensively addressed this issue at the conclusion of her written and oral submissions, including the following statement, based on her written submissions at paragraph [42], which appears at page 75 of the transcript:

MS KUBAK: Your Honour, in relation to the last issue, whether the BIL is estopped from claiming anything further from NCDC by virtue of the deed of consent executed on 15 December 2014, it is evident from the affidavit of Simon Vai that the BIL through its representative did execute a proforma deed of consent for the sum of K214,698 in answer to the BIL's invoice of [K]375,000. However, your Honour, it is our respectful submission that the BIL was procured by the defendant to discharge or release NCDCD from any further suit through misrepresentation after re-scoping of the project value and for the specific amount. The BIL's consent was obtained on the general belief that it would be paid the amount of K214,698 but instead the BIL was paid K193,228.22. I ask this Honourable Court to consider this fact in light of the documentation that is before the court and in relation to the dates of the deed of consent, the requisition and the cheque thereafter.

127. After hearing Ms Kubak's submissions for the BIL and Mr Boma's oral submissions in response for the NCDC, I expressly directed Mr Boma to address the Court on the issue of the validity and enforceability of the Deed of Consent as that issue was not covered in Mr Boma's written submissions. I refer to the following exchanges which took place between the Bench and Mr Boma, at pages 91 and 92

of the transcript:

HIS HONOUR: All right, I hear all of those submissions. I note from the Statement of Agreed And Disputed Facts and Issues that the last issue that was agreed between the parties for consideration by the Court was whether the BIL is estopped from claiming anything further from the National Capital District Commission by virtue of the Deed of Consent executed on 15 December 2014.

Mr Boma, your [written] submissions do not touch or address that issue. I would like you to speak very briefly on what you say the NCDC's position is in connection with the enforceability, validity or otherwise of that deed of consent.

MR BOMA: The only indication there, the evidence by the BIL is that that particular deed is for the Crystal Rapids project and if you look at the Deed of Consent itself, it has the amount [K]214,000 ...

HIS HONOUR: So what ...

MR BOMA:... which is the amount that was originally agreed to be paid but because of the withholding VAT tax, [K]192,000 plus was paid to the BIL. But the [K]214,000 there on the agreement itself gives indication to the court that is for the work, the Crystal Rapids Project because this is the amount that was agreed for the percentage of the work that was completed as reported by Mr Oapaisa for the Crystal Rapids project.

HIS HONOUR: So are you saying that the NCDC takes the position that that Deed of Consent is valid and enforceable by reference to the Crystal Rapids Project as a result of the parole evidence that was admitted into Court, rather than the absence of reference to the project within the body of the Deed itself?

MR BOMA: Yes

128. Despite Mr Boma's somewhat confused response and his erroneous reference to "VAT withholding tax" instead of withholding tax under the IRC's Tax Reporting System, the NCDC's position as put to me by Mr Boma is that the Deed of Consent signed by Mr Bani for BIL was binding on the parties and enforceable.

129. Turning to the legal principles which govern the validity and enforceability of deeds of release, I cite the following extract from the judgment of Injia CJ in *National Capital District NCDC v Yama Security Services Pty Ltd* (2003) SC707 at pp. 14-15:

Generally speaking, in cases where parties have reached a genuine settlement in a pending proceeding, courts should give due recognition and respect to such settlement. The court should not interfere with the compromise except in unusual or exceptional circumstances. Such exceptional circumstances are many and vary from case to case and it is not practical for me to provide an exhaustive list. I can give a few examples. These include the very situation such as in the present case, where a party disputes the validity or enforceability of the compromise on substantive grounds such as fraud, misrepresentation, illegality, or mistake as to the nature and extent of authority of representatives of a public authority.

130. In *Gene v Motor Vehicles Insurance (PNG) Trust* [1995] PNGLR 344 the plaintiff was an illiterate villager who signed a deed of release which released the MVIT for all liabilities in consideration for payment of a solatium of K600 for the death of the plaintiff's child in a motor vehicle accident. The MVIT sought to enforce the deed of release, the validity of which was challenged by the plaintiff. The Court held that the deed was unenforceable for this reason:

Whilst parties can always talk between themselves without lawyers, in the circumstances of PNG and by virtue of the disparity of education and understanding between the plaintiff and the defendant, I must find that the parties here are not on an equal footing. The plaintiff here is at a great disadvantage. I must find it is unconscionable for a plaintiff of the nature and sophistication of the Motor Vehicles Insurance Trust to negotiate directly with an illiterate villager without taking appropriate precautions to ensure that the villager understands his legal rights.

131. In the present case, the managing director of BIL, Mr Bani, is a reasonably well-educated businessman. He is not an illiterate villager. His demeanour and responses when in the witness box were those of a businessman who is able to understand the English language, even if he was not conversant with the NCDC's public procurement procedures under the *PFMA* in 2013. I find that Mr Bani well knew what he was signing and what the consequences of signing the Deed of Consent were. He signed the Deed of Consent of his own volition on behalf of his company, BIL.

132. Counsel for BIL Ms Kubak attempted to challenge the validity of the Deed

of Consent on the basis of alleged misrepresentation on the part of the NCDC. It was submitted that Mr Bani signed the Deed of Consent for BIL because Mr Bani believed that the NCDC would pay BIL a final amount of K214,698 without deduction in settlement of whatever claims BIL might have against NCDC for the Crystal Rapids Road Project arising from invoice no. BIL2013-0002, whereas when BIL received NCDC's settlement cheque on 24 December 2014 it was for K193,228.22, a short payment of K21,469.78. However, I find that the difference between these two amounts is readily explained,

133. The illegal contract for NCDC's engagement of BIL to undertake the Crystal Rapids Road Project came into existence on 8 August 2013. Mr Bani then caused BIL's immediate mobilization for this Project during most of the remainder of that month. Mr Bani submitted invoice no. BIL2013-0002 dated 23 August 2013 to the Works Division of the NCDC under cover of a letter from BIL of the same date. These are the documents which comprise annexure "F" to Mr Bani's affidavit. Invoice BIL2013-002 was for a total of K375,000 and stated that it was for "Patrol Grading to Sealing of Crystal Rapids Feeder Road. Being for Mobilization, Clear and Grubb" (underlining added). The invoice was supported by an NCDC document titled "Accomplishment Report for Services" dated 23 August 2013 prepared by Mr Maraga, NCDC Works Engineer (Roads). The Report, which was not signed by Mr Maraga, indicated that work carried out by BIL on the Project was at that stage 25% completed, K375,000 being one-quarter of the Project cost of K1.5 million.

134. Four months later, BIL received a cheque from the NCDC for K350,000 in payment of this invoice on 24 December 2013. This cheque was K25,000 short of the amount of K375,000 claimed in BIL's invoice. BIL then refused to do any further work on the Project until the outstanding difference of K25,000 was paid by the NCDC.

135. BIL continued to wait during 2014 for the NCDC to pay the shortfall of K25,000 from BIL's invoice, which Mr Bani insisted be paid by the NCDC before BIL would resume work on the Crystal Rapids Road Project. Matters came to a head in November 2014, which is when the NCDC's Senior Engineer Mr Oapaisa returned to the site and prepared a further report. Mr Oapaisa's report, which accompanied an internal memo he wrote to the NCDC's Deputy City Manager-Engineering Mr Vai, is part of annexure "N" to Mr Bani's affidavit. Mr Oapaisa's memo, which is dated 2 December 2014, unexpectedly stated that the extent of the work carried out by BIL for the Crystal Rapids Road Project as seen by Mr Oapaisa in November 2014 was only 14% completed, not 25% completed as had earlier been certified in the unsigned "Accomplishment Report for Services" dated 23 August 2013 purportedly prepared but unsigned by NCDC Works Engineer (Roads) Mr Maraga. Mr Oapaisa recommended in his report of 2 December 2014 to the

effect that BIL be paid an amount of K214,698, inclusive of 10% GST, in satisfaction of BIL's claim for K375,000 invoiced back on 23 August 2013. Mr Oapaisa indicated in his report, supported by photographic material and his own calculations, that if the Project were to be fully completed, the estimated cost of the roading works for the Crystal Rapids Road Project would need to be increased from K1.5 million to K2,026,321.

136. It is obvious from Mr Oapaisa's report of 2 December 2014 that he was unaware that BIL had already received on 24 December 2013 a cheque from the NCDC's Governor's Office for K350,000 in payment of most of BIL's invoice no. BIL2013-0002 dated 23 August 2013. A copy of that cheque from the NCDC dated 20 December 2013 is annexure "L" to Mr Bani's own affidavit.

137. Mr Bani deposes at paragraph [24] of his affidavit to the effect that based on Mr Oapaisa's estimated increase of the cost of the Crystal Rapids Road Project from K1.5 million to K2,026,321, "we agreed to start again after a payment of K193,228.20 was done by NCDC on the 24th December 2015." Mr Bani continues at para [25] of his affidavit:

25. We were ready to start work but Mr Simon Vai advised me to get a Purchase order first before doing any job. After going through all the mess with the first project ("Bomana Project"), I experienced difficulties in getting paid so was expecting the purchase order before starting but till now no purchase order was raised for the Plaintiff.

138. The evidence at trial, undisputed by BIL, showed that BIL received two cheques from the NCDC for the mobilization and preliminary works carried out by BIL for the Crystal Rapids Road Project. The first cheque was for K350,000 received by BIL from the Governor's Office on 24 December 2013. The second cheque was for K193,228.20 dated 23 December 2014 but it came from the Finance Division of the NCDC. The second cheque related to exactly the same mobilization and preliminary works covered by BIL's one and only invoice for the Crystal Rapids Road Project, namely invoice no. BIL2013-0002 dated 23 August 2013 for K375,000, on account of which BIL had already been paid K350,000 by the Governor's Office a year before.

139. A copy of the second cheque is annexure "J" to the affidavit of Mr Vai (Exhibit "C").

140. What is apparent is that Mr Bani entered into negotiations with certain officials of the NCDC in December 2014 to obtain further payment from the NCDC for the Crystal Rapids Road Project beyond the K350,000 received by BIL on 24

December 2013. This is what resulted in Mr Bani signing the settlement arrangement which is reflected in the Deed of Consent dated 15 December 2014, a copy of which is annexure “K” to Mr Vai’s affidavit.

141. The Deed of Consent clearly stated that the claimant was BIL and that the settlement related to BIL’s earlier claim for K375,000. The Deed did not recite the fact that BIL had already received a cheque from the NCDC for K350,000 on 24 December 2013 on account of BIL’s invoiced claim. Mr Bani, on behalf of BIL, agreed in the Deed that BIL’s claim, obviously a reference to invoice BIL2013-0002 dated 23 August 2013, “did not meet the NCDC’s documentary requirements” and that a payment for the sum of K214,698 would be paid in full satisfaction of BIL’s claim for K375,000. However, there was an important proviso to that payment being made. The text of the Deed continued, with Mr Bani representing BIL:

I hereby release and discharge NCDC from all actions, suites, causes of action, claims and demand whatsoever which I now have or at [any] time hereafter may have but tor the execution of this Deed could or might have had against NCDC.

I accept that there will no further payment for any reason other than this one and only final payment of K214,698.00. I further consent [sic] to NCDC that I do not have any other outstanding claims at the date of the deed apart from the one stated above.

I also agree to indemnify NCDC if my claim is proved to be incorrect.

I further agree to provide valid Certificate of Compliance or concur to have the agreed sum above taxed for business payment tax.

I also declare that I am familiar with English language and understood fully the contents of this Deed.

[underlining added]

142. I have already observed that Mr Bani in his capacity as the managing director of BIL presented at trial as a reasonably well-educated businessman. He is not an illiterate villager. His demeanour and responses when in the witness box were those of a businessman who is able understand the English language, even if he was not conversant with the NCDC’s public procurement procedures under the *PFMA* in 2013.

143. I find that Mr Bani well knew what he was signing when he placed his

signature on behalf of BIL on the Deed of Consent on 15 December 2014 and what the consequences of signing that Deed were. He signed the Deed of Consent of his own volition on behalf of his company, BIL. In so doing he agreed to the effect that BIL's claim for K375,000 in its invoice no. BIL2013-0002 being for "mobilization, clear and grub" of the feeder road at Crystal Rapids would be finalized as soon as BIL received payment from the NCDC of an amount of K214,698, subject only to BIL providing the NCDC with a valid Certificate of Compliance issued by the IRC so as to avoid the NCDC having to retain 10% of that settlement amount as withholding tax under the IRC's Tax Reporting System.

144. Mr Bani also well knew when he signed the Deed of Consent that BIL had already received the NCDC's cheque from the Governor's Office for K350,000 a year before on 24 December 2013, that payment having been made because of Mr Bani's protests against the NCDC's delayed payment of the company's invoice no. BIL2013-0002 dated 23 August 2013. I therefore find that Mr Bani deliberately failed to disclose this earlier payment of K350,000 to the NCDC in his negotiations with officials of the NCDC which gave rise to the Deed of Consent.

145. After signing the Deed of Consent on 15 December 2014, BIL had an obligation to produce to the NCDC a current Certificate of Compliance issued to the company by the IRC under its Tax Reporting System if the NCDC were to pay the full amount of K214,698 without deduction of 10% withholding tax of K21,469.80. BIL did not produce that Certificate of Compliance to the NCDC. It should therefore have come as no surprise to Mr Bani that the NCDC's cheque to BIL received by Mr Bani on 24 December 2014 was for K193,228.20. The deduction was made by the NCDC as per the proviso in that regard contained in the Deed of Consent.

146. Counsel for BIL argued that Mr Bani was induced to sign the Deed of Consent for BIL because Mr Bani believed the company would be paid an amount of K214,698 in one lump sum by the NCDC, but that BIL was instead only paid by K193,228.20 by the NCDC and was therefore short paid by K21,469.80. Counsel for BIL invited the Court to declare the Deed of Consent invalid for this reason. I reject this argument in its entirety. The Deed of Consent speaks for itself. BIL agreed "to provide [a] valid Certificate of Compliance or concur to have the agreed sum above taxed for business payment tax". NCDC's payment of the full amount of the settlement monies of K214,698 was expressly made conditional on BIL producing its Certificate of Compliance under the IRC's Tax Reporting System to the NCDC. Pending production of a valid Certificate of Compliance by BIL, the NCDC was entitled to retain the withholding tax of 10%, an amount of K21,469.80, from the settlement monies of K214,698.

147. Furthermore, I find it disingenuous of Mr Bani for him to have said in his

evidence that the reason BIL refused to do any further work on the Crystal Rapids Road Project after BIL received the NCDC's cheque for K193,228.20 on 24 December 2013 was because he was waiting on NCDC to issue a purchase order for the next phase of the Project. The reality is that Mr Bani was upset with the NCDC for having retained the withholding tax of K21,469.80 from the overall amount of K214,698 which BIL was wanting the NCDC to pay in full after Mr Bani had signed the Deed of Consent on 15 December 2014, notwithstanding that BIL was at that juncture unable or had failed to furnish the NCDC with a valid Certificate of Compliance for the company under the IRC's Tax Reporting System.

148. Annexed to Mr Bani's further affidavit filed on 19 June 2018 (Exhibit B) and marked "A" is a copy of BIL's Certificate of Compliance No. 043843219 issued by the IRC under its Tax Reporting System. However that Certificate of Compliance is in respect of the period 25 October 2017 to 25 April 2018. This Certificate of Compliance was not current for any period prior to 25 October 2017. There is no evidence before the Court that BIL ever produced that Certificate of Compliance to the NCDC. However if BIL had produced that Certificate to the NCDC after it was issued on 25 October 2017, BIL would in my view have then been entitled to receive from the NCDC payment of the amount of K21,469.80, being the amount of withholding tax which had been retained by the NCDC pursuant to its own statutory obligation to do so under the IRC's Tax Reporting System pending production of a then current Certificate of Compliance by BIL.

149. I accordingly find that the NCDC is required to account to BIL for the withholding tax of K21,469.80 which it has continued to hold for BIL given that there is now belated evidence that BIL obtained a Certificate of Compliance from the IRC for the period 25 October 2017 to 25 April 2018.

150. However, this does not explain BIL's refusal as from January 2015 onwards to proceed with the next phase of the Crystal Rapids Road Project, despite the *ex post facto* finding by this Court of the illegality of the contract for that Project due to the NCDC's non-compliance with public procurement requirements under the *PFMA*. Mr Bani asserted in his evidence that it was the NCDC which had breached the Deed of Consent by failing to pay the tax retention fund of K21,469.80 and that the NCDC had also breached the contract for the Project by failing to produce a purchase order for the next phase of the works outlined by Mr Oapaisa in his report to the A/City Manager Mr Alu dated 2 December 2014. Mr Bani did not know at that point in early 2015 that the contract was illegal, void and unenforceable. But I find that if BIL had resumed work on the Project in early 2015, BIL would still have been entitled to claim and be compensated for work performed by it for the Project under the equitable principles of restitution, *quantum meruit* and unjust enrichment, with consequential entitlement to damages for work actually performed. Instead, BIL, having already abandoned the Project as from early January 2014, simply

walked away from the Project after BIL received payment of K193,228.20 from the NCDC on 24 December 2014, wrongfully claiming that it was NCDC which had breached its contractual obligations to BIL for the Project.

151. I am reinforced in this finding by the evidence given by Mr Oapaisa in his affidavit filed on 15 June 2018 (Exhibit D). Mr Oapaisa deposes at para. 18 of his affidavit:

18. However, after the first and second payments worth over half a million kina, BIL did not continue the project and abandoned it. The second payment was after I conducted a review or investigation on the site as to how far the project had been completed. I noted there and then that BIL did not complete the project. It abandoned the project and decided not to do anything even long before the second payment. Thus, we are not obliged to pay BIL for works BIL never carried out as there is no agreement or contract between BIL and NCDC that BIL shall be paid before it shall do the Crystal Rapids road works.

152. Given this fact scenario, I find that it is BIL which was unduly enriched by its own failure to disclose in its negotiations with the NCDC which resulted in the Deed of Consent dated 15 December 2014 that BIL had already received K350,000 from the Governor's Office on account of the company's one and only invoice no. BIL2013-0002 for K375,00 for mobilisation and initial work performed by BIL during August 2013, with no further work on the Crystal Rapids Road Project having been carried out by BIL between September 2013 through to December 2014 or at any time thereafter. BIL is accordingly not entitled to liquidated damages, general damages or any other head of damages from the NCDC under any of the principles of restitution, *quantum meruit* or unjust enrichment on the part of the NCD for work which BIL did not perform.

Issue 5: What damages, if any, is BIL is entitled to for work it performed for the two Projects?

With reference to the Bomana Road Project, I have found that BIL is *prima facie* entitled to be compensated by the NCDC for the costs which BIL incurred for its mobilization and demobilization of machineries and equipment for this Project because of the representations made to Mr Bani by the late Mr Mauwe, who was the Project Coordinator for the Governor's Office.

153. Particulars of BIL's claims for its alleged costs of mobilization and demobilization for the Bomana Road Project and the Crystal Rapids Road Contract are pleaded at paragraph 24 of the company's amended statement of claim as

follows:

24. Particulars of Costs of Mobilisation and Demobilisation of Projects

Bomana Project

- (a) 26 units of Plant/equipment, material and associated labour, were mobilised and established on site over a total of 160 hours at the total costs of K961,720.00
- (b) Items in (a) were demobilised from site over a total period 30 hours at the total costs of K212,410.

Crystal Rapids Project

- (a) 6 units of Plant/equipment, material and associated labour, were mobilised and established on site over a total of 120 hours at the total costs of K73,880.00
- (b) Items in (a) were all demobilised from site over a total period 30 hours at the total costs of K19,490.00

154. However, no evidence at trial was adduced as to how these costs were calculated. No source documentation or banking records for the company were produced to the Court to verify any aspect of these purported costs. What was produced by BIL at trial were copies of 30 random invoices, without receipts, ranging in date from 23 January 2013 to 3 March 2015, which were annexed to Mr Bani's further affidavit filed on 19 June 2018 (Exhibit B). No attempt was made by BIL to properly link any of these invoices to the mobilization or demobilization costs allegedly incurred by BIL for the Bomana Road Project or the Crystal Rapids Project. The Court was expected to somehow make a connection between those random invoices and BIL's claims for its mobilization and demobilization costs for the two Projects as pleaded in BIL's amended statement of claim.

155. A cursory explanation for the absence of BIL's proper accounting documentation for the company's mobilization and demobilization claims was given at paragraph [5] of Mr Bani's further affidavit filed on 19 June 2018 (Exhibit B). This is what Mr Bani had to say:

- 5. Due to the breach of both Civil Works Contracts for the Bomana and

Crystal Rapids Project, the Plaintiff Company was locked out of its office and some of its documents and receipts of expenses incurred in the Plaintiff's operations were misplaced. Hence, only some receipts and documents have been retrieved whilst others remain missing to date.

156. I do not accept this facile explanation as being anywhere near satisfactory. Mr Bani deposed in paragraph [13] of his first affidavit that after Governor Parkop failed to attend the ground-breaking ceremony for the Bomana Road Project, which was to have happened at the end of April 2013, BIL rendered an invoice for that Project to NCDC. I infer from this evidence by Mr Bani that the invoice was in respect of BIL's mobilization and demobilization costs for the Bomana Project after Mr Mauwe told him in early May 2013 that the Project would not be going ahead due to lack of funding by the NCDC. If in fact BIL did render an invoice to the NCDC for its mobilization and demobilization costs for the Bomana Road Project, no attempt was made by BIL to produce a copy of that invoice in evidence. Even if it were true that BIL was unable to retrieve a copy of that invoice from its rented office after being locked out in May 2013 or June 2013, BIL should still have had an electronic record of that invoice in its computer records, alternatively BIL could have sought a copy of the alleged invoice from the NCDC by discovery on notice or by order for specific discovery directed to the NCDC under Order 9 of the *National Court Rules*. BIL did not do so.

157. BIL failed to produce any bank statements or other banking records to the Court at trial which could have assisted BIL's proof of payment of any of the copies of the 30 random invoices attached to Mr Bani's further affidavit. When I specifically asked Mr Bani during his cross-examination by counsel for the NCDC at trial if he had any bank records to substantiate payment of the copies of large value invoices and dockets attached to his further affidavit, page 11 of the transcript for 7 March 2019 shows that this is how Mr Bani replied:

HIS HONOUR: These are large item payments, have you got bank records showing that these have been paid?

MR BANI:

A: Yes.

Q: And are these bank records in your affidavit material?

A: Yes.

Q. Can you show me where?

A; I remember I got my bank statement and when I went to get a new bank statement my account was garnisheed.

Q. But your banks will give you copies of bank statements. I am asking you, is there anything in your affidavit material that show for example, that the invoice for [K]200,000 which is annexure R from – looks like – I cannot quite see it, but it looks like Ala Construction. That is an invoice for [K]200,000. Is there proof in your affidavit material through a copy of a bank statement to show that was ever paid?

A: Yes.

Q. And where is that bank statement in your affidavit material”

A: It is not attached but I can provide that.

Q. Well, this is your trial. I am concerned because that particular invoice shows that the company, Ala Construction, has given no GST number. It is not registered for GST and yet this is a huge amount, [K]200,000 that you are claiming. All right, next question, Mr Boma.

158. The copy of the purported invoice from Ala Construction for K200,000 which is annexure “R” to Mr Bani’s further affidavit and which I drew to Mr Bani’s attention during cross-examination by Mr Boma states that it is invoice # 2013/4-001 and is dated 19 April 2013. No GST has been allowed and no GST registration number for that company appears on the invoice. The description in the invoice for alleged services rendered by Ala Construction to BIL is given as “preperation [sic] of scoping, cost estimate and documentation of Bomana Police College Road”. No itemisation of hours spent or further description is given in Ala Construction’s invoice to justify the amount claimed for K200,000. The invoice bears the common seal of Ala Construction with an indecipherable signature endorsed over the seal. I reject this copy of Ala Construction’s invoice because it is obviously a document manufactured to support BIL’s claim against the NCDC for damages for expenses incurred by BIL in connection with the Bomana Road Project. Even if that invoice were genuine, which I say it is not, there is no proof adduced by BIL through banking records that the invoice was ever paid.

159. When Mr Boma continued his cross-examination of Mr Bani, the transcript shows at page 12 that Mr Bani was questioned regarding payment of an invoice

dated 2 April 2013 for K61,655 from a company named ISAS for the alleged supply to BIL of 7 x cement mixers, 3 x diesel water pumps, a 5 kva electricity generator, safety boots and signage. The copy of this invoice is annexure "P" to Mr Bani's further affidavit. I then put the following questions to Mr Bani regarding that invoice:

HIS HONOUR:

Q. Was it paid in cash or by cheque

MR BANI:

A:. Paid in cash.

Q: You had [K]60,000 in cash to pay?

A. Yes.

160. After further cross-examination by Mr Boma, the transcript shows at page 14 that Mr Bani made the following admission regarding BIL's failure to obtain copies of other invoices to support BIL's claim for damages after BIL was locked out of its rented office premises in May or June 2013:

MR BOMA:

Q. ... Have you taken any steps to obtain those documents by way of court order, coming to court to obtain those very crucial documents knowing that sooner or later you would file a claim in court and the documents would become necessary. Have you taken any steps of that sort?

MR BANI:

A: No.

Q: Why not?

A: Because the guy I was renting, that is in town, when we went back he was not there.

161. In these circumstances, where BIL has not provided the Court with any credible accounting documentation linked to the company's claim for its mobilization and demobilization expenses for the Bomana Road Project to prove those expenses, and as I have already ruled that the Deed of Consent entered into by BIL with the NCDC on 15 December 2014 was valid and that it settled BIL's claim for the company's mobilization expenses "and any other outstanding claims at the date of this deed" in respect of the Crystal Rapids Road Project, I conclude that no damages can be awarded to BIL for its wholly unsubstantiated claim pleaded in paragraph [24] of its amended statement of claim for mobilization and demobilization costs for the Bomana Road Project.

162. Had BIL adduced proper documentation in evidence at trial to support its claim for its mobilization and demobilization costs for the Bomana Road Project, those costs if established on the civil standard of proof could have been allowed in view of my finding that there was a *prima facie* entitlement on the part of BIL to claim those costs because of the representations made by the NCDC's Mr Mauwe. However the presentation of the case for BIL's claim for the costs for its mobilization and demobilization for the Bomana Road Project fell far below the degree of proof required.

Conclusion

163. In summary, I conclude that as no contract between BIL and the NCDC for the Bomana Road Project came into existence and as the contract between BIL and NCDC for the Crystal Rapids Road Project was illegal, void and unenforceable due to non-compliance by the NCDC with the public procurement requirements of the *PFMA*, no liquidated damages for breaches of contract alleged by BIL can be awarded against the NCDC.

164. Prior to settlement of BIL's invoice no. BIL2013-0002 dated 23 August 2013 by the Deed of Consent dated 15 December 2014 and receipt by BIL of the NCDC's cheque for K193,228.20 on 24 December 2014, BIL had already received an amount of K350,000 from the Governor's Office a year earlier on 24 December 2013 on account of exactly the same invoice for BIL's mobilisation costs and initial part performance of the contract for the Crystal Rapids Road Project. BIL is fortunate that in view of this double payment by the NCDC, no cross-claim or set-off in respect of that overpayment of K350,000 was ever pleaded or pursued by the NCDC in this proceeding. In the result, in retrospect BIL received the equivalent of a windfall of K350,000 from the NCDC over and above its claims made against the NCDC in this proceeding. BIL's claims for general damages for both Projects are dismissed, as is BIL's claim for the costs of its mobilization of equipment.

165. I find that the only entitlement to damages which BIL has against the NCDC in this suit is for the NCDC to be directed to account to BIL for the amount of K21,469.80 which the NCDC legitimately retained at the end of December 2014 on account of withholding tax from the settlement amount of K214,698 which the parties had agreed be paid by the NCDC to BIL pursuant to the Deed of Consent dated 15 December 2014. BIL failed at that time to comply with its obligation under the Deed of Consent to produce to the NCDC its then current Certificate of Compliance under the IRC's Tax Reporting System. That obligation on the part of BIL has now been belatedly complied with in that the company's Certificate of Compliance for the period 25 October 2017 to 25 April 2018 has been brought to the attention of the NCDC by reason of annexure "A" to Mr Bani's further affidavit filed on 19 June 2018.

166. Accordingly, there will be judgment for BIL such that the NCDC will be ordered to account to BIL for the sum of K21,469.80 representing the withholding tax which the NCDC has been holding for BIL pending production by BIL of a current Certificate of Compliance under the IRC's Tax Reporting System pursuant to BIL's obligation to do so under the parties' Deed of Consent dated 15 December 2014.

167. No interest will be awarded on the judgment amount of K21,469.80 under the *Judicial Proceedings (Interest on Debts and Damages) Act Chapter 52* because BIL took no steps to comply with its obligation to furnish the NCDC with a current Certificate of Compliance prior to the commencement of this proceeding on 11 October 2016.

168. As to BIL's claim for legal costs, I have found that there were substantial faults on the part of both BIL and NCDC in connection with the Bomana Road Project and the Crystal Rapids Road Project. I have ruled that BIL's claim for its mobilization and demobilization costs for the Crystal Rapids Road Project were settled by the Deed of Consent. Furthermore, I have found that BIL failed to present at trial any credible evidence in support of its claim for its mobilisation and demobilization costs for the Bomana Road Project. There is also what is in effect the windfall payment of K350,000 which BIL received from the Governor's Office. In these circumstances I consider it fair and just that each party should pay their own costs of and incidental to this proceeding.

ORDER

169. The terms of the formal Order of the Court are as follows:

- (1) The Second Defendant shall forthwith account to the Plaintiff for sum of K21,469.80 being the amount of withholding tax retained by the Second

Defendant pursuant to the parties' Deed of Consent dated 15 December 2014.

- (2) The Plaintiff's claims against the Second Defendant in this proceeding are dismissed.
- (3) Each party shall bear their own costs of and incidental to this proceeding.

Order accordingly

Kubak & Kubak: *Lawyers for the Plaintiff*

Boma Lawyers: *Lawyers for the First and Second Defendants*