

N10972

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (JR) NO. 131 OF 2023

BETWEEN:

**KALAPI TRANSPORT LIMITED TRADING AS KALAPI SCRAP &
BOTTLES**

Plaintiff

AND:

EASTERN HIGHLANDS PROVINCIAL EXECUTIVE COUNCIL

First Defendant

AND:

**HON SIMON SIA, GCL, LM, as Governor of Eastern Highlands Province
and Chairman of Eastern Highlands Provincial Executive Council**

Second Defendant

AND:

**ALLEN LOS as Eastern Highlands Provincial Administrator and
Chairman of Provincial Liquor Commission**

Third Defendant

AND:

EASTERN HIGHLANDS PROVINCIAL LIQUOR COMMISSION

Fourth Defendant

AND:

EASTERN HIGHLANDS PROVINCIAL GOVERNMENT

Fifth Defendant

Waigani: Purdon-Sully J
2024: 10 July & 23rd August

JUDICIAL REVIEW: Preliminary issue as to standing of applicant considered – Where plaintiff demonstrates a sufficient interest to seek judicial review – Whether there was a breach of the principles of natural justice in failing to accord the plaintiff the right to be heard before the making of the decision – Eastern Highlands Province Liquor Control Law 2015, ss 2(1) and 4(1)

Cases Cited:

Papua New Guinean Cases

PNG Pilots Association v Director of Civil Aviation [1983] PNGLR 1

Mondiai v Wawoi Guavi Timber Co Ltd [2007] SC886

Medaing v Gabut [2016] N6431
Steamships Trading Limited v. Garamut Enterprises Ltd (2000) N1959
David K Allolim v The Independent State of Papua New Guinea (2018) SC1735
Aquila Sampson v NEC and Ors (2019) SC1880
Mathew Sisimolu & 1 Or v Phillip Kende and Ors (2022) SC2267
Mari v Marape [2002] PGSC108; SC2311
Wapi v Kwa [2022] PGNC 597; N10362
Re Petition of MT Somare (No 1) [1981] PNGLR 265
Namah v Pato [1981] PNGLR 265
NTN Pty Ltd v Post & Telecommunication Corporation [1987] PNGLR 70
Arawe Logging Pty Ltd v. The State [1988-89] PNGLR 216
National Capital District Interim Commission v Crusoe Pty Ltd [1993] PNGLR 139
Manus Provincial Government v Kasou, The State and Jaha Development Corp Ltd [1990] PNGLR 395
Manufacturers Council of Papua New Guinea Inc v Commissioner General, Internal Revenue Commission [2003] PGNC 55; N2441
Kekedo v Burns Philp [1988-89] PNGLR 122
Karo v Ombudsman Commission of PNG [1985] PNGLR 348
Ilau v Somare [2007] N5511

Overseas Cases

Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Business Limited [1981] UKHL 2; [1981] 2 WLR 722
Council of Civil Service Unions v Minister of the Civil Service [1985] AC 374
Kioa v West (1985) 159 CLR 550
Sullivan v Department of Transport (1978) 20 ALR 323
Re Association of Architects; Ex Parte Municipal Officers Association of Australia (1989 HCA 13; (1989) 63 ALJR 298
Malloch v Aberdeen Corporation [1971] 2 All ER 1278

Legislation:

National Court Rules, Orders 16 Rule 1, 3(5)
Constitution, s59(2)
Eastern Highlands Province Liquor Control Law 2015. ss 2 (1), 4(1)
Liquor (Licensing) Act 1963
Distillation Act 1955

Counsel

Ms M Kispé, for the Plaintiff
Ms N Yomba, for the Defendants

DECISION

23rd August 2024

1. **PURDON-SULLY J:** This is an application for judicial review pursuant to Order 16 Rule 1 of the *National Court Rules (NCR)* and a Notice of Motion filed 6 March 2024 following the grant of leave on 5 December 2023.
2. The Plaintiff seeks judicial review of a decision numbered 1.3 in decision No 16 of 2023 by the First Defendant, certified by the Second Defendant in the meeting No 5 of 2023 on 29 September 2023, directing all manufacturers of alcohol to pack their products in can or other mediums of packaging other than bottle for sales and marketing purposes in the Eastern Highlands (**the decision**).

GROUNDS OF REVIEW

3. The Plaintiff raises three (3) grounds of review (see Statement Pursuant to Order 16 Rule 3 of the *NCR* filed 15 November 2024 at [12] to [19] and written submissions dated 10 July 2024 at [23] as follows:
 - a. Breach of natural justice, namely the decision was made without prior consultation and consideration of the views of the Plaintiff and others impacted by the decision;
 - b. *Ultra vires*, namely whether the First Defendant, chaired by the Second Defendant, had the power to make the decision;
 - c. Unreasonableness (*Wednesday* principle of unreasonableness).
4. The Plaintiff seeks the following relief:
 - a) An order in the nature of a declaration pursuant to Order 16 Rule 1(2) of the *NRC*, that decision numbered 1.3 of the First Defendant made on 29 September 2023 in special meeting No 5 of 2023, directing manufacturers of alcohol to pack their products in can or other medium of packaging other than bottle for sales and marketing purposes in Eastern Highlands Province is in breach of the principles of natural justice for the failure of the Defendants to consult or afford the Plaintiff and other impacted persons including the general public within Eastern Highlands, the opportunity to be heard prior to the imposition of the bottle ban, contrary to s 59 of the *Constitution*.
 - b) An order in the nature of a declaration pursuant to Order 16 Rule 1(2) of the *NRC*, that decision numbered 1.3 of the First Defendant made on 29 September 2023 in special meeting No 5 of 2023, directing

manufacturers of alcohol to pack their products in can or other medium of packaging other than bottle for sales and marketing purposes is *ultra vires* and of no legal effect in that the First Defendant does not have the power under the Eastern Highlands Province Liquor Control Law 2015 or any other law to direct, recommend or impose control measures relating to the packaging conditions of products of alcohol manufacturers that are produced within and/or outside the Eastern Highlands Province.

- c) An order in the nature of certiorari pursuant to Order 16 Rule 1(1) of the *NRC*, to bring into the National Court and quash the First Defendant's decision numbered 1.3 made on 29 September 2023 in special meeting No 5 of 2023, directing manufacturers of alcohol to pack their products in can or other medium of packaging other than bottle for sales and marketing purposes in Eastern Highlands Province effective from 16 November 2023.
- d) An order in the nature of mandamus pursuant to Order 16 Rule 1(2) of the *NRC*, requiring the Third Defendant to withdraw his notice issued 16 October 2023 to all manufacturers of alcoholic beverages in Eastern Highlands Province regarding the total ban on the sale and consumption of alcoholic beverages contained in bottles and to issue a notice of the Court's decision to quash the First Defendant's decision number 1.3 in Decision No 16 of 2023.
- e) That the First Defendant pay the costs of the Plaintiff of and incidental to these proceedings.
- f) Time of entry of these orders be abridged to the time of settlement by the Registrar which shall take place forthwith.

5. The Plaintiff's motion for judicial review is opposed by the Defendants who raise a preliminary issue as to the Plaintiff's standing to bring the application.

BACKGROUND FACTS

6. The Plaintiff, a company duly incorporated in Papua New Guinea (**PNG**) and certified to carry on business in PNG, conducts a business Kalapi Scrap & Bottles (6-328550) as a recyclable bottle buyer and re-seller to alcohol manufacturers such as SP Brewery Limited.

7. The Plaintiff is one of the biggest bottle buyers in the Highlands region with its main facilities and business based in Goroka, Eastern Highlands Province.

8. On 29 September 2023, the First Defendant passed Decision No 16 of 2023 in a special meeting No 5 of 2023 which resolved and endorsed new control measures for alcohol consumption, trading and packaging. There were four measures endorsed as follows:

- a. Recommended percentage for alcoholic content of any alcohol product sales in the province for consumption is set at 6% for health reasons.
- b. Period of sales of alcohol by retailers and wholesalers is (sic) commences from Monday – Thursday and Friday – Sunday is considered as liquor ban period.
- c. Manufacturers of Alcohol are directed to pack their products in can or other medium of packaging other than bottles for sales and marketing purposes.
- d. Liquor dealers operating in the province are given one month (October) grace period to adjust and comply to new alcohol control measures as implementation will take effect after grace period is over.

9. On 16 October 2023, the Third Defendant circulated Notices to all manufacturers of alcoholic beverages and the public, giving notice of the decision by the First Defendant to implement the new alcohol control measures effective a month thereafter, being 16 November 2023, in the following terms:

LIQUOR CONTROL ACT 2015

**NOTICE TO ALL MANUFACTURES OF
ALCOHOLIC BEVERAGES
IN EASTERN HIGHLANDS PROVINCE
TOTAL BAN ON THE SALE & CONSUMPTION OF ALCOHOLIC
BEVERAGES CONTAINED IN BOTTLES**

I, ALLEN LOS, Provincial Administrator & Chairman of the Provincial Liquor Licensing Commission and by virtue of the powers conferred upon me under the *Liquor Control Act 2015*, and in accordance with the *Provincial Executive Council Decision (PEC) No. 16/2023, Meeting No. 05/23*, I hereby declare that the sale and consumption of **ALL** forms of alcoholic beverages contained in **BOTTLES** will be **BANNED** in the

Province, and thereby direct the *Manufacturers*, including *Distributors*, *Wholesalers*, and *Retailers* to strictly comply with this *NOTICE*.

Pursuant to the above, the *Manufactures*, including *Distributors*, *Wholesalers* and *Retailers* are hereby further directed and given *ONE (1) MONTH* from the date of this *NOTICE* to dispose of (sell off) their current stock during this grace period. And *NO* further sale and consumption of the alcoholic beverages contained in *BOTTLES* will be allowed after the grace period is over.

ALLEN LOS

Provincial Administrator &
Chairman – Provincial Liquor Licensing Commission

Dated this 16th day of October 2023

10. It is unchallenged that, at all material times, there was no dialogue between the Defendants and the Eastern Highlands community, including the Plaintiff, and other parties who would be affected by the bottle ban.

11. On 6 November 2023, the Plaintiff through its lawyers, Leahy Lewin Lowing Sullivan Lawyers (LLS), caused a letter to be sent to the First, Second and Third Defendants informing them of its concerns regarding the ban on bottled packaging of alcohol and the effect it would have on the Plaintiff's business, other relevant persons, and the general community at large who depend on bottle recycling for a living.

12. The letter further requested that the Defendants reconsider the ban on bottles and that the First Defendant's decision numbered 1.3 of its Decision No. 16 of 2023 be amended accordingly.

13. No substantial response was received from the Defendants which led to the commencement of this proceeding.

14. By Court order of 5 December 2023 entered on 7 December 2023, leave was granted to judicially review the decision and the decision was stayed pending the substantive determination. The Defendants were also restrained from implementing and enforcing the decision.

THE ISSUES

15. The Defendants raise as a preliminary issue whether the Plaintiff has sufficient legal standing to seek judicial review.

16. If the answer is yes to that question, then the following issues arise for the Court's consideration:

- a. Did the Defendants breach principles of natural justice under section 59(2) of the *Constitution* by imposing a ban on bottled packaging of alcoholic products without consulting the Plaintiff and others impacted by the decision?
- b. Did the First Defendant, chaired by the Second Defendant act *ultra vires* in its powers in making the decision contrary to s 2 (1) and s 4(1) of the *Eastern Highlands Province Liquor Control Law 2015 (EHP Liquor Control Law)* or was the decision within its powers pursuant to s 83(1) of *EHP Liquor Control Law*?
- c. Was the First Defendant's decision to impose a total ban on bottled packaging of alcoholic products so unreasonable that no reasonable authority could have made it?

DOES THE PLAINTIFF HAVE LEGAL STANDING?

The Arguments

17. It is submitted on behalf of the Defendants that the Plaintiff does not have legal standing to seek judicial review because:

- a. The Plaintiff is not a trading house or distributor or manufacturer as envisaged under Section 2 (1) of *EHP Liquor Control Law* and therefore the duty to afford it natural justice and the right to be heard does not extend to it. This is because, s 2 (1) of the *EHP Liquor Control Law* relied upon by the Plaintiff applies to the sale, distribution, possession or manufacture of liquor and those who hold a valid liquor license under the *Liquor (Licensing) Act 1963* or the *Distillation Act 1955* for the sale, distribution, possession or manufacture of liquor.
- b. The Plaintiff:
 - (i) is not a seller, distributor or manufacturer of liquor/alcohol beverages.
 - (ii) is not a licensee under the *Liquor (Licensing) Act 1963*, the *Distillation Act 1955* or the *EHP Liquor Control Law* to operate as a seller, distributor or manufacturer of liquor.
 - (iii) is not a consumer of liquor/alcoholic beverages.

(iv) is a business which operates as a recyclable-bottle buyer and reseller to alcohol manufacturers, the Plaintiff's interest is the end product after the liquor is consumed by the consumer of the product.

b. The particular groups to which the *EHP Liquor Control Law* apply are not challenging the decision and while a duty to accord natural justice exists, it exists with respect to those particular groups who are not seeking to challenge the decision.

18. It is submitted on behalf of the Plaintiff that it has demonstrated a sufficient interest or standing to bring the proceedings by reference to the tests outlined in *Wapi v Kwa* [2023] PGNC 957; N10362 as follows:

a. The Plaintiff has shown actual or apprehended injury or damage as the decision affects its business and/or economic interests.

b. The Plaintiff has *locus standi* by reference to a sufficient interest in the matter which may not necessarily be a right and whether it is a trading house or distributor or manufacturer as envisaged under Section 2 (1) of the *EHP Liquor Control Law* is irrelevant to the question of whether it has demonstrated a sufficient interest.

c. The Court has expanded the categories or situations in which those aggrieved by a decision has standing.

d. The concept of *sufficient interest* is a mixed question of fact and law and the degree of the relationship between the Plaintiff and the subject matter of his complaint. In this case the Plaintiff is not challenging the entirety of the decision made by the First Defendant but only decision 1.3 in relation to the ban of bottles or bottle packaging of alcohol. It is that decision that has a direct consequence for the Plaintiff's business being a major component of that business.

e. The Court should not too readily exclude a challenge by a citizen on the grounds of a lack of a direct person interest or right.

19. Other preliminary objections raised on behalf of the Plaintiff were addressed and dismissed during the course of the hearing and do not require consideration.

The Legal Principles

20. Before an individual or body may institute an application for judicial review, they must demonstrate they have standing (*locus standi*). Standing goes to whether the Plaintiff, who is challenging the decision, is a proper party to seek the Court's adjudication on the matter. It is a principle required to be satisfied for the grant of leave and one that finds expression in Order 16 Rule 3(5) of the *NCR*.

21. The fact that the requirement of standing was met by an applicant when granted leave for judicial review, does not prohibit the issue of standing being raised at the substantive hearing stage.

22. What constitutes *sufficient interest* is not defined in the *NCR*. However, on authoritative pronouncement, a person will have standing if they have a "real" or "*sufficient interest in the matter to which the application relates*" (*PNG Pilots Association v Director of Civil Aviation* [1983] PNGLR 1; *Mondiai v Wawoi Guavi Timber Co Ltd* [2007] SC886; *Medaing v Gabut* [2016] N6431).

23. In light of the submissions made on behalf of the Defendants, in my respectful view, it is helpful to commence this discussion by revisiting Lord Denning's classic statement on standing in *Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Business Limited* [1980] 2 All ER 378, a decision followed in this jurisdiction, where at 389 & 390 His Lordship defined *sufficient interest* in this way:

To that I answer, as many statutes have done in similar situations: any person aggrieved by the failure of a public authority to do its duty has a sufficient interest.

On this review of the authorities, I would endorse the general principle stated by Professor H W R Wade QC in his *Administrative Law* (4th ed) 1977 at 608). He says that:

"It (the law) should recognise that public authorities should be compellable to perform their duties, as a matter of public interest, at the instance of any person genuinely concerned; and in suitable cases, subject always to discretion, the court should be able to award the remedy on the applicant of a public spirited citizen who has no other interests than a regard for the due observance of the law".

[Underlining for discussion purposes]

24. His Lordship then went on to say at [391], with reference to the matter before him:

So I come back to the question: have the self-employed and small shopkeepers, through their association a “sufficient interest” to complain of this amnesty? Have they a genuine grievance? Are they genuinely concerned? Or are they mere busy bodies? The matter is to be decided objectively. A “busy body” is one who meddles officiously in other people’s affairs. He convinces himself, subjectively, that there is a cause for grievance when there is none. He should be refused. But a man who is genuinely concerned can point, objectively, to something that has gone wrong and should be put right. He should be heard.

[Underlining for discussion purposes]

25. In *Steamships Trading Limited v. Garamut Enterprises Ltd* (2000) N1959. Sheehan J said:

Sufficient interest is essentially a mixed question of fact and law, a matter of fact and the degree of the relationship between the Plaintiff and the subject matter of his complaint. Generally, a Plaintiff will have standing if he can show that he has reasonably arguable claim that by an invalid exercise of statutory power, some private right in law has been affected or that he has suffered some prejudice. But the right to invoke the Court’s supervisory jurisdiction is not restricted to protection of personal rights only. It can extend to more public issues. A broad brush analogy may be drawn with the status of citizen witnessing an indictable offence being committed. He has no legal obligation to intervene or to stop that offence but he does have the status to affect a citizens arrest.

In determining standing, Court decisions in this country lean strongly towards the granting of status to citizens seeking to complain of what is seen as breaches of laws of the country. In brief the decisions show an inclusive rather than an exclusive view of applicants with standing, holding that challenges by citizens to the validity of decisions of statutory or public authorities should not too readily be excluded from the Courts on grounds of lack of direct personal involvement. Very often determination of standing is only possible with an examination of the complaint itself.

26. That exposition of the law has been cited and approved by the Supreme Court in a number of authorities in this jurisdiction (See for example, *David K Allolim v The Independent State of Papua New Guinea* (2018) SC1735, *Aquila Sampson v NEC and Ors* (2019) SC1880, *Mathew Sisimolu & 1 Or v Phillip Kende and Ors* (2022) SC2267; *Mari v Marape* [2002] PGSC108; SC2311).

27. A more recent consideration of the authorities and relevant legal principles on the subject was outlined in *Wapi v Kwa* [2022] PGNC 597; N10362 (23 November 2022) where Kandakasi DCJ at [20] said as follows:

There is a large body of case law clearly establishing the principles governing the issue of a person's locus standi or standing to bring judicial review proceedings. Firstly, locus standi is a threshold issue which must be determined first: See Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Business Limited [1981] UKHL 2; [1981] 2 WLR 722 per Lord Diplock, as adopted and applied in Jim Kas v. Sevua (2000) N2010 by Sakora J. Secondly, depending on the nature of the relief being sought, a plaintiff will in general have locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interests and perhaps to his social or political interests: See Australian Conservation Foundation Inc. v. Commonwealth of Australia (1980) 146 C.L.R. 493; 54 A.L.J.R. 176, per Mason J; Papua New Guinea Air Pilots Association v. The Director of Civil Aviation and the National Airline Commission trading as Air Niugini [1983] PNGLR 1, per Andrew J. Thirdly, the cases are various and so much depends in each case on the nature of the relief sought because, what is sufficient interest in one case may be less than sufficient in another: See Robinson v. The Western Australian Museum (1977) 138 C.L.R. 283, per Mason J. Fourthly, the Courts have on many occasions expended (sic) the categories or situations in which a person could have locus standi simply by reference to having 'sufficient interest' in the matter, which may not necessarily be a right: See NTN Pty Limited v. The Board of Post & Telecommunications Corporation [1987] PNGLR 70, per Wilson J; Arawe Logging Pty Ltd v. The State [1988-89] PNGLR 216, per Brunton AJ; and National Capital District Interim Commission v. Crusoe Pty Ltd [1993] PNGLR 139, per Brunton J. Fifthly, the concept of "sufficient interest" is essentially a mixed question of fact and law and the degree of the relationship between the Plaintiff and the subject matter of his complaint. Generally, a plaintiff will have standing if he can show that he has a reasonably arguable claim that by an invalid exercise of statutory power, some private right in law has been affected or that he has suffered some prejudice: see Steamships Trading Limited v. Garamut Enterprises Ltd (2000) N1959, per Sheehan J as endorsed by the Supreme Court in Aquila Sampson v. NEC (2019) SC1880, per Anis J with Kassman and Toliken JJ agreeing; David Kabomyap Allolim v Biul Kirokim (2018) SC1735, per Batari J, David & Frank JJ. Sixthly, the right to invoke the Court's supervisory jurisdiction is not restricted to protection of personal rights. It can extend to more public issues. In determining standing, Court decisions in our jurisdiction lean strongly towards the granting of locus standi to

citizens seeking to complain of what is seen as breaches of laws of the country: See Steamships Trading Limited v. Garamut Enterprises Ltd (supra), endorsed by the Supreme Court in Aquila Sampson v. NEC (supra). Finally, the relevant decisions on point show an inclusive rather than an exclusive view of applicants with standing, holding that, challenges by citizens to the validity of decisions of statutory or public authorities should not too readily be excluded from the Courts on grounds of lack of direct personal interest or right. Very often determination of standing is only possible with an examination of the complaint itself: Steamships Trading Limited v. Garamut Enterprises Ltd (supra) as endorsed by the Supreme Court in Aquila Sampson v. NEC (supra).

Consideration

28. Applying the above principles to the facts of this case, I am satisfied that the Plaintiff has standing to bring these proceedings and that the Defendants' objections to the contrary must fail. My reasons are as follows:

- a. The Plaintiff is not required to demonstrate the right or same interest as a manufacturer, distributor, wholesaler, and retailer of alcoholic beverages to whom the notice was directed or hold a trading licence to seek judicial review (see *Steamships Trading Limited v. Garamut Enterprises Ltd (supra)*; *Re Petition of MT Somare (No 1)* [1981] PNGLR 265 (**Somare No 1**); *Namah v Pato* [2014] SC 1304 (**Namah**)). It may be sufficient for the Plaintiff to show that as a consequence of a decision of an authority exercising public power it has suffered a prejudice. For example, if one looks at the authorities, on point, referred to in *Wapi v Kwa (supra)*:
 - (i) In *NTN Pty Ltd v Post & Telecommunication Corporation* [1987] PNGLR 70, the Court held that even though the applicant, a holder of a television broadcasting licence, had no legal right infringed if the licencing authority acted lawfully in granting a licence to a competitor, the applicant's commercial interests were deemed to be so affected by the appearance of an alternative broadcaster that it was held to constitute a sufficient interest to which the application related.
 - (ii) In *Arawe Logging Pty Ltd v. The State* [1988-89] PNGLR 216, although the first plaintiff company was not a party to the Timber Rights Purchase Agreement between the second plaintiffs and the State, the company was held to have

sufficient interest in the matter to dispute the issue of a timber licence to another company.

- (iii) In *National Capital District Interim Commission v Crusoe Pty Ltd* [1993] PNGLR 139, the plaintiff was found to have no property rights in the subject land, yet it was found to have a sufficient interest to seek a review of a ministerial decision to approve a grant of a lease to the respondent.
- b. The Plaintiff has evidenced a sufficient interest or, on the plain meaning of the word, “enough of an interest” to complain about the bottle ban and to inquire whether due process was followed before it was introduced. Put another way, the Plaintiff does not present as a meddlesome “busy body” or someone without a genuine concern or grievance (*Inland Revenue Commissioners; ex parte National Federation of Self-Employed and Small Business Limited* ((*supra*); *Mondiai v Wawoi Guavi Timber Co Ltd* (*supra*)).
- c. In considering its complaint, the Plaintiff, a recyclable-bottle buyer and reseller to alcohol manufacturers has demonstrated a *bona fide* connection between its interest and the decision, one that presents as having a direct or apprehended injury or damage to its business and/or economic interests, an interest the Court should properly recognise. For example, the Plaintiff’s Director, Mark Sinclair Lundy, in his affidavit filed 15 November 2023 at [11] - [13] gives the following evidence:
 - 11. KTL is one of the biggest bottle buyers in the Highlands region with its main facilities and business being based in Goroka. The bottle ban will essentially put KTL out of business as the main source of recyclable bottles are those from SP Brewery Limited’s products.
 - 12. KTL generates an approximate annual net revenue of K2.5 million.
 - 13. Once the bottle ban comes into effect, KTL as well as other parties in the same business will suffer substantial economic loss.
- d. Putting to one side whether there is persuasive or any evidence adduced to support the contentions made, whether on the submissions of the Defendants the Plaintiff is able to continue to recycle cans instead of bottles such that “*it’s not a total loss to the*

Plaintiff”, whether it can conduct its recycling business outside of the Province or not, whether other provinces have introduced a “beer ban”, whether licence holders and others to whom the notice was directed have failed to challenge the decision and, finally, whether the intent behind the decision is a good one made in the public interest, is not persuasive of a conclusion that the Plaintiff has failed to demonstrate a sufficient interest or right to invoke the Court’s supervisory jurisdiction.

- e. The approach of the Defendants is a restrictive and exclusive one, the need for an open, liberal and inclusive response to standing clear on the authorities (see *Namah* at [30], [38] & [39]; *Mari v Marape* (supra) at [61] – [64]. As earlier observed, the Courts have long recognised that even a public-spirited citizen without a direct legal interest, may seek judicial review in a public interest matter (*Mondiai v. Wawoi Guavi Timbers Co. Ltd* (supra) at [79]; see also *Somare (No 1)*; *Manus Provincial Government v Kasou, The State and Jaha Development Corp Ltd* [1990] PNGLR 395). In the present case, on the evidence, the Court is able to comfortably conclude that the Plaintiff’s private interests are sufficiently impacted by the decision to ground its complaint in judicial review.
- f. The decision of *Manufacturers Council of Papua New Guinea Inc v Commissioner General, Internal Revenue Commission* [2003] PGNC 55; N2441, relied upon by the Defendants, is, respectfully, distinguishable on its facts. Firstly, there were procedural issues to do with the Originating Summons and Notice of Motion before the Court and the named parties. Secondly, in considering the relationship between the Plaintiff and the subject matter and complaint, the Court found that the Plaintiff had no financial interest in the matter. It was acting in a representative capacity. Unlike the Plaintiffs in the present case, it was not engaged in a business that was directly affected by the decision under review. Relevantly, what constitutes a sufficient interest in one case may be less than sufficient in another.

29. In summary, on an objective assessment of the evidence, I find that the impacts on the Plaintiff’s business as a consequence of the decision is sufficient enough to establish that it has a *sufficient interest* in the matter.

30. Having so determined I now turn to the Plaintiff’s grounds of review. There is no dispute that the Plaintiff raises recognised grounds of judicial review, namely breach of natural justice, *ultra vires* and unreasonableness (*Wednesbury*) (*Council of Civil Service Unions v Minister of the Civil Service*

[1985] AC 374; *Kekedo v Burns Philp* [1988-89] PNGLR 122; see also Order 16 Rule 13(1)).

BREACH OF NATURAL JUSTICE

31. It is submitted on behalf of the Plaintiff that the First Defendant breached s 59(2) of the *Constitution* by failing to consult the Plaintiff and other impacted persons or businesses and the general community at large who depend on bottle recycling thereby affording them an opportunity to be heard prior to the making of the decision by the First Defendant and circulation of the Notices by the Third Defendant. The minimum requirement of natural justice is the duty to act fairly and be seen to act fairly.

32. It is further submitted that the First, Second and Third Defendants did not provide any substantive response to the Plaintiffs request for reconsideration of an amendment to the decision to allow for only recyclable bottles.

33. The submissions on behalf of the Defendants are primarily linked to its submissions on standing. It is submitted that the principle of natural justice should not be accorded to the Plaintiff as it did not have a right or interest as a manufacturer, distributor, retailer or wholesaler of liquor/alcohol beverages, the Plaintiff a mere third party who benefited from the packaging of liquor products. It is submitted that the right to natural justice under s 59 of the *Constitution* in the context of this case can only be utilised by the Plaintiff if the Plaintiff has the right as a licensee under the *Distillation Act, Liquor (Licencing Act)* and *EHP Liquor Control Law*. Only a right conveyed under any of these laws would qualify the Plaintiff to claim a breach of natural justice.

Consideration

34. Amongst the grounds of review listed in Order 16 Rule 13 of the *NCR*, natural justice or procedural fairness is the duty to act fairly in decision-making where the exercise of statutory powers may affect an individual's rights, interests or legitimate expectations subject only to the clear manifestation of contrary statutory intention (*Kioa v West* (1985) 159 CLR 550 per Mason J at p 582, citing with approval Deane J in *Sullivan v Department of Transport* (1978) 20 ALR 323 at p 343).

35. The right to procedural fairness includes the right that a party be given a reasonable opportunity to be heard and present its case before a decision is made (*Re Association of Architects; Ex Parte Municipal Officers Association of Australia* (1989 HCA 13; (1989) 63 ALJR 298 per Gaurdon J at p 305; *Karo v Ombudsman Commission of PNG* [1985] PNGLR 348 per Sheehan J; *Ilau v Somare* [2007] N5511 at [66]). It is a right generally understood, one fundamental to the concept of fairness or just treatment.

36. It is a right that is an integral part of the underlying law of Papua New Guinea, the minimum requirement of which is expressly recognised by s 59 of the *Constitution that provides for “the duty to act fairly, and, in principle, to be seen to act fairly”* (*Kaiyo v Pawa* [2015] SC1469 at [26]).

37. The importance of a decision-maker in ensuring procedural fairness which includes the right to be heard cannot be overstated. As Cunnings J said in *Ila v Somare* (supra), the right to be heard is “...*special – something to be cherished in a society built on principles of fairness, decency and democracy*”. As Lord Denning described it, the right to be heard is “... *the most elementary protection of all...*” (*Malloch v Aberdeen Corporation* [1971] 2 All ER 1278).

38. Applying these principles to the facts of this case:

- a. It is not in contest that there was no dialogue between the Defendants and the Eastern Highlands community, including the Plaintiff, and other parties who would be affected by the bottle ban before the making of the decision. It is clear from annexures A1 to A5 of the affidavit of the Second Defendant filed on 22 March 2024 that no thought was given to the need to ensure fair process including the right to be heard was accorded to relevant stakeholders before the decision was made. The decision was made on 29 September 2023, the Third Defendant circulating public notices of the decision on 16 October 2023 notifying the public of the implementation of the control measures within a month, being 16 November 2023. On the evidence of Mr Lundy, he only became aware of the decision on about 26 October 2023 by way of a WhatsApp message from a contact in his network. On his evidence he was unaware of any dialogue between the Defendants and the Eastern Highlands community, his company or the other parties affected by the bottle ban.
- b. The Plaintiff, whose interests were likely to be affected by the decision, had a right to reasonable notice of it and a reasonable opportunity to be heard before the decision was implemented. That right was denied. Meeting that right and meeting the public interest did not present as mutually exclusive outcomes. There is no evidence that permitting the Plaintiff and others to take the best advantage of the opportunity to put a case before the decision was made would have significantly and adversely impacted the public interest or that the form of protections the Defendants sought to implement would have been less effective as a consequence.

- c. There is no evidence of an express provision in the relevant enabling legislation that excluded the Plaintiff's right to be heard.

39. It cannot be reasonably doubted that the intent of the control law was to serve the public interest, one that arose from a public outcry of alcohol related violence and public health safety within the province. However judicial review is not concerned with the merits of the decision made, rather the decision-making process (*Kekedo (supra)* per Kapi DCJ (as he then was) at [124]). Good intentions and a positive public outcome do not entitle a branch of government or public authority in the exercise of its public duties to ignore a constitutional right to fair process. The end, no matter how laudatory, cannot justify the means, in this case, a failure to accord the Plaintiff a right to be heard on a matter that affected its interests.

40. This ground of review is upheld.

CONCLUSION AND ORDERS

41. The upholding of the first ground of review as pleaded being dispositive of the application before the Court, it is not necessary to consider the other grounds.

42. The Plaintiff seeks remedies by way of declaration, certiorari and mandamus. No submissions were made on behalf of the Defendants to suggest that the relief was not open or should not be made in the event that the Plaintiff's review was upheld.

43. In its discretion, the Court determines that the remedy of declaration and certiorari should be granted being relief available to the Plaintiff where the procedure leading to the decision is vitiated by a failure to observe natural justice. A decision that violates natural justice is an excess of jurisdiction. The decision was, accordingly, *ultra vires* or beyond the power of the First Defendant to make. There is no evidence to suggest that the Plaintiff's conduct would negate the granting of that relief.

44. Further, in the Court's discretion, the order of mandamus should also be granted. The relief sought will restore the Plaintiff to a situation before the issuing of the notice on 16 October 2023.

45. Costs should be paid by the Defendants on a solicitor and client basis given the attempt by the Plaintiff to resolve the matter at the earliest and the lack of evidence of meaningful engagement by the Defendants to the communications from LLLS.

46. The Court makes the following orders:

- 1) An order in the nature of a declaration pursuant to Order 16 Rule 1(2) of the *National Court Rules 1983*, that decision numbered 1.3 of the First Defendant made on 29 September 2023 in special meeting No 5 of 2023, directing manufacturers of alcohol to pack their products in can or other medium of packaging other than bottle for sales and marketing purposes in Eastern Highlands Province is in breach of the principles of natural justice for the failure of the Defendants to consult or afford the Plaintiff and other impacted persons including the general public within Eastern Highlands, the opportunity to be heard prior to the imposition of the bottle ban, contrary to s 59 of the *Constitution*.
- 2) An order in the nature of a declaration pursuant to Order 16 Rule 1(2) of the *National Court Rules 1983*, that decision numbered 1.3 of the First Defendant made on 29 September 2023 in special meeting No 5 of 2023, directing manufacturers of alcohol to pack their products in can or other medium of packaging other than bottle for sales and marketing purposes is *ultra vires* and of no legal effect.
- 3) An order in the nature of certiorari pursuant to Order 16 Rule 1(1) of the *National Court Rules 1983*, to bring into the National Court and quash the First Defendant's decision numbered 1.3 made on 29 September 2023 in special meeting No 5 of 2023, directing manufacturers of alcohol to pack their products in can or other medium of packaging other than bottle for sales and marketing purposes in Eastern Highlands Province effective from 16 November 2023.
- 4) An order in the nature of mandamus pursuant to Order 16 Rule 1(2) of the *National Court Rules 1983*, requiring the Third Defendant to withdraw his notice issued 16 October 2023 to all manufacturers of alcoholic beverages in Eastern Highlands Province regarding the total ban on the sale and consumption of alcoholic beverages contained in bottles and to issue a notice of the Court's decision to quash the First Defendant's decision number 1.3 in Decision No 16 of 2023.
- 5) That the Defendants pay the costs of the Plaintiff on a solicitor client basis to be agreed or taxed.
- 6) Time of settlement of the Orders be abridged to the time of settlement by the Registrar which shall take place forthwith.

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