SC2798

PAPUA NEW GUINEA
[SUPREME COURT OF JUSTICE]

SCA 79 OF 2023 (IECMS)

NOAH AOTE, TIKI LIMBAO & OTHERS
Appellants

V

NATIONAL CAPITAL DISTRICT COMMISSION
Respondent

WAIGANI: ANIS J, CARMODY J, KOSTOPOULOS J
30 SEPTEMBER, 4 NOVEMBER 2025

SUPREME COURT APPEAL – Appeal against declaratory orders – appellants sought declaratory relief to declare application of various provisions of the Employment Act Chapter No. 373 including ss.10(1) and 15(1) to apply to them as employees of the respondent – trial Judge dismissed the proceedings – main premise of dismissal based on want of controversies found in the proceedings – appellants aggrieved and appealed – consideration – whether trial judge erred in finding lack of controversies – requirement to consider the submissions of both parties - ruling

EMPLOYMENT ACT – Interpretation of Section 3(1)(b) – Air Niugini v Salter case – Application of Section 19 – Employment Contract in Breach of Act – No evidence of labour officers appointed by Secretary – No endorsement from employer certifying that employees read, understood and agreed to the terms and conditions of employment contract

CONTRACT LAW – Validity of contract under statute

Cases cited

Abiari v. The State [1990] PNGLR 250

Motor Vehicles Insurance (PNG) Trust v. Etape [1994] PNGLR 596
Juveniles AL & BIL v The State [2025] N11384
Kawage v. State (2022) SC2241
Andy Kapinias v. O&G Niugini Ltd and Ors (2018) N7486
Amos Ere v. National Housing Corporation (2016) N6515
Ok Tedi Mining Ltd v. Niugini Insurance Corporation and Others (No 2) [1988-89] PNGLR 425
Placer Dome (PNG) Ltd v. Yako (2011) N4691
Independent State of Papua New Guinea v. Central Provincial Government (2009) SC977
Dr. Onne Rageau v. Kina Finance Ltd (2015) N6175
National Fisheries Authority v. New Britain Resources Development Ltd (2009) N4068
Pako F&C Holdings PNG Limited v. PNG Sustainable Development Program Limited and 1 Or (2025) N11204
ExxonMobil (PNG) Ltd v. Halimbu Lembo and 2 Ors (2024) N10919
Air Niugini v. Salter (2001) SC 679
Leo v Nepe [2024] PGNC 352
Petrus v Telikom Limited (2008) N3373
Pius Pundi v Chris Rupen (2015) SC1430
Magini v Central Provincial Government [2003] PGNC 45
Rage v Rageau (2020) SC1971
Carltona v Commissioner of Works [1943] 2 All ER 560
Constructions, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1
Hadley v Baxendale [1854] EWHC J70
Pearks v Moseley (1880) 5 App.Cas 714
*Project Blue Sky, Inc. v. Australian Broadcasting Authority (*1998) 194 CLR 355
SZTAL v Minister for Immigration and Boarder Protection [2017] HCA 34; 262 CLR 362 91; ALJR 936 347; ALR 405
The Institute of Patent Agents v Lockwood [1894] AC 347
The Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd [1921] 2 AC 438
Woollett v Minister of Agriculture & Fisheries [1955] 1 QB 103
WorkPac Pty Ltd v Rossato [2021] HCA 23
ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2

Counsel

R G Otto for the appellants
J Ules for the respondent

1. **ANIS J &CARMODY J**: The appellants were plaintiffs in a National Court proceeding, *OS 287 of 2021 – Noah Aote and Tiki Lambao and Ors v. National Capital District Commission* (**OS 287 of 2021**). They are former and current drivers and bus crew employees of the respondent. They all signed short term standard employment contracts which were renewable yearly subject to performances and other conditions that were or are stipulated in the contracts.

2. According to their Amended Originating Summons filed 24 February 2022 (**AOS**), the appellants sough the following main relief:

1. *A declaration that according to ss. 10(1) and 15(1) of the Employment Act, a casual employee is an employee who is employed by the same employer for more than six (6) days in any one month and is deemed to be an 'oral contract employee' of his employer.*
2. *Consequential to the declaration sought in paragraph 1 above, the plaintiffs who are employed by the defendant on contract for one (1) year are not casual employees but permanent employees and therefore are entitled to receive allowances and benefits that the defendant pays its permanent employees who are doing same work as the plaintiffs.*
3. *A further order that the yearly contract by the Plaintiffs and Defendant is null and void and of no effect at all as it is against the provisions and the intent and purposes of the Employment Act which is more superior to the contract.*

3. The matter was trialed in 2022. On 1 May 2023, the trial Judge handed down her final decision in an extempore ruling. Her Honour dismissed OS 287 of 2021. The final order, which is contained at [300] of the Appeal Book filed 15 May 2025 (**AB**), read:

1. *All relief sought by the Plaintiff are refused and dismissed accordingly.*

2. *The Plaintiffs shall pay the costs of this proceedings on a party-party basis to be taxed if not agreed.*

3. *The file is closed.*

4. The trial Judge's actual findings are located at lines 10 and 20 at [300] of the AB which are as follows:

> *My finding is that there is no real controversy between the parties. The short term contract speaks for itself and governs the employment relationship between the two parties. I am not satisfied that the legal right*

is at issue here and that the contract is in order and is in clear terms and binds both the employer and the employee.

Furthermore, the controversy is not within the court's jurisdiction; meaning that this court is ousted of jurisdiction to grant the orders that the plaintiffs are seeking. Furthermore, the issues, in my view, are merely hypothetical and not real and that the plaintiffs do not have proper or tangible interest in obtaining the reliefs that they are seeking.

So, for all these reasons, I find that there is no cause of action disclosed. I am of the view that the claim is in fact misconceived and for those reasons, I dismiss the claim in its entirety. The plaintiff shall pay the cost of this proceeding on a party-party basis to be taxed, if not agreed. And the file will be closed.

APPEAL GROUNDS

5. Aggrieved by that decision, the appellants appealed to the Supreme Court. The Notice of Appeal filed 8 June 2023 (**NoA**) pleads 5 grounds which are as follows:

(a) Her Honor erred in law and/or in mixed fact and law in that she failed to consider and realise that the first order by way of a declaration sought pursuant to s. 10(1) and 15(1) of the Employment Act, Ch. No. 373 may not be necessarily applicable to the Appellants but is the guide and law on casual employees in Papua New Guinea and when applied to the employment conditions of the Appellants, they cannot be considered as casuals based on a yearly contract signed with the Respondent as sought in the second consequential declaratory order.

(b) Her Honor erred in law and fact in failing to find and conclude that consequential to the first declaratory order sought, the Appellants who are employed for various numbers of years based on a yearly contract are not casual employees but permanent employees and are entitled to receive allowances and benefits similarly to those of their other counterparts who do the same work but are employed on permanent basis.

(c) Her Honour erred in law and/or in mixed fact and law when she ruled that by reason of the yearly contract signed between the Appellants and the Respondent, the parties were bound by that and the court lacked jurisdiction to deal with and interfere in their contractual relationship when it was open to the court to exercise its inherent powers to

interfere and interpret the contract and to decide whether or not the contract complies with the Employment Act, Ch. 373.

(d) Her Honour erred in law and/or in mixed fact and law when she ceased the courts inherent jurisdiction completely to divulge further into the parties' contractual relationships and determine as to whether or not the yearly contract signed between the Appellants and the Respondent was null and void and of no effect at all as it was against the provisions and the intent and purposes of the Employment Act, Ch. 373 which is more superior than the contract.

(e) Her Honour erred in law when she ceased the courts jurisdiction to make its findings and decide whether or not a contract is null and void or is void ab initio as sought by the Appellants.

APPEAL - A REHEARING

6. Section 6 of the *Supreme Court Act Chapter No. 37* (**SC Act**) states:

(1) An appeal to the Supreme Court shall be by way of rehearing on the evidence given in the court the decision of which is appealed against, subject to the right of the Supreme Court–

(a) to allow fresh evidence to be adduced where it is satisfied that the justice of the case warrants it; and
(b) to draw inferences of fact.

(2) For the purposes of hearing and determining an appeal, the Supreme Court has all the powers, authority and jurisdiction of a Judge exercising the jurisdiction of the National Court.

7. Unlike a review, an appeal that is filed in the Supreme Court under the SC Act shall proceed by way of a rehearing.

8. After the appeal grounds in a matter have surpassed the tests of leave, objections, dismissal and other preliminary issues, and the appeal reaches the hearing stage, the Supreme Court, under the guidance of its inherent jurisdiction, is required by s.6(1) of the SC Act to conduct a rehearing (or a *de novo hearing*), that is, within the ambit or purview of s.6(1). See cases: *Abiari v. The State* [1990] PNGLR 250, *Motor Vehicles Insurance (PNG) Trust v. Etape* [1994] PNGLR 596 and *Kawage v. State* (2022) SC2241. Section 6(2), on the other hand, appears to extend the jurisdiction of the Supreme Court to

cover or include *de novo trials*. Practice and case law have revealed no discussion on their distinctions or applications, but the section is there, in our view, as a legislative guide to the Supreme Court when it is exercising its inherent power under s.155(2) of the *Constitution* on appeal matters.

9. Section 16 of the SC Act is also relevant. It states:

> **16. DECISION, ETC. ON APPEAL.**
>
> On the hearing of an appeal, the Supreme Court shall inquire into the matter and may–
>
> (a) adjourn the hearing from time to time; or
> (b) affirm, reverse or modify the judgement; or
> (c) give such judgement as ought to have been given in the first instance; or
> (d) remit the case in whole or in part for further hearing; or
> (e) order a new trial.

WHETHER CONTROVERSY EXISTED

10. At the outset of the hearing, the Court asked counsel for the appellants what the controversy was in relation to the primary relief that was pleaded or sought in the AOS. As their primary relief, the appellants requested the National Court to merely declare ss.10(1) and 15(1) of the *Employment Act Chapter No. 373* (**E Act**). Counsel, with respect, did not give a clear response to this query. However, it seems to us that the appellants' primary relief, which was relief 1 in the AOS, was sought to assert their rights in (i) their respective employment contracts or (ii) their employment relationships, that they had or have with the respondent through the E Act.

11. The question of controversy is paramount in proceedings commenced under originating summonses where declaratory relief is sought. Such proceedings involve questions of law where the facts are not so much in dispute (Order 4 rule 3(2) – *National Court Rules*). The common types of questions a court would ask at the outset will include this, "What primary right(s) is the plaintiff(s) seeking to assert, protect or enforce against a defendant(s)?" Cases: *Andy Kapinias v. O&G Niugini Ltd and Ors* (2018) N7486, *Amos Ere v. National Housing Corporation* (2016) N6515, *The Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd* [1921] 2 AC 438, *Ok Tedi Mining Ltd v. Niugini Insurance Corporation and Others* (No 2) [1988-89] PNGLR 425, *Placer Dome (PNG) Ltd v. Yako* (2011) N4691, *Independent State of Papua New Guinea v. Central Provincial Government* (2009) SC977, *Dr.*

Onne Rageau v. Kina Finance Ltd (2015) N6175 and *National Fisheries Authority v. New Britain Resources Development Ltd* (2009) N4068.

12. Justice Hartshorn, in *Amos Ere* summarized the relevant factors that a plaintiff is required to establish to seek declaratory relief in an originating summons. At paragraphs 11, 12, 13 and 14, His Honour states:

> *"**Declaratory relief***
>
> *11. As the plaintiffs' seek declaratory relief, it is necessary to consider the factors that are required to be established before a declaratory order can be made. These factors are set out in The Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd [1921] 2 AC 438. This case has been referred to in various cases including Ok Tedi Mining Ltd v. Niugini Insurance Corporation and Others (No 2) [1988-89] PNGLR 425; Placer Dome (PNG) Ltd v. Yako (2011) N4691; Independent State of Papua New Guinea v. Central Provincial Government (2009) SC977; Dr. Onne Rageau v. Kina Finance Ltd (2015) N6175 and National Fisheries Authority v. New Britain Resources Development Ltd (2009) N4068.*
>
> *12. The factors are:*
>
> *a) There must exist a controversy between the parties;*
>
> *b) The proceedings must involve a right;*
>
> *c) The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order;*
>
> *d) The controversy must be subject to the court's jurisdiction;*
>
> *e) The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claim;*
>
> *f) The issue must be a real one. It must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.*
>
> *13. In the High Court of Australia decision, Ainsworth v. Criminal Justice Commission [1992] HCA 10; (1991-1992) 175 CLR 564, Brennan J. referred to the Russian Commercial case (supra) and said that notwithstanding the wide discretion that exists in deciding whether a*

declaration should be made, it was not appropriate to grant a declaration if there was no real controversy to be determined.

14. Also, recently, the Supreme Court in considering the issue of standing to seek declaratory orders in Pius Pundi v. Chris Rupen (2015) SC1430 held amongst others that:

"A declaration is a discretionary remedy that should only be granted where there exists a real controversy between the parties to the proceedings, a legal right is at issue, the party seeking it has a proper or tangible interest in obtaining it, the controversy is within the court's jurisdiction, the defendant has a proper or tangible interest in opposing the plaintiff's claim and the issues involved are real, and not merely of academic interest or hypothetical."

13. For us to determine the asserted right(s) of the appellants (who had filed the AOS), we need to consider the evidence for assistance. See cases: *Pako F&C Holdings PNG Limited v. PNG Sustainable Development Program Limited and 1 Or* (2025) N11204 and *ExxonMobil (PNG) Ltd v. Halimbu Lembo and 2 Ors* (2024) N10919.

14. With the above settings, we make the following observations regarding the 3 declaratory reliefs that were sought in the AOS:

- Relief 1 requests the Court to declare provisions in an Act of Parliament, namely, ss. 10 and 15 of the E Act;
- Seeking a mere declaration of a law, in our view, is not the intended purpose of relief that one may seek in an originating summons if the declaration is sought without clarity or without attesting it to an asserted right(s) of a plaintiff;
- To better understand the appellants' rights that had caused them to come to Court in the Court below in the manner as they had done, we turn to the supportive evidence and submissions of their counsel;
- The total number of appellants is 17; they are Noah Aote, Tiki Lambao and 15 others; Noah Aote and Tiki Lambao described themselves as crew members; 12 of these persons had described themselves as crew members whilst 5 had described themselves as bus drivers, in the Court below;
- It is not disputed that all the appellants had signed 'short-term' written contracts with the respondent, to work as bus drivers and crew members; their standard contracts were adduced into evidence in the Court below; some have been compiled into the AB which is before this Court;
- We have had the benefit of considering the standard employment contracts. Clause 3.7 of their employment contracts states,

This is a performance based Agreement and performance will be reviewed every twelve months to ensure your performance is at the satisfactory level, in the interest of public safety and that of the Commission.

Performance will be assessed every twelve months for the purpose of re-engagement

- The appellants were aggrieved by their employment contracts which was why they filed OS 287 of 2021;
- Premised on the AOS, the appellants had sought orders for the National Court to recognize and declare that their employments with the respondent, which were not disputed, were governed by the E Act and not the employment contracts that they had signed with the respondent;
- We observe in general that a party entering into a private employment contract with either a private or government institution such as the respondent, may seek application of provisions within the E Act in regard to his or her contract: See: *Air Niugini v. Salter* (2001) SC 679;
- In *Salter*, the Supreme Court expressly stated that the E Act generally applies to both citizens and non-citizens who may seek its application;
- However, there are provisions within the E Act such as s. 3(1)(b) which may have to be considered in detail if the matter is properly tried in the National Court; s.3(1)(b) of the E Act restricts the application of the E Act where there are other laws that govern employments of both citizens and non-citizens in the country;
- Legal issues such as s.3(1)(b) had not been properly raised in the Court below thus we will refrain from dealing or making a finding on it now.

15. When we weigh these, there is no doubt in our minds that there were controversies raised by the appellants against the respondent in the AOS. The main controversy was whether the E Act was superior to the appellants' employment contracts that they had signed with the respondent. Their main aim was to ask the Court to declare that their contractual relationships with the respondent were governed by the E Act and not their respective contracts that they had signed. The proceeding did involve their rights, that is, their rights as employees or former employees of the respondent at the material time. They each had or have tangible interest in the matter. The controversy was subject to the National Court's jurisdiction; what they sought was something that the National Court could have deliberated on. The respondent also had a real tangible interest in the matter as the employer or former employer of the

appellants, and the issues raised before the National Court were also real and not academic.

16. The appellants, in our view, have met all the 6 prerequisites as summarised in *Amos Ere*.

17. On that premise, we find that the trial Judge erred when she ruled, as her primary finding, that there were no controversies disclosed by the appellants.

18. In addition to our finding that there were controversies, we further note that the trial Judge did not address the issue of whether the E Act applied to the employment relationship between the appellants and the respondent. Careful consideration of the E Act was required by the National Court. That is so because, as we have earlier explained, that Act, despite its title, does not apply with respect to all employment contracts and may or may not have applied in this case. That is so because of the provision to which we have previously referred - s. 3 (1)(b) states:

> *3. APPLICATION*
>
> *(1) Except where it is specifically provided otherwise, this Act does not apply to or in relation to the employment of a person –*
> *(a) by the State in carrying in the vicinity of his village from day to day; or*
> *(b) under any other law in force in the country. (Emphasis added)*

19. There are a number of Acts which have been held to apply to employment contracts. For example, in *Magini v Central Provincial Government* [2003] PGNC 45 the following observation was made:

> *In this respect it needs to be stated here that the principal legislation dealing with conditions of employment is the Employment Act (Ch 373). But this Act does not apply in all cases, as there may be other legislation covering special classes of employees. Such a legislation is the Public Services (Management) Act which applies to members of the public service who are not covered by the Employment Act. Section 3 of this Act makes provisions in relation to its application, and sub-s (1) is pertinent …*

20. It is our respectful view that the National Court was required to consider the opposing positions of the parties and rule on the issue of the E Act. That was particularly so when that Act was the main "plank" so to speak of the appellants' case. In failing to do so the National Court also fell into error.

21. We find support for the above proposition in *Rage v Rageau* (2020) SC1971 at para 18:

> *His Honour was obliged to discuss the evidence, refer to the law, and apply the law to the facts to get to his decision. The error is compounded by the fact that his Honour failed to properly discuss the submissions by counsel for the appellants…* (Emphasis added)

22. For the reason earlier stated in this judgment as s. 3 (1)(b) was not properly raised in the National Court we will refrain from dealing or making a finding with respect to the E Act other than to note that it was a provision which should have been considered.

ORDERS

23. Our findings that the trial Judge erred both when she ruled that there were no controversies disclosed and when she failed to address the issue of the E Act, are sufficient, in our view, to overturn the entire decision and uphold the appeal.

24. Therefore, we make the following orders:

1. The appeal is upheld.

2. *OS 287 of 2021 – Noah Aote and Tiki Lambao and Ors v. National Capital District Commission* shall be referred back to the National Court for a re-hearing before another judge.

3. The respondent shall pay the appellants' costs of the appeal which may be taxed if not agreed.

25. **KOSTOPOULOS J**: This is an Appeal from the National Court judgment of Wurr AJ dated 1 May 2023.

26. I have had the opportunity to read the draft judgments of Anis J and Carmody J and I agree with the orders to be made but I provide my separate reasons in this judgment.

27. The Plaintiffs (now Appellants in this Appeal) are challenging the employment classification decision and seeking rights under *Employment Act* 1978 (the Act).

28. The Appeal is heard before the Supreme Court without leave pursuant to Section 14(1) of the *Supreme Court Act* 1975 on the basis that it raises questions of law and mixed facts and law from a final judgment of the National Court.

29. For ease of reference and convenience, I will refer to Noah Aote and others in this judgment as the Appellants and the National Capital District Commission, or NCDC (interchangeably) as the Respondent in this Appeal.

30. At times, I will refer to the Plaintiffs and Defendant as appropriate for emphasis in the judgment relevant to the trial below.

BACKGROUND

31. The Appellants were employed by NCDC as bus drivers and crew on a series of short - term (12-month) Contracts (the NCDC Contract), renewed annually since 2013 in at least one instance and similar contracts for varying periods for each Appellant when they entered into the first 12-month period.

32. The Appellants claim to have performed continuous service and sought to be recognized as permanent employees, arguing that the repeated use of short - term Contracts was contrary to the Employment Act and, by operation of the Act, that they were entitled to the same benefits and status as permanent staff and employees of NCDC.

33. The National Court found that the NCDC Contracts were valid and binding, resulting in the Court below lacking jurisdiction to interfere in the employment relationship, distinguishing the facts from other cases where no written contract existed.

34. The Appellants appealed the whole of the decision below arguing that the trial judge erred in law and fact, particularly regarding the interpretation and application of the Employment Act (the Act) and the Court's jurisdiction that the declarations sought by the Appellants were non - justiciable.

35. The Appellants are employed by the NCDC in the role of 17 bus drivers and crew who were engaged by the Respondent on short-term 12-month Contracts, that were renewed yearly between 2013 and 2022, depending on each Plaintiffs' commencement date when the trial below was heard by Wurr AJ.

36. Mr. Noah Aote, one of the two lead Plaintiffs in the proceedings at the National Court, was employed as crew within the NCDC Public Transport Division in or around 27 July 2013 and served the Defendant for 9 years on

casual basis pursuant to yearly 12 month short - term contracts of employment (NCDC Contract).

37. Mr. Aote deposes in his affidavit sworn 29th November 2021, that a number of the staff members who were recruited about the same time as himself and the other Plaintiffs (now Appellants) were made permanent employees and public servants while the Appellants remained as casual employees despite numerous appeals to the senior management, including the City Manager of the NCDC, to appoint them as permanent employees of NCDC.

38. On the 17th October 2019, an initial letter was sent to the City Manager, Mr Bernard Kipit, formally requesting him to consider the employment status of the Appellants and appoint them as permanent employees.

39. By 28th May 2020 no response was sent to the Appellants, causing them to send a follow up letter to the Acting City Manager, Mr. Frank Ravu.

40. On the 9th March 2021, the Appellants' lawyers wrote to Mr. Kipit putting forward the same request and requiring a response to the Appellants' previous correspondence referred to above.

41. On the 7th May 2021, Mr. Kipit responded to the letter essentially rejecting the request.

42. Mr. Kipit stated in his final letter that the Appellants were engaged on a Contract of engagement with the Respondent and that their employment conditions were within the requirements of law. Further, Mr. Kipit discouraged the Appellants from pursuing the matter further.

43. The facts referred to above are common to the parties and not in issue.

44. On the 29th June 2021, the Appellants wrote to the Office of the Solicitor General giving Notice of their Intention to Sue the Respondent and served notice on the State in compliance with Section 5 of the Claims By and Against the State Act 1996.

45. On the 29th November 2021, the Appellants filed the Originating Summons (OS No. 287 of 2021) in the National Court seeking declarations that they were permanent employees and that the yearly contracts were oral contracts under the Employment Act.

46. The Appellants claimed the following: -

i. A Declaration that according to ss. 10(1) and 15(1) of the Employment Act, a casual employee is an employee who is employed by the same employer for more than six (6) days in any one month and is deemed to be a 'oral contract employee' of his employer.

ii. Consequential to the declaration sought in paragraph 1 above, the Plaintiffs who are employed by the Defendant on contract for one (1) year are not casual employees but permanent employees and therefore are entitled to receive allowances and benefits that the Defendant pays its permanent employees who are doing the same work as the Plaintiffs.

iii. The Defendant to pay the cost of an incidental to this proceeding.

iv. Any other orders the Court deems appropriate in the circumstances of this case.

47. The prayers sought in the Originating Summons did not seek declarations alleging that the NCDC Contract was unenforceable, invalid and of no legal force and effect.

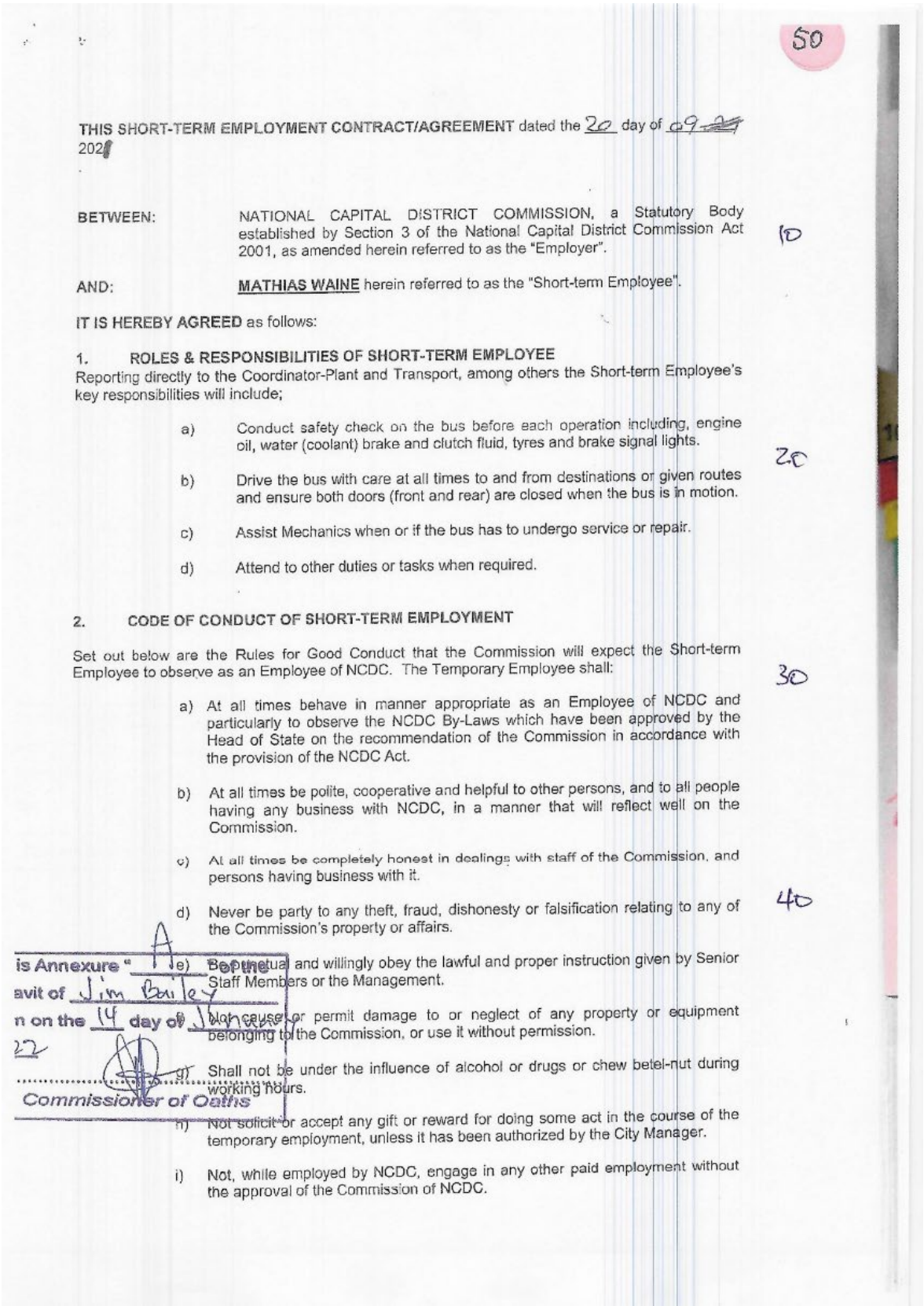
48. On the 30th December 2021 a directions order was issued by the National Court to case - manage the proceedings below.

49. On the 14th January 2022, the Respondent filed an Affidavit by Mr. Jim Bailey who is the Human Resources Manager for the Respondent wherein he deposes to confirm that, a copy of one of the Appellants' Contracts was annexed and Mr. Bailey then states that: -

i. He strongly believed there to be nothing illegal with the Contract of Employment.
ii. The contract was one for a fixed period of 12 months.
iii. The Appellants entered into the Contract accepting the terms and conditions and are bound by it.
iv. The terms and conditions are not unreasonable.
v. The Appellants were not casual employees of the NCDC as they were on fixed term employment.
vi. The Appellants were using the Court as a means to bargain with the Respondent to acquire more benefits.
vii. Allegedly a wrong interpretation had been made by the Appellants in relation to the NCDC Contract (noting it does not appear from the evidence Mr. Bailey is legally trained).

viii. That he was authorized to swear this affidavit on behalf of NCDC (without evidence of his compliance or certification of his appointment under the Employment Act).

50. For the purposes of this judgment a copy of the NCDC Contract in its original form in evidence in the trial below is reproduced below and will be referred to in my reasons in the interpretation of the Employment Act:



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THIS SHORT-TERM EMPLOYMENT CONTRACT/AGREEMENT dated the 20 day of 09 202

BETWEEN: NATIONAL CAPITAL DISTRICT COMMISSION, a Statutory Body established by Section 3 of the National Capital District Commission Act 2001, as amended herein referred to as the "Employer".

AND: MATHIAS WAINE herein referred to as the "Short-term Employee".

IT IS HEREBY AGREED as follows:

1. ROLES & RESPONSIBILITIES OF SHORT-TERM EMPLOYEE

Reporting directly to the Coordinator-Plant and Transport, among others the Short-term Employee's key responsibilities will include;

a) Conduct safety check on the bus before each operation including, engine oil, water (coolant) brake and clutch fluid, tyres and brake signal lights.

b) Drive the bus with care at all times to and from destinations or given routes and ensure both doors (front and rear) are closed when the bus is in motion.

c) Assist Mechanics when or if the bus has to undergo service or repair.

d) Attend to other duties or tasks when required.

2. CODE OF CONDUCT OF SHORT-TERM EMPLOYMENT

Set out below are the Rules for Good Conduct that the Commission will expect the Short-term Employee to observe as an Employee of NCDC. The Temporary Employee shall:

a) At all times behave in manner appropriate as an Employee of NCDC and particularly to observe the NCDC By-Laws which have been approved by the Head of State on the recommendation of the Commission in accordance with the provision of the NCDC Act.

b) At all times be polite, cooperative and helpful to other persons, and to all people having any business with NCDC, in a manner that will reflect well on the Commission.

c) At all times be completely honest in dealings with staff of the Commission, and persons having business with it.

d) Never be party to any theft, fraud, dishonesty or falsification relating to any of the Commission's property or affairs.

e) Be mutual and willingly obey the lawful and proper instruction given by Senior Staff Members or the Management.

f) Not cause or permit damage to or neglect of any property or equipment belonging to the Commission, or use it without permission.

g) Shall not be under the influence of alcohol or drugs or chew betel-nut during working hours.

h) Not solicit or accept any gift or reward for doing some act in the course of the temporary employment, unless it has been authorized by the City Manager.

i) Not, while employed by NCDC, engage in any other paid employment without the approval of the Commission of NCDC.

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22
Commissioner of Oaths

j) Not act or behave in such a manner that maybe a source of danger to any other person or persons.

k) Not any time authorize or commit NCDC to expenditure without first checking the availability of funds or getting approval to an amount of over-expenditure.

If the Short-term Employee acts in breach of any of the above, the management of NCDC will take disciplinary action, including possible termination.

3. TERMS & CONDITIONS OF SHORT-TERM EMPLOYMENT

3.1 Subject to this Agreement, the Short-term Employee shall be paid the salary of K25, 369.00 per annum which was approved for Unskilled Manual Workers.

3.2 The Short-term Employee shall be eligible to contribute to Nambawan Super after successful completion of the six (6) months of casual employment.

3.3 The Short-term Employee shall work Monday to Friday;

3.3.1 from 6.45 am to 9:00 am,

3.3.2 from 3:00 pm to 6:00 pm,

3.3.3 the Employer reserves the right to engage the employee outside the working hours.

3.4 Overtime will be paid upon approval by the City Manager through request from Coordinator-Plant and Transport.

3.5 The Short-term Employee is/will not entitle to other benefits or allowances such as leave fares, shift allowances, risk allowance, etc,

3.6 The Short-term Employee is/will entitle to the General Leaves such as;

3.6.1 Recreational Leave - 3 weeks (15 working days) per annum
3.6.2 Compassionate/Emergency Leave - 2 weeks (10 working days) per annum
3.6.3 Sick Leave - 2 weeks (10 working days) per annum

3.7 Measurement and Review of Casual Employment

This is a performance-based Agreement and performance will be reviewed every twelve (12) months to ensure your performance is at the satisfactorily level, in the interest of public safety and that of the Commission.

Performance will be assessed every twelve months for the purpose of re-engagement of Short-term employment.

4. TERMINATION

4.1.1 The employment hereunder maybe terminated by the Employer if the Employer decides that:

4.1.2 The Short-term Employee is by reason of mental or bodily infirmity or for any other reason whatsoever unfit to discharge or incapable of discharging his duties hereunder.

4.1.3 The Short-term Employee has committed a serious breach of this contract or breach of the Rules for good conduct as set out in Clause 2 (a-k) of this Contract.

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4.1.4 The Short-term Employee willfully disobeys a lawful and reasonable order of the Employer.

4.1.5 The Short-term Employee misconduct himself by an act of commission or omission that is inconsistent with the due and faithful discharge of his duties.

4.1.6 The Short-term Employee is found guilty by a Court of Law of a fraud or dishonesty. 10

4.1.7 The Short-term Employee is habitually neglectful of his duties.

4.1.8 The Short-term Employee is convicted of a criminal offence whether or relating to his temporary employment.

4.1.9 The Short-term Employee is continually absent from his employment without leave or reasonable excuse.

4.1.10 The position occupied by the Casual Employee is declared redundant.

4.1.11 The Short-term Employee is engaged in employment other than this employment under this contract without the prior approval of the Employer. 20

4.1.12 The Short-term Employee shall be given fourteen (14) days notice in writing of termination

4.1.13 The Short-term Employee may terminate the employment hereunder by giving at least fourteen (14) days notice in writing directly to the Employer and in the event of his giving such notice shall also deemed to have resigned from the employment hereunder from the date of the expiry of the said notice.

Acceptance of Short-term Employment Agreement/Contract

I, MATHIAS WANE; have accepted the casual employment offer, will diligently carry out my duties and willingly comply with terms and conditions of this casual employment agreement. 30

Signature: ..... Date: 20/09/21.

~~staffnumber~~ MAIMU K

Witness..... Name.....Designation..... Date: REU 20/09/21

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51. It should be noted that the notation on behalf of NCDC is incomplete referring to the name of the "REO" or "REU" officer (which is not clear) who signed the NCDC Contract on behalf of the Respondent and is not clearly identified on the Contract or was the necessary witness attestation completed as this will become relevant in my reasons below.

52. At paragraph 7 of the affidavit of Jim Bailey sworn 14th January 2022, Mr. Bailey deposes that he "strongly believes that there is nothing illegal with the short-term employment contract and that it complies with all relevant lawful requirements."

53. I emphasize that Mr. Bailey has not deposed to disclose his training or legal knowledge to make these sweeping statements of the lawfulness of the NCDC Contract.

54. On the 3rd February 2022, a further affidavit was sworn by Mr. Bailey.

55. Mr. Bailey gave evidence that the Appellants' job descriptions did not fall within the organizational structure of the Respondent subject to the Salaries and Conditions Monitoring Committee suggesting that persons were employed in accordance with the structure.

56. The organizational structure does not fall under a formal industrial award or workplace agreement in the evidence at the trial below and remains an internal policy decision or process made by resolutions of the Monitoring Committee and not legally binding under statute law.

57. The Salaries and Conditions Monitoring Committee is not a recognized entity that ratifies employment or industrial awards into law nor is it a statutory office under a separate Act.

58. Mr. Bailey stated further that five of the Appellants were no longer employed with the Respondent due to a strike action against the compulsory COVID 19 Protocol resulting in several Appellants being summarily dismissed by the NCDC.

59. Having given the above evidence, Mr Bailey, also made the following gratuitous remark at paragraph 13 of his affidavit sworn 3 February 2022: -

> *"The Plaintiffs are, with the greatest respect, not grateful that they have an (sic) employment particularly, given the difficult times brought about due to the*

Covid – 19 Pandemic."

60. I infer from the remarks of Mr. Bailey that he used unfair bargaining power to hold the Appellants to workplace ransom year after year to commit the Appellants to short-term contracts given difficult times exploiting the Appellants' anxiety for the renewal of their contracts with NCDC.

61. On the 24th February 2023, the lawyers for the Appellants filed an Amended Originating Summons seeking declarations under Sections 10(1) and 15(1) of the Employment Act that the NCDC Contract signed by the Appellants and the Respondent under the Act and under the general law were null and void and of no legal force and effect including other orders that the Court deemed appropriate at trial.

62. The Amended Originating Summons claimed five orders as follows: -

i. *"A declaration that according to Sections 10(1) and 15(1) of the Employment Act, a casual employee is an employee who is employed by the same employer for more than six days in any one month and is deemed to be an oral contract employee of his employer.*

ii. *Consequential to the declaration sought in paragraph one above, the Plaintiffs who are employed by the Defendant on contract for one year are not casual employees but permanent employees and therefore are entitled to receive allowances and benefits that the Defendant pays its permanent employees who are doing the same work as the Plaintiffs.*

iii. A further order that the yearly contract signed by the Plaintiffs and the Defendant is null and void and of no effect at all as it is against the provisions, the intent, and the purposes of the Employment Act, which is more superior to the contract.

iv. *The Defendant pays the costs of and incidental to this proceeding.*

v. Any other orders that the Court deems appropriate in the circumstances of this case."

63. On the 1st May 2023, Wurr AJ, delivered an ex-tempore judgment finding in favour of the Respondent.

64. In the brief reasons of the trial judge, Her Honor then dismissed the claim in its entirety by applying the authority of Pundi v Rupen (2015) SC1430, then ordered costs in favour of the Defendant and directed the file to be closed.

65. On the 8th June 2023, the Appellants filed a Notice of Appeal in the Supreme Court, challenging the whole of National Court's decision below on several grounds, including errors of law, facts and the jurisdictional issue ultimately determined by Wurr AJ dismissing the proceedings at trial.

66. The Appellants are appealing the whole of the judgment entered on 1st May 2023.

67. On the 4th July 2023, the Notice of Appeal and Court Order were served on the Respondent's lawyers.

68. On the 1st March 2024, a Notice of Appearance was filed by Kopunye Lawyers for the Respondent, confirming representation in the Supreme Court.

69. On the 13th June 2024, the Respondent filed a Notice of Change of Lawyers. Service of this notice was effected on the Appellants' Lawyers.

70. On the 15th May 2025, the Appeal Book was filed in the Supreme Court.

71. On 1st October 2025, the matter was argued and heard before this Court.

72. The Court reserved its decision to consider the matter.

STATEMENT OF AGREED AND DISPUTED FACTS BEFORE WURR AJ AND LEGAL ISSUES

73. The issues at trial that were argued and required determination by the trial judge are set out clearly in the Statement of Agreed and Disputed Facts at trial and clearly defined for Wurr AJ to identify and provide her reasons.

74. The table below is reproduced in the form in which it was filed in the court file below and sets out the position of the parties at trial before Wurr AJ that required determination by the trial judge.

Para No.	Relevant Facts (Plaintiffs' Statement of the Facts)	Defendant's Disputed Facts/Alternative Narrative
1.	The two named lead Plaintiffs and 15 others are Drivers and Crews employed within the public transport division of the Defendant as casuals.	All drivers and crews have a yearly contract of engagement with the Defendant.

2.	There are 5 drivers and 12 crews Plaintiffs recruited at different periods and have served for 7 - 9 years beginning in 2013.	There has been consistent increment to their engagement based on their work performances and within the terms of engagement.
3.	The 17 Plaintiffs are still casuals based on the yearly contract which the Plaintiffs allege is a bad contract and is against the provisions and the intent and purposes of the *Employment Act* which is more superior than the yearly contract as sought in the Amended OS filed on 24 February 2022.	Paid allowances correctly based on their terms and conditions of engagement with no disparity.
4.	Others who were recruited at or about the same time and doing the same work have been made permanent public servants with benefits and entitlements.	Employment conditions are within the requirements of laws.
5.	Numerous appeals to be made permanent have not been considered.	The Defendant has responded to the Plaintiffs' appeals.
6.	The Plaintiffs pay taxes such as income tax and contribute to superannuation fund but receive no leave entitlements and repatriation costs on the basis of being casuals.	The Plaintiffs are paid entitlements in accordance with applicable law. As for repatriation, there is no obligation to repatriate as the Plaintiffs' place of recruitment is Port Moresby.
7.	The drivers and crews have had a shortfall of K3 fortnightly on their wages with no risk and housing allowances as opposed to their permanent counterparts.	Each of the Plaintiffs were individually offered terms of employment in writing and which they have accepted. The terms of employment are freely entered into. At the expiry of the period of employment of 12 months, the Plaintiffs can each individually discuss with the defendant the terms of employment and subject to mutual agreement enter into new contracts.

		The court cannot force upon parties, terms and conditions of employment, not agreed upon, unless imposed by law explicitly or by implication.
8.	About 4 drivers and 2 crews in the same category have died whilst 3 drivers and 2 crews are not involved in this proceeding.	The Plaintiffs' employment positions are not part of the approved organisational structure. Therefore, they are employed on a yearly contract of employment outside of the approved structure.
9.	4 of the Plaintiffs have been terminated from employment since commencement of the proceedings.	The Plaintiffs were not forced or coerced by the Defendant to accept the terms and conditions of the yearly contract of employment. And since the commencement of the proceedings 5 of them were terminated for misconduct.
10.	The Plaintiffs have given notice to claim under Section 5 of the *Claims By and Against the State Act*, 1996 on 29 June 2021.	The Plaintiffs have not given notice to claim under Section 5 of the *Claims By and Against the State Act* 1996.

GROUNDS OF APPEAL

75. There are five grounds of appeal outlined in the Appellants' Notice of Appeal, as set out more fully below: -

i. *"Her Honor erred in law and/or fact and law in that she failed to consider and realise that the first order by way of a declaration sought pursuant to s. 10(1) and 15(1) of the Employment Act, Ch. No. 373 may not be necessarily applicable to the Appellants but is to guide the law on casual employees in PNG and when applied to the employment conditions of the Appellants, they cannot be considered as casuals based on a yearly contract signed with the Respondent as sought in the second consequential declaratory order.*

ii. *Her Honor erred in law and fact in failing to find and conclude that consequential to the first declaration order sought, the Appellants who are employed for various numbers of years based on a yearly contract are not casual employees but permanent employees and are entitled to receive allowance and benefits similar to those of their other*

counterparts who do the same work but are employed on permanent basis.

iii. Her Honor erred in law and/or in mixed fact and law when she ruled that by reason of the yearly contract signed between the Appellants and the Respondent, the parties were bound by that and the court lacked jurisdiction to deal with and interfere in their contractual relationship when it was open to the court to exercise its inherent powers to interfere and interpret the contract and to decide whether or not the contract complies with the Employment Act, Ch. 373.

(my emphasis added)

iv. Her Honor erred in law and/or in mixed fact and law when she ceased the courts inherent jurisdiction completely to divulge further into the parties' contractual relationships and determine as to whether or not the yearly contract signed between the Appellants and the Respondent was null and void and of no effect at all as it was against the provisions and the intent and purposes of the Employment Act, Ch. 373 which is more superior than the contract.

v. Her Honor erred in law when she ceased the court's jurisdiction to make its findings and decide whether or not a contract is null and void or is void ab initio as sought by the Appellants."

TRIAL JUDGE'S FINDINGS

76. In her ex–tempore judgment, the trial judge distinguished the Plaintiffs' case below by the application of the following authority stated *in Petrus v Telikom PNG Ltd* (2008) N3373 and found that although the Appellants had worked continuous for many years with NCDC, the Appellants remained casual employees of NCDC.

77. The trial judge then set out the Appellants' case in the amended summons including addressing the Plaintiffs' arguments at trial that the NCDC Contract is null and void and of no legal force or effect applying to all 17 NCDC Contracts in the litigation below.

78. It is my view that the trial judge then fell into error by finding that it was not contested that the Plaintiffs were engaged on short-term 12-month NCDC Contracts by the interpretation of the Employment Act, and did not make findings or provide reasons on the critical threshold point which was hotly contested in relation to the validity of the contract which remains an issue that requires determination by this Court.

79. I refer to the trial judge's judgment and reasoning below: -

"In direct contrast, the plaintiffs in this case cannot be categorised as oral contract employees because they all have entered into short - term written employment contracts with the defendant. All the terms and conditions are spelt out in the contract itself. It is therefore a misconception by the plaintiffs to seek such reliefs in their originating summons.

Again, according to the case of Pius Pundi v Chris Rupen (2015) SC1430, in order to obtain a declaration, the plaintiffs must establish that there exists a real controversy between the parties to the proceedings, that a legal right is at issue, the parties seeking it has a proper or tangible interest in obtaining it, that the controversy is within the court's jurisdiction, that the defendant has a proper or tangible interest in opposing the plaintiffs' claim and that the issues involved are real and not merely of academic interest or hypothetical.

My finding is that there is no real controversy between the parties. **(my emphasis appears)**

The short - term contract speaks for itself and governs the employment relationship between the two parties. I am not satisfied that the legal right is at issue here and that the contract is in order and is in clear terms and binds both the employer and the employee.
Furthermore, the controversy is not within the court's jurisdiction; meaning that this court is ousted of jurisdiction to grant the orders that the plaintiffs are seeking. Furthermore, the issues, in my view, are merely hypothetical and not real and that the plaintiffs do not have a proper or tangible interest in obtaining the reliefs that they are seeking."

80. To summarize, the trial judge found in the judgment below:

i. There is no real controversy between the parties.
ii. The short-term contract speaks for itself governing the employment relationship between the parties.
iii. The legal rights of the Plaintiffs are not at issue here.
iv. The contract is in order in clear terms and binds both parties as employer and the employee.
v. The controversy is not within Court's jurisdiction.
vi. The Court cannot or is ousted from granting the orders sought by the Plaintiffs.

vii. In the trial judge's view, the issues were merely hypothetical and not real.
viii. The Plaintiffs do not have a proper or tangible interest in obtaining the relief they are seeking.

81. For the above reasons, the trial judge found that there was no cause of action disclosed and dismissed the proceedings.

82. The trial judge concluded that the claim was in fact misconceived dismissing the claim in its entirety with a costs order against the Plaintiffs at trial.

83. It is my view that the critical matters below suggest the trial judge failed to give reasons and misapplied the law consequently falling into error in the following
respect: -

i. To interpret the Employment Act by finding that it did or did not apply.
ii. Simply restated the tests in Pundi v. Rupen without giving reasons on each element.
iii. Failed to deal with the facts that support each element of the test set out in Pundi v Rupen.
iv. Failed to give proper reasons that the NCDC Contract was valid and in force.
v. Finding that the disputes prosecuted by the Plaintiffs at trial were "hypothetical and not real".
vi. Concluding that the claim was misconceived and in effect non-justiciable before the National Court in dismissing the entire proceedings.

84. I will now set out my reasons why the judgment of Wurr AJ is untenable and must be set aside by this Court.

THE DUTY OF NATIONAL COURT JUDGES TO GIVE REASONS

85. Judges give reasons in almost every case which remain incidental and normative in the judicial process as the common law dictates the judicial obligation to explain how and why a decision has been reached is an immutable duty.

86. For abundant reasons, the Constitution creates obvious dimensions pursuant to Section 59 where it is necessary and implied that a losing party must be able to understand the reason why the proceeding before the Court failed,

and conversely, a successful party has a decision in its favour representing the law of the country determined by superior courts of record, like the National Court of Papua New Guinea at trial level.

87. Instructively, it is my view that the opinion of the judge particularly at trial level in reviewing the evidence relied upon by the parties is seized with the duty to give reasons exacting the following benefits:

i. it permits the losing party to review whether any appealable or reviewable error has occurred or accept the judge's final analysis.
ii. a Defendant or corporation is accountable for its actions that affect the rights of the parties.
iii. public scrutiny is an open-court system that prevents acts of arbitrary conduct or decision-making.
iv. the rationale of the decision-making judiciary remains robust and based on evidence and the law.

88. The National Court of Papua New Guinea remains the superior court of record and its decision, and the reasoning process of its judges are followed or provide guidelines in cases that follow ensuring the stability of the rule of law.

89. The three basis yet distinct reasons for a judge to give reason in his or her judgments are: -

i. the parties can review whether their submissions or arguments were understood and accepted when the judge gave his or her reasons.
ii. judicial accountability.
iii. courts not only resolve the disputes between the parties but also formulate rules that can be applied in future cases or by the public in matters determining their rights and affecting the legal position of their actions.

90. On disputed factual question, the primary contested issues require the trial judge to set out his or her reasoning in full.

91. Wurr AJ did not provide an insight as to why she determined that the terms and conditions in the 12-month renewable contract were valid, and did not treat the operation of the Employment Act in her judgment to exclude the Plaintiffs' argument that the Defendant should or could have converted the Plaintiffs' tenures of 10 years as casual to permanent employees of the NCDC.

92. It seems Wurr AJ's sweeping statement leading to an ultimate conclusion in applying the test in Pundi case without explaining the facts to support her

conclusion, remain unlikely to support her views without proper explanation and, in my view, remain insufficient to explain her reasoning processes.

93. I was left speculating from the reasoning of the judge below in how she formed her view on the Pundi test to suggest that the matter was not justiciable, or to use her own words 'hypothetical and not real' to dismiss the claim.

94. It appeared to me that the reasoning of Wurr AJ was a leap of faith from setting out the dispute at the trial below to dismissing the Plaintiffs' claim without the necessary path of disclosing her reasoning processes.

95. It is my view that the trial judge was obliged at the very minimum to set out her reasons why and how the 12-month contract did or did not offend the operation of the rights asserted by the Plaintiffs and why the Employment Act did not apply in the interpretation of the Act with regard to the time-honoured principles of the purposive test in statutory interpretation.

96. I find that the failure to address the anterior points of contrasting the contract with the legislation involving the Appellants' rights is a failure by the trial judge to provide adequate reasoning and must be set aside.

97. It is my view that it is not possible to understand from the reasons of the trial judge how the conclusion was reached leading to my finding that the reasons appearing in the judgment below are inadequate in the application of the law.

98. I now set out the critical points in my findings with greater granular analysis.

THE APPEAL

99. I have carefully considered the submissions by the parties to this Appeal which I summarize below as follows.

Appellants' Submissions

100. Counsel for the Appellants, Mr. Otto argued that the Appeal should be upheld followed by other necessary consequential orders because the yearly fixed-term Contract was null and void or bad from the outset. It was done in breach of the provisions and standards required by the Employment Act, applying legislative requirements to protect workers.

101. Mr. Otto argued that the trial judge erred in law when Her Honor ruled on the legality of the contract in light of the without applying the provisions of the Employment Act and providing reasons why the contract was valid.

102. Finally, Mr. Otto then submitted that by reason of the fixed-term yearly contract, the Appellants were bound by the terms and conditions of the employment including benefits which they should have been entitled to if they were made permanent employees by the Respondent.

Respondent's Submissions

103. Counsel for the Respondent, Mr. Ules argued that the Appellants are not casual employees for the purposes of Sections 10(1) and 15(1) of the Employment Act because each of the Appellants freely entered into the NCDC Contract with the Respondent.

104. Mr. Ules argued that the Appellants are fixed term employees for the contracted period of 12 months only and that the NCDC Contract did not provide that the Appellants would be made permanent employees after a period of time as a common law position.

105. They further submit that if the Appellants were to be employed as permanent employees, their roles as permanent employees would have to fall under the scope of the Respondent's organizational structure as approved by the Salaries and Conditioning Monitoring Committee.

106. Mr. Ules did not make submissions on the issue of the Court's jurisdiction to intervene and make orders.

107. Counsel for both parties generally made the same submissions as those made in the proceedings of the Court below, save for the submissions on Section 3(1)(b) of the Employment Act which was put to Counsel in arguendo before the Appeal bench in an issue raised by Anis J, in the interpretation of the Employment Act that the parties are bound by a private treaty employment contract which by operation of Section 3(1)(b) above excludes the Act.

108. In oral argument before this Court, Counsel for NCDC adopted the proposition that the NCDC Contracts were excluded from the Employment Act by operation of s.3(1)(b) of the said Act and argued the new point raised on Appeal was a complete defence to the Appellants' claims at large.

THE ISSUES ON APPEAL

109. The interpretation of the Employment Act is a necessary and obvious feature in this Appeal as it was not interpreted at all by Wurr AJ in her judgment below.

110. The operation of the Act is also vital in this Appeal in respect of Section 3(1)(b) being pleaded as a defence by employers in future trials in the National Courts and requires interpretation by the Supreme Court in my judgment as an essential element in the application of employment law in Papua New Guinea.

Interpretation of the Employment Act

111. The Court must approach statutory construction with the well-established principles that a Court construing a statutory provision must strive to give meaning to every word contained in the provision or provisions of the Act relevant to the proceedings.

112. In this regard, the Court must strive to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of all the provision and regulations governing the statutory scheme to ensure the entire Act remains intact and cohesive.

The Issues

113. The parties are in issue as to the application of the NCDC Contract to the Employment Act.

114. The Court below did not interpret the Employment Act, rather Wurr AJ simply referred to it and dismissed the Act's application without any adequate explanation or reason.

115. It is now necessary for this Court to undertake the task to interpret the Employment Act and its necessary application which Wurr AJ failed to provide in the reasons that appears in her judgment dismissing the Appellants' relief in the Court below as, in effect, hypothetical and fictitious.

116. Notwithstanding that Section 3(1)(b) of the Act was raised by the President of the Appeal Panel, Anis J, as a fresh issue not dealt with at trial, the Act requires interpreting for the purpose of this substantive Appeal which does not appear in the judgment below.

117. In my view there is scope for s.3(1)(b) to work in a subordinate way to the purpose of the entire Act as will be explained further in this judgment.

118. The plain English language of the Act is introduced as an Act of Parliament relating to the employment of '***certain persons***'.

119. The application of the Act to certain people is treated in the definition of these people in Section 1 of the Act, namely: -

i. *""**employee**" means a person serving another person under a contract of service and includes a prospective employee;*
ii. *"**employer**" means a person who employs another person under a contract of service and includes a prospective employer;"*

120. It is my view that the interpretation of "employee" and "employer" applies to a broad category of persons seeking employment in the workplace, including candidates or applicants seeking work and the broad category of employers offering work or prepared to offer work to the right candidates.

121. For the exclusion under Section 3(1)(b) to be valid and necessarily apply, it must satisfy the requirements of being an exclusion of a specified class or classes of employees or persons seeking employment by either notice and gazetted or by other statute intervening.

122. The next essential element in the interpretation of the Act is to determine the category of persons who are authorized officers to administer the Act, on behalf of the employers, that is, the NCDC in the proceedings below and now in this Appeal defined as follows:

> *""**authorized officer**" means a labour officer, medical practitioner, or medical assistant appointed under Section 8;"*

123. To continue in an orderly manner to interpret the definition of Authorized Officer, I turn to Section 8 of the Act that states: -

> *"(1) The Secretary may, by notice in the National Gazette, appoint–*
>
> *(a) **officers to be labour officers**; and*
> *(b) with the approval of the Secretary for Health–*
>
> *(i) medical practitioners registered under the Medical Registration Act 1980 to be medical officers; and*
> *(ii) medical aids and medical assistants and health extension officers of the Public Service to be medical assistants.*

*(2) Every labour officer, medical officer and medical assistant shall be furnished with a **certificate of appointment** signed by the Secretary."*
(my emphasis appears)

124. To complete in an orderly fashion the essential interpretation of the functions of the Secretary referred to in Section 8, the definition of ***Secretary*** means: -

"the Departmental Head of the Department responsible for labour and employment matters;"

125. Section 2 of the Act binds the State, and every authority and the instrumentalities of the State, which includes, on the undisputed facts at trial and during the Appeal, the NCDC.

126. Section 6 operates to preserve existing law in relation to any required law in force immediately before the commencement date of this Act, which is not the case in the current proceedings.

127. In order to administer the Employment Act, the Secretary may delegate, under the force of an instrument executed by him or her, to any officer, all of the Secretary's powers under the Act.

128. The delegation of the powers of the Secretary under the Act which includes officers, or labour officers relevant to the facts below, must be consistent with the alter ego principles of law otherwise known as the Carltona principles from the well-established authority of *Carltona v Commissioner of Works* [1943] 2 All ER 560.

129. Section 8 provides the legal requirements to enable the Secretary by notice in the National Gazette to: -

i. *"officers to be labour officers and*
ii. *subject to approval by the Secretary of Health, Medical Practitioners, and Medical Assistants."*

130. Relevantly, the above labour officers, medical practitioners and medical assistants are provided with Certificates of Appointment signed by the Secretary as defined by the Act.

131. The evidence of the NCDC below did not prove or established that the person or persons who signed the NCDC contract for the NCDC complied with Section 8 of the Act or were authorised to do so to abide by Section 38 of the

Constitution dealing with qualified rights including the evidentiary burden of proof required pursuant to
Section 38(3) on the NCDC that states: -

> *"The burden of showing that a law is a law that complies with the requirements of Subsection (1) is on the party relying on its validity."*

132. It is my view that this is not an optional step in the process.

133. Without proof of appointment as Section 8 officers or labour officers under the Employment Act, the presumption of regularity in the performance of the duties that public officials or appointed officers act in accordance with the law in carrying out their official duties remains a failure to follow required conventional statutory practice.

134. Therefore any act or performance remains irregular and can vitiate instruments or contracts like the NCDC Contract under the Employment Act as ultra vires and beyond power; see *Woollett v Minister of Agriculture & Fisheries* (1955) 1 QB 103 at 120 – 134.

The Application of the Employment Act to the NCDC Contract

135. On a strict interpretation of Section 3(1)(b) of the Employment Act, it appears at first blush that there is a convulsion between Section 3 and 4 of the Act which requires analysis and can be easily explained as to the intent and purpose focusing on the interpretation of the "other law or laws" that would apply to ensure the cohesion of the Act, read and interpret as a whole statue.

136. The interpretation of s.3(1)(b) it is now critical as it may be argued, if there is a new trial, that it is a complete defence available to the NCDC to defeat the Plaintiffs' claims.

137. It is my view that it is not applicable for the reasons I set out below.

138. Section 3(1)(b) provides: -

> *"(1) Except where it is specifically provided otherwise, this Act does not apply to or in relation to the employment of a person–*
> *(a) ...*
> *(b) under* ***any other law*** *in force in the country.*
> *(2) ..."*
> ***(my emphasis appears)***

139. In addressing the Employment Act and its interpretation the Supreme Court, Amet CJ, Injia and Sawong JJ, in *Air Niugini v Salter* [2001] SC679 said: -

> *"However, S.3(1)(b) contains two important exclusion provisions. First, the Act does not apply to a person employed under any other law (**meaning statutory law**) in force in the country. Secondly, where specific provisions of the **Employment Act** or that **"other law"** under which a person is employed **"specifically provided otherwise"**."*
> ***(my emphasis appears)***

140. I adopt, confirm and agree with the decision of the Chief Justice and the senior-member bench in the Salter case above, applying the ratio decidendi to support my decision in this judgment on the interpretation of s.3(1)(b) of the Act.

141. Section 4 provides as follows: -

> *"The Minister may, by notice in the National Gazette, exempt from all or any of the provisions of this Act–*
> *(a) any person whose wages exceed the prescribed amount; or*
> *(b) any–*
> *(i) person or class of persons; or*
> *(ii) occupation, trade or industry,*
> *specified in the notice."*

142. There is no evidence in the trial below to establish that the Minister has gazetted exceptions from all or any of the provisions of the Act to any person or class of persons or occupation, trade, or industry involving the Appellants pursuant to Section 4 of the Act.

143. A class is a group the members to which come within a certain category or description defined by a general or collective formula or governed by a statute is defined in *Pearks v Moseley* (1880) 5 App Cas 714 at 723 per Lord Selborne.

144. Therefore it is my view that on a proper interpretation and construction of the Act, the Act must apply to the Appellants as bus drivers and bus crews with the NCDC.

145. Without the decision of Salter above, there may be convulsion and inconsistency in reconciling Sections 3 and 4 in the construction of the two provisions.

146. However, Salter makes it clear that Section 3(1)(b) must be specifically interpreted with the meaning of the laws referring to statute law, and not the law of private treaties in contract law, which means that s.3(1)(b) and s.4 can continue to coexist harmoniously without controversy.

147. Accordingly, the interpretation is clear and focuses on statutory law in the interpretation of Section 3(1)(b) of the Employment Act which is not the case here involving the Appellants.

148. The plain English meaning of Section 3(1)(b) in its purposive interpretation applying the Salter case above is that employees or workers, for example, as members of the Papua New Guinea Defence Force or Papua New Guinea Constabulary, are a special category of persons in special category occupations, trades or industries governed by separate statutes for their appointment as officers, and service men and women of this Nation.

149. The respective statutes set out their duties and their salaries or remuneration that by force of statute laws excludes the Employment Act for obvious and necessary reasons including rank-and-file structure, the hierarchy of command and control and other indicia affecting their employment and remuneration.

150. It is clear that the trial judge did not provide reasons or consider the issue raised by the Appellants at the trial below in relation to the validity of the contract despite the s.3(1)(b) debate arising as an issue at the Appeal.

151. Accepting Section 3(1)(b) does not exclude the Appellants, I now provide my reasons in this judgment dealing with the construction of Section 19 of the Act which applies to the Appellants determining the validity of the NCDC Contract under the Act.

152. For the exclusion to be valid I emphasise that it must satisfy the requirement of being an exclusion of a specified class or classes pursuant to the requirements of Section 4 of the Act requiring the Minister by notice in the National Gazette, to exempt the Appellants from all or any of the provisions of the Act.

153. The Appellants have not been characterised or exempted pursuant to Section 4 of the Act relying on the lack of evidence on this point in the trial below.

THE VALIDITY OF THE NCDC CONTRACT

154. Section 19 of the Employment Act provides the mandatory minimum requirements for the contract to comply with the Act which are not optional and cannot contract out of the Act by the internal Monitoring Committee decisions of policy within the NCDC.

155. The appointment of officers and their certification of the officers under Section 8 of the Act satisfies the appointing Secretary that they are trained and experienced in the operation of the Act, in this instance, in employment laws and policies relevant to the State's instrumentality, such as the NCDC in this matter.

156. In seriatim, Section 19 of the Act provide that: -

'A written contract of service is in no force or effect unless and until –

(a) In the case of a literate employee
- *i. he has signed the instrument of agreement and has certified under his hand on the agreement that he has read, understood and agreed to abide by the terms and conditions endorsed on the agreement; and*
- *ii. the employer has endorsed on the agreement a note that he believes and is satisfied that–*
  - *(A) the employee is literate; and*
  - *(B) before signing the agreement, the employee read and understood it; and*

(b) In the case of an illiterate employee,
- *i. signed; or*
- *ii. affixed his mark or an impression of his thumb on,*

the instrument of agreement in the presence of a labour officer and the labour officer certifies that Section 23 has been complied with.'

157. It is clear that the contract entered into between the Appellants and the NCDC violates the Employment Act in relation to the mandatory requirements referred to above set out in Section 19 of the Act.

158. From its outset, the NCDC Contracts violated the Act and are of no legal force and effect when the parties executed the NCDC Contracts every 12 months.

159. The above matter was not considered by the trial judge.

160. The issue invalidating the contract was not determined or considered by the trial judge below as Wurr AJ concluded, without examining the validity of

the contract in her reasoning, that in the trial judge's determination that the entire matter was hypothetical and did not raise a justiciable issue to determine the matter.

161. This judgment clearly proves otherwise on complex interpretation and construction of the Act that was not examined by Wurr AJ below.

162. It is my view that the validity of the NCDC Contract was a justiciable issue at the trial below and remains a live justiciable issue to be determined in this Appeal.

163. The trial judge fell into error in prematurely applying the test set out in the Pius Pundi case to dismiss the proceedings without identifying and clearly applying her mind to the core issues.

164. The fresh point raised at the hearing of the Appeal and adopted by the Respondent's Counsel that the Appellants suffer exclusion from the operation of the Act under section 3(1)(b) resulting in the common law applying as the 'other law' in the country is, in my view, unsustainable.

165. Lord Herschell LL in *The Institute of Patent Agents v. Lockwood* (1894) AC at 360, approved and applied in *Project Blue Sky, Inc. v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 are persuasive authority in relation to the interpretation of statute laws and rules to support my view.

166. The application of Section 3(1)(b) must strive to give meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme to make it compatible with the rights and obligations for both employees and employers under the Act.

167. It is my view that there was a cause of action that ought to have been determined by the Court below, yet it was not by the trial judge in this instance.

168. The purposive test applied to the Employment Act remains a statute with clear intent and meaning that ensures that skilled and non-skilled workers have statutory protection against employers exercising their dominant bargaining position and uneven dominance in the workplace to provide checks and balances against, at the bare minimum: -

i. Worker's rights
ii. Fair compensation for a hard day's work
iii. Protection of employment status

iv. The legitimate expectation that contracts of employment under the Act would be compliant.

169. I refer to paragraphs 50 - 57 of my judgment in *Juveniles AL & BIL v The State* [2025] N11384 where I discussed the purposive test: -

> *"The persuasive argument for a purposive approach builds on the dissenting judgment of Gageler J. in SZTAL v Minister for Immigration and Boarder Protection [2017] HCA 34 262; CLR 362 91; ALJR 936 347; ALR 405…*
>
> *The Parliament of Papua New Guinea has strictly controlled the reception of international law into the domestic legal system, demonstrating a widely observed executive anxiety towards international law.*
>
> *The application of the reasoning of Gageler J, now Chief Justice of Australia, at paragraphs 31 to 59 of the judgment is relevant to the principles of autochthony in Papua New Guinea for the development of domestic law to accord with the applicable laws in relation to juveniles in Papua New Guinea under the State's obligation of care when considering international laws regarding the rights of children.*
>
> *The reasoning of Gageler J (as he then was) is persuasive and assist in the development of juvenile justice in the interpretation of the Act relevantly to the operation of the Juvenile Justice Act in Papua New Guinea"*

170. The above reasoning is also applicable to the Employment Act to Papua New Guinea's adoption of International Covenants involving employment and having regard to International Covenants as reasonably justifiable in a democratic society, pursuant to Section 39(1)-(3) of the *Constitution* and specifically with reference to s.39(3)(j) of *the Constitution* that states that: -

> *"a court may have regard to any other material that the court considers relevant."*

171. The international obligations to a fair workplace applying the Act by the State and to which I rely upon as 'relevant' extrinsic material in the interpretation of the Act, is set out in Article 7 of the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*), which was **ratified by Papua New Guinea on 21 July 2008** and provides that: -

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

172. The facts support the expectation that Article 7(c) of the *ICESCR* would apply in the construction of the *Employment Act 1977*, as 'relevant' extrinsic material in that the covenant was ratified by PNG on 21 July 2008 relevant to the fact that the NCDC continued to employ the Appellants for over a decade, suggesting that they were both competent and senior employees.

173. Otherwise, the NCDC would not have continued to renew their contract annually for a decade.

174. Section 3(1)(b), in my view, is not a separable and independent section of the Act making stand – alone directory powers of excluding workers inconsistent with the Act.

175. In applying *Salter's* case above, it cannot be interpreted against the interests of the Appellants who have a legislative expectation that the *Employment Act* would apply to protect their interests, particularly involving contracts of service between a State instrumentality and workers contrary to the application of this section adopted by the Respondent on appeal arguing its statutory purpose.

176. As a matter of interpretation, there is nothing in Section 3(1)(b) in which either expressly or by implication permits an outcome inconsistent with the other provisions of the *Employment Act* to contract out of the Act.

177. If that argument were to prevail it would result in a granular absurdity in the construction of one provision in the Act smothering the purpose of the entire Act and destroying its validity.

178. It is also not the case in my view that Section 3(1)(b) is conceivably meant to be interpreted in that it applies in diminution, dilution of or degradation of the rights granted in an entire Act to protect workers from being unfairly deprived of the protections set out in the Act.

179. I reject those arguments or conclusions on the interpretation of s.3(1)(b).

180. In other words, separability of Section 3(1)(b) requires reconciling confusing provisions that will often require the Court to determine which is the leading provision and which is the subordinate provision and which must give way to the other.

181. The examples of conceivable provision permissible under 3(1)(b) can be gleaned under the *Police Act 1998* (*the Police Act*).

182. With reference to Section 42 *Police Act* (as to recruitment), 'potential employees' as defined under the *Employment Act*, contemplates the appointments of members of the regular constabulary pursuant to Section 43 which sets out the regime of both recruitment and appointments of constables of police including the chain of command and thereby would satisfy the provisions of Section 3(1)(b) to exclude police under the Employment Act.

183. Therefore it also follows that Section 3(1)(b) applies to members of the PNG Royal Constabulary.

184. Likewise, further examples are contained in the *Defence Act 1974* (Part VII of the Act) where civilians employed by the Defence Force have their own regime of recruitment, employment, remuneration and rights under the *Defence Act* pursuant to Sections 30 to 39.

185. It must therefore follow that both the *Police Act* and the *Defence Act* are readily available examples that crystalise the operation of s.3(1)(b) and the application to exclude candidates and employees in the respective Defence and Police Forces where Section 3(1)(b) applies and has work to do.

186. Section 3(1)(b) applies to exclude service men and women recruited in the Papua New Guinea Defence Force under respective statutes.

187. Otherwise, a watershed approach would be taken by the State, its instrumentalities and all future employers granting short-term contracts to avoid paying allowances and entitlements and other benefits afforded to permanent employees at the peril of long-term casual employees.

188. The interpretation adopted by the Respondent employer would introduce what would be a new defence under Section (3)(1)(b) in all proceedings commenced in the National Court in the future including employment disputes which may create varying interpretations at trial level by the National Court trial judges.

189. This Court needs to avoid uncertainty in supervising lower Courts against future agile arguments on the construction and interpretation of the Act.

190. It is my view that it would violate the entire *Employment Act* resulting, in future negotiations and contracts rendering the *Employment Act* colourable, uncertain and unworkable.

191. The current sections 10, 15 and 19 of the *Employment Act* are provisions left intact for the protection of employees under the Act by the Appellants on a proper and fair reading of Section 3(1)(b).

192. The proposed interpretation of Section 3(1)(b) would dilute existing rights and obligations between employers and employee and hence would be necessarily inconsistent with the purpose of the *Employment Act*.

193. The Act expressly provides for rights and obligations to exist in favour of workers if the employer under the Act does not comply with Section 19 of the Act which renders NCDC Contracts of no force and effect.

194. In other words, the consequences of Section 3(1)(b) in a proper interpretation and purpose of that section presents inconsistencies in that regard and remain pendulous suffering interpretative tension.

195. It is my view there is scope for work to be done by Section 3(1)(b) of the Act in a subordinate sense contemplated by the application of other statutes or industrial awards I have discussed above in the treatment of Police and Defence Force members as relevant examples of the provision.

196. Section 3(1)(b) expressly contemplates the exclusion of contracts from the operation of the *Employment Act* covering a specified class or classes of persons which would otherwise be covered by other legislations.

197. It cannot be read in an ordinary sense and meaning to include the common law regarding private treaty contracts which include rights at common law to the contracting parties in favour of employers, infringing on the rights of the Appellants to rely on the captured provisions of the *Employment Act*.

198. The question of interpretation is therefore whether what is excluded by Section 3(1)(b) is any private treaty contract for employment such as the NCDC Contracts that is the subject of the litigation in the National Court below and its interpretation now being raised in this Appeal for the first time.

199. In my view to include private contracts under the common law by operation of s.3(1)(b) of the Act is an argument that is not sustainable.

200. A watershed of defences would flood National Court employment disputes to the detriment of the Appellants in this Appeal and other casual or part-time employees employed by the State and its instrumentalities.

201. In my view to interpret Section 3(1)(b) otherwise is to introduce a defence that the common law principles of contract law arising from a private treaty contract applies is contrary to the purposive test to the whole of the *Employment Act* and would be invalid in its statutory construction.

202. The declaratory relief sought by the Appellants in the Court below included a declaration that the NCDC Contract was invalid and of no force or effect.

203. In my view, I find the contract has no force in effect by applying Section 19 of the Act and therefore applies to all the NCDC Contract executed by the Appellants to which discussion on the construction and interpretation of Section 19 of the Act follows in this judgment.

Section 19 of the Employment Act

204. Section 19 makes it clear that a written contract of service is of no force and effect unless and until: -

(a) In the case of a literate employee

i. he has signed the instrument of agreement and has certified under his hand on the agreement that he has read, understood and agreed to abide by the terms and conditions endorsed on the agreement; and

ii. the employer has endorsed on the agreement a note that he believes and is satisfied that–

(A) the employee is literate; and

(B) before signing the agreement, the employee read and understood it; and

(b) In the case of an illiterate employee,

i. signed; or

ii. affixed his mark or an impression of his thumb on,

the instrument of agreement in the presence of a labour officer and the labour officer certifies that Section 23 has been complied with.'

205. The evidence from a proper reading of the NCDC Contract tendered in the Court below establishes that: -

i. The Appellants all signed the instrument.
ii. The Appellants did not certify under their hands on the agreement that they had read, understood, and agreed to abide by the terms and conditions endorsed on the agreement.

206. On this basis alone the NCDC Contract is of no force and effect.

207. Taking the case of an illiterate employee under Section 19(b) before signing the agreement, the employee must read and have understood the terms and conditions in the contract.

208. The NCDC Contract speaks for itself.

209. There is no endorsement that appears on the NCDC Contract that the employee read and understood it.

210. On the second basis, it is my view that the NCDC Contract is of no force and effect.

211. A further point I make is that the lion's share of agreements or contracts of service generated by the State and its instrumentalities are in English.

212. The question of literacy then arises that represents an unfair advantage in favour of employers to the detriment of employees in Papua New Guinea generally who are conversant in Pidgin and/or their mother tongue of their

provinces or clans, suggesting English represents a second or third language from birth until they commence their education.

213. The endorsement in my view that the employees are literate in English to read and understand the contract properly is necessary and obvious, or that the Contract was translated for them into a language the employee understood.

214. Therefore Section 19 of the Act is a mandatory provision that the Respondent has failed to comply with in the circumstances.

215. Section 19(b) provides that in the case of an illiterate employee he or she has signed or affixed a mark of his or her thumb in the presence of a duly appointed and certified labour officer on behalf of the employer.

216. In the hearing below, there is no answer to the question of whether the relevant officer on behalf of the employer had complied with Section 19 to determine literacy or illiteracy of the Appellants or any factor to ensure that before signing the agreement that the employee to that contract had understood it and the endorsement under Section 19 being entered by the representative of the NCDC.

217. In my view the NCDC Contracts are void ab initio and unenforceable.

218. The contracts of service arising from the agreements are of no legal force or effect unless the NCDC Contracts comply with Section 19 of the Employment Act and for all the reasons set out in my judgment.

219. There is no evidence that the human resource manager or the other officer were certified under the Act pursuant to Section 8 of the Act.

220. I now turn to the next critical point of the failures by the Respondent to satisfy the provisions of the Employment Act in the circumstances.

Failure to comply with Section 19 of the Employment Act.

221. In the affidavits of Mr Bailey, there is no evidence that he had the delegation required and granted to him by the Secretary to be a labour officer of the Respondent in relation to the issue of contractual capacity to enter into the NCDC Contract on behalf of NCDC and the Appellants.

222. Mr. Bailey might be the Human Resource Manager of NCDC, but there does not appear to be any evidence to suggest he has been furnished with a certificate of his appointment signed by the Secretary of his department

pursuant to Section 8 of the Act and that he was gazetted under the Act in this regard which equally applies to the other unknown officer who signed the agreement.

223. It is clear that without evidence of this delegated authority or his certificate of appointment being proven, his capacity to enter into the NCDC Contract has not been established and therefore offends Section 19 of the Act in the employee/employer relationship that is required to be determined in this Appeal.

224. The absence of the certificate of appointment, the Gazette, or evidence under the principles of the alter ego position of the officers or labour officers was not proven by the Respondent in the Court below on the balance of probabilities.

225. Mr. Bailey has simply stated in his evidence that he was *'authorised to make this Affidavit on behalf of NCDC…"* and did not establish that he and the unknown officer were authorised to enter into the NCDC Contract with the Appellants.

226. The above analysis was not carried out by Wurr AJ nor were reasons provided to adequately interpret the Act at all to consider the evidence that the Contract that Mr. Bailey and the other signatory appearing on the NCDC Contracts were duly appointed and authorized under the *Employment Act*.

Findings and Reasons of Wurr AJ judgment.

227. It is my view that had Wurr AJ applied her mind and provided reasons in the interpretation of the Employment Act that she ought to have found in the trial below, the NCDC Contract between the Appellants and the Respondent for the range of service the Appellants provided to NCDC from 2012 until some Appellants were terminated, and those that remain employed with the Respondent, have been employed under a contract that was of no force or effect ab initio and invalid.

228. Following my views and interpretation of the *Employment Act*, Sections 10 and 15 would operate to characterise the Appellants as casual workers which would deem the Appellants as oral contract employees of NCDC under Division 3 of the Act.

229. Division 3 of the Act involving oral contracts creates a regime of rights would that allow the Appellants to claim for years of service with the Respondent for entitlements, allowances, the accumulation of sickness and

holiday pay long service leave (if they had been employed for more than 10 years) or ultimately pension rights with the Respondent.

230. The protection against breaches of their rights set out in Section 19 of the Act includes fair notice before termination occurred instead of payment of wages or rights in relation to being summarily terminated unless there was lawful cause or excuse.

231. The *Employment Act* protects the rights of oral contract employees such as the Appellants in the facts and circumstances set out in this judgment akin to the fairness of transactions contemplated by Section 2 and 5 of the *Fairness of Transactions Act 1993* which involves constitutional provisions of fairness in transactions.

232. In determining all these questions under this Act, interpretation did not take place before Wurr AJ at all.

233. Trial judges must apply equity and good conscience without being bound by the rules of evidence in determining that the NCDC Contracts or any other contracts of employment between the Appellants and Respondent were valid and or of no legal effect from inception pursuant to s.149 of the Act.

234. Wurr AJ did not apply the statutory requirement mandated by Section 149 of the Act in her entire judgment or use words to that effect to establish that the trial judge had considered the entire Act in her judgment.

DISCERNMENT

235. The position put by the counsel for the NCDC including the fresh point raised during arguments at the hearing of this Appeal including the interpretation of Section 3(1)(b) of the Act requires sapience and clear-sightedness in my concluding observations and views.

236. Assuming the common law steps to exclude private treaty employment contracts as the '**other laws'**, it is my view that construction of the *Employment Act* applies incredible strain on the purpose of the Act and defies the reasonable interpretation of the Act to ultimately obstruct or exclude employees' rights in favour of diminishing employers' duties to act fairly in negotiating workplace agreements.

237. As I have reasoned more than once in this judgment, there must be equity afforded to the employee when seeking employment, then, in the negotiation process to execute contracts of service in the workplace without prejudicing the

expanding unemployed labour force seeking employment in Papua New Guinea.

238. This must be so particularly at times of high unemployment in the Nation experiencing the basic hourly rate for employees on offer being increased to the handsome sum of 5 Kina an hour in employment contracts in January 2026.

239. Otherwise, the cohesion and purpose of the Act would weaken the statutory force and effectiveness of the provisions in the whole Act.

240. With the necessary and obvious perceptibility in interpreting the Employment Act, the purposive test applies not just for the Appellants in this Appeal but for tens of thousands of workers negotiating workplace agreements with the State and its instrumentalities like NCDC.

241. Only robust legislation like the Employment Act and its provisions permit the contracting out of its purposive provisions under Section 3(1)(b) to the extent that statutory laws apply to special or defined employees or a class of workers to be excluded from the operation of the Employment Act.

242. For all the reasons in this judgment, it is my view that s.3(1)(b) does not apply to the parties in this Appeal under the NCDC Contract or like contracts in the workplace unless a statute declares otherwise.

243. In my view human experience would dictate that the State and its instrumentalities would apply Section 3(1)(b) to place most, if not all of its workforce, on short-term contracts to avoid extended rights afforded to permanent employees.

244. To illustrate the above point with reference to a non-exhaustive list, workers' rights and employment entitlements for permanent employees would include sick leave, holiday pay and loadings, allowances and clothing, long service leave, bereavement leave, maternity or paternity leave, pensions for long term staff, and other allowances and benefits in favour of the workers of PNG and the accumulation of these benefits to be paid out at the end of the permanent employment career or changing employment of workers or upon the present instance of termination of the Appellants at the prejudice of the workers.

245. The loss of those rights would cause current and future workers considerable anxiety created by the uneven bargaining power in favour of the State and its instrumentalities resulting in unfair transactions in the workplace taking place contemplated by the safeguards set out in Section 19 of the

Employment Act to buttress and balance the uneven bargaining position that prevails in the employer/employee relationship.

246. The *Fairness of Transactions Act* provides protection to the general public and at large to bring balance to unfair, inequitable, unreasonable or onerous contracts for review by the Courts.

247. The purpose of the *Employment Act* is to provide the same safeguards and rights in the Nation's workplace particularly for the illiterate and semi-illiterate working class of Papua New Guinea.

248. The *Employment Act* puts in place mandatory protective measures and requirements to ensure that both the worker and his or her employer are protected in ensuring the ultimate contract for service was reasonable negotiated.

249. The worker having the benefit of reading the terms and conditions of the contract, understanding these terms and raising objections during negotiations in understanding the entire contract or agreement by endorsing the agreement as being read and understood in the presence of the employer before the solemnity of a person's signature concluding the contract in a language understood by, or interpreted to, the employee by the employer as a minimum standard.

250. Conversely, the employer is protected by having duly appointed and certified employment or labour officers signing and noting on the Contract that the Contract was understood before it was endorsed and signed by the worker after the labour officer ascertained whether the worker was literate or illiterate in an 'understood language' to avoid exploitation of the worker.

251. Otherwise, Section 3(1)(b) would represent a totemic provision separate from the other purposive provisions of the Act.

252. In my concluding remarks it is clear from all the NCDC Contracts in evidence before Wurr AJ in the trial below clearly violated the requirements of Section 19 of the Act.

253. As the matter will now proceed to a new trial before a fresh trial judge of the National Court by way of pleadings it is necessary to deal with my findings and view that the NCDC Contract was void ab initio.

254. In my view there is no enforceable or valid contract therefore: –

i. The Plaintiff cannot seek damages for breach of contract under the two well-trodden limbs set out in *Hadley v Baxendale* [1854] EWHC J70.

ii. The Plaintiff cannot seek damages for breach of contract for "reasonably foreseen' losses suffered by the offending party, or reasonably contemplated by the terms and conditions of the contract when entered into by the parties, or 'special circumstances' communicated to the breaching party.

iii. The Plaintiff must apply the principles of restitution leading to the unjust and/or unlawful enrichment the Defendant has gained by not having to pay the Appellants the entitlements I refer to in this judgment as full time employees of NCDC and/or quantum meruit for the reasonable value of services performed by the Appellants.

255. Wurr AJ had a sudden and erroneous leap of judicial faith from her findings that the NCDC Contract were valid without explanation or reasons, then determining that there was no justiciable case before the Court by erroneously applying the tests in Pundi's case to dismiss the proceedings altogether in a 'no case to answer' finding against the Appellants.

256. For all the above reasons the *Employment Act* applies in these proceedings.

257. The ellipsis or omission of the words contained in Section 149 of the *Employment Act* were obvious and necessary requirements that 'must' be apparent in her judgment, or words to that effect, to ensure that the entire Act was considered and properly interpreted for the judgment of Wurr AJ to stand.

258. In my concluding findings it is clear that the trial judge did not apply the necessary equity and good conscious mandated pursuant to Section 149 of the Act at all in her findings to dismiss the Appellants' action below in the circumstances.

259. I am applying the law of equity and good conscious required by the statute and demanded by the dictates of justice in the reasons for my judgment in upholding the Appeal.

260. I find that the judgment of Wurr AJ dated 1 May 2023 must be set aside.

261. I strongly recommend and advise that the parties refer the matter to mediation after pleadings are closed and before the new trial commences.

262. The disposition of the Appeal and the orders I make follow.

DISPOSITION AND ORDERS

263. For all the reasons and findings above, I agree with the orders proposed by Anis J in this Appeal excepting for the following additional orders:

i. Judgment of Wurr AJ in National Court at Waigani dated 1 May 2023 is set aside.

ii. The matter should be referred to mediation before the new trial commences.

264. I publish my reasons.

FINAL ORDERS

265. By majority, the final orders of the Court shall be as follows:

1. The appeal is upheld.

2. *OS 287 of 2021 – Noah Aote and Tiki Lambao and Ors v. National Capital District Commission* shall be referred back to the National Court for a re-hearing before another judge.

3. The respondent shall pay the appellants' costs of the appeal which may be taxed if not agreed.

Lawyers for the appellants: *Themis Lawyers*
Lawyers for the respondent: *NCDC In-house Counsel*