CASE NOTES

CLAIMS BY AND AGAINST THE STATE ACT – THE APPLICATION OF SECTION 5 NOTICE ON HUMAN RIGHTS PROCEEDINGS – THE ROGER BAI CASE

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This paper stems from a collection of ideas and discussions amongst lawyers from the Police Team within the Office of the Solicitor General[1] which formed the foundations of the State's submissions in the Supreme Court Case of *Independent State of Papua New Guinea v Nimbituo.*[2] This paper also draws on the observations of Kirriwom J in the Roger Bai case relating to Section 5 Notice of the *Claims By and Against the State Act* 1996 (CBASA).

The Application of Section 5 Notice

It has long been held since the case of *Paul Tohian v Tau Liu*[3] that no claim can be made against the State unless Notice under Section 5 of the *CBASA* is given. However, in the last couple of years, there has been an increase in the number of Human Rights cases before the Human Rights court which have been commenced without the parties giving notice to the State under Section 5 of the CBASA. This practice had been endorsed by the courts on the basis that Section 5 is only mandatory for certain types of cases. Questions have been asked particularly on whether notice is required to be given under Section 5 of the CBASA for proceedings commenced by way of Human Rights Applications pursuant to Section 57 of *Constitution* and Order 23 of the *National Court Rules*.

To answer some of these questions, I begin by looking at the legislative intent of Section 5 of the *CBASA*. In the case of *Kaurigova v Perone*[4] the Supreme Court considered this issue and said:

> With respect to the question of whether Ms. Ephraim was a proper person to receive the notice by the appellant under s. 5(3), we consider that the question needs to be determined in the context of the legislative intent behind s.5 by taking a purposive approach to the Section. The scheme and purpose of s. 5 in our view is akin to that of s. 54(6) of the MVIT Act, thus the purpose of a s. 5 notice is to ensure that the notice of intention to make a claim by a claimant against the State gets to the notice of the State through the officers mentioned in Subsection (1) viz. Attorney General the (Secretary for Justice) or the Solicitor General as the case may be within the time stipulated under Subsection (2) so that, the State is put on early notice and is made aware of an impending claim against it. The purpose of a notice under s. 54 (6) of the MVIT Act, was first discussed in (sic.) *Graham Rundall v. Motor Vehicles Insurance (PNG) Trust (No.1)* [1988] PNGLR 20 at 23 where Bremeyer J, said:
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> "The purpose of s.54(6) is to give the Trust early notice of the claim so that it can make its inquiries. Obviously, inquiries as to the driver, the owner and the insurance details of the vehicle become more difficult as time passes. Drivers change addresses and sometimes in Papua New Guinea their names, witnesses disappear, expatriates leave Papua New Guinea and police accident reports and insurance certificates get lost."….

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1 I want to thank and acknowledge the contribution of my learned colleagues Mr George Akia, Ms Charity Kuson and Ms Apolonia Kajoka of the Office of the Solicitor General.

2 (2020) SC1974. The decision on the case was handed down on 2 July 2020.

3 (1998) SC566.

4 (2008) SC964.

Then in *Daniel Hewali v. Papua New Guinea Police Force and The Independent State of Papua New Guinea* N2233, Kandakasi J, considered the issue of sufficiency of a notice of intention to make a claim against the State by a claimant under s.5 of the CBAS Act. This his Honour did by reference to s.54(6) of the *Motor Vehicle Insurance (PNG) Trust Act*, and said:

"The wording in this section (s.5 of CBAS Act) is identical to section 54(6) of the MVIT Act. There are two differences between the two sections. First, there is no guidance has (sic.) to what form a notice under section 54(6) of the MVIT Act, should take, whereas under the CBASA (CBAS Act), it provides that the notice must be in writing. Akuram J (as he then was) spoke of this difference in *Kamapu Minato & Anor v The State* N1768. Secondly, it prescribes the manner in which the notice must be served.

In *Kamapu Minato & Anor v The Independent State of Papua New Guinea* N1768, Akuram J, compared s.5 of the CBAS Act, to s.45(6) of the MVIT Act, and said:

"..The purpose of Section 54(6) was explained in Rundle's case by Bredmeyer J at p. 23 is to give the Trust early notification of the claim so that it can make its own enquiries as to the driver, owner, witnesses, police accident reports and insurance certificates. Section 54(6) is designed to give the Trust prior notice of the claim within six months.

I would apply the same reasoning here and say that the purpose of Section 5(1) & (2) of the *Claim By and Against the State Act*, 1996, is to give the State early notification of the claim so that it can make enquiries. Obviously, enquiries as to, as in this case, the raid itself, the policemen involved, the properties damaged or destroyed, their value, the witnesses and whether the action is time barred. Section 5(1) & (2) is therefore designed to give the State and its agents or servants sufficient prior notice of the claim within six months.

All these cases affirm that the purpose of a notice of an intention to make a claim under s.5 of the CBAS Act, is the same as a notice of an intention to make a claim under s.54(6) of the MVIT Act."

It can be drawn from the case of *Kaurigova* and the list of authorities referred to in this case that the purpose of section 5 is to give early warning to the State about an impending claim against it by a claimant so that it can make its own investigations regarding the claim. It has the same intent as section 54(6) of the MVIT.

Section 5(1) of the *CBASA* states that:

> No action to enforce any claim against the State lies against the State unless notice in writing of intention to make a claim is given in accordance with this Section by the claimant to- the Departmental Head of the Department responsible for justice matters; or the Solicitor-General.

The question that is posed is whether a section 5 notice is a prerequisite before a Human Rights application can be pursued against the State. The answer to this question can partly be gleaned from Section 2(2) of the *CBASA* which states that:

> The provisions of this Act apply to applications for the enforcement against the State of a right or freedom under section 57 (Enforcement of guaranteed rights or freedoms) of the *Constitution* and for damages for infringement of a right or freedom under section 58 (Compensation) of the *Constitution*.

It is evident that Section 2(2) unequivocally declares that all provisions of the *CBASA* including Section 5 apply to proceedings commenced by way of Human Rights applications under Section 57 of the *Constitution*.

The Definition of a "Claim" under Section 5 of CBASA

The Supreme Court has over the years established that a claim under Section 5 of the CBASA includes a claim for breach of Constitutional Rights as defined under Section 2(2) of the CBASA. Section 2 of CBASA provides that:

> 2. SUITS AGAINST THE STATE.
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> (1) A person making a claim against the State in contract or in tort may bring a suit against the State, in respect of the claim, in any court in which such a suit may be brought as between other persons.

> (2) The provisions of this Act apply to applications for the enforcement against the State of a right or freedom under Section 57 (Enforcement of guaranteed rights and freedoms) of the *Constitution* and for damages for infringement of a right or freedom under Section 58 (Compensation) of the *Constitution*.

In the case of *Frederick Martins Punangi v Sinai Brown as Minister for Public Service, Sir Michael Somare as Chairman of the National Executive Council and The State*[5], His Honor Deputy Chief Justice Injia (as he then was), defined the term "claim" and the application of Section 5 of the CBASA as follows:

> In ordinary usage, the word claim generally is 'a right that somebody believes they have to something especially property, land, etc.': Oxford Advanced Learner's Dictionary (2000 ed.). The word "claim" has wide meaning in law. It means the "assertion of a right": Osborne's Concise Law Dictionary (1976 ed). Therefore, assertion of "a right" is the gist of a "claim" in law.
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> Section 2 of the Act actually defines the ambit of a "claim" against the State for which the State may be sued under the Act. Subsection (1) defines "claims" to mean "claims" "in contract or in tort". These are usually all personal actions in law for damages in tort or contract under principles of common law and equity as modified by statute, such as claims for debt in money, goods or property; or compensatory damages for breach of statutory duty: *Awabdy v German* [1971] PNGLR 68. Claims against the State in tort is also governed by statute: see the definition of "tort" in s.1 of the *Wrongs (Miscellaneous Provisions) Act* (Ch. No. 297). The procedure for enforcing a claim in contract or tort is set out in the National Court Rules. The entire National Court Rules, except O 16, (Judicial Review) sets out rules of procedure for commencing actions for damages in tort or contract or for breach of statutory duty. This procedure also applies to proceedings commenced against the State.
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> Subsection (2) then adds applications for enforcement of constitutional rights made under s.57and claim for damages under s.58 of the *Constitution*, to the list of "claims" under Subsection (1). The procedure for application for enforcement of Constitutional rights is separate from the procedure for instituting actions in tort or contract. Currently, the procedure under s.57 and s.58 of the *Constitution* is still in its development stages. Many persons are in fact using the same procedure under the National Court Rules because the breaches of Constitutional rights sometimes also constitute torts.
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> Reading subsection (1) and (2) together, all claims against the State in contract or tort or an application under s.57 and s. 58 of the *Constitution* for which a suit may be brought against the State in "any court" of law of competent jurisdiction (s.1), are covered by the Act. Conversely, an application in the nature of a prerogative writ under Order 16 is not included in s.2. Therefore, by implication, application for Orders in the nature of prerogative writs are excluded from the definition section in s.2., hence the notice provisions in the Act does not apply to such application.
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> Under s.5(1) of the Act "no action to enforce any claim" must be by necessary implication, refer to bringing a suit against the State as defined in s.1, in "any claim" on contract or tort and enforcement of constitutional rights under s.57 and s.58 of the *Constitution*, as defined in s.2. A notice of claim must be given for such claim.

The issue was addressed by the Supreme Court in *Asiki v Zurenuoc, Provincial Administrator*.[6] In this case, the Supreme Court dealt with the question of whether an applicant for judicial review proceedings should comply with the mandatory requirements of the CBASA. The court also dealt with the issue of enforcement of rights and freedoms under Section 57 of the *Constitution* and

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5 (2004) N2661.
6 (2005) SC797.

Section 2 of *CBASA*. The three men bench, comprising Jalina J, Cannings J, and Manuhu J, held (inter alia) that:

> The notice requirements of the *Claims By and Against the State Act* apply only to actions that are founded on contract or tort or breaches of constitutional rights.

In that Supreme Court judgment, their Honours endorsed the decision and reasoning of Justice Injia in the *Punangi case* and added that:

> We agree with Injia DCJ's reasoning in Punangi v Brown, adopt it for the purposes of the present case and find that:
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> the notice requirements of the *Claims By and Against the State Act* apply only to actions that are founded on contract or tort or a breach of constitutional rights. Section 5 does not apply to actions seeking orders in the nature of prerogative writs commenced under Order 16 of the National Court Rules, as Order 16 provides a comprehensive and exclusive procedure for judicial review and includes a requirement for giving notice to the State.

The Supreme Court, in the case of *Public Curator of Papua New Guinea v Kara*[7] also dealt with the issue of whether the common law claim of *devastavit* was a claim that can be captured under CBASA. The court did not have any issue as to whether enforcement of guaranteed rights or freedoms under Section 57 of the *Constitution* falls under a "claim" under Section 5 of the CBASA. The Supreme Court said:

> For these reasons, we are of the respectful opinion that the common law claim of devastavit based on negligence is a "claim" within the meaning of Section 2 of the CBASA: see *Frederick Martins Punangi v Sinai Brown* (2004) N2661, *Mision Asiki v Manasupe Zurenuoc* (2005) SC797 and *Morobe Provincial Government v The State* (2007) SCA No. 44 of 2005, Unreported & Unnumbered Judgment, (Hinchliffe, J, Jalina, J & Lay, J) delivered on 28th June 2007 at Waigani on the meaning of the word "claim". These cases confirm that for a "claim" to fall within the meaning of Section 2 of the CBASA, it must be an action that is founded on contract or tort or a breach of constitutional rights under Sections 57 or 58 of the *Constitution*. It follows that the primary judge erred when he found that a claim based under Section 36 of the *Public Curator's Act* was a statutory cause of action and not one founded in contract or tort.

Also, in the Supreme Court case of *State v Downer Construction (PNG) Ltd*[8]*,* the Court comprising their honours, Justice Gavara-Nanu, Justice Kandakasi and Justice Lay, dealt with the issue of whether the terms "suit", "claim" and "action" as defined under CBASA includes arbitration proceedings. Though Kandakasi J (as he then was), (in his dissenting judgment) held that an arbitration, though not a court proceeding, is a claim captured under CBASA*,* it was generally agreed by the majority that any claim against the State that come by way of court proceedings must give notice to the State. The Supreme Court also defined the term "claim" by considering the meaning derived from the whole scheme and context of the CBASA and also the intention of Parliament in coming up with the CBASA. Justice Gavara-Nanu's explanation was that:

> Moreover, a claim for which a notice is given under s.5 contemplates legal proceedings that may be commenced or have been commenced by the claimant in a "suit" or an "action" within the meaning of ss.1, 2(1) and 5(1) and (2). The word "suit" in s.2 is defined by s.1 as including "any action or original proceeding between parties in any court of competent jurisdiction". It follows that the word "claim" in ss. 2(1) and 5(1) when given reasonable construction can only relate to a "suit" or an "action" taken in a court or legal proceedings, bearing in mind that a "suit" means an action taken in a court of law or a lawsuit. In this connection, a "suit" also means "action" taken in court proceedings.

Justice Kandakasi on the other hand, explained that:

> I have searched a number of legal and ordinary English language dictionaries for the meaning of the word "claim". Leaving the everyday English language usage aside, the use of the word in the legal sense leads to this definition. A claim is an assertion, statement, allegation or averment which may be coupled with a demand or request or a call for a remedy or redress of a breach or damage done to one's person or property right or interest recognized, granted or protected by law. Bringing

[7] (2014) SC1420.
[8] (2009) SC979.

> a suit or taking court action is not an essential element in the definition of a claim. Hence, a claim may be made without necessarily having issued a "suit" or a "court action". Clearly, therefore, there is a distinction between, the word "suit" and "claim" with the later forming the foundation for a "suit" since a "suit" is usually an action taken by a party seeking to enforce his or her claim. In other words, a "claim" becomes the basis for a "suit". The whole scheme of the Act under consideration as we noted in the foregoing, appear in my view to go along with this distinction. For these reasons, I accept the submissions by Mr. Egan that, there is a distinction between "suit" and "claim".

From these judgments, it can be concluded that the term "claim" refers to a "claim" as captured under Section 2 of the CBASA. A claim under Section 2 includes a claim for breach of constitutional rights. There is no distinction in the meaning to say that claims commenced as applications under Section 57 of the *Constitution* should be considered in two forms, that is one seeking damages, and the others not.

The Mal and Karo Cases on Section 5 Notice

There are two cases by the National Court which have taken a different approach to that of the Supreme Court as discussed above. They have established that *Section 5 Notice is not required to be served on the State before a Human Rights Application which does not seek monetary, costs or compensation against the State*. The first case is the case of *Mal v Commander, Beon Correctional Institution*[9] and the second is the case of *Karo v Commissioner of Correctional Services*[10] In the Mal case, the applicant, a prisoner, applied for early release on humanitarian grounds**.** The State then filed an application to dismiss the proceedings for failure to give notice to the State. In dealing with the matter his honor, Justice Cannings, firstly dealt with the definition of 'claim'. His honor defined the term 'claim' in section 5 of the CBASA as follows:

> The term "claim" in Section 5 refers to a monetary claim or a claim for an order such as an injunction that would involve direct cost or prejudice to the State. Although Section 2(2) clarifies that the Act applies to applications under Section 57 of the *Constitution* for enforcement of human rights (and the present application is such an application) that does not alter the meaning and effect of the word "claim" in Section 5. It refers to monetary or other similar claims. None is made in this case. The applicant did not have to give a Section 5 notice. Her application will not be refused because of the alleged failure to comply with the Act. There was no failure to comply.

The court then dismissed the State's application. Then in the Karo case, the court also considered the issue of whether a section 5 notice is required before a Human Rights application is filed. In that case, the State filed an application seeking dismissal of the proceedings on the grounds that the applicant failed to give notice to the State before commencing the proceedings. In his judgment, Justice Tamate considered the intention of the Parliament by looking at the explanation by the then Minister for Justice, Hon Arnold Marsipal during debate in Parliament on 20 November 1996 on the Bill. The court then reasoned that the purpose of the Bill and the subsequent passing of the CBASA is for claims that are monetary in nature for actions or suit in court for damages or compensation in contract, tort or for breach of human rights under Sections 57 and 58 of the *Constitution*. His Honour concluded that:

> In determining this question, one has to look at some of the rights that require enforcement which are not monetary in nature so as to require Section 5 Notice. State continues to raise the objection or seek dismissal to such applications or actions when Section 5 Notice has not been served by an applicant or Plaintiff. These are applications such as (but not limited to):
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> Application for parole
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> Application for leave of absence (LOA)
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> Application for transfer to prison close to relatives who can visit
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> Application to correct a due date of release (DDR) from prison
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> Application for medical treatment and attention

[9] (2017) N6710.
[10] (2018) N7799.

Application for release from unlawful detention

Application for early release on medical grounds

Applications for protection of the law

These are not court actions for monetary claims against the State, but applications for enforcement of human rights. Obviously, such applications cannot be caught under Section 5 of the *Claims By and Against the State Act* as per the purpose and the legislative intent of its passing in Parliament.

In the interest of justice, I would apply common sense when dealing with this issue. The Supreme Court cases discussed above did not consider the issue from this context, where enforcement of human rights, such as those referred to above in paragraph 48 are concerned. These are not claims based on contract, tort or for damages or compensation, where rights of persons have been breached as a result of allegations of Police brutality or similar types of violations by Public servants or agents of the State.

I would agree with the approach taken by Cannings, J in Mal's case where the court dealt with an application for early release from prison on health grounds. There was an objection by the Respondent on the application for non-compliance with notice under CBASA. The Court in considering the application held that the applicant was not making a claim against the State for the purpose of CBASA, therefore it was not necessary to give notice under Section 5 of the Act of her intention to make a claim against the State. The Court defined the term "claim" under Section 5 to mean 'a monetary claim or a claim for an order such as an injunction that would involve direct cost or prejudice to the State.

Conclusion

Based on the above, any proceeding filed as Human Rights proceedings which do not comply with Section 5 Notice requirement is an abuse of process and is at risk of being dismissed. It is a condition precedent and hence must be complied with before instituting proceedings against the State.

Proceedings filed by way of Human Rights applications under Order 23 of the *National Court Rules* are captured under Section 2 of the CBASA as being subject to Section 5 requirement of giving Notice to the State irrespective of whether the reliefs sought are for damages or compensation.

At present, there is no exception to the Section 5 Notice rule, and that it must be strictly complied with, in all proceedings filed under Section 57 and Order 23 of the *National Court Rules* for breach of constitutional rights.