

**Malewo v Faulkner [2007] PGNC 150; N3357 (20  
November 2007)**

[N3357](#)

**PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]**

OS NO. 718 of 2006

BETWEEN

**TIGAM MALEWO AND ROBERT DEMUTT  
AND HENS GUIMBEN ON THEIR BEHALF AND ON BEHALF  
OF TAMA, AMISAN AND DAVENTEM CLAN MEMBERS**  
*First Plaintiffs*

AND

**DICK BOMKI, NON KOREK, NORMAN BONBEN  
AND SILO KONDOMO ON THEIR BEHALF AND ON BEHALF  
OF BRULLA GENHO, DAUPKA AND KIMKA CLAN MEMBERS**  
*Second Plaintiffs*

AND

**KEITH FAULKNER - MANAGING DIRECTOR,  
OK TEDI MINING LIMITED**  
*First Defendant*

AND

**OK TEDI MINING LIMITED**  
*Second Defendant*

AND

**PNG SUSTAINABLE DEVELOPMENT  
PROGRAMME COMPANY**  
*Third Defendant*

AND

**BHP (PNG) LTD**  
*Fourth Defendant*

AND

**THE INDEPENDENT STATE OF PAPUA NEW GUINEA**  
*Fifth Defendant*

AND

**INMET MINING CORPORATION**  
*Sixth Defendant*

AND



**BHP BILLITON LTD**  
*Seventh Defendant*

Waigani: Davani, J  
2007: 24 September  
24 October  
20 November

*PRACTISE AND PROCEDURE - originating summons - seeks numerous declarations - disputed facts apparent - incorrect mode of proceedings - o. 4 r. 2 - o. 4 r. 3(2) of National Court Rules.*

*REPRESENTATIVE ACTION - originating summons - lack of indorsement - lack of written authorities - lack of cause of action - o.4 r. 20 - o. 5 r. 13 of National Court Rules.*

*PRACTISE AND PROCEDURE - reliance on affidavits in motions - affidavits not to be filed on day of hearing, unless leave is sought - r. 12 of Motions (Amendment) Rules 2005.*

*Plaintiff filed an originating summons seeking numerous declarations against defendants claiming alleged  **pollution**  of the Ok Tedi River and flood plains, more particularly the defendants' negligent actions in allowing hazardous and destructive chemicals and waste to flow into the Ok Tedi River and flood plains causing damage and injuries to the environment and occupants of that area.*

*The defendants challenge the propriety of the mode of proceedings.*

## **Held**

Where proceedings are commenced as a representative action, the indorsement on the writ must show that. It is the indorsement on the writ that is crucial, not the statement in the title which is a mere description.

Bowler v John Mollem & Co. [\[1954\] 1 WLR 445](#)  
Evans v Talair Pty Ltd [\[1983\] PNGLR 196](#)

The court has an over riding discretion by use of the words "unless the court otherwise orders" to prevent representative proceedings otherwise validly brought from continuing.

Bollinger v Goldwell Ltd [\[1971\] RPC 412](#)  
Simon Mali v The State (2002) SC 690  
O.5 R.13 (1) (2) of National Court Rules.

A claim by plaintiffs for damages including exemplary damages of \$US3.75 billion, damage to environment and contamination of people and environment that would last for 200 to 4000 years. An originating summons is not the correct mode of proceedings for a claim of this nature, which is a claim for damages and which raises facts which are disputed to a large extent.

Kiee Toap v The State and Others (2004) [N2766](#)  
Gabriel Apio Irafawe v Yauwe Riyong (1999) [N1915](#)  
O. 4 R. 25 and 26 O.4 Rs 1 and 2 of National Court Rules.

## Cases Cited

### Papua New Guinea Cases

Evans v Talair Pty Ltd [\[1983\] PNGLR 196](#)  
PNG forest Products Pty Ltd & Anor v The Independent State of Papua New Guinea & Anor [\[1992\] PNGLR 88](#)  
PNG Forest Products v The State [\[1992\] PNGLR 85](#)  
Apio Irafawe v Yauwe Riyong (1999) [N1915](#)  
Eliakim Laki on behalf of himself and 167 other formal block holders of Kabugara Oil Palm Block, West New Britain Province v Maurice Alaluku, Secretary Department of Lands, Utula Samana, Secretary Department of Agriculture and Livestock and Independent State of Papua New Guinea (2000) [N2001](#)  
Simon Mali v The State (2002) [SC690](#)  
Kie Toap v The State and Others (2004) [N2766](#)

### Overseas Cases

Barnes & Co. Ltd v Sharpe [\[1910\] HCA 26](#); [\(1910\) 11 CLR 462](#)  
Booth v Briscoe [\[1877\] 2 QBD 497](#)  
Bowler v John Mollem & Co [\[1954\] 1 WLR 445](#)  
Bollinger v Goldwell Ltd [\[1971\] RPC 412](#)  
Dyson v AG [\[1911\] 1 KB 410](#)  
Lonrho v Fayed [1991] 3 All ER 303  
Nagle v Fielden [\[1996\] 1 All ER 589](#)  
Renowden v McMullin [\[1970\] HCA 24](#); [\(1970\) 123 C.L.R. 584](#)  
Republic of Peru v Peruvian Guano Company (1887) 36 Ch. D. 489

## **Counsel**

C. Narokobi, for first and second plaintiffs  
I. Molloy & J. Aisa Jnr, for first, second, fifth and sixth defendants  
I. Shepherd, for fourth and seventh defendants  
R. Lindsay, for third defendant

## **DECISION**

**20 November, 2007**

1. DAVANI, J: Before me are several motions filed by various parties which I heard and which are;

- Notice of Motion filed on 20th July, 2007 by Blake Dawson Waldron for and on behalf of the fourth and the seventh defendants seeking orders that the proceedings be dismissed pursuant to O. 12 r. 40 (1) (a) and/or (c) of the National Court Rules (NCR).



- Notice of Motion filed on 1st June, 2007 by Allens Arthur Robinson Lawyers for the first, second, fifth and sixth defendants seeking orders that the proceedings be stayed or dismissed, application made pursuant to O. 12 r. 40 (1) of the NCR and/or s. 155 (4) of the Constitution.

- Notice of Motion filed by Gadens Lawyers for the third defendant on 6th August, 2007 seeking orders pursuant to O. 12 r. 40 (1) (a) (c) and O. 4 r. 4 (2) (d) of the NCR and O. 5 r. 13 of the NCR, that the amended originating summons filed on 29 March, 2007 be dismissed.

- Notice of Motions for directions filed on 8th August, 2007 by Narokobi Lawyers for the first and second plaintiffs, seeking directions as to how the substantive matter should proceed.

## Background

2. First, the notices of motions filed by all defendants lawyers referred to above, seek dismissal of proceedings on similar grounds, basically that the originating summons filed by the plaintiffs are not the correct mode of proceedings because there are a lot of disputed facts which will not be properly tried if the matter were to proceed by way of originating summons. They ask for orders that the proceedings commence by Writ of Summons and statement of claim and proceed by way of pleadings or alternatively, that the proceedings be dismissed.

3. The applications arise as a result of the filing of proceedings on 10th October, 2006 by the first and second plaintiffs through their lawyer, Narokobi Lawyers. The plaintiff filed an Originating Summons seeking various declaratory orders, all relating to the alleged  **pollution**  of the OK Tedi river and flood plains by the second and fourth defendants, more particularly their alleged negligent actions in allowing hazardous and destructive chemicals and waste to flow into the OK Tedi river and flood plains causing damage and injuries to the environment and the occupants/villagers.

4. On 29th March, 2007 the plaintiff filed an amended originating summons. It is necessary that I set out a few paragraphs taken from the amended originating summons and which read;



*"1. A declaration that the defendants and their servants and or agents including but not limited to Directors Shareholders conduct whether direct or indirect, commencing on or about January 1980 in discharging mining operations waste material including but not limited to rock, material chemicals, and or metal including but not limited to heavy toxic metals known as lead, copper, cyanide mercury into the 38.5 kilometers sections of Ok Tedi River known as Ok Mani junction down to Ok Brim junction and adjoining lands, water course owned and used from time immemorial by Plaintiffs was and continues to amount to:*

...

*II. Unreasonable interference or denial of Plaintiffs peaceful use or enjoyment of Ok Tedi River waters in that the waters were and are likely to be poisonous, unclean and dangerous and that such conduct is interference and continues to be interference since the mine commenced, now and in the future. Plaintiffs are consequently denied their customary riparian rights including but not limited to the following rights;*

1. *Fishing for subsistence and commercial profit.*
2. *Place fish traps to catch shrimps, prawns, eels.*
3. *Hunting crocodiles.*
4. *Extract clay for customary purposes including body paint for singing ceremony.*
5. *Extract sand, stones and gravel for domestic use.*
6. *Traditional ceremonial purposes.*
7. *Washing including washing of sago and root crops.*
8. *Safe drinking and washing water.*
9. *Cooking.*
10. *Supply of safe drinking water for animals.*
11. *Transport of persons and building materials.*
12. *Irrigation of crops.*
13. *To replenish and augment top soils on the flood plains.*

...

*4. A Declaration that  **pollution**  referred to in paragraph 1, 2 and 3 has devastated all forms of life, flora and fauna associated with Ok Tedi River, its waters and nounderlining affected other forms of animal and plant life which Plaintiffs depended on.*

...

*9. A Declaration that the conduct of Defendants activities in discharging mining wastes into Ok Tedi River is ultra hazardous of hazardous which involves risks of serious or potentially serious harm to the Plaintiffs their descendants and the environment along the said river and the Defendants are negligent and continue to be negligent in one, some and/or all of the following:-*

- (a) Failure to keep proper control of chemical and wastes within its mining premises.*
- (b) Failure to take precautions to neutralize the chemicals and wastes before discharging them.*
- (c) Failure to ensure that the chemicals and wastes were neutralize at acceptable level.*
- (d) Failure to dispose of chemical and wastes with due care and attention.*
- (e) Failure to take precaution in safely disposing of the chemical and wastes.*

*(f) Deliberately recklessly disposing the chemical and wastes into the Ok Tedi River knowing at all times its dangerous concentration levels and likely adverse health threatening consequences including risk to lives of the Plaintiffs and their descendants who live, depend or expose to the river.*

*(g) Failure to notify the villagers of the Plaintiffs and the members of the class along the 38.5 kilometers of river that chemical and wastes of dangerous and toxic levels have been discharged.*

*(h) Failure to exercise due care and attention in disposal of the chemical and wastes.*

*(i) Failure to construct an alternative and safe chemical and wastes disposal facility failure in constructing a safe tailings dam.*

...

*11. A Declaration that as a result of discharge by First, Second and Seventh Defendants of mine waste into Ok Tedi River;*

*(i) Plaintiffs and member so class and their descendants have lost and will continue to lose land.*

*(ii) Plaintiffs have lost and will continue to lose natural washing, drinking, sago making, fishing, stone collecting, water potting for domestic use.*



*(iii) Plaintiff have lost areas of forest and likely to lose such forest or vegetation which formally provide Plaintiffs land and materials for gardening, hunting, gathering of housing materials and food sources - patches of sago palms.*

*(iv) Plaintiffs lost valuable forest land and likely to do so for many years as a result of deposit of tailing in the river causing water table to rise into the adjacent land so that land becomes swampy and die back of forests appears and is likely to continue in the foreseeable future.*

...

*17. An Order that Third Defendant has a duty to fund sustainable programmes including but not limited of Housing, Health, Education, Water Supply, infrastructure development and business activities and projects independently of others supported by the said Defendants affected by Ok Tedi Mine and that the Plaintiffs are entitled to received assistance for such programmes at levels proportionate to or greater than amounts Third Defendant had spent outside Plaintiff areas following agreement with Plaintiff.*

...

*22. An Order that Defendants particularly First Defendant, Fifth and Seventh Defendants make available to Plaintiffs all relevant Reports done in relation to  **pollution**  of Ok Tedi River and are in its possession or those undertaken, known or likely to be known by the Defendants, particularly the following:-*

*(i) 1991 Hague International Water Tribunal Ruling on Ok Tedi Mining effects on Ok Tedi and Fly River systems.*

*(ii) 1991 German Stamberg Institute Report.*

*(iii) OTML sponsored studies by Australian Conservation Foundation by Stuart Kirch.*

*(iv) 1996 Out of Court Settlement Agreement with Rex Dagi and Alex Maun known as Community Mine Continuation Agreements (CMCA's).*

*(v) 1999 World Bank Funded Study of Ok Tedi Mine and Ok Tedi Fly River.*

...

*25. An Order that Environment Act apply to Mining Operations at Tabubil and the discharge of Affluent from such operations by Defendants into Ok Tedi River and that common law principles applicable to riparian rights and that of international law continue to apply and that parties are subject to them.*

...

*27. An Order pursuant to Section 155(4) of the Constitution that the Defendant pays for the cost of medical experts to determine the level of health problems directly attributed to the discharge of waste material on the people along Ok Tedi River and the surrounding areas and that a medical care and monitoring fund be established by the Defendants of an amount to be agreed by parties for the Plaintiffs and that if an agreement is not reached within 14 days that Defendants contribute \$100 million US dollars for it.*

...

*34. An Order that First and Third Defendants are guilty of:*

*(i) Private nuisance.*

*(ii) Public nuisance.*

*(iii) Trespass.*

*(iv) Breach of absolute and or reasonable duty of care.*

*(v) Violation of domestic and international law.*

*35. An Order that Plaintiff are entitled to remedies in law and equity including compensatory and punitive damages with 8% interest to be agreed if not to be ascertained at the trial.*

..."

## **The application**

5. Submission by all defendant/applicants are similar in many respects, as pointed out above. Their submissions are raised in relation to the procedure adopted by the plaintiffs, the lack of written authorities from individual plaintiffs, the lack of standing by the plaintiffs, that there

are numerous factual issues in dispute, that there is no cause of action on foot and that what is pleaded lacks numerous particulars. I will discuss these under various subheadings.

6. However, prior to doing that, I note that the only issue is whether the originating summons is the correct mode of proceedings to be filed in a claim of this nature.

7. To answer this issue, I perused the amended originating summons and extracted paragraphs from it, some of which I set out above, which demonstrate how the orders sought are pleaded throughout in the originating summons.

8. The matters in contention as raised by the defendants and which I have pointed out are -

(i) **Wrong party sued** - The fourth defendant submits that the named fourth defendant "BHP (PNG) Limited" is non-existent. The number 3-23776 referred to by Narokobi Lawyers in its letter of 6th June, 2007 to Blake Dawson Waldron Lawyers, refers to a company described as "*BHP Papua New Guinea Pty Limited*" which was incorporated on 3rd March, 1995 and registered on 3rd March, 1995. This is the same company referred to by Narokobi Lawyers in its letter of 6th June, 2007, which states that it also conducted a company search which search revealed that the company was "*BHP (PNG) Ltd company no. 3-23376*."

9. These are two separate legal entities. The fourth defendant submits that because the company named on the OS as the fourth defendant is not a registered entity, the proceedings as against the fourth defendant ought to be dismissed. However, I am of the view that this is an error that can be rectified by an amendment to the correct name put to the Court by the company search from Blake Dawson Waldron Lawyers. This is because the company number noted by Narokobi Lawyers is the same number put to the Court by Blake Dawson Waldron, which means, although the names are different, it is the same company.

(ii) **Failure to identify the plaintiff** - All the defendants submit that all the plaintiffs must be identified in order for the Court to determine each person's claim, loss and damage. That each person must be named in order to determine whether they have customary rights to the land or water for which they claim loss, and/or damage.

That also, where a claim is being pursued, that it is necessary to know the name of each person purportedly represented to ensure that those people consented to the proceedings being brought and that in the event the plaintiffs claim is unsuccessful, it is necessary to know the names of all plaintiffs for reasons of enforcing any costs order.

10. Order 5 rule 13 (1) of the NCR provides for representative actions. It reads;

*"(1) Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them".*

11. It has been held in numerous cases that in all actions or proceedings of a representative nature, of which this is one, all intended plaintiffs must be named and duly identified in the originating process. One such case, *Simon Mali v The State* (2002) [SC690](#), the Supreme Court said that intending plaintiffs must give specific instructions (evidenced in writing) to their lawyers to act for them.

12. Order 5 is the part in the NCR which relates to *"parties and causes of action"*. Rule 13 of O. 5 refers to *"any proceedings"* which means that the proceedings may be one commenced by either originating summons, writ of summons, miscellaneous proceedings or any other proceedings commenced under the NCR. The named first and second plaintiffs claim to sue *"on their behalf and on behalf of Tama, Amisan and Daventen members"* and *"...Brulla, Genho, Daupka and Kimka clan members"*. They are effectively suing in a representative capacity, presumably pursuant to O. 5 r. 13 of the NCR. However, that is not pleaded in the originating summons. In this case, the plaintiffs, without setting out the background to the claim and the basis on which the claim is being made, claim Declarations and other orders. The plaintiffs submit that this is done pursuant to O. 4 r. 25 and r.26 of the NCR . These rules read;

*"25. Choice of summons*

*A plaintiff commencing proceedings by originating summons may use either a summons stating an appointment for hearing in accordance with Rule 26 or a summons for a hearing to be appointed in accordance with Rule 27.*

*26. Summons stating appointment for hearing.*

*(1) This Rule applies to proceedings commenced by originating summons in Form 6 stating an appointment for hearing.*

*(2) The appointment for hearing to be stated in a summons under this Rule may be fixed by the Court, or, if not fixed by the Court, shall be obtained from the Registry.*

*(3) Where there is a defendant, the summons shall, unless the Court otherwise orders, be served not less than five days before the date of the appointment for hearing.*

*(4) Where the appointment for hearing is obtained from the Registry and the summons is to be served outside Papua New Guinea, the date of the appointment shall be not less than one month after the date of filing of the summons.*

*(5) Where the Court makes an order under Sub-rule (3), the summons shall bear a note of the order made."*

13. Order 4 is the rule on "*commencement of proceedings*". Order 4 r. 1 states that proceedings may be commenced by writ of summons or by originating summons, subject to the provisions of any act, regulations or rules. In relation to the proceedings to be commenced by writ of summons, O. 4 r. 2 of the NCR sets out when a Writ of Summons can be filed.

*"2. Where writ of summons required*

*(1). Proceedings shall be commenced by writ of summons -*

- a. *where a claim is made by the plaintiff for any relief or remedy for any tort; and*
- b. *where a claim made by the plaintiff is based on an allegation of fraud; and*
- c. *where a claim is made by the plaintiff for damages for breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under an Act or independently of any contract or any such provision), and the damages claimed consist of or include damages in respect of the death of any person or in respect of personal injuries to any person in respect of damage to any property; and*
- d. *where a claim is made by the plaintiff for damages for a breach of promise of marriage.*

*(2). In sub-rule (1) "personal injuries" includes any disease and any impairment of a person's physical or mental condition.*

*(3). Sub-rule (1) does not apply to proceedings commenced by a person who desires to apply for-*

- a. *a declaration of right; or*

- b. *an immediate injunction; or*
- c. *an immediate appointment of a receiver; or*
- d. *immediate orders under Order 14 Rule 10 (the preservation of property)."*

14. I agree with Mr. Narokobi's submission that a plaintiff is at liberty to choose the mode of proceedings it wishes to rely on. But, this is done, **subject to the NCR** (my emphasis). Proceedings will be commenced by originating summons if the various factors set out in O. 4 r. 3 (2) are complied with. This rule reads;

*"3. Where plaintiff may choose. (4/3)*





*(1). Except in the case of proceedings which by these rules or by or under any Act are required to be commenced by writ of summons, proceedings may be commenced either by writ of summons or by originating summons as the plaintiff considers appropriate.*

*(2). Proceedings –*

*(a) is which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law; or*

*(b) in which there is unlikely to be a substantial dispute of fact; or*

*(c) in which a person is authorized by an Act, regulation or by these Rules to make an application to the Court or a Judge with respect to a matter that is not already the subject matter of a pending cause or matter, and no other mode of making the application is prescribed by that Act, or regulation or by these Rules, are amongst those which are appropriate to be commenced by originating summons unless the plaintiff considers the proceedings more appropriate to be commenced by writ of summons."*

15. Although the plaintiff applies for declarations of right, the matters that it raises in its originating summons do not fall within the category listed in O. 4 r. 3(2). I say this because on hearing counsel, there are obviously going to be numerous disputed facts, that the issues before the court are not the interpretation or construction of an act or an instrument or a deed or a will etc but one which raises claims of  **pollution**  by defendant companies of the Fly River area which has allegedly resulted in  **pollution**  to the river system and ultimately, injuries suffered by the plaintiff.

16. Although the plaintiff has the right to choose the mode of proceedings, clearly the declaratory orders it seeks raise numerous disputed issues and which orders cannot be claimed in the originating summons.

17. As to representative action, O. 4 r. 20 of the rules states that where the plaintiff sues in a representative capacity it must set out a statement of the capacity in which he sues. This rule reads;

*"20. Endorsement as to capacity. (UK 6/3)*

*(1) Before a writ of summons is issued it must be endorsed -*

*(a) where the plaintiff sues in a representative capacity - with a statement of the capacity in which he sues; and*

*..."*



18. The plaintiffs' representative capacity must be indorsed on the writ before it is issued. It is the indorsement on the writ that is crucial and not the statement in the title which is a mere description (*Bowler v John Mollem & Co.* [\[1954\] 1 WLR 445](#)). It is necessary that I point out the importance of an indorsement to a Writ of Summons. Andrew, J discussed this in *Evans v Talair Pty Ltd* [\[1983\] PNGLR 196](#). He said;

*"The relationship between the indorsement and the statement of claim was discussed in *Renowden v McMullin* [\[1970\] HCA 24](#); [\(1970\) 123 C.L.R. 584](#) at 595, 596 where the joint judgment of Barwick C.J. and McTiernan J. (although in dissent) the following appears:*

*"The indorsement on the writ not being a statement of claim is not in the nature of a pleading. In our opinion, it should not be construed as such but read for what it is, namely, a notice of the nature of the plaintiff's claim, of the cause thereof and of the relief sought in the action. It suffices if it conveys that information generally and without particularity save where and to the extent to which particularity is indispensable to notify the required elements of the indorsement, e.g. on some occasion identification of the instrument upon which a claim is founded. But insufficiency of the indorsement does not render the writ a nullity. *Hill v Luton Corporation* (1951) 2 K.B. 387; *Pontin v Wood* (1962) 1 Q.B. 594. On the other hand, the indorsement marks out the perimeter or range of the area within which the plaintiff may*

*express his claim in a formal fashion in his statement of claim whether as originally filed or as sought to be amended see Cave v Crew (1893) 62 L.J. Ch. 530, United Telephone Co. v Tasker (Supra), Moore v Alwill (1881) 8 L.R. Ir. (C.L.) 245. 'The statement of claim is the specific way of stating the claim he has endorsed on the writ' per Dowse B. in Moore v Alwill (supra)." (pg. 198).*

19. Therefore, the indorsement to the Writ is of particular importance, because if not properly and sufficiently pleaded, may render the statement of claim a nugatory, because the plaintiff has not properly marked out the perimeters of their claim.

20. In this case, the plaintiffs have filed an originating summons. Order 4 Rule 20 only refers to Writs of Summons. But even so, the indorsement on the writ or in this case, the originating summons, marks the perimeter or range of the plaintiffs claim. Paragraph 1 of the Originating Summons only seeks a Declaration and points out the grievances by the plaintiffs in relation to the alleged  **pollution**  in the Ok Tedi River basin and its effects on the environment and the people. This is more appropriately done in a Writ of Summons where the indorsement on the writ would firstly introduce who the plaintiffs are, where they are from, the capacity in which they are suing and the nature of their claim against the defendants. This is because the indorsement of the writ determines the essential nature of the action.

21. However Mr. Narokobi referred the Court to O. 5 r. 13 of the NCR and submits that the plaintiffs' action is properly before the Court. This then takes me to the plaintiffs' authority to sue, which I discuss below;

(iii) **Lack of written authority** - All defendants submit that the plaintiffs have failed to show that they are bringing the action in a representative capacity. The defendants referred the court to O. 5 r. 13(1) of the NCR which is identical to O. 15 r. 12 of the Rules of the Supreme Court 1965 (UK). I set out in full again, O. 5 r. 13(1) of the **NCR** and O. 15 r. 12 of the UK rule.

*"13. Representation: Current interest. (8/13)*

*(1) Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them."*

O. 15 r. 12 of the Rules of the Supreme Court 1965 (UK) reads;

*"(1) When numerous persons have the same interest in any proceedings not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the court otherwise orders, continued, by or against anyone or more of them as representing all or as representing all except one or more of them."*

22. The numerous persons represented, whether as plaintiffs or as defendants, but in this case as plaintiffs, should **"have the same interest"** in the proceedings. It is not enough to have similar interests. However, it appears in this case that the plaintiffs do have the same interest. But the court has an overriding discretion by reason of the words **"unless the court otherwise orders"** in O. 5 r. 13 (1), to prevent representative proceedings otherwise validly brought, from continuing. (*Bollinger v Goldwell Ltd* [1971] RPC 412) and the court would only order otherwise if the processes in relation to representative actions are not complied with. I refer again to Simon Mali (supra) where Hinchliffe, Sakora and Batari, JJ said;

*"... in all actions or proceedings of a representative nature, all the intended plaintiffs' must be named and duly identified in the originating process, be it writ of summons, originating summons or statement of claim endorsed on a writ. In this respect, pursuant to the rules each and every intending plaintiff must give specific instructions (evidenced in writing) to their lawyers to act for them. There are good reasons for this one being where costs of the litigation are concerned, if awarded against the plaintiff. Some of the problems or consequences in a representative action are anticipated in various sub-rules under O. 5 r. 13 of the NCR (representation: current interest)" (pg. 18).*

23. In *Eliakim Laki on behalf of himself and 167 other formal block holders of Kabugara Oil Palm Block, West New Britain Province v Maurice Alaluku, Secretary Department of Lands, Utula Samana, Secretary Department of Agriculture and Livestock and Independent State of Papua New Guinea* (2000) [N2001](#), decision of Sevua, J, His Honour held the following;

1. Although Eliakim Laki said he was filing a claim on behalf of 167 others who are named in the amended schedule of the writ, that he did not produce an authority to the court to show that he was authorised by the claimants to file proceedings as a class representative of the 167 others. The court held that he should not represent the others without a proper authority.

2. That the pleadings were quite inadequate because it did not represent claims by the 168 different plaintiffs and what each of them were claiming against each of the 3 defendants.

The court held that it was unfair for a defendant to be left guessing as to what a plaintiff's allegations against him were. That the plaintiff has a duty to fully plead his claim so that a defendant is given the opportunity to either admit or deny each allegation and to state facts to counter those allegations.

3. That the pleadings as they were did not disclose a cause of action against each of the defendants. The court proceeded to strike out the proceedings so that fresh proceedings could be instituted.

24. On this basis, the defendants submit that the plaintiffs are required to provide to them or their lawyers a written authority from each plaintiff. It is submitted that one reason for this requirement is to ensure that each plaintiff demonstrate that they understand the nature of the proceeding. A second reason would be to establish the extent of Narokobi Lawyers' instructions in relation to each plaintiff.

25. Mr. Narokobi submits that he had authorities to file but could not do so because the court had earlier directed that no further affidavits be filed. I point out that Mr. Narokobi's submissions are misleading to a certain extent because at that point in time, all defendants, through their lawyers, had completed their submissions, in reply to Mr. Narokobi's submission. Mr. Narokobi also did not have these affidavits and authorities with him in court. Earlier, when the application was moved by the defendant lawyers, Mr Narokobi had indicated that he had affidavits and authorities to file. It was then that I pointed out to the parties that affidavits should not be filed after the commencement of the hearing of a motion as is the requirement under R. 12 of the Motions (Amendment) Rules 2005 which reads;

#### "12. Supporting affidavits



- (1.) All affidavits in support of the Motion must be filed on the date of filing the Motion;
- (2.) All affidavits opposing and counter motions must be filed at the latest by 2 pm on the day before the hearing of the motion;
- (3.) Motion files will be sent to the Motions Judge at the latest by 3 pm on the day preceding the day the Motion is to be heard;
- (4.) Leave must be sought from the Motion Judge before any affidavit is filed on the day of the hearing. The Registry will no longer accept affidavits filed after 2 pm on the day preceding the hearing of the Motion or on the morning the Motion is to be heard'
- (5.) With the exception of contempt hearings, there shall be no cross-examination of deponents of affidavits, except with leave of the Court".

26. Additionally, Mr. Narokobi could have applied for leave to file and serve these affidavits in court, but he did not do that. It was up to Mr. Narokobi to either file the affidavits and authorities before the hearing of the application or apply for leave to file in Court, but he did

neither. But even if he did file them, the form of the proceedings now before the Court does not justify the filing of these affidavits and authorities.

27. I have been referred to the affidavits of Hens Guimben and Tigam Malewo both sworn and filed on 6th August, 2007. Both depose that they are members of the Ningerum LLG. They depose amongst others, to the fact that they can provide the names of their clansmen, women and children. But as at the date of the hearing of the motion, they had not done that.

(v) **Lack of Standing** - The Amended Originating Summons filed on 29th March, 2007 (the Amended Claim) seeks numerous declarations against the defendants for alleged contamination to a 38.5 kilometre section of the Ok Tedi River and surrounding land and waterways. It is claimed that the effects on customary rights and contamination to people and environment may last between 200 to 4000 years. The claim is very large and seek damages, including exemplary damages of \$US3.75 billion.

28. Paragraphs 2, 3 and 4 of the orders sought state, inter alia, that the plaintiffs live along or near the Ok Tedi River and that erosion, flooding and poisoning had occurred down the watercourse of Ok Tedi River to adjoining land. The plaintiffs also claim that devastation has occurred to all forms of life, flora and fauna associated with the Ok Tedi River. But the plaintiffs did not specifically identify the land or waterways, which it claims have been  **polluted** . The defendants are entitled to know the location of all waterways and/or land in order to determine whether the plaintiffs hold any rights over those waterways or land and to also determine whether they are responsible for the claims pleaded.

29. The orders sought do not plead the essential elements of whether the plaintiffs are the customary owners of the land, which has allegedly been contaminated. Or alternatively, it does not plead whether each plaintiff were resident within the affected areas, the period they were resident there and the nature of the injuries, damage sustained or suffered either during that period or after. The claim also does not plead the essential elements of whether the plaintiffs hold water rights over any particular rivers or waterways, which have allegedly been contaminated. If as they say, they are clan members, these must be pleaded together with their claims as to ownership of land and by whom.

30. I find that I am unable to ascertain and identify from the facts set out in the originating summons these very important elements. Obviously considering the complexity of this claim including the reliefs sought, the manner in which the OS is pleaded leaves a lot to be desired. On the face of the facts pleaded in the OS, the court is faced with the unenviable task of finding that the plaintiffs, whoever they are, although may have standing because of the alleged damages and injuries suffered, have not properly and sufficiently made this out.

**(vi) Factual issues in dispute** - Many of the issues alleged by the plaintiffs are disputed by the defendants and therefore the plaintiffs should not have filed their claim by way of Originating Summons.

31. The affidavit of Camilus Narokobi filed on 17 May, 2007, states at paragraph 8:

*"I believe there is no dispute that there exists a duty of care and that both excessive harmful mining wastes and chemicals are discharged into Ok Mani River which flows into Ok Tedi River..."*.

32. But Mr. Narokobi is the lawyer with carriage of the matter. He is not in a position to depose to the duty of care owed by the defendants to the plaintiffs. These can only be established by pleadings and evidence supporting these pleadings, evidence by the plaintiffs themselves. And that is where I re-emphasise O. 4 R. 3 (2) (b) which states that proceedings will be commenced by OS where here is unlikely to be a substantial dispute of fact.

33. In Mr Smith's affidavit filed on 20th July, 2007, he deposes that the fourth and seventh defendants' dispute many of the matters referred to in the affidavit of Camillus Narokobi filed on 17th May, 2007 and many of the statements contained in the amended Originating Summons. Furthermore, in the affidavit of Robin Moaina, which was filed on behalf of the second defendant on 1st June, 2007, he deposes that there are numerous factual issues in the claim that are disputed by Ok Tedi Mining Limited. And the nature of the claim suggests that to be so.

34. That it was likely that there would be a dispute, should have been apparent given the history of the Ok Tedi Mine and the notorious landowner litigation of the past. Further, that there was likely to be a dispute is apparent from the legislation governing the operation of the Ok Tedi Mine in particular the *Mining (Ok Tedi Restated Eighth Supplemental Agreement)*, which by its terms provides a statutory defence to environmental claims of the kind referred to in the Amended Claim. It may be that the plaintiffs will contest the availability of that defence and the defendants, vice versa. However, even if they do, unless the claim is properly pleaded and particularised, it will not be possible to determine whether or not the statutory defence is available.

**(vii) No cause of action** - No cause of action has been pleaded. The amended Claim merely seeks a number of declarations against the defendants. If the plaintiffs had pleaded a cause of

action, then it would enable the defendants to understand the nature of the claim and how the plaintiffs say the defendants are liable for their actions. The amended originating summons simply makes a number of assertions and seeks various declarations, although there is no "structure" to the claim which sets the framework to allow an understanding of what the claim is about and how liability is asserted.

35. Paragraph 34 seeks an Order that the first and third defendants are guilty of private nuisance, public nuisance, trespass, breach of absolute and/or reasonable duty of care and violation of domestic and international law. However, the facts alleged to constitute each of those alleged causes of action are neither pleaded nor particularised. This applies to all defendants, but is more particularly so where the plaintiffs seek to have remedies against those defendants who did not operate the mine, including the fourth and seventh defendants.

36. It is incumbent on the plaintiffs to plead identifiable causes of action: *PNG forest Products Pty Ltd & Anor v The Independent State of Papua New Guinea & Anor* [1992] PNGLR 88. At page 88, Justice Sheehan cited with approval the decision of *Dyson v AG* [1911] 1 KB 410, where Fletcher Moulton LJ said that the procedures for striking out a claim should be confirmed to cases where the cause of action was "obviously and almost incontestably bad".

37. In *Kiee Toap v The State and Others* (2004) N2766, Justice Cannings stated at page 15 that:

*"...whenever a person brings a case to court, the originating document - in the present case, the writ of summons and statement of claim - must demonstrate that the plaintiff has a 'cause of action'. The document must clearly set out:*

- (a) the legal ingredients or the elements of the claim; and*
- (b) the facts that support each element of the claim."*

*And*

*"But the plaintiff must outline the claim and demonstrate that it has a clear legal basis. If the plaintiff's originating document does that, there is a reasonable cause of action. If not, it does not disclose a reasonable cause of action".*

38. Furthermore, in *Gabriel Apio Irafawe v Yauwe Riyong* (1999) [N1915](#), Justice Kirriwom stated at page 6:

*"The Statement of Claim, lacking particularity as it is, does not even facilitate orderly and rational pleadings to identify the real issues and is thus in dire need of wholesale polishing. I therefore agree with counsel for the applicant that this action is vexatious and frivolous and tantamount to an abuse of process of the Court".*

39. Based on the reasoning in the above three decisions, I find that the orders sought do not contain a cause or causes of action, and further, do not properly state allegations against each defendant and how each one of them are responsible.

(viii) **Lack of particulars** - Much of the amended originating summons lacks particulars. As Justice Sevua found in *Eliakim Laki* (supra), the plaintiffs' pleadings are too general in nature and do not give each of the defendants the opportunity to adequately and properly respond to each allegation.

40. There are no particulars relating to the damages which have been allegedly suffered. There are numerous defects on this issue in the amended originating summons. For example, in paragraph (iii)(1), there are no particulars of which defendant has suffered loss or damage for fishing. If there has been a loss for "subsistence or commercial profit" then the defendants have a right to know which plaintiffs here suffered and what loss. In paragraph 11, no particulars have been provided for loss of land, loss of natural washing water, loss of drinking water and loss of fishing and destruction of forest land. In paragraph 29, the plaintiffs have not particularised the "adverse effects" and "medical risks" which it claims will occur for up to 4000 years.

41. If there are in fact 13,000 plaintiffs, and on the basis that the plaintiffs' claim covers 38.5 kilometres along the Ok Tedi River, the defendants are entitled to know what each plaintiffs claim is against them.

42. The plaintiffs' cause of action purports to be one of negligence. Page 685 of *Bullen & Leake and Jacob's Precedents and Pleading*, 12th Edition 1975, states this in relation to pleadings:

*"It is not enough for the plaintiff in his Statement of Claim to allege merely that the defendant acted negligent and thereby caused him damage; he must also set out facts which show that the alleged negligence was a breach of a duty which the defendant owed to the plaintiff. The Statement of Claim ought to state the facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which the defendant is charged".*

And

*"Then should follow an allegation of the precise breach of that duty of which the plaintiff complains; in other words, particulars must always be given in the leading, showing precisely in what respect the defendant was negligent; and lastly, the details of the damage sustained"*

43. The amended originating summons lacks fundamental details of a cause of action and particulars. Eliakim's case and the above passage from Bullen & Leake identify those issues as being essential ingredients of a claim.

(viii) **Personal injuries claim** - Part of the amended originating summons purports to be a personal injuries claim, in particular, paragraphs (ii), 2, 7, 9, 13 and 14. Order 8 Rule 33 of the National Court Rules states that the particulars of each injury and supporting information must be supplied by each person/plaintiff. For example, paragraph 13 states:

*"...that it has caused, continue to cause and likely to cause deaths, skin irritations, sores and diseases or threatened Plaintiffs and animal lives and health".*

44. To adopt the reasoning in Eliakim's case, the defendants do not know what each plaintiffs claim is against each of them i.e. for the deaths, skin irritations, sores and diseases, or whether the claim is against only one defendant. Furthermore, claims for death can only be brought by a representative or a dependant under the Wrongs (Miscellaneous Provisions) Act. The amended originating summons does not state the names of persons who have died, and if so, the authority of their representative or dependant to make a claim.



45. If a plaintiff is claiming loss and damages for disease, the defendants are entitled to know the nature of the disease, plus all the particulars set out in Order 8 Rule 33 of the NCR. This requirement has not been met. Despite having been put on notice about this issue by Blake Dawson Waldron, the plaintiffs have refused to supply the details. The lack of particulars of

personal injuries for potentially 13,000 people is a factor the plaintiff must remedy as that appears to be the "*complaint*" that they have.

46. And I do not think individual plaintiffs will want his or her claim "*lumped*" together with another plaintiff. Each plaintiff's claim must be separately dealt with. (See also *Booth v Briscoe* [1877] 2 QBD 497 and *Barnes & Co. Ltd v Sharpe* [1910] HCA 26; (1910) 11 CLR 462). Even if the plaintiffs consent to one lump sum being awarded to all of them, which is highly unlikely, the court is not obliged to adopt this course because of the principles already outlined.

ix. **Claims statute** - barred- No doubt, if the plaintiffs claims on negligence are properly pleaded, that there is a high likelihood that some claims may be statute - barred. But the defendants are prevented from raising this defence by the lack of or inadequate or non-existence of particulars of claim by each plaintiff.

## **Conclusion**

47. The plaintiffs claim in their capacity as landowners for damages they have allegedly suffered as a result of  **pollution**  caused by mining to their land. But they chose the wrong mode of proceedings in bringing this action. The amended originating summons does not demonstrate this fact.

Proceedings have been struck out or dismissed where the alleged cause of action is obviously bad, or if the claim is so ambiguous that it leaves the defendant guessing as to what the plaintiff's cause of action is.

In this case, many, possibly most, of the plaintiffs' claims are either ambiguous, or cannot possibly succeed. In many cases the Defendants are left guessing as to what the claims are. Some of the relief claimed simply cannot be granted: See paragraphs 16 to 20 inclusive of the amended originating summons.

Further, there is no division of the claims between the various defendants. There is no indication, for instance, whether each of the Defendants is sought to be made liable in respect of each and every claim. Conversely, if a particular Defendant is being sued only in respect of some matters, then there is no indication of what those matters are.

51. The defendants submit that based on these reasons, the plaintiffs statement of claim should preferably be dismissed. They submit this relying on O. 12 R. 40 of the NCR. I set out the law in relation to this.

**(i) Whether there is a reasonable cause of action**

52. The law on this is succinctly laid out by Sheehan. J in *PNG Forest Products v The State* [1992] PNGLR 85. He said at pg. 88 when citing Chitty. J in Republic of Peru v Peruvian Guano Company (1887) 36 Ch. D. 489;

*"If, notwithstanding defects in the pleading.. the Court is of the view that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put an end to litigation."*

*He continued "this line of reasoning was followed in the Court of Appeal in Hubbard and Sons Ltd v Wilkinson, Heywood and Clerk Ltd [1899] 1QB 86 at page 91 where Lord Lundley MR was emphasizing the distinction between seeking to have action decided on a preliminary point of law and moving to have it struck out for want of a reasonable cause of action stated -*

*"... Two courses are open ... the first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the Statement of Claim as it stands is insufficient, even if proved, to enable the plaintiff to what he seeks".*

53. In *Lonrho v Fayed* [1991] 3 All ER 303, Lord Bridge cited and quoted Dyson v AG [1911] 1KB 410 where Fletcher Moulton LJ said that the procedures shall be confined to cases where the cause of action was "obviously and almost incontestably bad".

54. Sheehan. J further quoted from Salmon LJ in *Nagle v Fielden* [1996] 1 All ER 589 where he said -

*"It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable".*

55. Sheehan. J in applying the above cases said at page 89;

*"It has certainly not been shown before me that it is 'plain and obvious' that the plaintiff cannot succeed or that the defence is unarguable... The fact is that both plaintiffs and defendants have extensive arguable cases on fact and law. That provides all the more reason for the action to be set down for trial, rather than attempt to exclude a party from contention without hearing..."*

56. It is now not a matter of whether the action or case is unarguable or not. I have seen that the orders and reliefs sought is such that there is no cause of action at all, and that this is obviously and incontestably, bad.

**(ii) Are the proceedings frivolous and vexatious?**

57. The plaintiffs claim is very ambiguous and lacking certainty in many respects, which I have already covered. The defendants are left guessing as to who is making the claim, what they are claiming and the actions on which they rely in making these claims.

The declaratory orders sought also raise numerous issues which are disputed by the defendants but which the defendants are unable to properly defend because of the mode of proceedings filed by the plaintiff. Clearly this claim cannot be properly litigated in its present form. It is very frivolous and very vexatious.

**(iii) Are the proceedings an abuse of the process of this Court?**

59. I find they are for the reasons raised above. No amount of amendment can cure the serious procedural anomalies raised.

60. The whole claim must be dismissed. The plaintiffs can always recommence action in the proper form. It means therefore that I need not issue any further directions, which is the Courts finding on the Motion filed by Narokobi Lawyers.

## **Costs**

61. The defendants' costs must be paid. I have heard submissions from the defendants and the plaintiffs on this aspect. It appears Narokobi Lawyers were advised of these irregularities by Blake Dawson Waldron Lawyers detailed letter of 19th June, 2007 but took no steps to remedy these defects and irregularities. In fact Narokobi Lawyers were requested to discontinue the proceedings. This letter is before me as evidence attached to the affidavit of Derek Wood sworn on 20th July, 2007.

62. I have also heard and it is not disputed that the plaintiffs are villagers who may not have the means to meet a costs order. In this case, the orders sought are manifestly and incurably bad. These defects have been apparent to the plaintiffs' lawyers for sometime, at least since Blake Dawson Waldron's letter of 19th June, 2007. They have allowed the proceedings to come this far. It is only proper that the plaintiffs' lawyers pay the costs of the proceedings.

63. In relation to Southern Counsels costs, I do not consider this an application requiring appearance of Southern Counsel. I do not certify Southern Counsels costs.

## **Formal orders**

64. The Courts formal orders are these;

1. The amended Originating Summons filed on 20th March, 2007 is dismissed in its entirety;
2. Narokobi Lawyers shall pay all defendants costs of the proceedings including this application, to be assessed on a party/party basis and to be taxed if not agreed.

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Narokobi Lawyers: Lawyer for first and second Plaintiffs  
Allens Arthur Robinson Lawyers: Lawyer for first, second, fifth & sixth Defendants

Blake Dawson Waldron Lawyers: Lawyer for fourth and seventh Defendants  
Gadens Lawyers: Lawyer for third Defendant

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