*Ngeremlengui Chiefs v. Ngeremlengui Gov't,* 8 ROP Intrm. 178 (2000)

**NGEREMLENGUI STATE COUNCIL OF CHIEFS,**
**Appellant,**

**v.**

**NGEREMLENGUI STATE GOVERNMENT, et al.,**
**Appellees.**

CIVIL APPEAL NO. 99-13
Civil Action No. 98-149

Supreme Court, Appellate Division
Republic of Palau

Argued: January 27, 2000
Decided: April 27, 2000

Counsel for Appellants: Raynold B. Oilouch

Counsel for Government Appellees: J. Roman Bedor

Counsel for Appellee Palau Organic Farms, Inc.: William L. Ridpath

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; DANIEL N. CADRA, Senior Land Court Judge.

MILLER, Justice:

This case concerns whether state officials can dispose of public land in Ngeremlengui without authorization from the Ngeremlengui State Public Lands Authority ("NSPLA") or the consent of the Ngeremlengui State Council of Chiefs. The trial division entered summary judgment for the defendants, upholding the validity of two agreements entered into by state officials and Palau Organic Farms, Inc. providing for the use of public land in a commercial farming operation. We affirm in part and reverse in part and remand for further proceedings consistent with this opinion.

## I. BACKGROUND

The facts underlying this appeal are not complex. In the mid-1990s Governor John Skebong and other state officials executed a Memorandum of Agreement ("MOA") and a Joint Venture Agreement ("JVA") with Palau Organic Farms committing approximately 400 hectares of public land in the Ngerikronger Asahi area of Ngeremlengui to a commercial farming operation to be run by Palau Organic Farms. Palau Organic Farms has since been running a commercial farming operation on the land described in the agreements.

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In 1998 the Ngeremlengui State Council of Chiefs [1] filed a lawsuit against the Governor, the other state officials, the state legislature, the state government, and Palau Organic Farms. The Council claimed that the MOA and JVA are invalid because they were executed without the involvement of the NSPLA and without the knowledge, consultation, or consent of the Council. While the case was being litigated the state legislature enacted NSPL 4-14, which directed the NSPLA to ratify the MOA and JVA. *See* NSPL 4-14 §10. That statute also provided that the Council should appoint four members to the Board of Trustees of the NSPLA, but ⊥179 barred it from appointing any of its own members to the Board of the NSPLA. *Id.* §§ 3(5), (6).

All litigants moved for summary judgment under ROP R. Civ. P. 56(c). [2] The Trial Division entered summary judgment for the defendants. The Trial Division held that the MOA and JVA were invalid at the time of execution because the agreements were executed without the involvement of the NSPLA and the Governor failed to obtain the advice and consent of the state legislature as required by the state constitution. *See Ngeremlengui Const.* , art. IX, § 4(f). Nevertheless, the court held that the agreements were valid because the state legislature ratified the agreements by enacting NSPL 4-14. Rejecting the principal basis for the Council's motion, the court also held that the Governor was not required to obtain the consent of the Council before executing the agreements.

The Council filed this appeal on May 24, 1999. Subsequently, the Governor and the state legislature enacted NSPL 4-19, which modified NSPL 4-14 to vest in the Governor sole appointment authority of the members of the Board of the NSPLA. *See* NSPL 4-19 § 2. On August 16, 1999 a newly-appointed Board ratified the MOA and JVA.

## II. DISCUSSION

On appeal the Council contends that the Trial Division erred in ruling that the state legislature ratified the MOA and JVA and that the Governor was not required to obtain the consent of the Council before executing the agreements. The Council also contends that the MOA and JVA violate the Statute of Frauds.

We agree with the Council that the Trial Division erred in holding that the state legislature validly ratified the MOA and JVA. Accordingly, we reverse the grant of the defendants' motions for summary judgment and remand for the Trial Division to consider the validity of NSPLA's post-judgment ratification. On the other hand, we agree with the Trial Division that the Governor was not required to obtain the consent of the Council before executing the agreements. We therefore affirm the denial of the Council's motion for summary judgment.

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[1] The Ngeremlengui State Council of Chiefs is a branch of the state government and consists of the four Uong, the highest ranking chiefs in Ngeremlengui, and the four hamlet chiefs. *See Ngeremlengui Const.* art. VIII, § 1.

[2] ROP R. Civ. P. 56(c) provides that summary judgment "shall be entered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."

**A. The State Legislature's Ratification of the MOA and JVA**

The Council contends that the state legislature lacks authority to ratify the MOA and JVA because the lands disposed of in the agreements are owned by the NSPLA.[3] We agree.

The trial court determined that the NSPLA owns all public land in Ngeremlengui ⊥180 as the successor to the Ngeremlengui Municipal Public Lands Authority, which acquired title to public land in Ngeremlengui from the Palau Public Lands Authority in 1983. As the parties do not dispute this determination, we accept its correctness on appeal. *See Idechiil v. Uludong,* 5 ROP Intrm. 15, 17 (1994).

This determination, which led the trial court to conclude that "the Governor and the other signatories [to the agreements] had no authority to commit state land to the project," also precludes any conclusion that the state legislature had the authority to ratify the MOA and JVA. An entity can only ratify an action which it was authorized to take in the first instance. *See Restatement (Second) of Agency* § 84 (1958). Thus, while the legislature's approval might cure any infirmity in the Governor's failure to seek *its* advice and consent before entering into the agreements, *see* p.3 *supra*, it cannot cure his failure to obtain *NSPLA's* approval before proceeding.[4]

*ROP v. Etpison* , 5 ROP Intrm. 313 (Tr. Div. 1995), relied on by the Trial Division, is inapposite, because no question was raised there concerning the authority of the legislature to ratify the executive acts at issue in that case. Nor does section 4(c) of article X of the state constitution give the state legislature power to ratify the MOA and JVA. Section 4(c) only empowers the legislature to "ratify agreements between . . . the state government and other organizations." This provision only applies to actions falling within the authority of the state government and cannot give the state legislature power to ratify executive-branch dispositions of land not owned by the state government.

Appellees argue that the MOA and JVA are valid even if the state legislature lacked authority to ratify the agreements because, after this appeal was filed and following the enactment of NSPL 4-19, the newly-constituted Board of the NSPLA ratified the agreements. Though the Council does not dispute the fact of the ratification, it responds by challenging the validity of NSPL 4-19. Since its arguments in that regard obviously have not (and could not have) been presented below, we believe they are better addressed by the Trial Division in the first instance. *See* 5 Am. Jur. 2d *Appeal & Error* § 486 (1995); *Landy v. Federal Deposit Insurance Co.*, 486 F.2d 139, 151 (3rd Cir. 1973).

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[3] The Council also contends that NSPL 4-14 is invalid because it interferes with the Council's right to appoint its own members to the Board of Trustees of the NSPLA. Because we hold that the state legislature lacked authority to ratify the MOA and JVA and because this aspect of the law has been modified in any event, *see* p.3 *supra*, we do not reach this issue.

[4] Strictly speaking, NSPL 4-14 does not ratify the agreements on behalf of the legislature, but directs NSPLA to do so. We do not believe that the legislature can achieve indirectly what is not authorized to do directly.

**B. The Governor's Failure to Obtain the Consent of the Council Before Executing the MOA and JVA**

The Council contends that the Governor was required to obtain the consent of the Council before executing the MOA and JVA under section 3(b) of article VIII of the state constitution, which, the Council claims, requires that the advice and consent of the Council be obtained before any use can be made of public land in Ngeremlengui. The Trial Division rejected this argument and we agree with its reasoning.

The English version of section 3(b) provides that the Council's powers include "to provide advice and consent on bills dealing with traditional matters or subjects dealing ⊥181 with the use of land and territorial waters for state projects, before approval by the Governor." *Ngeremlengui Const.* art. VIII, § 3(b). However, the Palauan version of section 3(b) reads:

> ngeiul a uldesuir el kirel a uldasu el mo llach el melutk el kirel a uldelid el tekoi ma lechub eng uspechel a utem ma daob el kirel a meklou el ureor er uchei er a bol saing er ngii a Governor.

As noted by the Trial Division, the Palauan word for consent, "kengei," is absent from the Palauan version of section 3(b). Instead, the word "uldesuir" is used, which means "thought about" or "taken into consideration." *Lewis S. Josephs, New Palauan-English Dictionary* 111 (1990). The state constitution provides that in cases of conflict between the English and Palauan versions of the constitution, "the Palauan version shall prevail." *Ngeremlengui Const.* art. XII, § 1. Giving authoritative weight to the Palauan version of section 3(b), the Trial Division concluded that the consent of the Council is not required before use can be made of public land in Ngeremlengui.

We see no error in the Trial Division's reasoning. The framers of the state constitution used the word "kengei" in describing the approval powers of the state legislature in section 4(b) of article IX and section 4(c) of article X. As noted by the Trial Division, "the absence of the word 'kengei' in some clauses, and its presence in others, cannot be inadvertence."

The Council argues that the English version of section 3(b) should be used to interpret the Palauan version. However, the plain meaning of the authoritative Palauan version of section 3(b) is that the consent of the Council is not required for the pertinent bills and subjects. There is no need to resort to the English version for interpretation where there is no ambiguity in the Palauan version.

The Council contends that the Trial Division's interpretation of section 3(b) is inconsistent with the intentions of the framers and destroys the balance of power between the state legislature and the Council.[5] However, the courts are required to give effect to the intent of

[5] The Council submits affidavits from individuals who participated in the drafting of the Ngeremlengui Constitution stating that the intent of section 3(b) was to preserve the traditional power of the chiefs to dispose of public land. These affidavits were presented to the Trial

the framers as expressed in the plain meaning of the language used in the constitution. *See Remeliik v. The Senate* , 1 ROP Intrm. 1 (Tr. Div. 1981) ("[I]t is a cardinal rule of constitutional construction, that if a constitutional provision is positive and free from all ambiguity, it must be accepted by the courts as it is written."). The plain meaning of the language used in the Palauan version of section 3(b) indicates that the framers of the state constitution intended the Council not to have a right of consent over the disposition of public land in Ngeremlengui.

The Council argues that the MOA and JVA are invalid even under the Trial Division's interpretation of section 3(b) ⊥182 because the Governor failed to consult the Council before executing the agreements. However, the Council did not present this argument as an alternative basis for summary judgment in the Trial Division. With narrow exceptions that do not apply here, this Court will not consider arguments raised for the first time on appeal. *See Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998).[6]

### C. The Statute of Frauds

The Council contends that the MOA and JVA are invalid because they violate the statute of frauds in that they purport to lease land to Palau Organic Farms without requiring the execution of a written lease. The statute of frauds can only be asserted as a defense to enforcement of a contract by a party who is sought to be charged thereon and his privies. *See Speer v. City of Dodge City* , 636 P.2d 178, 181-82 (Kan. App. 1981); 73 Am. Jur. 2d *Statute of Frauds* § 576 (1974). Not a party to the agreements, the Council lacks standing to assert the Statute of Frauds as grounds for invalidating the MOA and JVA.

## III. Conclusion

Because we hold that the Ngeremlengui legislature lacked authority to ratify the MOA and JVA, we reverse the grant of the defendants' motions for summary judgment. Because we hold that the Governor was not required to obtain the consent of the Council before executing the MOA and JVA, we affirm the denial of the Council's motion for summary judgment. We remand for further proceedings consistent with this opinion.

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Division after summary judgment had been granted and in conjunction with a motion to reconsider the judgment that the Trial Division rejected as untimely. Accordingly, they will not be considered here.

[6] To the extent it bears on issues not yet addressed by the Trial Division, the Council is free to raise this argument on remand.