

N8430

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS (HR) NO 3 OF 2020

CHRISTOPHER SESEVE HAIVETA, GOVERNOR, GULF PROVINCE
Plaintiff

V

PONDROS KALUWIN, PUBLIC PROSECUTOR
First Defendant

HONOURABLE JOB POMAT, SPEAKER, NATIONAL PARLIAMENT
Second Defendant

HONOURABLE DAVIS STEVEN, ATTORNEY-GENERAL
Third Defendant

OMBUDSMAN COMMISSION
Fourth Defendant

THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Fifth Defendant

HONOURABLE SIR GIBBS SALIKA, CHIEF JUSTICE
Sixth Defendant

Waigani: Cannings J
2020: 10th, 17th, 27th July

HUMAN RIGHTS – application for enforcement – Leadership Code proceedings – request by Public Prosecutor to Chief Justice to appoint leadership tribunal – whether Public Prosecutor’s request infringed human rights of leader – lapse of more than 11 years after previous tribunal inquiring into same allegations of misconduct was disbanded – whether Public Prosecutor’s request was harsh, oppressive etc under Constitution, s 41 (proscribed acts) – whether appointment of second tribunal would infringe

leader's right to fair hearing within a reasonable time – Constitution, s 37 (protection of the law) – whether Public Prosecutor's request entailed breach of the principles of natural justice – Constitution, s 59 (principles of natural justice).

REMEDIES – whether necessary or appropriate to grant: declarations as to breach of human rights, injunction to restrain appointment of another tribunal, permanent stay of leader's suspension –Constitution, s 57 (enforcement of guaranteed rights and freedoms), s 155(4) (the national judicial system).

The plaintiff, a member of the National Parliament, commenced proceedings by originating summons in the National Court, seeking declarations as to the breach of his human rights and permanent injunctions regarding the proposed appointment in 2020 of a leadership tribunal to inquire into allegations of misconduct in office against him, which were the subject of a matter concerning him referred to a leadership tribunal in February 2007. The plaintiff claimed that a request to appoint a new tribunal to inquire into the same allegations, made by the Public Prosecutor to the Chief Justice in May 2018, was harsh and oppressive for purposes of s 41 of the *Constitution*, amounted to infringement of his right under ss 37(1), (3) and (11) of the *Constitution* to a fair hearing within a reasonable time and would deprive him of the right to a fair hearing and protection of the principles of natural justice under s 59 of the *Constitution*. The defendants were the Public Prosecutor, the Speaker, the Attorney-General, the Ombudsman Commission, the State and the Chief Justice. All apart from the Chief Justice participated in the proceedings, and opposed all relief sought by the plaintiff.

Held:

- (1) The Public Prosecutor's request to the Chief Justice in May 2018 to appoint another leadership tribunal was harsh, oppressive and not warranted by the requirements of the particular circumstances for purposes of s 41 of the *Constitution* as: (a) the request was made nine months after the plaintiff had become a leader again, after a lapse of ten years; (b) the request was left un-pursued by the Public Prosecutor for one year, 10 months before the Chief Justice indicated his intention in March 2020 to appoint a new tribunal; (c) the request could only result in appointment of a new tribunal (two members of the previous tribunal having died), in 2020, that would have to rehear evidence presented to the previous tribunal 13 years ago; (d) in the 13-year period since the previous tribunal disbanded, it is reasonably

expected that some evidence would have been lost or misplaced, and some of the plaintiff's witnesses had died; (e) the subject matter of the allegations traversed the period from 1993 to 2002, meaning that a tribunal appointed in 2020 would be inquiring into alleged misconduct committed 18 to 27 years ago.

- (2) The Public Prosecutor's request to the Chief Justice, in May 2018, to appoint another leadership tribunal, unpursued for one year, ten months, amounted to infringement of the plaintiff's right under ss 37(1), (3) and (11) of the *Constitution* to the full protection of the law, in particular to a fair hearing of allegations of misconduct in office before a leadership tribunal within a reasonable time, in that the appointment in 2020 of a new tribunal cannot result in a fair hearing or a hearing within a reasonable time, due to: (a) the subject matter of the allegations traversed the period from 1993 to 2002, meaning that a tribunal appointed in 2020 would be inquiring into alleged misconduct committed 18 to 27 years ago; (b) in the 13-year period since the previous tribunal disbanded, it is reasonably expected that some evidence would have been lost or misplaced, and some of the plaintiff's witnesses had died; (c) the passage of time between when the Ombudsman Commission referred the plaintiff's matter to the Public Prosecutor (January 2006) and when a new tribunal could, if its appointment is not restrained, be appointed (say August 2020), is (excluding the period of ten years from August 2007 to August 2017 when the plaintiff was not subject to the Leadership Code) was four years, seven months.
- (3) Declarations were made that the plaintiff's human rights under ss 41(1) and 37(1), (3) and (11) of the *Constitution* had been and would, if not restrained, be further infringed, and a permanent injunction was granted, enjoining the appointment of a new tribunal to inquire into the allegations referred to the previous tribunal in February 2007, and a permanent stay of the plaintiff's February 2007 suspension was granted.

Cases Cited

The following cases are cited in the judgment:

Application by Benetius Gehasa (2005) N2817
Application by Roger Bai Nimituo & 4 Others (2015) N6516
Application for Enforcement of Basic Rights by Boisen Buo and Ali Buo (2007) N5033
Bomai Wati v David Gavera (2013) N5363
Bona v Kidu [1992] PNGLR 316
Joe Kape Meta v Kumono, Kulunio & The State (2012) N4598
Joyce Avosa v Rene Motril (2014) N5732
Leahy v Kaluwin (2014) N5813
Morobe Provincial Government v John Kameku (2012) SC1164
David Simon v Michael Koisen (2018) N7075
Paru v Kotigama & Bmobile-Vodafone (2015) N6089
Petrus & Gawi v Telikom PNG Ltd (2008) N3373
Public Employees Association of PNG v Public Services Commission [1983] PNGLR 206
Re Belden Namah (2020) SC1946
Re Public Prosecutor's Power to Request Chief Justice to appoint a Leadership Tribunal (2008) SC1011
Re Ricky Yanepa [1988-89] PNGLR 166
SC Ref No 1 of 1984, Re Minimum Penalties Legislation [1984] PNGLR 314
SC Ref No 2 of 1992, Reference by the Public Prosecutor [1992] PNGLR 336
SC Ref No 1 of 2010, Re Constitutional (Amendment) Law 2008 (2013) SC1302
SC Ref No 2 of 2016, Re Namah v Poole (2016) SC1516
SC Ref No 5 of 1980, Re Joseph Auna [1980] PNGLR 500
The State v Peter Kakam Borarae [1984] PNGLR 99
The State v Peter Painke [1976] PNGLR 210

ORIGINATING SUMMONS

This was an application for enforcement of human rights in which the plaintiff sought declarations and permanent injunctions to restrain appointment of a leadership tribunal.

Counsel

P A Lowing & P Andrew, for the Plaintiff
G Geroro, for the First Defendant

E S Geita & H Wangi, for the Second, Third and Fifth Defendants
R P Koralyo, for the Fourth Defendant

27th July, 2020

1. **CANNINGS J:** The plaintiff, the Honourable Christopher Seseve Haiveta MP, the Member for Gulf Provincial and Governor of Gulf Province, applies by originating summons for enforcement of his human rights. He seeks declarations and permanent injunctions regarding the proposed appointment in 2020 of a leadership tribunal to inquire into allegations of misconduct in office against him, which were the subject of a matter concerning him referred by the Public Prosecutor to a leadership tribunal in February 2007.

2. The plaintiff claims that a request made by the Public Prosecutor to the Chief Justice in May 2018 to appoint a new tribunal to inquire into the same allegations, was and continues increasingly to be:

- harsh and oppressive for the purposes of s 41 of the *Constitution*;
- an infringement of his right under ss 37(1), (3) and (11) of the *Constitution* to a fair hearing of such allegations of misconduct in office before a leadership tribunal within a reasonable time; and
- a deprivation of his right to a fair hearing and protection of the principles of natural justice under s 59 of the *Constitution*.

3. The defendants are:

- the Public Prosecutor, first defendant;
- the Speaker of the National Parliament, second defendant;
- the Attorney-General, third defendant;
- the Ombudsman Commission, fourth defendant;
- the State, fifth defendant; and
- the Chief Justice, sixth defendant.

4. All defendants except the Chief Justice participated in the proceedings and opposed all relief sought by the plaintiff.

ISSUES

5. Four issues arise:

1. Has the plaintiff proven any actual or imminent infringement of human rights under s 41 of the *Constitution*?
2. Has the plaintiff proven any actual or imminent infringement of human rights under ss 37(1), (3) and (11) of the *Constitution*?
3. Has the plaintiff proven any actual or imminent infringement of human rights under s 59 of the *Constitution*?
4. Should the Court grant any of the remedies (declarations and injunctions) sought by the plaintiff?

FACTS

1992-2005

6. The plaintiff was first elected as the member for Gulf Provincial at the 1992 general election. He was re-elected at the 1997 and 2002 general elections. His holding office as a member of the National Parliament made him a leader and subject to the Leadership Code under s 26(1)(c) of the *Constitution*.

2006

31 January The Ombudsman Commission referred a matter of alleged misconduct in office regarding the plaintiff to the Public Prosecutor for prosecution before a leadership tribunal.

30 August The Public Prosecutor requested the then Chief Justice, Sir Mari Kapi, to appoint an appropriate tribunal to inquire into the matter of alleged misconduct in office regarding the plaintiff, which had been referred to the Public Prosecutor by the Ombudsman Commission.

6 October The Chief Justice appointed the tribunal comprising Justice Timothy Hinchliffe as Chairman and senior magistrates Mr Stephen Abisai and Mr Mark Pupaka.

2007

20 February The Public Prosecutor referred the matter to the Hinchliffe tribunal. The plaintiff was thereupon suspended from duty under s 28(1) of the *Organic Law on the Duties and Responsibilities of Leadership*. The matter referred to the tribunal was 28 allegations of misconduct in office, in four categories:

- (a) failing to furnish annual statements on time and failure to cooperate with the Ombudsman Commission during the period 1999-2002: allegation Nos 1 to 19;
- (b) misapplication of provincial support grants during the period 1999-2001, K1,402,500.00: allegation Nos 20 to 22;
- (c) misapplication of public funds (Kerema-Malalaua road upgrade and Yule Island Girls Boarding School) during the period 2001-2002, K524,000.00: allegation Nos 23 to 25;
- (d) misapplication of public funds (provincial support grants, discretionary component) during the period April-May 2002, K250,000.00: allegation Nos 26 to 28.

Feb-May The Hinchliffe tribunal conducted its proceedings. It completed the process of hearing evidence presented by the Public Prosecutor, then ruled against the plaintiff on a no-case submission and then commenced hearing evidence for the plaintiff.

23 May The last day of the Hinchliffe tribunal. At that point the plaintiff had given evidence and one other witness had given evidence for him. The plaintiff, through his counsel, Mr R Pato, indicated that he intended to call three more witnesses. However, the tribunal, after hearing submissions from the parties, decided to adjourn its proceedings to 6 August 2007, due to the impending general election at which the plaintiff was a candidate and the likelihood that it could not complete its proceedings until after the polling period.

- June-July The plaintiff lost his seat at the 2007 general election.
- 6 August The Hinchliffe tribunal convened briefly and formally disbanded as the plaintiff was no longer subject to the Leadership Code and the tribunal had no jurisdiction.
- Jul 07-Jul 17** In this ten-year period the plaintiff was not subject to the Leadership Code as he was an unsuccessful candidate at both the 2007 and the 2012 general elections and did not hold any other leadership position. He was appointed Acting Secretary to the National Executive Council in December 2011, but the evidence is unclear for how long he occupied that office, which appears, in any event, not to be a leadership office under s 26(1) of the *Constitution*.

2017

- July The plaintiff was re-elected as member for Gulf Provincial at the 2017 general election. The precise date on which he took office under s 104(1) of the *Constitution* (a member of the Parliament takes office on the day immediately following the day fixed for the return of the writ for the election in his electorate) is not clear from the evidence. I estimate that it was in late July.

2018

- 18 May The Public Prosecutor wrote to the then Chief Justice, Sir Salamo Injia, requesting the appointment of an appropriate tribunal to inquire into the matter of alleged misconduct in office, which had been referred by the Ombudsman Commission to the Public Prosecutor in January 2006, and referred by the Public Prosecutor to the Hinchliffe tribunal in February 2007. The Public Prosecutor provided a background of the matter, indicating that during the period since May 2007 two members of the tribunal, Justice Hinchliffe and Mr Abisai, had died. The Public Prosecutor's request for appointment of a tribunal was reported in the media. There was an exchange of correspondence between the Public Prosecutor and the plaintiff's lawyers. The plaintiff was notified formally of the

Public Prosecutor's intentions.

May-December There was no response to the Public Prosecutor's 18 May 2018 request. On 31 October 2018 Sir Salamo Injia's term of office ended. Sir Gibbs Salika was appointed Chief Justice in November 2018.

2019

January-December Nothing happened throughout 2019 regarding the plaintiff's matter. The Public Prosecutor did nothing to follow up his 18 May 2018 request to Chief Justice Injia to appoint a tribunal.

2020

24 March Chief Justice Salika wrote to the Public Prosecutor, indicating that his understanding was that the leadership tribunal regarding the plaintiff was left part-heard in 2007, that the plaintiff was again subject to the Leadership Code, that it was a long outstanding matter and that it was his intention to appoint another leadership tribunal to complete the matter.

14 April The Public Prosecutor acknowledged the Chief Justice's letter of 24 March 2020 and said he awaited appointment of the tribunal. He also said that the plaintiff had been advised of the intention to appoint another tribunal. However, there is no evidence (and it is not conceded by the plaintiff) that in fact the plaintiff was advised of the Chief Justice's intention.

5 June The plaintiff commenced the present OS (HR) proceedings

17 June This Court granted, on application by the plaintiff, a declaration that until further order of the Court he is not suspended from duty arising out of his referral to the leadership tribunal in February 2007.

I now address the four issues identified earlier.

1:HAS THE PLAINTIFF PROVEN ANY ACTUAL OR IMMINENT INFRINGEMENT OF HUMAN RIGHTS UNDER S 41 OF THE

CONSTITUTION?

7. This issue gives rise to three further questions:

- (a) Does the plaintiff have any enforceable rights under s 41?
- (b) Is it lawful for a leader to face prosecution for alleged misconduct in office committed in a previous period of office?
- (c) Would it be harsh or oppressive etc for the plaintiff to face another leadership tribunal?

(a) Does the plaintiff have any enforceable rights under s 41?

8. Section 41 (*proscribed acts*) states:

(1) *Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in the particular case—*

- (a) *is harsh or oppressive; or*
- (b) *is not warranted by, or is disproportionate to, the requirements of the particular circumstances or of the particular case; or*
- (c) *is otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind,*

is an unlawful act.

(2) *The burden of showing that Subsection (1)(a), (b) or (c) applies in respect of an act is on the party alleging it, and may be discharged on the balance of probabilities.*

(3) *Nothing in this section affects the operation of any other law under which an act may be held to be unlawful or invalid.*

9. Mr Geroro led the defendants' position on this point by arguing no, s 41 does not create any basic rights, and is not enforceable under s 57 of the *Constitution*, which is the provision the plaintiff is relying on to seek relief. Mr Geroro relied

on the majority opinion of Kidu CJ and Kapi DCJ, which prevailed over the strong dissent of Amet J, in the leading Supreme Court case of *Raz v Matane* [1985] PNGLR 329.

10. There is certainly support for the majority view in *Raz v Matane* that s 41 has a restricted application, in the form of a string of National Court decisions, including those of Cory J in *Application by Tom Ireeuw* [1985] PNGLR 430, Hinchliffe J in *Tarere v ANZ Bank* [1988] PNGLR 201, Brown J in *Bank of Papua New Guinea v Muteng Basa* [1992] PNGLR 271 and *Curran v The State* (1994) N1259, Salika J in *Max Umbu v Steamships Ltd* (2004) N2738 and Hartshorn J in *Department of Works v International Construction (PNG) Ltd* (2008) N5896 and *James Geama v OTML Shares In Success Ltd* (2011) N4269.

11. However, as I observed in *Agnes Millia Okona-Meten v Leslie B Mamu, Public Solicitor* (2019) N7668, there is another school of judicial thought on s 41, which follows the approach of Sir Arnold Amet in *Raz v Matane*: s 41 creates rights and freedoms and is enforceable under s 57 of the *Constitution* in the same way that are the other provisions of Division III.3 of the *Constitution*. It is all-embracing and has no restricted application.

12. This broad approach has been taken by Brunton AJ in *Re Ricky Yanepa* [1988-89] PNGLR 166 and Los J in *Nowra No 8 Pty Ltd v Kala Swokin* [1993] PNGLR 498. It is the approach I have taken in *Kamit v Aus-PNG Research & Resources Impex Ltd* (2007) N3112, *Petrus & Gawi v Telikom PNG Ltd* (2008) N3373, *Joyce Avosa v Rene Motril* (2014) N5732, *Paru v Kotigama & Bmobile-Vodafone* (2015) N6089, *David Simon v Michael Koisen* (2018) N7075 and in *Okona-Meten v Mamu*.

13. Mr Geroro did not persuade me that I ought to change my mind on s 41 or that there is any special reason it is inapplicable to a case such as this. Nor were learned counsel for defendants other than the Public Prosecutor able to show me why s 41 cannot apply, at least potentially.

14. It is very significant that s 41 is in Division III.3 (*basic rights*) of the *Constitution*, surrounded by provisions that very clearly confer the following rights and freedoms on all persons (or in some cases only citizens) in Papua New Guinea:

- right to freedom (s 32);
- right to life (s 35);

- freedom from inhuman treatment (s 36);
- protection of the law (s 37);
- liberty of the person (s 42);
- freedom from forced labour (s 43);
- freedom from arbitrary search and entry (s 44);
- freedom of conscience, thought and religion (s 45);
- freedom of expression (s 46);
- freedom of assembly and association (s 47);
- freedom of employment (s 48);
- right to privacy (s 49);
- right to vote and stand for public office (s 50);
- right to freedom of information (s 51);
- right to freedom of movement (s 52);
- protection from unjust deprivation of property (s 53);
- equality of citizens (s 55).

15. Section 41 proscribes (ie prohibits) and gives protection against seven sorts of acts (*Morobe Provincial Government v John Kameku* (2012) SC1164, *Petrus and Gawi v Telikom PNG Ltd* (2008) N3373; *Joe Kape Meta v Kumono, Kulunio & The State* (2012) N4598). Even if done under a valid law and notwithstanding anything to the contrary in any law, an act is unlawful if it is, in the particular case:

- 1 harsh; or
- 2 oppressive; or
- 3 not warranted by the requirements of the particular circumstances; or
- 4 disproportionate to the requirements of the particular circumstances; or
- 5 not warranted by the requirements of the particular case; or
- 6 disproportionate to the requirements of the particular case; or
- 7 otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind.

16. Under s 41(2) the burden of showing that another person has committed an act falling within one of the seven categories of acts proscribed by s 41(1) is on the party alleging it.

17. The answer to the question ‘does the plaintiff have any enforceable rights

under s 41?’ is yes.

(b) Is it lawful for a leader to face prosecution for alleged misconduct in office committed in a previous period?

18. Yes. Even if the plaintiff had held a leadership position different in character to the one he now occupies, eg if he had been a departmental head for the period 1992 to 2007, then became subject to the Leadership Code again, as a member of Parliament in 2017, he could still face prosecution during his current term of office as a member of Parliament for alleged misconduct committed in his term as departmental head. That is the effect of the Supreme Court decisions in *SC Ref No 5 of 1980, Re Joseph Auna* [1980] PNGLR 500 and *SC Ref No 2 of 1992, Reference by the Public Prosecutor* [1992] PNGLR 336.

19. However, it is important to appreciate that s 41 can apply to “any act that is done under a valid law” and “notwithstanding anything to the contrary in any other provision of any other law”. This means that an act that is done under a valid law and in compliance with a valid law, ie an ostensibly lawful act, can be rendered unlawful under s 41 if in the particular case it falls within one of the seven categories of proscribed acts in s 41(1)(a), (b) or (c).

20. In the present case, the impugned act of the Public Prosecutor, requesting the Chief Justice on 18 May 2018 to appoint a tribunal to inquire into allegations of misconduct in office that were partly dealt with by the Hinchliffe tribunal in February-May 2007, was done under valid laws: the *Constitution* and the *Organic Law on the Duties and Responsibilities of Leadership*. There is nothing in those laws that prohibits the Public Prosecutor taking that action, 11 years after the Hinchliffe tribunal concluded. Nor is there anything in those laws that fixes anything like a limitation period found in the *Frauds and Limitations Act* 1988 for commencement of some civil proceedings.

21. That means that the Public Prosecutor’s request of 18 May 2018 and the proposed prosecution of the plaintiff before a leadership tribunal in 2020 for misconduct in office are ostensibly lawful acts.

22. The question then arises whether those ostensibly lawful acts are rendered unlawful by their falling into one of the seven categories of proscribed acts in s41(1).

(c) Would it be harsh or oppressive etc for the plaintiff to face another

leadership tribunal?

23. Ms Koralyo, for the Ombudsman Commission, submitted that s 41, though it may potentially apply in the present case, has no actual relevance, as s 41, according to the reasoning of Kapi DCJ in *SC Ref No 1 of 1984, Re Minimum Penalties Legislation* [1984] PNGLR 314, only applies to discretionary acts. It was submitted that the Public Prosecutor, having decided in 2006, to bring proceedings regarding the plaintiff, had no discretion not to continue the proceedings after the plaintiff resumed leadership status in late July 2017.

24. I reject that argument. I find that the Public Prosecutor could properly have decided in August 2017 to not pursue the matter. He had a discretion to exercise: to pursue or to not pursue the matter. He exercised that discretion eventually, by deciding to pursue the matter, after a long delay.

25. Bearing in mind that it is the plaintiff who must show, on the balance of probabilities, that the act of the Public Prosecutor in writing to the Chief Justice on 18 May 2018 to request the appointment of a leadership tribunal, falls into one or more of the seven categories of proscribed acts in s 41(1), I find that the plaintiff *has* discharged that burden; particularly when account is taken of what has happened, regarding the allegations of misconduct in office against the plaintiff, in the two years since May 2018.

26. What has happened is next to nothing. The Chief Justice wrote to the Public Prosecutor on 24 March 2020 to say that he intended to appoint a tribunal. But no tribunal has been appointed. That is the only thing to happen in the last two years and two months. There is no evidence that the plaintiff has been put on notice that some action is imminent. He is the one who has brought the issue to a head.

27. The following aspects of this unusual case require such findings:

(i) The request, of May 2018, was made nine months after the plaintiff had become a leader again, in late July 2017, after a lapse of ten years.

28. The nine-month period was an inordinate delay, in my view. The Ombudsman Commission, one of the purposes of establishment of which is, under s 218(d) of the *Constitution*, “to supervise the enforcement of Division III.2 (*leadership code*)”, should have maintained a watching brief over the plaintiff’s leadership status. It should have advised the Public Prosecutor, immediately the plaintiff resumed office as a member of Parliament in late July 2017, that he was

again subject to the Leadership Code. There is no evidence that that happened. Nor is there evidence that it did not happen.

29. It should have happened, but even if it didn't, the Public Prosecutor should have, without being prompted by the Ombudsman Commission, been alert to the need, in August 2017, to make a decision on what to do with the plaintiff's case.

30. The Public Prosecutor has two primary functions conferred by s 177(1) of the *Constitution*: (a) "to control the exercise and performance of the prosecution function ... before the Supreme Court and the National Court ..."; and (b) "to bring or decline to bring proceedings under Division III.3 (*leadership code*) for misconduct in office". Prosecution of matters before leadership tribunals is not a minor or subsidiary task for the Public Prosecutor. It is one of his core constitutional functions.

31. Leadership tribunal cases should be given a special priority. This one wasn't. The plaintiff was left to resume office as member for Gulf Provincial after a gap of ten years and settle himself back into that significant office for nine months without anyone, in particular the Public Prosecutor, notifying him of the intention to resurrect a matter that had last been before a leadership tribunal 11 years previously.

(ii) The request was left unpursued by the Public Prosecutor for one year, 10 months before the Chief Justice indicated his intention in March 2020 to appoint a new tribunal.

32. This was another inordinate and unsatisfactory delay, in my view. The Public Prosecutor made his request to appoint a tribunal to Chief Justice Injia on 18 May 2018. The request, the evidence shows, was not responded to by the time Chief Justice Injia's term expired, five months later, in October 2018.

33. Then, no attempt was made by the Public Prosecutor to bring the matter to the attention of Sir Gibbs Salika when he took office as Chief Justice in November 2018. The Public Prosecutor continued to do nothing to pursue his request for a further 16 months before Chief Justice Salika indicated in March 2020 his intention to appoint a tribunal.

34. It is no answer to the allegation of continued inaction on the part of the Public Prosecutor, in failing to pursue or follow up his request of 18 May 2018, to say that the question of appointment of a tribunal is a matter entirely for the Chief

Justice. Yes, that is true, to a point. The following principles were settled by the Supreme Court (Cannings J, David J, Polume-Kiele J) in *SC Ref No 2 of 2016, Re Namah v Poole* (2016) SC1516:

- appointment of a leadership tribunal for a member of Parliament is an administrative, not a judicial, function, for the Chief Justice to perform under s 27(7)(e) of the *Organic Law on the Duties and Responsibilities of Leadership*. It is a function that entails duties and discretion;
- the Chief Justice cannot refuse to appoint the members of a tribunal;
- the Chief Justice has a discretion under Section 27(7)(e) of the *Organic Law* as to who is appointed, provided that the Chairman is a Judge and the two other members are senior magistrates (*Re Public Prosecutor's Power to Request Chief Justice to appoint a Leadership Tribunal* (2008) SC1011);
- the Chief Justice also has a discretion as to the timing of the appointments (*Bona v Kidu* [1992] PNGLR 316).

35. The fact that appointment by the Chief Justice (or any of the other appointing authorities) of leadership tribunals is a constitutional function entailing duties and discretions, necessarily means that, if there were an issue about alleged refusal on the part of the Chief Justice to appoint a tribunal or appointment of allegedly unqualified members or alleged unreasonable delay in appointment, the decision (or failure to make a decision) by the Chief Justice would be amenable to judicial review or to some other enforcement proceedings (eg under ss 22 and 23 of the *Constitution*).

36. I am not suggesting that the Public Prosecutor ought to have resorted to such action in this case. But what he should clearly have done, after making the request to Chief Justice Injia in May 2018 and not having received an acknowledgment of it, is at least after a reasonable period – say, one month – sent a reminder to the Chief Justice.

37. When a new Chief Justice took office five months after the 18 May 2018 request was made, it was incumbent on the Public Prosecutor to bring the matter to the attention of the new Chief Justice, especially bearing in mind that by this

time – November 2018 – it was 15 months since the plaintiff had again become subject to the Leadership Code.

38. The Public Prosecutor did nothing, however, in November 2018, and continued to do nothing for a further 16 months before Chief Justice Salika, of his own volition (without being asked by the Public Prosecutor) indicated his intention in March 2020, to appoint a tribunal.

39. I reiterate that it is the Public Prosecutor's duty to give leadership tribunal cases a special priority. This one, and the leader involved, were not accorded that priority. The plaintiff, who had been informed in May 2018 of the likelihood of a tribunal being appointed to resume an inquiry into the allegations considered by the Hinchliffe tribunal, was left again to continue in office as member for Gulf Provincial and Governor of that province, without being told anything by anyone about the appointment of a tribunal.

40. In fact, what he should have been told, by the Public Prosecutor and/or the Ombudsman Commission, is that he was still under suspension from 20 February 2007, when his matter was referred to the Hinchliffe tribunal (*Re Belden Namah* (2020) SC1946). No advice of that nature was given to the plaintiff at any time.

(iii) The request could only result in appointment of a new tribunal (two members of the previous tribunal having died), in 2020, that would have to rehear evidence presented to the previous tribunal 13 years ago.

41. Because of the death of Justice Hinchliffe and Senior Magistrate Mr Abisai, it is impossible to reconvene the leadership tribunal which in 2007 partly dealt with the plaintiff's matter. It must also be noted that the third member of the tribunal, Mr Pupaka, is now the Chief Magistrate. I heard no argument on whether a Chief Magistrate can be appointed as a member of a tribunal under s27(7)(e) of the *Organic Law on the Duties and Responsibilities of Leadership*, which requires that a tribunal for any member of Parliament other than the Prime Minister shall consist of "a Judge (who shall be Chairman) and two senior Magistrates appointment by the Chief Justice". It is a moot point whether the present Chief Magistrate could or should be appointed if there is to be a newly appointed tribunal.

42. However, the reality needs to be addressed that if a new tribunal is appointed, it will consist of at least two new members, and the imposing task of the new tribunal will be to rehear evidence that was first presented to the

Hinchliffe tribunal 13 years ago.

43. In the 13-year period since the previous tribunal disbanded, it is reasonably expected that some evidence would have been lost or misplaced. There is evidence in these proceedings that some of the plaintiff's witnesses have died since 2007. This will make it intrinsically difficult for the plaintiff to defend the allegations.

(iv) The subject matter of the allegations traverses the period from 1993 to 2002, meaning that a tribunal appointed in 2020 would be inquiring into alleged misconduct committed 18 to 27 years ago.

44. This fact alone bespeaks the very great practical problems confronting any newly appointed tribunal. The most recent allegations are in the final category: misapplication of K250,000.00 public funds, derived from the 2002 Provincial Support Grants, in the months of April and May 2002. Specifically, it is alleged that the plaintiff made "37 unverifiable and/or improper debit transactions totalling K163,451.37 by writing out cheques to pay cash".

45. It will be virtually impossible for a newly appointed tribunal to properly inquire into such allegations, 18 years after the event. And it will be virtually impossible for the plaintiff to defend himself.

46. Those are the most recent allegations. The oldest ones go back to 1993, when the plaintiff allegedly began consistently failing to provide his annual statements to the Ombudsman Commission in accordance with s 4 of the *Organic Law on the Duties and Responsibilities of Leadership*.

47. The age of the allegations and the difficult position in which the plaintiff will be placed makes fresh proceedings before a newly appointed tribunal look like a costly exercise in futility.

Conclusion as to s 41

48. I find that the plaintiff has proven that the Public Prosecutor's request to the Chief Justice of 18 May 2018 to appoint another leadership tribunal to inquire into the allegations of misconduct in office against the plaintiff, which were the subject of a matter concerning him referred by the Public Prosecutor to a leadership tribunal on 20 February 2007, was and is:

- harsh, and
- oppressive, and
- not warranted by the requirements of the particular case; and is therefore
- a proscribed act for the purposes of s 41 of the *Constitution*.

2: HAS THE PLAINTIFF PROVEN ANY ACTUAL OR IMMINENT INFRINGEMENT OF HUMAN RIGHTS UNDER SS 37(1), (3) AND (11) OF THE CONSTITUTION?

49. It is the plaintiff's contention that the request made by the Public Prosecutor to the Chief Justice in May 2018 to appoint a new tribunal to inquire into the same allegations that were partly inquired into by the Hinchliffe tribunal in 2007 was, and continues increasingly to be, an infringement of his right under ss 37(1), (3) and (11) of the *Constitution* to a fair hearing within a reasonable time.

50. The defendants do not deny that the plaintiff has a right to the full protection of the law, and assure the plaintiff that he will be afforded that protection in the event that a new tribunal is appointed to inquire into the allegations of misconduct in office. However, the defendants assert that the specific right in s 37, as to a fair hearing within a reasonable time, is not that one that inures in favour of the plaintiff. Two questions arise:

(a) Does the plaintiff have a right to a fair hearing within a reasonable time?

(b) Has any such right been infringed?

(a) Does the plaintiff have a right to a fair hearing within a reasonable time?

51. Sections 37(1), (3) and (11) of the *Constitution* are in the following terms:

(1) Every person has the right to the full protection of the law, and the succeeding provisions of this section are intended to ensure that that right is fully available, especially to persons in custody or charged with offences. ...

(3) A person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time, by

an independent and impartial court. ...

(11) A determination of the existence or extent of a civil right or obligation shall not be made except by an independent and impartial court or other authority prescribed by law or agreed upon by the parties, and proceedings for such a determination shall be fairly heard within a reasonable time. [Emphasis added.]

52. It was decided by the Supreme Court (Kidu CJ, Pratt J, Bredmeyer J) in *Public Employees Association of PNG v Public Services Commission* [1983] PNGLR 206 that the term “offence” in s 37(3) means criminal offences only. It does not extend to disciplinary offences. I accept the defendants’ argument that misconduct in office under the Leadership Code is not a criminal offence. Although a finding of guilt of misconduct in office can lead to a criminal penalty in the form of a fine, leadership tribunal proceedings are not criminal proceedings. So s 37(3) does not directly apply.

53. However, I consider that s 37(3) indirectly applies, in that the rights it confers, and the obligations it imposes, are channelled into and reflected in s37(11). I uphold the submission of Mr Lowing, for the plaintiff, that proceedings before a leadership tribunal are properly regarded as “a determination of the existence or extent of a civil right or obligation” and, that being the case, “proceedings for such a determination” – being leadership tribunal proceedings – “shall be fairly heard within a reasonable time”. Thus the plaintiff has the right to a fair hearing within a reasonable time.

54. Though the rights are not expressly conferred under s 37(11), in the same way as they are in s 37(3), it can hardly be contemplated that the opposite construction of s 37(11) should prevail: that it does not apply to Leadership Code matters. That would mean that a person charged with a criminal offence has a right to a fair hearing within a reasonable time, but a leader alleged to have committed misconduct in office has no such right. I don’t think that that would be the fair, large or liberal interpretation of the *Constitution* that is required. So I reject the defendants’ argument that s 37(11) is irrelevant to this case.

55. A leader facing allegations of misconduct in office has rights to the full protection of the law in the same way that persons charged with criminal offences have the following rights:

- a fair hearing;

- within a reasonable time;
- by an independent and impartial court or tribunal (*The State v Peter Painke* [1976] PNGLR 210, *The State v Peter Kakam Borarae* [1984] PNGLR 99, *Application by Benetius Gehasa* (2005) N2817).

56. In criminal matters, the “reasonable time” requirement imposes two obligations on the Public Prosecutor:

- he must commence the prosecution within a reasonable time after the accused is charged; and
- he must complete the case within a reasonable time after commencing it (*Leahy v Kaluwin* (2014) N5813).

57. What is a “reasonable time” will vary from case to case. If there is an apparently inordinate delay in having a case commenced or completed, it is incumbent on the prosecutor to explain the delay and provide good reasons for it (*Application for Enforcement of Basic Rights by Boisen Buo and Ali Buo* (2007) N5033).

58. The “reasonable time” requirement imposes obligations on all persons and institutions involved in the criminal justice system to ensure that all accused persons have the charges against them heard *and determined* with all due dispatch (*Re Ricky Yanepa* [1988-89] PNGLR 166, *Application for Enforcement of Basic Rights by Boisen Buo and Ali Buo* (2007) N5033, *Bomai Wati v David Gavera* (2013) N5363, *Application by Roger Bai Nimituo & 4 Others* (2015) N6516).

59. The same principles apply, in my view, to Leadership Code proceedings. There is no good reason that leaders, who are subject to additional obligations under the Leadership Code over and above persons who are not leaders, ought to have a lesser standard of protection of the law than persons who are charged with criminal offences.

60. As for this case, I find that the plaintiff had, and has, an ongoing right to a fair hearing of the allegations of misconduct in office *within a reasonable time*.

(b) Has the plaintiff’s right to a fair hearing within a reasonable time been infringed?

61. The defendants argue strongly no, the plaintiff will still get a fair hearing and it will be within a reasonable time, if and when a new tribunal is appointed. They point to the fact that the ten-year hiatus in the plaintiff's leadership status meant that nothing could be done regarding the allegations, so the delay involved in that period cannot be taken into account.

62. I agree that the ten years from July 2007 to July 2017 cannot be directly counted in ascertaining whether the allegations have been prosecuted within a reasonable time.

63. However, I uphold the submission of Mr Lowing that what has happened, or not happened, since late July 2017 is very relevant, and that the effect of the delay in dealing with the matter must be considered in the context of the long lapse in time since the last tribunal and the "age" of the allegations. I am satisfied that the plaintiff has proven that he has been denied a right to a fair hearing within a reasonable time, for the following reasons:

(i) The subject matter of the allegations traversed the period from 1993 to 2002, meaning that a tribunal appointed in 2020 would be inquiring into alleged misconduct committed 18 to 27 years ago.

(ii) In the 13-year period since the previous tribunal disbanded, it is reasonably expected that some evidence would have been lost or misplaced, and some of the plaintiff's witnesses had died.

(iii) The passage of time between when the Ombudsman Commission referred the plaintiff's matter to the Public Prosecutor (January 2006) and when a new tribunal could, if its appointment is not restrained, be appointed (say August 2020), is (excluding the period of ten years when the plaintiff was not subject to the Leadership Code) four years, seven months.

(iv) It is almost three years since the plaintiff, in late July 2017, resumed leadership status. In that period insufficient steps have been taken to prosecute the allegations. The plaintiff was subject to the Leadership Code for nine months before the Public Prosecutor did anything. Even if the Public Prosecutor were regarded as having the standard time of one to four months to make a decision on whether to bring proceedings (see *SC Ref No 1 of 2010, Re Constitutional (Amendment) Law 2008* (2013))

SC1302), he was too slow to act. The matter has been left to drag on. The plaintiff has been left in limbo for almost three years. These issues are only being brought to a head because of the plaintiff's actions, not the defendants' actions.

(v) I repeat the view I expressed in the recent case of *Namah v Higgins (No 2)* (2020) N8415 that it is incumbent on all constitutional office-holders and institutions involved in administration and enforcement of the Leadership Code to act quickly and decisively when there is clear evidence of very serious allegations of misconduct in office involving a leader. There comes a time when enough is enough, and that time is now.

All of this amounts to a denial of the full protection of the law.

Conclusion re s 37

64. The Public Prosecutor's request to the Chief Justice, in May 2018, to appoint another leadership tribunal, which was then unpursued for one year, ten months, amounts to infringement of the plaintiff's right under ss 37(1), (3) and (11) of the *Constitution* to the full protection of the law, in particular to a fair hearing of allegations of misconduct in office before a leadership tribunal within a reasonable time.

3: HAS THE PLAINTIFF PROVEN ANY ACTUAL OR IMMINENT INFRINGEMENT OF HUMAN RIGHTS UNDER S 59 OF THE CONSTITUTION?

65. Section 59 of the *Constitution* states:

- (1) *Subject to this Constitution and to any statute, the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings.*
- (2) *The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.*

66. The plaintiff has failed to articulate this part of his case. I am not satisfied that there has been any breach by the defendants of the right of the plaintiff to

protection of the principles of natural justice. The plaintiff has not proven any actual or imminent infringement of his rights in that regard.

4: SHOULD THE COURT GRANT ANY OF THE REMEDIES (DECLARATIONS AND INJUNCTIONS) SOUGHT BY THE PLAINTIFF?

67. Mr Geita, for the Attorney-General, the Speaker and the State, submitted that, even if the plaintiff succeeds in showing an actual or imminent infringement of some of his human rights, he should be refused all relief he is seeking, as all of his concerns can be addressed by a freshly constituted leadership tribunal. The plaintiff, according to this argument, can rest assured that he will be afforded the full protection of the law by the new tribunal, which is obliged to conduct its proceedings in accordance with the principles of natural justice. Mr Geita submitted that the Court should exercise extreme caution before seriously contemplating interrupting the constitutional process. Reliance was placed on dicta of the Supreme Court (Manuhu J, Murray J & Pitpit J) in *Patrick Pruaitch v Chronox Manek* (2017) SC1593:

In relation to proceedings under the Leadership Code, we are also of the view that the National Court in its civil jurisdiction should not interfere with proceedings of the process under the Leadership Code. Proceedings under the Leadership Code are sanctioned by an Organic Law - not any ordinary Act of Parliament. For that reason alone, an aggrieved person enforcing his private right should not be allowed to interfere with the proceeding when it is still in progress. In the exercise of discretion, the Courts ought to take into account the hierarchy of laws and supremacy of Constitutional Laws and refrain from entertaining intervening civil proceedings.

68. I have taken full account of those words of caution, and I am being extremely cautious. However, I think that this is such a special and unprecedented case, involving substantial delays and inaction since the plaintiff was referred by the Ombudsman Commission to the Public Prosecutor 14 and a half years ago, in January 2006, that it is time to call a halt to a process that will, if allowed to continue, entail a serious breach of human rights and be a costly and time-consuming exercise in futility.

69. I will now consider the specific relief sought by the plaintiff. By the further amended originating summons filed on 8 July 2020, the plaintiff seeks five

substantive remedies, identified in paragraphs 1 to 5. The relief sought in paragraph 6 was abandoned. Paragraphs 7 and 8 are about costs, which I will deal with separately. Paragraph 9 seeks any other orders the Court deems fit and paragraph 9 is about the abridgment of time.

70. The further amended originating summons seeks:

1. A declaration pursuant to section 57(1) and 155(4) of the *Constitution* that the Public Prosecutor Mr Pondros Kaluwin's request to the then Chief Justice, Sir Salamo Injia on 18th May 2018, to appoint an appropriate tribunal (the *Tribunal*) or any other leadership tribunal, to hear and enquire into allegations of misconduct against the plaintiff pursuant to Section 27(7)(e) of the *Organic Law on Duties and Responsibilities of Leadership* (OLDRL) and/ or any subsequent similar requests(s) by the Public Prosecutor to the sixth defendant, or any person acting in his position to appoint a leadership tribunal to hear and enquire into the allegations of misconduct charges against the plaintiff is:
 - (a) harsh and oppressive, not warranted by the circumstances of the case and/ or not reasonably justifiable in a democratic society having proper regard for the rights and dignity of the plaintiff as a person and/ or a leader, contrary to section 41 of the *Constitution*;
 - (b) has taken an inordinate amount of time and accordingly is contrary to and in breach of the plaintiff's human rights pursuant to section 37(3) and/ or 37(11) of the *Constitution*; and
 - (c) any such Leadership Tribunal would deprive the plaintiff of his rights under section 59 of the *Constitution* and is accordingly unlawful.
2. A declaration in accordance with sections 57 and 155(4) of the *Constitution* that the continued supervision or suspension of the plaintiff of his duties after the commencing of a Leadership Tribunal on or around February 2007 and comprising that late Justice Timothy Hinchcliffe, the late Stephen Abisai and Mr Mark Pupaka to enquire into allegations contained in a reference from the Public Prosecutor (the reference), in accordance with section 28(1)

of the OLDRL, is a breach of the plaintiff's human rights under sections 37(3) and/ or 37(11), 41 and 59 of the *Constitution*.

3. In accordance with section 57(1) and section 155(4) of the *Constitution* and Order 12 Rule 1 of the *National Court Rules*, a permanent injunction enjoying the appointment of the Tribunal, or any subsequent leadership tribunal from commencing, resuming or conducting any hearing or inquiry into the allegations of misconduct against the plaintiff pursuant to section 27 of the OLDRL and dealing generally with allegations of misconduct and as contained in the reference and dealt with by the Leadership Tribunal comprising the late Timothy Hinchcliffe, the late Stephen Abisai and Mr Mark Pupaka on or around February 2007.
4. In accordance with sections 57 and 155(4) of the *Constitution* and Order 12 Rule 1 of the *National Court Rules*, a permanent stay of and order setting aside the suspension of the plaintiff of his duties as the member of the National Parliament for the Gulf Regional seat and consequently as the Governor of the Gulf Province, pursuant to section 28(1) of the OLDRL, as a consequence of the referral to the Leadership Tribunal on 20 February 2007.
5. Consequent upon terms 1,2,3 and 4 above and pursuant to sections 58, 23(2) and 155(4) of the *Constitution*, a declaration that damages are payable to the plaintiff by the defendants.
6. ~~Further, and/or alternatively, an order pursuant to Order 4 Rule 35(1) of the *National Court Rules* that the proceedings continued on pleadings, or affidavits filed by parties in the proceedings stand as pleadings or order that a statement of claim or other pleadings be filed as ordered by the Court.~~
7. An order that the costs (on an indemnity basis) of the Plaintiff in relation to the aborted leadership tribunal appointed on or about 27 January 2006, comprising of late Hinchcliffe J, Senior Magistrates Messrs late Abisai and Mark Pupaka proceedings be paid by the fifth defendant.
8. Costs of these proceedings be paid by the fifth defendant.

9. Any other orders this Honourable Court deems fit.

10. The time for entry of these orders be abridged to the date of settlement by the Registrar which shall take place forthwith.

71. In determining these claims for relief I am exercising jurisdiction under ss 57(3), 57(5) and 155(4) of the *Constitution*.

72. Sections 57(3) and 57(5) (*enforcement of guaranteed rights and freedoms*) state:

57(3): A court that has jurisdiction under Subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force). ...

57(5): Relief under this section is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.

73. Section 155(4) (*the National Judicial System*) states:

Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case.

74. I will grant the relief sought in paragraphs 1 to 5. It is not necessary to make any other substantive order.

75. The plaintiff will therefore be substantially awarded the relief he sought in these proceedings. It is appropriate that costs follow the event, but not appropriate that costs be awarded on an indemnity basis. The result was not a lay-down-misere. The costs order will be on a party-party basis and apply against the State,

which is the appropriate entity to carry liability for costs in a proceeding of this nature.

ORDER

76. It is ordered, in relation to the further amended originating summons filed 8 July 2020, that:

- (1) The relief sought in paragraphs 1 to 4 is substantially granted and accordingly, pursuant to ss 57(3), 57(5) and 155(4) of the *Constitution*:
 - (a) it is declared that the Public Prosecutor's request to the Chief Justice of 18 May 2018 to appoint another leadership tribunal to inquire into the allegations of misconduct in office against the plaintiff, which were the subject of a matter concerning him referred by the Public Prosecutor to a leadership tribunal on 20 February 2007, was and is harsh and oppressive and not warranted by the requirements of the particular case and is a proscribed act for purposes of s 41 of the *Constitution*, and did and does amount to infringement of the plaintiff's right under ss 37(1), (3) and (11) of the *Constitution* to a fair hearing of such allegations of misconduct in office before a leadership tribunal within a reasonable time;
 - (b) it is declared that the continued suspension of the plaintiff in respect of the referral of a matter concerning him to a leadership tribunal on 20 February 2007 would be harsh and oppressive and a proscribed act for purposes of s 41 of the *Constitution*, and would amount to infringement of the plaintiff's right under ss 37(1), (3) and (11) of the *Constitution* to a fair hearing of such allegations of misconduct in office before a leadership tribunal within a reasonable time;
 - (c) a permanent injunction is granted enjoining the appointment of another leadership tribunal to inquire into the same allegations of misconduct in office against the plaintiff that were the subject of the referral of a matter concerning him to a leadership tribunal on 20 February 2007;
 - (d) the suspension of the plaintiff under s 28(1) of the *Organic Law on the Duties and Responsibilities of Leadership* that took effect in respect of the referral of a matter concerning him to a leadership tribunal on 20

February 2007, is permanently stayed.

- (2) The relief sought in paragraphs 5, 6 (abandoned) and 7, is refused.
- (3) The relief sought in paragraph 8 is substantially granted and accordingly it is ordered that, subject to any costs orders made in the course of the proceedings, the fifth defendant shall pay the plaintiff's costs of the proceedings on a party-party basis, which shall, if not agreed, be taxed.
- (4) All interim orders made in the course of the proceedings are dissolved.
- (5) The proceedings are thereby determined and the file is closed.

Ordered accordingly.

Leahy Lewin Lowing Sullivan Lawyers: *Lawyers for the Plaintiff*
Geroro Lawyers: *Lawyers for the First Defendant*
Solicitor-General: *Lawyers for the Second, Third & Fifth Defendants*
Counsel to the Commission: *Lawyer for the Fourth Defendant*