

SC1998

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCM NO. 16 OF 2020

BETWEEN:
THE INDEPENDENT STATE OF PAPUA NEW GUINEA
First Appellant

AND:
PONDROS KALUWIN in his capacity as PUBLIC PROSECUTOR
Second Appellant

AND:
HONOURABLE BELDEN NORMAN NAMA, MP
First Respondent

AND:
**LEADERSHIP TRIBUNAL COMPRISING THE HON. JUSTICE HIGGINS
& SENIOR MAGISTRATES PATRICIA TIVESI AND ALAX KALANDI**
Second Respondent

AND:
OMBUDSMAN COMMISSION
Third Respondent

AND:
CHIEF JUSTICE
Fourth Respondent

Waigani: Manuhu, J.
2020: 3rd & 10th September

PRACTICE AND PROCEDURE –Appeal against permanent injunction of proceeding of leadership tribunal –Interim stay pending appeal –Whether stay is necessary – Burden of proof.

Cases Cited

Ano Pala v Cosmas Bidar (2015) SC 1465,
Application Pursuant to Constitution, Section 18 (1) Application by Honourable Belden Norman Namah MP (2020) SC 1946,
Ereman Ragi v Joseph Maingu (1994) SC459,
Hon Belden Norman Namah v Leadership Tribunal & Ors (2020) No 299 of 2018,
Kondra v Lenalia [2016] SC 1527,
Luke Benjamin Supro v Gereaa Aopi [1997] PNGLR 353,
McHardy v Prosec Security and Communications Ltd [2000] PNGLR 279,
Namah v. Poole & Ors [2016] N6397,
Re the Honourable Belden Namah MP, Member for Vanimo-Green (2018) N7194 (LT),
SC Ref No 2 of 2016, Re Namah v Poole Tribunal (No 1) (2016) SC1508,
SC Ref No 2 of 2016, Re Namah v Poole Tribunal (No 2) (2016) SC1516),
SCC (OS) No. 4 of 2020 (IECMS) Application Pursuant to Constitution Section 18 (1),
SCC(OS) No 20 of 2020 (IECMS) Application Pursuant to Constitution Section 18 (1).

Counsel:

G. Geroro, for the Applicant/Appellant
G. Sheppard with *P. Tabuchi*, for the First Respondent.

10th September 2020

1. **MANUHU, J.:** Before me on 3rd September 2020 was an application for interim stay of the orders made by Cannings, J in a judicial review proceeding filed by the First Respondent, Hon Belden Norman Namah (“Belden Namah”) where he sought a judicial review of the findings and dismissal recommendation of the Leadership Tribunal which was appointed to investigate misconduct charges against him. This is my ruling on the application.

Background facts

2. Belden Namah is currently a Member of Parliament and Open Member for Vanimo-Green, an electorate in Sandaun Province. He has been a Member of Parliament since 2007. Following an investigation into alleged misconduct in office, Belden Namah was referred to the Public Prosecutor for prosecution under

the *Leadership Code* on 13 April 2015. At the request of the Public Prosecutor, a Tribunal was appointed by the former Chief Justice, Sir Salamo Injia, which commenced its hearing at the end of November 2015.

3. On 24 November 2015, Belden Namah was suspended on full pay by operation of section 28 of the *Organic Law on Duties and Responsibilities of Leadership* (“The Organic Law”) when the Public Prosecutor presented the Charges and Statement of Reasons to the Tribunal. On 2 September 2016, Belden Namah successfully obtained a permanent injunction against the Tribunal from proceeding with the inquiry: See *Namah v. Poole & Ors* [2016] N6397.

4. The Court found that:

“The conduct of the members of the leadership tribunal during the course of the litigation did give rise to a reasonable apprehension of bias on their part. A tribunal whose jurisdiction is called into question by proceedings in the National Court should normally play no active role in the proceedings. Here, the role of the tribunal was so aggressive a reasonable person would suspect that the tribunal was no longer impartial and that if the plaintiff were required to go back before that tribunal, he would not be guaranteed a fair hearing. The tribunal had let itself be unduly antagonized by the plaintiff’s conduct and in doing so breached the principles of natural justice and shed itself of the cloak and aura of impartiality it was required to maintain at all times.”

5. It became necessary for a new tribunal to be appointed but no appointment was made until 28 September 2017. The new Tribunal proceeded with the hearing of the misconduct allegations against Belden Namah on 18 October 2017 and concluded its hearing on 10 November 2018. On 9 April 2018, the Tribunal found Belden Namah guilty of misconduct in office and recommended his dismissal from office.

Judicial Review: findings and orders

6. On 11 May 2018, Belden Namah was granted leave to review the decision of the Tribunal. The substantive relief sought in the review application was for permanent stay of any further investigation and hearing on allegations of misconduct in office. The basis for the challenge was that the Tribunal failed to accord him the opportunity to be heard before deciding on penalty.

7. Cannings, J, who presided in the review application found that the Tribunal did fail to accord natural justice to Belden Namah in that it failed to give him the opportunity to be heard before it decided to recommend his dismissal from office: *Hon Belden Norman Namah v Leadership Tribunal & Ors* (2020) No 299 of 2018.

8. The substantive orders of Cannings, J are:

- *An order in the nature of certiorari is granted by which the decision of the Tribunal of 9 April 2018 is quashed in its entirety.*
- *A permanent stay is granted of the allegations of misconduct in office contained in the charges and statement of reasons dated 23rd November 2015,*
- *A declaration that Belden Namah's suspension from duty no longer applies is granted and accordingly it is declared that for the purposes of the proceedings under the Leadership Code the subject of these proceedings, these proceedings are by force of this Order resolved with immediate effect and Belden Namah suspension from duty under section 28 (1) of the Organic Law is lifted with immediate effect.*

9. The Public Prosecutor has appealed against the decision of the review court and is seeking an interim stay on the effects of the underlined orders. The application is opposed.

Law on Stay

10. Section 19 of the *Supreme Court Act* states:

“19. STAY OF PROCEEDINGS ON APPEAL.

“Unless otherwise ordered by the Supreme Court or a Judge, an appeal, or an application for leave to appeal, to the Supreme Court does not operate as a stay of proceedings.”

11. Essentially, an appeal to the Supreme Court does not automatically stay the decision or order of the National Court. It is accepted that ordinarily, a successful litigant is entitled to enjoy the fruit of judgment and is at liberty to enforce the judgment pending the determination of any appeal. See *McHardy v Prosec*

Security and Communications Ltd [2000] PNGLR 279.

12. Secondly, grant of stay is discretionary.

13. Thirdly, the onus is on an applicant to persuade the court to exercise its discretion, which the court will only do if circumstances are shown justifying the departure from the ordinary rule (that a successful litigant is entitled to the fruit of judgment). The main issue to consider is whether the grant of a stay is necessary:

- to preserve the subject matter or
- to preserve the integrity of the appeal, or
- whether refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal.

14. The case of *McHardy v. Prosec Security and Communications Ltd* [2000] PNGLR 279 sets out a list of factors to take into account before grant of stay. The decision in *Kondra v Lenalia* [2016] SC 1527 attempts to distinguish *McHardy* case in the context of Public Law and Private Law interests.

15. Public Law are laws such as Criminal Law, Constitution and Organic Laws. They are laws that affect the public at large and the society as a whole while private law, such as contract law and tort law, affect individual citizens and corporations. See *Luke Benjamin Supro v Gereia Aopi* [1997] PNGLR 353 and *Ereman Ragi v Joseph Maingu* (1994) SC459. Understanding the distinction is useful when one is considering the merits of applications such as this or other interim orders pending appeal. See, for instance, the case of *Ano Pala v Cosmas Bidar* (2015) SC 1465.

16. No doubt, no two cases are the same. Each case will be decided on its own merits. This application will be decided on its own merits. The question remains, is a grant of stay necessary?

Submissions by the Public Prosecutor

17. The Public Prosecutor, through counsel, Mr. Geroro, has submitted that the prejudice the appellants and citizens of this country are likely to suffer if an interim stay is not granted, including the prejudice to the operation of the *Leadership Code*, substantially outweigh any prejudice to Belden Namah. While Belden Namah has been found guilty of misconduct in office in the highest degree, he has resumed office as a Member of Parliament and as Opposition Leader.

18. The effect of a stay, if granted, would be that suspension under section 28 of the *Organic Law* would continue to run and prevent him from performing his function as Open Member for Vanimo-Green and as Opposition Leader, and preserve the integrity of the *Leadership Code*.

Consideration of the merits of the application

19. I begin with the premise that Belden Namah is entitled to enjoy the fruit of judgment. Mr. Geroro relied on the case of *Kondra v Lenalia* (above) to argue that Belden Namah should remain under suspension pending appeal but in my view that case does not assist the Public Prosecutor.

20. In that case, Mr. Kondra was found guilty by his tribunal and there was a recommendation for his dismissal from office. He filed an application for judicial review which was dismissed. Mr. Kondra appealed to the Supreme Court and pending appeal, he sought an interim stay. I was a member of the bench which refused his application for a stay. Among other things, it held that a stay would be against public interest. It was expressed, thus:

“This case is clearly a public interest case in that it raises Constitutional Law issues and issues of good governance. In appropriate public interest cases, it would be in the public interest that a person found guilty of misconduct in office be prevented from occupying a public office pending appeal. Respect for and confidence in the integrity of a public office is adversely affected when a person found guilty of misconduct in office continues to occupy a public office.”

21. In this case, unlike Mr. Kondra, Belden Namah is a successful litigant in his judicial review application which found that the Tribunal breached the principles of natural justice. With that advantage, whoever that seeks to deprive him of the benefit of judgment bears the burden to demonstrate that it is necessary to grant a stay.

22. The only practical reason advanced by the Public Prosecutor was that since the lifting of his suspension, Belden Namah has instituted proceedings questioning the validity of the *Pandemic Act 2020* (SCC (OS) No. 4 of 2020 (IECMS) *Application Pursuant to Constitution Section 18 (1)*) and the election of the Prime Minister (SCC(OS) No 20 of 2020 (IECMS) *Application Pursuant to Constitution Section 18 (1)*). It was submitted that if a stay is not granted:

“...it could cause an absurd situation where he is, ultimately, suspended or dismissed from office but performed various leadership roles and responsibilities, including successfully challenge the constitutional validity of legislation, when he was never entitled to do so **ab initio**.”

23. Based on the recent Supreme Court decision in *Application Pursuant to Constitution, Section 18 (1) Application by Honourable Belden Norman Namah MP in his capacity as the Leader of the Opposition* (2020) SC 1946, I do understand and appreciate the concerns raised by the Public Prosecutor. However, I am of the view that the Public Prosecutor’s reason does not prejudice his prosecution of the appeal and will not affect the Supreme Court’s consideration of the merits of the appeal.

24. The concerns raised by the Public Prosecutor at first glance seemed convincing but on closer examination, they are political in nature and therefore, with due respect, ill-conceived as far as this application is concerned. A stay, if granted, would undoubtedly favour the Prime Minister and the ruling coalition. However, the validity of the *Pandemic Act*, if the hearing proceeds, would be determined according to law. The validity of the election of the Prime Minister would likewise be considered according to law.

25. The two proceedings have been widely publicized. The public is interested in the outcome of these proceedings. On the basis of the Public Prosecutor’s argument, grant of stay would surely interfere with the two proceeding. See *Application Pursuant to Constitution, Section 18 (1) Application by Honourable Belden Norman Namah MP* (2020) SC 1946. I am of the view that the question of whether Belden Namah, as Opposition Leader, is entitled to initiate those proceeding has to be decided in those proceedings – not here.

26. Secondly, the Public Prosecutor is confident of the prospect of success of the appeal to support his application for a stay. In my view, it may not be that easy considering the extent of inconvenience and hardship Belden Namah (and his electorate) has been subjected to. Justice delayed is justice denied.

27. The misconduct charges arose from an incident that took place eight years ago on 24 May 2012 when Belden Namah attempted to arrest this former Chief Justice, Sir Salamo Injia, who at that time was presiding in court. Belden Namah was subsequently cited for contempt which was withdrawn in 2013.

28. The Ombudsman Commission then referred Belden Namah to the Public Prosecutor for prosecution under the *Leadership Code*. Charges and Statement of

Reasons were presented to the first Tribunal on 24 November 2015. Belden Namah was automatically suspended upon presentation of the Charges and Statement of Reasons.

29. Belden Namah filed proceedings in the Supreme Court questioning the constitutionality of the appointment of the Tribunal: *SC Ref No 2 of 2016, Re Namah v Poole Tribunal (No 1)* (2016) SC1508, *SC Ref No 2 of 2016, Re Namah v Poole Tribunal (No 2)* (2016) SC1516). Then he applied for enforcement of his human rights regarding the proceedings of the Tribunal.

30. On 2 September 2016 the National Court granted a permanent injunction restraining the Tribunal from further convening in relation to the allegations of misconduct in office against Belden Namah (*Namah v Poole Tribunal* (2016) N6397). The permanent injunction also extinguished his suspension. As a free man, Belden Namah contested in the 2017 general election and was re-elected as member for Vanimo-Green River Open Electorate.

31. Then the second Tribunal was appointed on 28 September 2017 as requested by the Public Prosecutor. Misconduct Charges and Statement of Reasons were presented to the Tribunal on 18 October 2017 and, upon that presentation, Belden Namah was again suspended. On 9 April 2018, the Tribunal found Belden Namah guilty of misconduct in office and recommended his dismissal from office: *Re the Honourable Belden Namah MP, Member for Vanimo-Green* (2018) N7194 (LT).

32. The suspension continued after the Tribunal completed its hearing until 16 July 2020 when Canning, J. ruled on the judicial review application. Belden Namah's first suspension was for nine months. The second suspension was for two years and nine months. He has been under suspension for a total of three years and six months.

33. It is worth noting that under section 31 of the *Organic Law* a person who has been dismissed for misconduct in office under the *Leadership Code* is not eligible to hold any elective public office for a period of three years from the date of his dismissal. Belden Namah's total sum of suspension has exceeded three years.

34. It is clear that those charged with the responsibility to administer the *Leadership Code* have a duty to act with due diligence. I endorse the comments made by Canning J in *Hon Belden Norman Namah v Leadership Tribunal & Ors* (2020) OS (JR) No 299 of 2018:

“It is incumbent on all constitutional office-holders and institutions

involved in administration and enforcement of the Leadership Code to act quickly and decisively...”

35. Belden Namah and the people of his electorate have been severely affected by his suspension for more than three years and a general delay of over eight years so far. These are factors that would ordinarily mitigate his penalty and, if he is sent back to face a new tribunal, the tribunal could decide against a recommendation for dismissal.

36. In the circumstances, I am of the view that Belden Namah deserves a reprieve, at least temporarily, until such time the Supreme Court decides on the appeal, which result could go either way. If he loses the appeal, he would be facing some more months, if not years, of suspension before a new tribunal decides on penalty.

37. Thirdly, and I raised this point with counsel, why should I restore Belden Namah’s suspension when there is no Leadership Tribunal in existence? The last Tribunal has been disbanded. If the appeal is successful, a new tribunal would have to be appointed.

38. Section 28 of the *Organic Law*, states:

“(1) Where a matter has been referred to a tribunal under Section 27 the person alleged to have committed misconduct in office is suspended from duty.

(2) A suspension under Subsection (1) is on full pay.”

39. It seems to me that the provision envisaged suspension taking effect while the proceeding of a tribunal is in progress. This argument was not specifically raised in *Application Pursuant to Constitution, Section 18 (1) Application by Honourable Belden Norman Namah MP (2020) SC 1946* so until such time it is raised, argued, and determined, I am reluctant to exercise my discretion in favour of grant of stay when Belden Namah’s Tribunal is already *functus officio*.

Conclusion

40. Ultimately, for the foregoing reasons, I find that the Public Prosecutor has failed to demonstrate that grant of stay is necessary. I would dismiss the application with costs which, if not agreed, shall be taxed.

41. I have been advised by counsel that compilation of the appeal book is

progressing well and nearly completed. I would encourage the parties to act with due diligence and ensure that the appeal is heard without delay. Preferably, this appeal is heard and determined before the hearing of the two proceedings.

Orders accordingly.

Geroro Lawyers: *Lawyer for the Applicant*

Young & Williams: *Lawyer for the Respondents*