PAPUA NEW GUINEA

[In the Leadership Tribunal appointed under Section 27(2)(a) of the Organic Law on the Duties and Responsibilities of Leadership]

AND:

In the matter of a Reference by the Public Prosecutor under s. 27(7) of the Organic Law on Duties and Responsibilities of Leadership

AND:

In the matter of the HONOURABLE BRYAN KRAMER MP.
Member for Madang Open Electorate
(The leader)

Waigani: Justice Lawrence Kangwia ML (Chairman)
Principal Magistrate Josephine Nidue (Member)
Magistrate Edward Komia (Member)

2023: 28 February

Counsel:
P. Kaiuwin & H. Roalokono & D. Kuvi for the Referrer
M. Giruakonda & Sir Arnold Amet assisting the Leader.

Constitutional Law – Leadership code – Leadership Tribunal – Role of tribunal – Onus and Standard of Proof – Member of National Parliament – Twelve (12) allegations of misconduct in office – Scandalising the Judiciary – Interference in police operational matters – Engaging associate companies to benefit from District Services Improvement programme (DSIP) funds – Misappropriation of (DSIP) funds to make payments to unauthorised purposes – Creating a structure within Madang District Development Authority without approval from Personnel Management – Abuse of power – whether evidence sufficient to sustain charges.

Cases cited; Hon Patrick Pruaitch v Chronox Manek (2009) N3903; Sir Michael Somare v Chronox Manek (2011) 5C1118; John Mua Nilkare v Ombudsman Commission (1995) N1344; Hon Solan Mirisim MP (2021) N9315; SCR No 2 of 1992 Re Leadership Code [1992] PNGLR 336; Re James Eki Mopio [1981] PNGLR 416; Re: Michael Pondros, MP (1983) N425; Re Kedea Uru (1988-89) N425; SCR No 3 of 1984; SC Reference No 1 of 1978 in Re Leo Morgan [1978] PNGLR 460.

Ex Parte Rowan CaHick and Joe Koroma (1985) PNGLR 67.
Legislations cited:
Constitution; s 27 (7) (e), 29 (1)
Organic Law on Duties and Responsibilities of Leadership; s13, 17 (d), 20 (4),
s27 (2) & (7) (e), s17 (d), s20 (4), 27 (1) & s28.
District Development Authority Act of 2014.
Public Finance Management Act; DSIP Guidelines, Finance instructions
National Procurement Act.

INTRODUCTION

BY THE TRIBUNAL: This Tribunal was appointed pursuant to s27 (7) (e) of the
Organic Law on Duties and Responsibilities of Leadership (Organic Law) to
enquire into certain allegations of misconduct in office by the Honourable Brian
Kramer MP, (the leader) within the meaning of s 27 of the Constitution.

The Ombudsman Commission originally referred 13 allegations of misconduct in
office by the leader to the Public Prosecutor pursuant to s29 (1) of the
Constitution and s 17 (d), s 20 (4) and s 27 (1) of the Organic Law respectively.
On 30 September 2022 the Public Prosecutor pursuant to s 27 (2) of the Organic
Law formally referred the Honourable Brian Kramer to the Leadership Tribunal
by presenting 13 allegations. By operation of s 28 of the Organic Law the leader
was suspended from official duties.

On 14 October 2022 the Tribunal formally read the charges to the leader. He
denied all allegations levelled against him. On 24 October 2022 the Public
Prosecutor presented the statement of reasons accompanying the charges
through the Chief Ombudsman Commissioner.

In the process of the hearing allegation 10 was discontinued for duplicity and
the trial proceeded with 12 allegations. During the trial thirteen (13) witnesses
were called by the referrer while the leader called three (3) witnesses.
Each witness was subjected to examination, cross examination, and re-
examination. At the conclusion of the trail proper the hearing was

adjourned
to 20 February 2023 for parties to prepare submissions on verdict.

CONSTITUTIONAL ISSUE

On the date fixed for submissions, the leader proposed that the Tribunal first consider a preliminary constitutional issue seeking to dismiss the entire proceeding. It was intimated that the threshold issue related to the failure by the Ombudsman Commission to afford him the right to be heard when it refused to provide him the relevant evidence sought to be relied on. He relied on the case of Hon Patrick Pruaitch v Chronox Manek (2009) N3903 and Sir Michael Somare v Chronox Manek (2011) SC1118 as conferring authority on the Tribunal to consider any question of interpretation and application of a Constitutional nature that may arise concerning the investigation by the Ombudsman Commission.

In view of the necessity to accord the right to be heard at any stage of the proceeding the tribunal granted leave for the leader to incorporate the issue in its submissions on verdict to be determined separately. The effect of the grant of leave was that if the Preliminary issue was in favour of the leader the proceeding could stand dismissed. If the preliminary issue was denied the decision on verdict would be delivered.

This is the decision from that preliminary issue. The leader's submission was that by the refusal to provide him the evidence sought to be relied on by the Ombudsman Commission he was denied a fair and reasonable opportunity to respond to the allegations as intended by s 20 (3) of the Organic Law on Duties and Responsibilities of Leadership. If he had been provided the relevant evidence constituted of 20 volumes containing 8,488 pages of the alleged breaches, he would have offered an explanation or clarification that would have dispelled the allegations leading to a no prima facie case.

Without exercising due diligence and giving him the opportunity to be heard

the Ombudsman Commission made a deliberate decision to refer him to the
Public Prosecutor which was a breach of his Constitutional right, and the
Tribunal should dismiss all charges.
He relied on the cases of John Mua Nilkare v Ombudsman Commission (1995)
N1344 and the findings by the Tribunal in the Hon Solon Mirisim MP (2021)
N9315 as authority supporting his proposition.
The referrer while contending that the leader was accorded the right to be
heard by the Ombudsman Commission submitted that the issue raised was
belated. The leader had the opportunity to raise it as a preliminary issue when
the Tribunal hearing commenced and not after evidence had been called and
completed. On the case of Solan Mirisim cited by the leader it was intimated
that the circumstances of that case were different to the present application
and not relevant.
We agree with the law and case authority on the right to be heard. A right to
be heard generally remains with a person to the grave so to speak. The right
to be heard by a leader facing misconduct allegations must be accorded a fair
hearing and given the opportunity to respond or challenge what is alleged.
However, we have reservations on the view that a leader should be called in
for an interview. An allegation by its very nature is an allegation yet to be
proved and a leader should not be subjected to an interview akin to a felon in
a criminal case at a police station. There is a basic presumption that Leaders
are expected to know and do what is right and do it properly for without the
necessary attributes, they should not hold leadership positions in the first
place.
In the present preliminary application by the leader, our view is consistent
with the position of the referrer. The issue raised is far belated. It is in essence
asking the tribunal to disband without considering the evidence already
before it. There was nothing preventing the leader from raising the issue as a
preliminary or competency issue when the Tribunal first commenced the

hearing. The only preliminary issue that parties were invited to address at the
commencement of hearing was the composition of the Tribunal members.

4

Even then, because the leader's application involved Constitutional issues the
proper remedy in our view lay in a judicial review as was in the Patrick Pruaitch
case that the leader referred to.
From the evidence before us the leader was not completely deprived of the
right to be heard. The unchallenged evidence is that on 3rd December 2021
the Ombudsman Commission served the leader the right to be heard.
Annexed to the letter was the statement of reasons on the 13 allegations in a
291 paged document sought to be relied on. The leader on 4th December 2021
by letter sought an extension of 21 days to respond and further requested
copies of the evidence sought to be relied on. On 20 December 2021 the
Ombudsman Commission granted an additional 21 days and refused to
provide any evidentiary documents.
Because the leader was not provided the evidentiary documents, the leader
deemed it unfair and saw no utility in responding to the right to be heard.
When no response was received after the extension period lapsed the
Ombudsman Commission on 14 February 2022 by letter notified the leader
that it would refer the leader to the Public Prosecutor for not responding and
made a deliberate finding of prima facie guilty of misconduct in office. On 15
March 2022 the Ombudsman Commission referred the leader to the Public
Prosecutor. The referral to the Public Prosecutor included the 20 volumes of
evidence that was refused to be served on the leader.
This case was not a situation like the case of Solan Mirisim. In that case the
right to be heard was given some years after the allegations arose and the
leaders was referred to the public prosecutor 6 years thereafter. The dismissal
by the Tribunal was based on denial of a fair hearing.
In the present case the leader was not denied a fair hearing. He was accorded
the opportunity to exercise his right to be heard by the Ombudsman
Commission soon after it completed its investigation. The refusal to

provide
the documentary evidence did not extinguish his right to be heard. He was still
possessed of the right. The assertion that had he been given the documentary
evidence he would have provided a proper and better explanation which
would have found a basis for a no prima facie case is in our view farfetched.
He did not do that when he was accorded the right to be heard in the Tribunal.

He pleaded not guilty to the allegations when put to him. When he pleaded
not guilty, he was deemed to have accepted what transpired thereby setting
in motion the hearing proper to proceed.
The trial proper proceeded therefrom without any challenge as to its
propriety, competency, or lack of jurisdiction. Even then the leader still is
possessed of the right to be heard if he is not satisfied by any determination
the Tribunal makes.
For those reasons we decline to grant the orders sought by the leader.
We now deliver the unanimous decision of the Tribunal from the hearing proper.

DECISION

We start with the notion reposited in SCR No 2 of 1992 Re Leadership Code
[1992] PNGLR 336 that the thrust of the Leadership Code is to preserve the
people of this country from misconduct by its leaders. That private interest does
not conflict with public responsibility as a leader. Leaders subject to the
Leadership Code are those classified under s 26 of the Constitution. Leadership
can be either earned or given. Either way the leader is accountable for any
misconduct while in office.

To safely hold a leader guilty of misconduct in office, factual allegations must be
proved before a determination is made as to whether the proven facts
constituted a breach of the duties enumerated under s 27 of the Constitution.

In a Tribunal there is no legal onus to prove but the basic principle of law is that

any person who alleges an illegal act, practice or conduct bears the burden of
proving what he or she alleges, and Leadership Tribunals enjoy no exception to
the grounded principle, the minimum being the practical onus to satisfy the
principles of natural justice at every stage of the proceeding.

By the very nature of the alleged misconduct in office created by the
Constitution and implemented through the Organic Law on the Duties and
Responsibilities of Leadership, it will require a high standard of proof.

Case law embrace the view that standard of proof in a leadership Tribunal must
be high and nearer to the criminal standard of proof beyond reasonable doubt.
This requirement is well founded in this jurisdiction as in the case of Re James
Eki Mopio [1981] PNGLR 416 where the Court illuminated the requirement this
way.
"There is no absolute degree of standard of proof to be applied by the Leadership
Tribunal. The Tribunal must be reasonably satisfied of the truth of the
allegations, and it must.give full weight to the gravity of the misconduct in office
by a person subject to the leadership code to the adverse consequences which
may follow and to the duty to act judicially and in compliance of the principle of
natural justice. Such satisfaction in matters so grave can never be achieved on a
mere balance of probabilities". (See also Re: Michael Pondros, MP (1983) N425;
Re Kedea Uru (1988-89) N425)

By the requirement for a high standard of proof the Tribunal is restricted to the
allegations as pleaded in the referral by the Public Prosecutor. Unless an
allegation is withdrawn by the referrer the tribunal must make a finding on each
allegation.

In the present case there is no dispute that between 27 July 2017 and 27 July
2022 the Hon Bryan Kramer MP was, a leader by virtue of s 26 (1)

(c) & (d) of the
Constitution in his capacity as member for Madang Open. By virtue of that office,
he became the Chairman of the Madang District Development Authority
(Authority) pursuant to s 12 (1) (a) of the District Development Authority Act
(the Act). He was returned to the same leadership post in the 2022 National
Elections. He is therefore subject to the responsibilities of leadership prescribed
under s 27 of the Constitution.

From the 12 categories of allegations referred to the tribunal 07 of them were
alleged to have breached responsibilities of office under s 27 (5). (b) of the
Constitution while 05 related to misappropriation of funds of Papua New Guinea
under s 13 of the Organic Law. it was the duty of the Tribunal to enquire into
and determine, whether the 12 categories of allegations breached obligations
imposed by s 27 (5) (b) of the Constitution relating to responsibilities of office

and s 13 of the Organic Law which relates to misappropriation of funds of Papua
New Guinea to constitute misconduct in office.

Since s 27 (5) (b) of the Constitution subsumes all the preceding subsections, we
reproduce the entire provision along with s 13 of the Organic Law.

The provisions state as follows;
27. Responsibilities of office.
(1) A person to whom this Division applies has a duty to conduct himself in
such a way, both in his public or official life and his private life, and in his
associations with other persons, as not—
(a) to place himself in a position in which he has or could have a conflict of
interests or might be compromised when discharging his public or official duties;
or
(b) to demean his office or position; or
(c) to allow his public or official integrity, or his personal integrity, to be called
into question; or
(d) to endanger or diminish respect for and confidence in the integrity of

government in Papua New Guinea.
(2) In particular, a person to whom this Division applies shall not use his office
for personal gain or enter into any transaction or engage in any enterprise or
activity that might be expected to give rise to doubt in the public mind as to
whether he is carrying out or has carried out the duty imposed by Subsection (1).
(3) It is the further duty of a person to whom this Division applies –
(a) to ensure, as far as is within his lawful power, that his spouse and children
and any other persons for whom he is responsible (whether morally, legally or by
usage), including nominees, trustees, and agents, do not conduct themselves in
a way that might be expected to give rise to doubt in the public mind as to his
complying with his duties under this section; and
(b) if necessary, to publicly disassociate himself from any activity or enterprise
of any of his associates, or of a person referred to in paragraph (a), that might
be expected to give rise to such a doubt.
(4) The Ombudsman Commission or other authority prescribed for the
purpose under Section 28 (further provisions) may, subject to this Division and to
any Organic Law made for the purposes of this Division, give directions, either
generally or in a particular case, to ensure the attainment of the objects of this
section.
(5) A person to whom this Division applies who–

(a) is convicted of an offence in respect of his office or position or in relation
to the performance of his functions or duties; or
(b) fails to comply with a direction under Subsection (4) or otherwise fails to
carry out the obligations imposed by Subsections (1), (2) and (3), is guilty of
misconduct in office.

13. Misappropriation of funds of Papua New Guinea
A person to whom this law applies who
(a) Intentionally applies any money forming part of any fund under the
control of Papua New Guinea to any purpose to which it cannot be lawfully

applied; or
(b) Intentionally agrees to any such application of any such monies.
is guilty of misconduct in office.

The combined effect of those provisions is to deter abuse of power and influence
for personal benefit or gain as enunciated in SC Reference No 1 of 1978 in Re Leo
Morgan [1978] PNGLR 460. The extent of responsibilities and the type of
conduct expected of a leader by s 27 in his public and personal life is high, wide,
and varied. There is no precise definition of conduct. We adopt and endorse the
opinion of the Tribunal in the Matter of Solan Mirisim MP (2021) N9315 which
said, "In our opinion s. 27 is an all-encompassing law that covers all forms of
leadership breaches constituting misconduct in office by leaders".

We now deal with the categories of allegations this way. Allegations 1, 2, and 4
will be considered together as they overlap and relate to the 03 articles posted
on the leader's Facebook account. All the 3 allegations deem the leader as guilty
of misconduct in office under s 27 (5) (b) of the Constitution.

Allegation 1. Scandalising the Judiciary by posting articles on his Facebook
account and insinuating a conflict of interest by the Hon. Sir Gibbs Salika, Chief
Justice of Papua New Guinea.

Under this category the referrer alleged that the leader failed to carry out
obligations imposed by s 27 (1) of the Constitution by publishing articles
insinuating a conflict of interest when he published these words; "A relevant
point to note is that the Chief Justice was only recently appointed by O'Neill late
last year.

In submissions the position of the referrer was that the leader being a person of
intelligence while knowing that the Chief Justice was appointed by the National
Executive Council, published an inaccurate fact that the Chief

Justice was recently appointed by O'Neill. That his actions amounted to ridiculing and mocking the Chief Justice and disrespect for the judiciary which is dangerous to democracy.

By writing and publishing those words it brought the Court or Judge into disrepute; lower the authority of the Court; lower the authority of the Chief Justice, interfere with due course of justice; interfere with lawful process of the Court; and undermine public confidence in the administration of justice.

By doing so he demeaned his office, allowed his official and personal integrity to be called into question and endanger or diminish respect for and confidence in the integrity of government and therefore he was guilty of misconduct in office under s 27 (5) (b) of the Constitution.

The leader while acknowledging that the statement was inaccurate contended that when properly understood it merely stated a constitutional fact that the Chief Justice was recently appointed by Prime Minister O'Neill's government and cannot be said to be scandalous in any way whatsoever.

That by merely publishing this constitutional fact he did not demean his office or position nor allow his personal integrity, or his personal integrity to be called into question within the meaning of s 27 (1) (b) of the Constitution. The publication was not scurrilous, abusive or cast any imputations against the judiciary or unduly spoken against a member of the judiciary or the judiciary generally.

The main contention was that the charge cannot be sustained because scandalising is a form of Contempt of Court and a serious criminal offence under Common Law where the standard of proof was high and the requirement to prove the elements of the charge was not met rendering the allegation against him as speculations and assumptions.

Therefore, the charge should be dismissed. He referred to the SCR No 3 of 1984;
Ex Parte Rowan Callick and Joe Koroma (1985) PNGLR 67 which cited various
overseas cases as authority for his assertion that scandalising is a form of
contempt.

Allegation 2. Scandalising the Judiciary by posting articles on his Facebook
account accusing Hon Peter O'Neill and his lawyers of filing a fake Warrant of
Arrest to deceive and mislead the Court in the matter OS (JR) 720 of 2019.

Under this category the allegation was that the leader as Minister for Police
scandalised the Court by posting on his Face Book account the following words.

"What was not anticipated was that O'Neill and his lawyers would solicit
assistance from the Chief Justice and desperate enough to submit fabricated
documents to mislead the Court that the Warrant was defective as a means to
obtain a stay order".

The submission by the referrer was that the publication was a malicious
accusation against O'Neill and his lawyers and intended for the public to draw
the conclusion that since O'Neill appointed the Chief Justice the request to the
Chief Justice was for a return favour. That he had the intention to scandalise the
Chief Justice and or the Judiciary when he published the following words on his
Facebook account;

"In response the Chief Justice hand-wrote on the same letter directing the judge
to attend to the matter for a temporary stay until 21st October 2019; Miviri
please attend to this matter for a temporary stay until 21/10/19; following the
directions issued by the CJ Miviri J vacated his earlier directions and agreed to
hear O'Neill's lawyers application at 3pm that afternoon; After hearing the
application consistent with Os directions the judge granted an interim stay,

restraining police from arresting and executing the warrant of arrest against
0,Neill until Monday 21st October 2019; A relevant matter to not is that the Chief
Justice was only recently appointed by O'Neill last years."

11

That in the totality of the circumstances the articles the leader posted on
Facebook had the effect of scandalising the judiciary as they were calculated to
bring the Court or Judge into disrepute and lower the authority of the Chief
Justice and the Court and undermine and endanger public confidence in the
judiciary. By doing so the leader demeaned his office and positions, allowed his
official integrity into question and endangered and diminished respect for and
confidence in the integrity of government thereby being guilty of misconduct in
office under s 27 (5) (b) of the Constitution.

The leader while adopting his contentions under allegation 1 intimated that the
publication complained of were directed at the unethical and inappropriate
conduct of Mr O'Neill's lawyers and not against the Chief Justice. They did not
scandalise the Court or bring the Court into disrepute, lower the authority of the
chief Justice or interfere with the due course of justice. In like manner the
publication did not demean his office and position or allow his official or
personal integrity into question therefore he was not guilty of misconduct in
office under s 27 (5) (b) of the Constitution.

Category 4. Publicizing the complaint lodged against him by Hon Sir Gibbs Salika
the Chief Justice of Papua New Guinea and posting it on the Facebook account.

Under this category the referrer alleged that the leader failed to carry out
obligations imposed by s 27 (1) of the Constitution when he published the letter
of complaint by the Chief Justice to the Police Commissioner which was
calculated to bring the integrity of the Chief Justice into

disrepute, interfere with
due course of justice, and undermine public confidence in the administration of
justice thereby being guilty of misconduct in office under s 27 (5) (b) of the
Constitution.

The leader's contention was that he did not use his office or position to obtain
from the Commissioner of Police the letter by the Chief Justice nor publishes it.
The letter had been publicized by one Nathan Liwago on WhatsApp platform. It
was the leader's assertion that even if he had published the letter, it would not
amount to misconduct in office by any measure.

It was his further contention that the process from criminal complaints to
sentence were supposed to be transparent and not confidential. Since the
document consisted of a criminal complaint against him personally and as the
most affected person, he had to publish it to let his electors in Madang know
that a criminal complaint had been laid against him for transparency purposes.
Therefore, the allegation was baseless, and should be dismissed.

The approach we take is that the allegations will be considered in totality.

The allegations shall be viewed objectively according to the standards and
reactions of the reasonable person. It is irrelevant whether the Common Law
recognises scandalising the judiciary as a form of contempt as intimated by the
leader. The Common Law recognition relates to publications concerning ongoing
proceedings because any publication regarding an ongoing proceeding is
prohibited. The case that was the subject of the publications in this proceeding
was a dead and done case.

Our findings under categories 1, 2 and 4 are these. The evidence presented
under the three categories of allegations show elaborate articles produced by
the leader on his Facebook account in three parts on separate dates

between
2nd and 10 November 2019.

The articles had its genesis from a criminal complaint laid by the leader against
Peter O'Neill on 7 October 2019 for abuse of office for directing the payment of
more than K300, 000 from the National Gaming Control Board which eventually
helped his political nemesis Nixon Duban win the Madang Open Electorate
under the auspices of upgrading Yagaum Lutheran Rural Hospital. Out of that
transaction the Court of Disputed Returns found Duban guilty of bribery and
undue influence and voided his election as member.

Following the leader's complaint, a Warrant of Arrest was necessary to bring
O'Neill for questioning by police. Police obtained from the Waigani District Court
a Warrant of Arrest against O'Neill.

On 16 October 2019, before police could execute the Warrant of Arrest, O'Neill
through Nivage Lawyers sought an urgent application in the National Court for
orders to stay the Warrant of Arrest from being executed. The reason for the
application by O'Neill was to seek Judicial Review of the decision to issue the
Warrant of Arrest which was couched as constituting patent defects. The
application ended up with Hon Justice Miviri twice.

On both occasions, Hon Justice Miviri fixed 21 October 2019 as the date for
hearing the application inter-parte. Not satisfied with Hon Justice Miviri's
decision and fearing imminent arrest, Peter O'Neill's lawyer wrote to the
Associate to the Chief Justice Togi Maniawa seeking an urgent interim stay.
That letter was forwarded to the Chief Justice. Upon receipt of that letter the
Hon Chief Justice by notation on the same letter wrote the following words:
"Miviri J. Please attend to this matter for a temporary stay until 21/10/19".

Following that notation Hon Justice Miviri heard the application and granted orders restraining police from executing the Warrant of Arrest pending determination of the substantive proceedings. Peter O'Neill was not arrested. On the return date police withdrew the warrant of arrest and O'Neill was not charged.

After those occurrences, the leader on 2r November 2019 commenced posting on his Facebook account, articles containing events and comments leading to and surrounding the stay order. The articles posted in three parts were entitled "O'Neill flees country as National Court dismisses his case preventing arrest".

The articles alleged to be scandalous started like this.

"Following the directions issued by the Chief Justice, Judge Miviri vacated his earlier directions and agreed to hear O'Neill's lawyers' application at 3 pm that afternoon. After hearing the application, consistent with CJ's directions the Judge granted an interim stay, restraining police from arresting and executing the Warrant of Arrest against O'Neill until Monday 21st October 2019.

The words alleged to be scandalous are these;

"A relevant matter to note is that the Chief Justice was only recently appointed by O'Neill late last year". And later;
"What was not anticipated was that O'Neill and his lawyers would solicit assistance from the Chief Justice and desperate enough to submit fabricated documents to mislead the Court that the Warrant was defective as a means to obtain a stay order".

Being aggrieved by the articles the Chief Justice wrote a letter to the acting Commissioner of Police, David Manning to charge the leader under the Summary Offences Act and possibly the Cybercrimes Act. He also wrote to the Ombudsman Commission. The leader upon receipt of a copy of the letter posted the entire letter on his Facebook account. Thereafter numerous

comments and
responses from the public were published. The Ombudsman Commission investigated and referred the leader to the Public Prosecutor under the three
categories of allegations.

We commence our finding with the view that in a democracy like ours, freedom
of speech generally is a noble calling. The Constitution under s 46 recognises
that proposition as freedom of expression. However, such freedom must be
exercised with caution and restraint to avoid adverse consequences.
Our findings of the primary facts from the Facebook articles are these. The
heading to the Facebook articles stated, "O'Neill flees country as National Court
dismisses his case preventing arrest". The leader's assertion that the National
Court dismissed O'Neill's case is far from the truth. There is no evidence that the
National Court dismissed O'Neill's case.
There is also no evidence that O'Neill was charged with any offence that was
dismissed. What is in evidence is that the Warrant of Arrest was set aside by
court order. It is a misstatement and a distortion of facts by the leader to assert
in the Facebook articles that O'Neill's case was dismissed.
Secondly, from the information before us there is no evidence that O'Neill and
his lawyer solicited any assistance from the Chief Justice. This position was
enhanced in evidence during cross examination of George Lau the Lawyer acting
for O'Neill, that communication with the Chief Justice was a "no go" for a lawyer.

The only evidence on record is that the lawyer for O'Neill wrote to the associate
to Chief Justice requesting an urgent stay. That mode of communication is the
norm for Court record purposes as the National Court is a Court of record.
Thirdly, there is no evidence of a collusion by the Chief Justice with Greg
Shepard's Law firm where the Chief Justice's daughter worked. The undisputed
evidence is that Nivage Lawyers appeared in court after briefing out from Greg
Shepard's Law Firm relating to the application for a stay order

which is a normal
practice among lawyers.
Finally, there is no evidence of a defective or fake Warrant of Arrest as alleged.
There is also no evidence that O'Neill and his lawyer used a fake Warrant of
Arrest to obtain the stay order.
However, there is evidence of a Warrant of Arrest that was tampered with. The
oral evidence by Senior Constable Kila Tali who applied for the Warrant of Arrest
told the Tribunal that he tampered with the copy given to him by ticking it which
was not ticked when he obtained it from the Court house.
It was his evidence that he ticked the Warrant of Arrest to identify the reason
for the arrest which was lacking on the copy given to him. His further evidence
was that he withdrew the warrant after the file was removed from him by the
police hierarchy.
The evidence by Serah Amet the Clerk of the District Court who prepared the
Warrant of Arrest was that the copy she kept at the District Court was the only
correct copy and without a tick. When questioned on the signatures being
slightly different her evidence was that two copies of the warrant were
produced, and the Magistrate signed the two copies separately. There was no
photocopy of a signed Warrant of Arrest.
Our finding from that evidence is that if there was in fact a defective or fake
warrant, then the copy held by SC Tali which the leader was privy to be the fake
one. SC Tali had tampered with it.
Our conclusion therefrom is that the leader had a vested interest in the
complaint against Peter O'Neill. He was the complainant. The complaint was
over official corruption and other irregularities in sourcing and expenditure of
public funding from the Gaming Control Board for Yagaum Hospital in Madang.

He became a victim of those irregularities and could not get elected sooner.
After his return as duly elected Member of Parliament for Madang Open, he felt
duty bound to right the wrongdoers. No one else could do it for his, people who

missed out on proper service delivery. He laid a formal complaint with police.
The police reacted to his complaint and obtained a Warrant of Arrest against
O'Neill who had directed the procurement of funds from the Gaming Control
Board for Yagaum Hospital. There was nothing improper on the part of the
leader in the laying of the complaint.
What turned out to be improper was what happened after the execution of the
Warrant of Arrest was frustrated, and O'Neill not arrested. The leader was not
pleased by what transpired. Without restraint and caution expected of a leader
he let loose his self-control in a subtle way to portray his dissatisfaction by
publishing articles the subject of these allegations. In the process the leader
further posted the letter of complaint the Chief Justice sent to the Police
Commissioner.
The document that later became controversial was brought to the attention of
the Chief Justice by his associate Togi Maniawa. It was a letter requesting a
hearing of an application by O'Neill's lawyer for a temporary stay of the Warrant
of Arrest to the date set by Justice Miviri. On that letter the Hon Chief Justice
wrote "Miviri J. Please attend to this matter for a temporary stay until
21/10/19".

From a reading of the notation by the Chief Justice it was in our view not a
direction to the trial Judge as asserted in the article by the leader. It was a
misstatement by the leader of the facts to say that the grant of stay by Justice
Miviri was consistent with directions by the Chief Justice. The Chief Justice did
not issue directions or use the word direct to Justice Miviri. The use of the word
"direct" would connote a compulsion to act. On the converse the enabling words
"please attend to this matter" exemplifies a request more than a direction. It
can also be interpreted as requesting Justice Miviri to reconsider his earlier
position. It was open to Justice Miviri to reconsider or stick to his earlier stance.
He chose to reconsider and hear the application. We cannot deem the notation

by the Chief justice as a direction as suggested by the leader.

There was nothing unusual, sinister, or intrusive in the way the Chief Justice
made the request to Justice Miviri to attend to the matter for a temporary stay.
The date suggested by the Chief Justice was consistent with the date set by
Justice Miviri.

The Chief Justice was entitled to do what he did as head of the Judiciary when
the decision of Justice Miviri was a decision from chambers and not a Court
Order. That proposition was affirmed in evidence by the Chief Justice himself
and the former Chief Justice Sir Arnold Amet that chamber directions are issued.
The difference between a decision from chambers and a Court Order was also
distinguished in evidence by the Hon Chief Justice and Sir Arnold Amet that a
Court Order is subject to an appeal to the higher Court while a direction from
chambers is more an administrative convenience. We add here that even though
a direction from chambers of a Judge would not be subject to an appeal, any
person who was so aggrieved by any such direction, could seek Judicial Review
of that direction as an administrative decision. It is still open to challenge.

The evidence of the Chief Justice was that he could not direct a judge to make
orders. It was up to the Trial Judge to independently determine whether to grant
or refuse the application as it is done in the usual course of judicial
determinations. Justice Miviri deposed to doing just that. He told the tribunal
that he made his own independent decision.

We also find no evidence that O'Neill appointed the Chief Justice. The Chief
Justice gave evidence that he was appointed by the National Executive Council
on 13 November 2018 from a shortlist of 5 names of other senior Judges. The
appointment process was further affirmed by the former Chief Justice Sir Arnold

Amet that by law it is the National Executive Council that appoints the Chief
Justice. That evidence has not been discredited.

There may be a hint of a conflict of interest by the Chief justice under two
circumstances. The obvious one was that at the time the Chief Justice was
appointed, Hon Peter O'Neill was the Prime Minister and by the office held, he
was the Chairman of the National Executive Council which was the appointing
authority.

There is also the evidence that Peter O'Neill directed Tom Kulunga, then
Commissioner of Police to approach Sir Gibbs Salika personally on an Arrest of
former Chief Justice Sir Salamo injia.

However, the publication by the leader in the Facebook article that the Chief
Justice was recently appointed by O'Neill is an inaccurate statement, distorted
and far from the truth. It is highly irregular and improper for the leader to
assume that a reader would interpret the words the way he meant it to be
interpreted. He was intelligent enough to distinguish facts from untruths.

The Chief Justice is the head of the third arm of government and the
appointment to such important position cannot be done by a single person, even
the Prime minister. By operation of s 169 (2) of the Constitution, the National
Executive Council is entrusted with the authority to appoint the Chief Justice by
advice to the Head of State. There is no other way. It seems the leader was
unaware of this process by his publication. If he was aware, then he chose to
interpret it his way. The publication of distorted and untruths renders any hint
of a conflict of interest by the Chief Justice nugatory.

Given those facts it is in our view farfetched and beyond the bounds of
possibility to insinuate a conflict of interest or corruption in the judiciary in
circumstances where the Chief Justice requested Justice Miviri to "Please attend

to this matter" as a return favour to O'Neill for appointing the Chief Justice.

On the allegation of deceiving and misleading the Court by O'Neill and his
lawyers, two copies of the warrants were published, and the leader compared
them on the Facebook.

We are of the view that even though the words under this category of allegation
were directed at O'Neill and his lawyers, by publishing that a fake Warrant of
Arrest was used to deceive and mislead the Court to obtain a Court Order, were
factually wrong and far from the truth.

The copies posted on the leaders Facebook account were both correct copies.
None was fake. The Warrant of Arrest that could be described as fake was the
copy tampered with a tick, by the Police Informant Senior Constable Kila Tali.

Secondly, there was no determination by the Court on the Warrant of Arrest.
Whether the Warrant of Arrest was fake or had substance was not determined.
Only a restraining order was given. To allege that the Court Order for a stay was
obtained by using a fake document was also factually incorrect. The evidence is
that the warrant that the police wanted to execute was the tampered one. The
correct copy was in the Court file which O'Neill's lawyer relied on. The
application to set aside the Warrant was proper because the two copies did not
match, one with a tick and the other without a tick.

The substantive application by O'Neill for judicial review was never dealt with
by the Court. The judiciary was distanced from the allegation of the fake warrant
when the Warrant of Arrest was withdrawn by SC Kila Tali being the Police
Informant.

We find that the articles published in the Facebook pages were not

calculated
to interfere with the due course of justice or lawful process of the Court. The
published articles related to a matter that was completed, dead and done. The
articles did not relate to a matter that was ongoing from which interference
could be inferred or bring the Court or Judge into disrepute by such publication.

On the allegation of publishing on Facebook, the letter of complaint by the Chief
Justice, like the Leader, the Chief Justice was entitled to write to the Police
Commissioner because it would have been inappropriate and demeaning of his
office to go stand behind the counter at a police station to lay his complaint. Be
that as it may, the leader was also entitled to react the way he did as the most
affected person by the letter of complaint.
Our conclusions from the series of articles and the publication of the letter by
the Chief Justice by the leader is that they constituted unsubstantiated facts and
unverified conclusions. The leader published them to enhance his personal
interest more than for the public good as the leader asserts.

The publications were also intended for the victims of his unrestrained
utterances to suffer any consequence that followed.
By those findings the issue now is whether the leader has committed a breach
of a duty alleged under s 27 (5) (b) of the Constitution. This provision is wide in
scope and encompasses all the subsections before it. It covers directions under
subsection (4) and obligations under subsections (1), (2) & (3).

We deal with the issue this way. Where the specific breach alleged is not proved
but the evidence discloses a breach of another duty imposed by s 27 of the
Constitution the tribunal will be at liberty to exercise its discretion to hold that
a duty not specifically charged was breached. The reason for that is simple. The
provision alleged to have been breached under s 27 (5) (b) subsumes all
preceding subsections. It was intended to cover a broad range of

misconduct
collectively and not individually.

To consider whether a breach under s 27 has been committed we shall determine the respective subsections through an elimination process.

Subsection 4 relates to directions from the Ombudsman Commission and does
not apply to these allegations. Subsections 2 relates to use of office for personal
gain and does not apply to these allegations. Subsection 3 relates to conduct of
spouses, children and associates and does not apply to these allegations.
Subsection 5 (a) relates to convictions and does not apply to these allegations.

After the eliminations the only provision remaining is subsection (1).
This provision is subsumed under s 27 (5) (b) which the referrer alleges was
breached by the leader. If an allegation cannot be charged under subsection (1)
alone, it can be charged under s 27 (5) (b). They operate interchangeably.

Under s 27 (1) (a) the requirement is that a leader must not place himself in a
conflict-of-interest situation. The utterances in the Facebook account do not
constitute a conflict-of-interest by the leader and does not apply to the
circumstances relating to scandalising the judiciary.

Under s 27 (1) (b) a leader must conduct himself so as not to demean his office.
Even though the materials on the Face book platform do not constitute an
official press release or a function related to his official duties as Minister for
Police complaining about Court processes in the media was going too far. The
standing practice was that the police and the Judiciary work at arm's length and
not attack each other at will. He as Minister for Police had to lead in that respect
and protect that relationship. The leader is deemed to have demeaned his office
by publishing articles of person interest in conflict with his position as Minister

for Police.

Under s 27 (1) (c) (d) the requirements are that a leader must not allow his official or personal integrity to be called into question. We adopt what we have just said above. The articles in the Facebook although personal, were published when he was a leader, being the Minister for Police and Member of Parliament representing the people of Madang Electorate. His personal interests from a by-product of a vendetta against O'Neill for supporting his political nemesis Nixon Duban to win the election clouded decorum and sound judgement. After winning the 2017 National Election the leader went in pursuit of killing the goose that lay the golden egg so to speak.

Even though the articles may not have been intended to scandalise the judiciary we cannot find the leaders comments as factual and fair in circumstances where the purported facts were in fact misstatements and inaccurate.

He failed to exercise restraint as a leader. He failed to warn himself of the adverse consequences of breeding negative perception on the judiciary by an exploitable and deceivable public. There were proper processes in place that the leader could have utilised instead of going too low to let a gullible public pass judgement.

Even though the bulk of the population in this country have no access to Facebook the numerous responses to the leader's articles and the publication of the letter by the Chief Justice from those persons who were connected to Facebook attest to the reactions and perceptions from the public.

The responses tendered into evidence were varied. We reproduce some of them verbatim.
Some of the responses insinuated corruption at the highest level where wrongdoing was least expected e.g. (It shows all Court system is corrupt around PNG); (Its embarrassing for a man known as chief justice to be

involved in
corruption). (Appoint some mature and man of vision to head the judiciary harm
in the country.

Other comments were susceptible to the veracity of the alleged wrongdoing by
the Chief Justice. e.g. (Hope there is evidence on your post inciting trouble or
causing ill feeling to people. Otherwise, the 0 should be thankful that you have
help expose a weakness in the judicial process and he should focus on improving
and making sure that does not happen again); (Look at all the mistakes on the
complaint against Police Minister Bryan Kramer... Do we still think this letter
originally came from the Chief Justice of Papua New Guinea?); (This is fake letter
by someone who have been bribed by someone who is heavily involved in those
corrupt deals".

There were also comments which portrayed the leader as a demigod against
corruption. e.g (BK stood the test of times against Goliath (in power) and still
persevere. Nothing is new. Only a new Goliath).
Thumbs up Bryan Kramer for your strong standing in fighting corruption in PNG.
You are the true patriotic leader of PNG to 'Take back PNG" from such colluded
corrupt officials.
My champion my hero God be with you).

Other commentators splashed accusations on the Chief justice. E.G (0 should
really stay out of issues like this n let judges do their work bkos he will only loose
his integrity); 0 and PO can manipulate the system with money bags as usual);
The pay you receive does not satisfy you and your family); "if the Chief Justice's
daughter was working with Greg Shepard's law firm and if so should CJ be
involved in cases where the law firm is engaged. Conflict of interest?" Cl tryina
save his own arse for lack of a better word); (In the history of Papua new Guinea
this 0 is impatient and it seems like he directly involved with Onil that why he
trinna coverup on this matter).

The responses to the leader's articles in total when viewed objectively are at
best disgraceful, shocking, insensitive and even ridiculous.

These types of utterances could not have been ignited had the leader as author
of the articles exercised restraint and refrained from publishing them. Instead,
the leader let loose his self- control in a subtle way and allowed his personal
interest to take precedence. Apart from personal satisfaction, what good
outcome was there to be gained by anyone else from the publication of
unreserved and factually untrue utterances remains a mystery.

The result of his conduct was that public confidence in the judiciary overall was
denigrated. It gave birth to negative perception and disrespect for the judiciary
leading to scandalising the judiciary, a government institution bestowed with a
high degree of trust.

By his conduct in publishing factually untrue statements it allowed his public and
personal integrity into question as to whether he was a leader of truth thereby
demeaning his office as Minister for Police and position as a leader.

We find that the leader is caught by s 27 (1) (c) of the Organic Law on Duties and
Responsibilities of Leadership. Even though the leader was not charged directly
under subsection (1) (c), subsection (5) (b) under which the leader was charged
is wide, and it covers all the responsibilities imposed on a leader which includes
subsection (1) (c).

The remaining provision is section 27 (1) (d). The requirement under this section
is that a leader must conduct himself so as not to endanger or diminish respect
for and confidence in the integrity of government in Papua New Guinea.
"Government" is wide in scope and covers all government entities and
instrumentalities which includes the judiciary. Even though the articles were not
recognised official media releases, they related to official government functions
the judiciary was involved in. We adopt what we said under

subsection 1 (c) in
this regard.

Insinuation of a conflict of interest by the ChiefJustice in the performance of his official functions is not supported by evidence. There is no evidence that O'Neill or his lawyer solicited assistance from the Chief justice apart from writing a letter requesting a hearing. O'Neill's lawyer served the interest of his client as is the normal duty of lawyers in this country and other countries that ascribe to the rule of law.

From the evidence before us two extremes of leadership are displayed. O'Neill being a leader challenged the Warrant of Arrest as defective through the normal judicial process which is available to one and all. It is ironic that the Leader also challenged, a Warrant of Arrest as fake on Facebook which is also available to the public.

There was nothing untoward in the approach taken by O'Neill's lawyer to pursue his client's interest in Court. On the converse, the articles on Facebook denigrated the high respect and confidence the public has of the Judiciary. It created doubts as to whether the last bastion of hope is wrought with corruption which the judiciary is supposed to protect and defend.

The varying responses to the articles on Facebook attest to this. The Facebook articles also created doubts in the minds of the learned members of the community on the independence of the judiciary a government body when the Chief Justice is alleged to have instructed another judge to issue orders. The foundation of the judiciary is the independence of the judge in decision making.

By insinuating that the Chief Justice directed another judge (which was factually untrue) to make a certain decision impinges substantially on the independence

of the judiciary thereby demeaning the integrity of the Chief Justice, lowering
his authority, endanger public confidence in the administration of justice and
scandalising the judiciary overall amounting to misconduct in office under s 27
(5) (b) of the Constitution.

The allegations relating to scandalising the judiciary through articles on the
leaders Facebook account have been proved to the required standard.

We find the leader guilty of misconduct in office pursuant to s 27 (5) (b) of the
Constitution for allegations 1 and 2.

On the allegation under category 4 relating to the letter of criminal complaint
by the Chief Justice, there was an element of undermining public confidence in
the administration of justice in the context that, the Chief justice who was least
expected to be in trouble with the law had joined the que and become another
complainant.

Despite that we do not find any dishonesty or conflict of interest on the part of
the leader in obtaining and publishing the letter on Facebook. The leader was
the person most affected by the letter, and he was entitled to react. Secondly,
the letter by the Chief Justice if properly attended to by police as requested, it
would have been in the public domain anyway.
We find the leader not guilty under category 4 of the allegations.

Allegation 3. Involvement and interference in police operational matters
resulting in the termination of Mr Paul Nii Director Legal Services.

Under this category the referrer alleged that the leader interfered in police
operational matters as then Minister for Police in the termination of one Paul
Nil who was then the Director of Police Legal Services; that the removal was
made after Mr Nii provided legal advice against the arrest of Peter O'Neill which
did not go down well with the leader's interests because the arrest of Peter

O'Neil arose out of a complaint by the leader.

The leader denied any involvement or interference in the termination of Mr. Nii.
His contention was that the termination was for abuse of a hire car and he was
not guilty of misconduct in office under s 27 (5) (b) of the Constitution.

The Law under s 197(2) of the Constitution is that a member of the police force
is not subject to direction or control by anyone outside the police force. This
includes the Minister responsible for Police.

The evidence under this allegation came from the victim of the termination, now
Magistrate Paul Nii who was at the relevant time Director Legal services in the
Royal Papua New Guinea Constabulary. His evidence briefly was of being in the
Police Commissioner's office when the leader had a discussion with the then
Acting Commissioner of Police over a complaint by the leader against Peter
O'Neill. From that discussion he was directed to do a file search on an application
by O'Neill to set aside a Warrant of Arrest.

While returning from the search the Acting Commissioner of Police directed him
to go to Boroko Police Station to give advice on a Court Order O'Neill had
obtained to set aside a Warrant of Arrest because the Police at Boroko were
divided on the Court Order. He gave advice against the arrest of O'Neill despite
the Police Commissioner's insistence to give legal clearance for police to arrest
O'Neill. A second opinion on the Court Order gave the same advice and O'Neill
was released.

On 27 December 2019 he was suspended by a show cause notice for abuse of
office and breach of contract relating to the use of two motor vehicles at Police
Department expense and eventually terminated.

Mr Nii in evidence denied the suspension as related to the hire car.

His assertion
was that he was allowed to use the vehicle by the Managing Director Nelson
Tengi while his suspension was upon pressure by the leader for giving legal
advice against the arrest of O'Neill. He relied on a letter by Mr Nelson Yarka the
accountant for Lama Rent A Car as supporting his assertion on the hire car.

According to the letter from Mr. Daniel Yarka the, the vehicle in question was
hired on a retainer basis by the Police Department commencing 22 April 2018
for 38 months to be invoiced on 6 monthly bases. When Mr Nii went to return
the vehicle in April 2019, he was allowed to keep the vehicle by the Managing
Director for reasons he did not know.

The letter was confusing as it portrayed a scenario where Mr. Nii had legitimate
use of the vehicle as allowed by the Managing Director and Police Department
could still pay the rates for hire.

A simple calculation on the retainer shows that 18 months retainer period would
have lapsed on 22 June 2021. Mr Nii had custody of the hired vehicle in 2019
while it was still under the retainer by the Police Department. Our conclusion is
that the suspension was for the unauthorised use of the hired vehicle and none
other.

We now revert to the substantive allegation that the leader interfered in police
operational matters to have Mr Nii terminated.

The oral evidence of Mr Nil was that the Commissioner of Police seemed to be
under pressure when he directed him so many times to give clearance for the
arrest of O'Neill. He was of the firm view that the leader pressured the
Commissioner to give legal clearance for the arrest of O'Neill after their earlier
meeting in the Police Commissioner's office.
When asked by counsel to verify "so many times" he was unable to give a
specific number. We consider this piece of evidence by Mr Nii as

grossly
exaggerated and unsubstantiated.

The other evidence on this allegation was from the Facebook articles, where the
leader referred to interference by a certain police officer who vigorously
opposed the arrest of O'Neill insisting that the Court Order forbade police from
arresting him. The alleged police officer was not named in the Facebook articles.

We find as a fact that political interference in operational matters of the Police
Force had occurred. Two instances signify our findings.

In the first instance there is evidence that former Commissioner of Police Tom
Kulunga and the then Commander Special Operations, David Manning went to
the private residence of the former Deputy Chief Justice Sir Gibbs Salika and had
discussions on a purported Arrest of the former Chief Justice Sir Salamo I njia at
the behest of the former Prime Minister Peter O'Neill.

In the second instance the evidence before us is that the leader, as then Minister
for Police held discussions with the Commissioner of Police on the Arrest of
former Prime Minister O'Neill from his personal complaint.

These are testaments of direct political interference in police operational
matters by leaders. Arrest of persons is an operational matter for the police to
the exclusion of all of us. It is a breach of and a blatant disregard of the
constitutional directive under s 197 (2) which restrains all and sundry from
interfering with operational matters of the Police Force.

Even though there was an element of interference and a conflict of interest by
the leader in police operational matters concerning his personal complaint, we
cannot safely connect those observations to interference by the leader in the
suspension and termination of Mr. Nii. We find the leader not guilty of this
allegation.

The balance of the allegations relates to the District Development Authority (Authority) and its enabling Act. We propose to make general observations on relevant provisions of the Act before proceeding with the allegations.

We start with the standing notion that laws are there to be obeyed by one and all. Where there is a breach or a disobedience to any law, sanctions naturally follow. District Development Authority (amendment) Act of 2014 (the Act) is one such law and enjoys no exception.

The Authority is by statute pursuant to s 4 (1) (a) of the Act a corporate body. It does not require certification by the Investment Promotion Authority to be recognised as a company. It replaced the functions of the former Joint District Planning & Budget Priorities Committee (JDPBPC) pursuant to s 33A of the Organic Law on Provincial and Local Level Government Act and comes under the umbrella of the Department of Provincial and Local Level Governments.

It has a board constituted by the Open Member as charman and all the presidents of the Local Level Governments in the District. The Chairman appoints three persons representing the community.

By operation of s22 the District Administrator (DA) who is a public servant and subject to the Department of Personnel Management, becomes the Chief Executive Officer (CEO) of the Authority.

He/she is the only person possessed of an overlapping responsibility as DA of the District and the CEO of the Authority. The incumbent DA requires no specific appointment as CEO because he is already recognised by s 22 as the CEO to the Authority.

Our reading of the Act is that the setting up of the Authority was a change in the regime of centralized funding control to be closer to the district. It was intended to facilitate an effective and coordinated approach to development and service

delivery in each District and nothing else.

Specific functions provided under s 5 (b) were to develop, build, repair, improve and maintain roads and other infrastructure only. The Authority also possessed an underlying power to do all that are necessary or convenient to be done in the implementation of the functions. Other functions specified under s 5 only compliment the development and service delivery requirements.

All functions of service delivery are as prescribed by the Act or by regulation accompanying the Act or by determinations from the portfolio minister pursuant to s 6, or directions by the Minister pursuant to s 20 of the Act. These requirements are mandatory. At the time of the allegations there was no regulation or any Ministerial determination or direction in force. The Act stood alone.

One of the functions of service delivery is to approve disbursement of appropriated funding under the District Support Grants (DSG) and District Services Improvement Programme (DSIP) funds. Apart from these appropriated funds, the Authority can receive funding from other sources like grants and donations if any. All these funds are paid into the district treasury and expenditures recorded accordingly in the Provincial Government Accounting System (PGAS) as they are all deemed public funds.

All financial matters for the Authority are subject to part VIII of the Public Finance Management Act 1995 and according to financial instructions and guidelines issued from time to time.

The established practice in financial matters is that the District Finance Office or District Treasury these days raises the requisition and General Expenses for invoices submitted to it after the initial approval is given by the board through the Chairman. The DA as section 32 officer authorises payment and

expenditures are recorded accordingly in the PGAS.

In the present case soon after the Leader was elected as MP for Madang in the 2017 National Elections, to improve service delivery for the district, he orchestrated the creation of Madang Ward Project office and established a new structure to administer and implement projects and other services from an office rented at Divine Word University. A secretariat was established, and staff were employed to implement the functions of the Ward Project Office.

The leader further orchestrated the incorporation of Madang Ward Project Limited as a business arm to implement ward projects and other projects initiated by the Ward Project office and approved by the board. The effect of this setup was that some of the functions of the DA and staff in the existing structure were subsumed into the new structure.

In like manner the leader also caused to be incorporated another company named as Madang Works & Equipment Ltd to implement road projects which were completely in dilapidated states. Large sums of DSIP funds were transferred to this company following a Court Order. The two companies were owned by the Madang DDA as shareholder with the same single director.

Therefrom, the leader among others proposed, office rental and engagement of consultants which the board eventually endorsed. It is from this new structure and engagement of consultants and related issues that led to the investigation by the Ombudsman Commission leading to the categories of allegations against the leader the subject of this proceeding.

We now deal with Allegations 5 & 6 together as they relate to the engagement of Tolo Enterprises.

Allegation 5: Allowing an associate company, namely Tolo Enterprises

Ltd to
benefit through consultancy services to the Madang District
Development
Authority
Allegation 6: Misappropriation of K455,751.20 to the use of Tolo
Enterprises Ltd
a company owned by an associate.
The allegations under these categories are that between 1st December
2017 and
31st June 2020 the Leader failed to carry out the obligations
imposed by Section
27(1)(b)(c) of the Constitution when he allowed an associate
company, namely
Tolo Enterprises Ltd, to financially benefit through consultancy
services to the
Madang District Development Authority thereby being guilty of
misconduct in
office under Section 27(5)(b) of the Constitution.
It is further alleged that the leader dishonestly applied the sum of
K455, 751.20
to the use of Tolo Enterprises Ltd who was an associate company
thereby being
guilty of misconduct in office under Section 13 (a) of the Organic
Law on the
Duties and Responsibilities of Leadership.
The position of the referrer is that Tolo Enterprises was not
properly engaged
from the beginning and as such the benefits that were received by
the company
were void.
The leader contended that that the charge was defective for failing
to plead
sufficient and relevant material facts. It was also the contention
that Tolo
Enterprise was not an associate company or owned by an associate or
was he a
shareholder or director to fall under the definition of associate
under s 1 of the
Organic Law. It was the assertion that Tolo's engagement for
consultancy
services was approved by the board along with 04 others by
resolution 1/2018
of 11 January 2018 and that the Engagement of consultants is
permitted under
s 7 of the DDA Act. The amount paid to the company were for services
rendered
under the agreement and adequately acquitted and therefore there was
no
misappropriation.
He then submitted that knowing a person or being acquainted with
them is not
evidence that they are associates within the definition under
Section 1 of the
Organic Law.

Because the referrer failed to plead properly the allegation of misappropriation
and the element of associate, the allegations should be dismissed.
The facts under these allegations are that the leader after a prior meeting with
Mrs Hitolo Carmichael Amet proposed to the Board the engagement of Tolo
Enterprise as technical adviser/consultant. In the minutes of board meeting No
1/2018, the leader was the sponsor of the agenda for the engagement of the
company and 4 others for consultancy services to the Authority. After
introducing the agenda, the leader recused from the meeting since he
personally knew Mrs. Hitolo Carmichael Amet. By doing so he complied with the
requirements under s 15 of the Organic Law to disclose his interest to avoid a
conflict-of-interest situation.

The board approved the engagements for an initial 6 months and paid them
from DSIP funds. Thereafter Toles consultancy engagement was extended, and
eventually paid from DSIP funds for services rendered totalling more than
K400,000. There is no evidence of what happened to the other consultants after
their terms expired.
To find the leader guilty of misconduct in office under these two categories there
must be proof of the allegation that Tolo Enterprise Ltd was an associate
company in the terms of the definition of "associate" under s 1 of the Organic
Law.

The definition under the Organic Law defines "associate" in the following terms;
"In relation to a person to whom this Law applies, includes a member of his
family or a relative, or a person (including an unincorporated profit-seeking
organization) associated with him or with a member of his family or a relative."

By virtue of the definition under the Organic Law we deem the leader as an
associate to the company. A company is a person under a corporate

name and
is covered by the definition of "person" under s 1 of the Organic Law. However,
a company cannot operate without a person or persons behind the corporate
veil.

33

The undisputed facts are that Tolo Enterprises is a company. It is owned by a
person. That person is Mrs Hitolo Carmichael Amet. The leader met her prior to
the formal engagement as consultant and discussed consultancy issues. Hitolo
Carmichael is the wife of Sir Arnold Amet. Sir Arnold had a strong relationship
with the leader. They were both from Madang Province. The leader appointed
Sir Arnold as community representative to the Authority Board. The leader and
Sir Arnold had strong political connections. To round it all off Sir Arnold assisted
the leader before this Tribunal.

These events cannot be coincidences. Despite which event occurred first in time
all events collectively display a strong relationship between the Leader and Sir
Arnold and his wife Hitolo Carmichael. Sir Arnold's wife being the sole owner
and director of Tolo Enterprise is therefore connected by that relationship to the
leader.
Under those circumstances the leader is not saved by the corporate veil of Tolo
Enterprise from being caught by the definition of the word "Person "under s 1
of the Organic Law as associate to the cornpany.

Further to that, the leader is not saved by his recusal from the Board meeting
that endorsed Hitolo Carmichael as consultant. It was in our view only a
smokescreen to comply with statutory requirement under s15 of the Act to
disclose his interest.

The declaration of interest in that meeting further affirms the strong
relationship that existed with Tolo and its owner. By the strong association or

relationship, the leader was instrumental in a deliberate course of conduct to
facilitate benefits to Tolo; first on a temporary engagement and later, for long
term engagement; such engagement in a conflict-of-interest situation. The only
wonder is how come the other 4 consultants were never given the same treatment.

Our conclusion is that when the leader allowed Tolo Enterprise to benefit from
consultancy services in a dishonest and conflict of interest situation he was guilty
of misconduct in office under s 27 (5) (b) of the Constitution.

It therefore follows that the leader dishonestly applied more than K400, 000 to
the benefit of Tolo Enterprise being an associate company thereby being guilty
of misconduct in office under s 13 (a) of the Organic law on Duties and
Responsibilities of leadership.

We find the leader guilty under allegations 5 & 6.

ALLEGATION 7. – Use of Madang District Services Improvement Programme
Funds in Paying Electoral Office Rentals Company Contrary to SRC
Determination 2015 and DSIP Funds Guidelines
ALLEGATION 8. – Misappropriation of K229,500.00 of the District Services
Improvement Program & District Support Grants on rental payment of ward
project office:
At the outset the allegations under these two categories are inter-related. We
find that both allegations relate to rental payment for the same office and
location with different amounts and for different purposes. The purposes for the
payment on record are that some were for Electoral Office rental. Other
payment records were for Ward Project office rental. It is difficult to
differentiate who is paying what from those records. We will deal the allegations
together.

The position of the referrer under these categories is that the office at Paramed
is the leader's electoral office. It was submitted that the leader

caused the
incorporation of the company for electoral duties under the auspices of the
authority to avoid using electoral allowances for office rent and staff wages,
employ electoral staff and serve electoral agenda. His electoral officers use that
office while the DA and his staff use the district office. Since the office at
Paramed was electoral office, the leader was wrong to allow payment of rent
from DSIP funds when he should pay it from his electoral allowance.
While maintaining that the project office is the leader's electoral office, the
referrer further submitted the summary of the payments made to the
employees occupying the ward company's office, which included electoral staff

By intentionally applying DSIP funds to pay rent for his electoral office while
receiving electoral allowances for rent he was guilty of misconduct in office
under s 13 of the organic law.

The leader contended that the charges were defective for failing to plead with
clarity sufficient relevant material facts. The alleged breach of DSIP guidelines
were not pleaded as there was no law known as DSIP guidelines as for
implementation of services improvement funds, the Finance Secretary issues
financial directions from time to time. The SRC determination of 2015 relied on
by the referrer was superseded by SRC determination of 2022 and the leader
cannot be prosecuted under a law that did not exist.

It was submitted that the Authority used its powers given under the Act to
establish the office and operated therefrom for service delivery purposes like
ward visits and project inspections.
The Administration operated from the district office because they had different
job descriptions. Without refuting the summary of payment referred to, the
leader maintains that the employees of the ward project company, are not his
electoral staff or attached to the member.
The other contention was that the Authority by resolution

incorporated the
Madang Ward Project Limited as permitted by s 4, 7 & 11 of the Act to carry out
service delivery in the district and the company also occupied the office at Divine
Word. Because the company belongs to the Authority the rentals paid from DSIP
funds were not illegal.

The further contention by the leader was that the use and application of DSIP
funds was a collective decision of the board and not him to be deemed as
dishonest or unethical to dictate the boards resolutions; that the application of
funds by the Authority must be seen in the context of Parliament's intent and
purpose.

Since there is no evidence that he intentionally applied public funds or breached
SRC determinations the allegations should be dismissed.

The combined effect of these two allegations is that the referrer is asking the
tribunal to make a determination on what appears to be against what is
apparent. What appears to be is that an electoral office was established by a
board resolution. What is apparent is that the board resolved to establish a ward
project office and it is operating. The assertion is that the project office is in fact
an electoral of the leader and therefore any rental payments for the office rental
from DSIP funds were unlawful and amounted to double dipping.

The issue is whose interest is the office intended to serve, the Authority interests
or electoral office interests.
Our understanding of the setup is that the Madang District Development
Authority is run by a board. Its administrative arm led by the District
Administrator under an established structure.
The DA is also the Chief Executive Officer of the Authority. He is the only person
in the district with an overlapping responsibility.
It is undisputed that the administrative arm operates from the district office with
other employees. Under normal circumstances electoral staff would

not be
employed with staff in the administration.
At the time of the allegations none of the employees under the district office
structure was employed at the Divine Word office. Likewise, no electoral staff
was working at the district office. A clear demarcation is apparent. Therefore,
there is a reasonable presumption that the Divine word office is occupied by the
leader's staff while the district office is occupied by administration staff.

The evidence of the District Administrator was that the district office was run
down and declared unhealthy by the health authorities. The money spent by
DDA on rent would have fully refurbished the district office.
The referrer argues that while the leader was receiving electoral allowance it
was improper for him to allow rental payments to be made for the rental of the
electoral office using the DSIP funds.
The leader stood firm on his assertion that the office was not his electoral office
and those using it were not his electoral officers. The referrer submitted a

summary of payments made to the employees which included electoral staff
which the leader acknowledged.
The District Administrator's evidence is that the administrative building was in a
rundown state and that it had been previously condemned by Madang Heath
Authority while the Paramed office had a conference room and office space
which was used for Authority and other administrative meetings.
The leader acknowledges that the district office was condemned and the use of
the rented office at Paramed but makes no mention of his position on the district
office building.
From those evidence our view is consistent with the evidence of the District
Administrator that, there was no need to rent outside. The exact amount of
money expended towards rental should have been used to maintain and the
existing building. However, we do not wish to delve into the judgement of the
leader and the board to choose rental instead of maintaining the

existing building because the Act gave them the power to make such determination.
However, given the totality of the evidence presented there is a presumption that the leader had a vested interest to rent another office space. He instigated the incorporation of a company to implement projects. A company was not subject to financial guidelines. He could be relieved of rental and staff wages expenses through the corporate veil.
The utterances that the district office was condemned by health authorities attracts condemnation from the tribunal. How was it allowed to deteriorate in the first place? What happened to all the money that was budgeted for the district? Why did the leader and the board ignore its condition and allow public servants to cling to it and scurry for cover in a rented property? It was a far cry and beyond the bounds of common sense and logic to rent a property at DSIP expense when the district office was begging maintenance.
Of the allegations, there is no evidence that there is an electoral office. There is evidence though of a Ward project office. It was set up by board resolution and people employed by the company are using the rented property. People were employed and placed on the structure payroll. It included electoral staff.
Electoral staff or electoral office cannot be given any other meaning or definition than what the SRC determination recognises them to be.

They are attached to the leader's electoral duty functions as political staff more than district administration functions. It is well known that political staff cannot be housed together with district administration employees.
In the present case the functions were lumped together to be under the umbrella of the Ward Project Company. Electoral staff were employed with project officers to implement projects. By lumping them the employees or those on temporary engagement were deemed company employees.
By deeming them company employees the leader was not required to pay the electoral staff wages from his electoral allowance as intended by

SRC
determination or pay rent for the office occupied by the company. The
corporate veil of the company protected the leader from this happening.
Even though the Ward Development Company was intended for service
delivery, there were electoral staff using the property and were on the new
structure payroll. It is safe to conclude that they were the leader's electoral staff.
If the office was rented for the authority, electoral staff would not have occupied
it or operated from it in the first place. Because they were the leader's electoral
staff, the leader allowed them to operate from the rented office under the
auspices of the company.
Our view is that if the leader was serious about having a good administration
facility in the district, he would have done repairs to the dilapidated district
building and work from there instead of spending money on rent.
Instead, he devised a scheme to incorporate a company as a front to avoid
financial guidelines, pay rent for electoral office, and wages for electoral staff
because a company was not subject to financial guidelines. The result of it was
that DSIP funds were expended for purposes for which it could not have been
expended.
We therefore find that the leader is guilty of misconduct in office under s 13 of
the Organic Law.

ALLEGATION 9

Creating a structure within the Madang DDA without obtaining approval from
the Department of Personnel Management.

Under this category the referrer alleged that the leader created a duplicate
structure within the Authority while there was an existing structure in the
district without the approval of the Department of Personnel Management
pursuant to s 23 of the Act.
It was the further allegation that the new structure was used to amass and
expend assets belonging to Madang District and made the Madang District
Public servants useless. Therefore, the leader was guilty of misconduct in office

under s 27 (5) (b) of the Constitution.

The leader contended that the charge cannot be sustained as the only approval
the Head of the Department can give was a proposed staffing structure pursuant
to 23 (2) (a) of the Act. In the present case neither the leader nor the Authority
created a staff structure within the Authority for approval to be obtained.

It was also intimated that the Secretary for Personnel Management in evidence
opined that s23 (2) (a) of the Act was intended for public service positions and
it was not necessary to obtain approval from the department to engage
consultants or persons like project staff.

To make findings under these categories the Tribunal relies on the oral evidence
and responses made to the Ombudsman Commission by Mr. Albert Ului as CEO
of the authority, Ms Helen Kanimba as Provincial Finance Manageress, Ms
Joanne Yeni as acting District Finance Manageress, Mr. Reuben Lulug as Ward
Project Manager and Pastor John Orape as Church Representative in the
Authority which were tendered into evidence through the Chief Ombudsman
without objection.

The facts under this category are that the Board approved a proposal by the
leader to create a Ward Project Office within the Authority. Under the Ward
Project Office a staff structure was created. Thereafter the Authority at the
behest of the leader incorporated Madang Ward Project Limited to implement
projects in the district. By the creation of the Ward Project Office structure the
Madang District had two administering structures.

First was the existing District Administration structure which operated from the
district office and was headed by Albert Ului. The new structure under the Ward
Project Office and later the Ward Project Limited operated from a

rented office
at Divine Word University Campus. The project office was headed by Rueben
Lulug.

The existing District Administration structure implemented sector programmes.
The new structure looked after a Secretariat to the DDA board, Special projects,
and Ward Projects as branches. They were implemented by staff employed
under the new structure.

According to the evidence of Helen Kaninba and Joanne Yeni the payment
records for disbursement of DSIP funds from 2017 to 2020 were kept by the
District Finance office. They were surrendered to the Ombudsman Commission
as directed. The records from 2021 onwards were kept by the secretariat at the
project office.

It is undisputed that there was an existing structure in the district. It was led by
the District Administrator. The evidence from the then Acting District
Administrator for Madang and the Secretary for Department of Personnel
Management Taies Sansan affirmed that there was already a structure in place
for each District and the positions were occupied by public servants. It was
headed by the District Administrator and had others working under him.

The Secretary for Personnel Management in cross-examination stated that there
was no regulation in place to implement the Act and guide the Authority. This
evidence was supported by the current Attorney General and former Minister
for Provincial and Local Level Government Affairs Mr. Pilla Niningi that there was
no regulation guiding how structures were to be established as he had no
structure in his own District. His opinion was that Districts have set up structures
to suit their own convenience.

For purposes of addressing our findings under these categories of allegations we
revert to the relevant provisions of the Act for answers.

The powers of the Authority are prescribed by s 7 as follows;

7. Powers of Authorities.
(1) An Authority has power to do all things that are necessary or convenient
to be done for, or in connection with, the performance of its functions.
(2) Without limiting Subsection (1), an Authority may –
(a) enter into contracts; and
(b) charge fees for work done, and services provided, by the Authority; and
(c) purchase and take on hire, and dispose of, plant, machinery, equipment
and other goods; and
(d) engage consultants and other persons to perform works or services for
the Authority; and
(e) form or participate in the formation of companies; and
(f) enter into partnerships and participate in joint ventures; and
(g) do anything incidental to any of its powers.
Our views of s 7 are these. Under subs-section 1 the Authority has wide powers
to do all things necessary or convenient in the performance of its functions.
Under sub-section (2) specific functions are prescribed for the Authority to
perform.

A specific function permitted under s 7 (2) (d) is the power to engage other
persons to perform works or services for the Authority. Other persons in our
view would refer to persons employed on a casual or temporary basis outside of
the existing public service structure in the district. Payments to those engaged
would be made by the Authority according to budget and or board resolution.

It is also a mandatory requirement under s 23 of the Act that the Authority shall
be serviced by such staff as are necessary in the following terms;
23. Secretariat and other staff of Authorities.
(1) An Authority shall be serviced by such staff as are necessary, including
staff for a secretariat to provide administrative and secretarial support to the
Authority, and staff to provide technical services to the Authority.
(2) The head of the department responsible for personnel management matters shall –
(a) approve a proposed staffing structure for an Authority; and

(b) determine the terms and conditions of the staff of an Authority in
accordance with the Public Services (Management) Act 2014 and the General
Orders under that Act.

In respect of subsection 2 (a) we do not accept the Leader's proposition that to
obtain approval of the head of Department responsible, one must propose a
staffing structure; that since he did not propose a staffing structure no authority
could be obtained from the head of the Department and therefore, no breach
of s 2 (a) of the Act was committed.

The leader's interpretation of s 2 (a) is in our view untenable. The head of
Department cannot approve a structure on its own volition without a proposal
for a staff structure. A proposed staff structure would refer a revised version of
the existing structure or a new one.

Where a proposed staff structure was not presented to the head of the
Department responsible then in would be deemed that the existing structure
was adequate and there was no need for a new or a restructured one. The
mandatory powers given to the head of the Department responsible under
Section 23 (1) is that the exercise of such power is by necessity only. One being
producing a proposed staffing structure.

A proposed staff structure would be implemented only after the mandatory
approval was given by the head of the Department responsible. The approval
would entail embodiment of terms and conditions in accordance with the Public
Services (Management Act 2014) and General Orders to enable payments for
entitlements under the normal public service pay structure. The conclusion
therefrom is that there can never be a standalone structure from the existing
one without the mandatory approval.

The same cannot be said of a secretariat. A secretariat by its very

nature would
not compose of a single person. It would be more than one individual aligned to
give administrative and secretarial ortechnical support to the authority. It would
be more a casual or temporary engagement to complement the existing structure.

The preferred option was to engage existing public servants for secretariat
duties but where expertise was lacking, people from outside could be engaged
using the power given by s 7 (2)(d). (Engage secretariat and other persons).

In the present case there was no approval for a structure given by the head of
the department responsible. The obvious reason was that there was no
proposed staffing structure presented to the head of Department by the leader
or the Authority. The other reason discerned from the evidence of Secretary
Taies Sansa was that there was no regulation in force to implement the Act
properly because of legal advice on a constitutional reference.

Apart from the legal advice relied on by the Secretary for Personnel
Management, there is no evidence of any Court Order restraining the
Department from implementing the Act pending determination of the
Constitutional Reference.
There is also no evidence of a ministerial direction pursuant to s 20 of the Act to
set up a structure.

The sum effect of all that is that at the time of the allegations, the prior existing
structure was the only implementing body for the Authority recognised by law.
It was headed by Mr Albert Ului as Acting District Administrator.

Despite the lack of approval for a structure or a ministerial direction, the board
on 29 November 2018 at the initiative of the leader set up a Ward Project
Structure to implement projects. It employed persons in positions created
therein and paid them from the DSIP fund allocations of the Authority. The
structure was first headed by Rueben Lulug as Project Manager with three teams
under his control.

The teams were named as Programme Management team, Electoral Coordinators and Electoral team and Finance and Administration team. Each team respectively engaged employees in various positions. Under the Electoral Coordinators and Electoral team component of the structure there were 4 Electoral Officers with 3 Electoral Assistants each for the 3 LLGs and one Electoral Assistant for Madang urban totalling 14 persons.

44

These acts may be construed as permissible in circumstances where the Authority was given wide powers under s 23 of the Act to employ persons or perform incidental acts.

Our view is that the powers given by s 23 were intended to compliment the staff in the existing structure if the leader or the authority discovered that the existing structure did not have the necessary capacity. The Authority could not just employ persons under another standalone structure from the existing structure. That did not happen here.

By setting up the new structure, a pattern was created where duties were duplicated at unnecessary cost. The powers and functions lawfully conferred on the DA and officers of the Madang District Authority were usurped. A secretariat performed some of them. The evidence of the then acting DA and CEO Mr Albert Ulu' was that by the creation of the new structure there were two administration components in the district. One was composed of Provincial public servants occupying 10 positions while the other being employees of the Ward Project Limited. He as the DA and CEO of the authority only supervised while the new structure implemented the activities of the authority.

A large amount of DSIP funds were spent on things where the money could not be lawfully expended like payment of wages to electoral staff and rent for electoral office and rent for staff.
Monies spent were from batch payments disbursed quarterly by the District Finance from DSIP funds to the Ward Project Office who paid the

service
providers or suppliers. It caused two sets of acquittals. One was from the District
Finance for batch payments to the Ward Project office while the entire spending
was collated and compiled by the new structure administration.
Two documents were used on official purposes, one bearing the District
Authority office name while the other bearing the name of the Ward Project
Office. The obvious resultant effect was that DSIP funds meant for development
were expended to maintain an overloaded structure.

Even though the Act allows for the formations of a company the creation and
incorporation of Madang Ward Project Limited was another load on the
Authority. It cannot be disputed that the company was specifically incorporated
to implement project requirements of the district which was difficult and
cumbersome through the existing structure. However, by the very nature of a
company the general proposition is that a company is supposed to generate
income or simply put, make money. Revenue, expenditure, profit and loss are
common denominators of a company.

In the present case the Madang Ward Project Limited does not fall into the
category of a real company. It existed by name only for one purpose. To spend
public funds day in day out without complying with procurement processes
under the safety of the corporate veil. There is no evidence of any revenue
generated by the Madang Ward Project company.
If there was any revenue generated by the company, then we regret to say that
we have not been led to it by evidence.

These outcomes would not have arisen had the leader exercised restraint and
improved the existing structure recognised by law like renovating the district
office and establishing office facilities to make conditions conducive and
compatible with normal standards.

Our view is that the company set up by the board through the leader was intended to implement projects at will without having to comply with the requirements of Part VIII of the Public Finance (Management) Act 1995. It was ideal for procurement purposes for the company to invoice the Authority as a service provider and the Authority pay them from DSIP funds or any other fund under its custody. Whatever money paid to the company from DSIP is not subject to Finance procurement processes or financial guidelines. It became company property and only answerable to Pastor John Orape as the sole director.

What is apparent from those observations is that the setup of the structure and incorporation of the company were very shrewd and flimsy ways of misapplying public funds under the magic word "development".

The conclusion therefrom is that the structure created at the behest of the leader was operating without the mandatory approval and therefore any person employed to created positions whether temporary or permanent and payments made as wages were illegal and void.
Where a leader breaches or ignores a law of Papua New Guinea he is likely to breach s 27 (1) (b) of the Constitution. (See Re Application by John Mua Nilkare (1997) SC 536)

Even though there was no criminal intent on the part of the leader, by intentionally causing the application of funds under the control of Papua New Guinea to purposes to which it could not be applied he breached s 13 (a) of the Organic Law on the Duties and Responsibilities of leadership.

By creating a structure in breach of the mandatory requirements of s 22 (4) of the Act and making payments of DSIP funds to purposes to which it could not be applied, the leader is guilty of misconduct in office pursuant to s 27 (5) (b) of the Constitution.

Allegation 10. Misapplication of Madang DSIP funds on salaries and wages of
electoral staff in the Madang District Ward Project Office contrary to the DSIP
guidelines

Under this category the referrer alleged that the leader intentionally applied
K233,514.449 of DSIP funds on salaries and wages of electoral office staff in the
Madang Ward Project Office while receiving electoral allowance through his
fortnightly salary thereby being guilty of misconduct in office under s 13 of the
Organic Law.

The referrer submitted that the salaries and allowances for electoral office staff
should be paid from the leader's electoral allowance received through SRC
determination EL 2017-17.

The leader contended that the referrer had failed to plead the particulars of the
DSIP guideline that he was alleged to have breached because there is no law
defined as DSIP guidelines.

It was the leader's further contention that the payments of salary and wages to
employees in the Madang District Ward Project Office were disbursements in
accordance with resolutions of the board and its company in compliance to with
s 11 (2) & (3) of the Act.
Finance division paid the wages for services provided and it was not a unilateral
decision by the leader and therefore the allegation should be dismissed.

To make our findings of primary facts under this category of allegations we
adopt what we said under Category 9 relating to the creation of a structure.

We restate the evidence of the then CEO Mr Albert Ului that by the creation of
the new structure there were two administration components in the district.
One was composed of Provincial public servants occupying 10 positions while

the other being employees of the Ward Project office.

According to the evidence of Finance Manager, Helen Kanimba and District Finance Manager Joanne Yeni, Madang District Finance Office was the paying office for all submissions from ward development secretariat for projects rental and wages of staff and casuals engaged by the Ward Project Office and its business arms with DSIP funds. The leader was involved in most approvals for payments.

This process changed when the District Finance paid grants in tranches to the Ward Project office and the company paid its employees and service providers. The District Finance no longer produced the TFF3 & 4 forms for payments to be made to service providers. The DA only authorised as Financial Delegate or s 32 officer because that activity or responsibility could not be easily removed from the DA,

Before us in evidence were copies of disbursements from District Finance office for periods 2017 to 2020 which were tendered into evidence through the Chief Ombudsman. It included TFF 3 & 4, and cheque payment records.

All payments including payment of wages for all casual and staff employees were paid by the district finance from DSIP funds.

A tabulation of payments made shows the following;

A. Electoral Officers

Name	Amount
1. Warib Medir	K14,664
2. Tony Tigile	K7,500
3. Stephanie Hanlou	K7,200
4. Joel Robert	K11,555
5. Sipora Sul	K6,500
6. Gabriel Papita	K15,500
7. Andy John	K8, 000
8. Jerry Kuta	K5, 200
9. Max Maupe	K1, 372
10. Epen M. Kogoya	K8, 121
11. Sipora Albert	K9,450
12. Sheila Keltem	K9,000

13. Donny Atege K9,000

B. Rental Payments for staff;

1. Emela Amon K6,000

C. Payments for Church Christmas Programmes

1. Payment to 13 wards at K5, 000 each totalled K115, 000.

These were records of payments made by District Finance from DSIP funds for the various activities upon approval of the Board through the leader. From 2021 grants were paid to the company and funds were expended through the company and Ward Project Office and disbursement records were no longer kept by the District Finance Office. It would be deemed that the Secretariat had custody of them as they facilitated the earlier requisitions.

On the face of the record the payments identified above do not amount to spending on development purposes. It may be deemed that such payments were lawful spending from DSIP funds allocated for administration costs.

Administration costs in our view do not cover all manner of expenditure. There are exceptions under the administration costs. Two obvious exceptions are wages of electoral officers and rental of electoral office. These exceptions are recognised under SRC determinations.

Under SRC determination EL 2015-17, individual allowances for elected leaders were replaced with a lump sum allowance named as electoral allowance for each member and paid with his fortnightly pay. The leader was allocated K86, 555 as non-taxable and paid fortnightly. The allowance included payment for electoral staff and electoral office rental.

The sum effect of those evidence is that there cannot be a combined office for electoral functions and the normal public service administration functions.

Despite that the Authority is possessed of wide powers under s 7 of the Act and

one of them is to engage consultants and other employees to assist in its service delivery functions.

Section 23 of the Act, also in mandatory terms provides that the Authority shall be serviced by such staff as are necessary, including staff for a secretariat to provide administrative and secretarial support to the Authority, and staff to provide technical services to the Authority.

Our reading of "other employees" under s 7 and "such staff for a secretariat" under s 23 do not cover electoral officers for the sole reason that they are not recognised by the Act. The only law recognising electoral officers is the Salaries and Remuneration Commission (SRC) determinations. The employment of electoral officials and their wages are specifically accommodated under the allowances paid to each elected member by SCR determinations. There is no evidence that SRC determinations can be implemented or executed from DSIP funds.

We cannot agree with the leader's assertion that SRC determination of 2015 did not apply. The allegations occurred when the SRC 2015 determination was in force. The revised SRC determination of 2022 did not apply.

Electoral staff are the eyes and ears of an elected leader for the district. They are employed or engaged at the discretion of the leader. Their employment or engagement is outside of the normal public service structure. Wages for an electoral officer would have to be paid from the electoral allowance of the leader as intended by the SRC determination.

That was not the case with the leader. He permitted employment of electoral staff on the new structure. The new structure specifically named electoral officers against positions. By resolution no 2/2018 the Board resolved to engage temporary electoral staff and drivers and their wages for a budget of K6,600 per month as proposed by the leader. We find this to be a deliberate

exercise
designed to make the payments of wages look valid in line with the powers given
under s 7 and 23 of the Act.

We refuse to accept the leader's assertion that those employees were not his
electoral officers. The naming of electoral officers under the new structure
cannot be an oversight. Electoral officers by the very name connotes persons
employed or engaged to help the elected leader perform his electoral duties.
Electoral duties are more politically aligned and outside the normal Authority
business.

In the present case electoral officers were working from the office rented by the
Authority at Divine Word University and paid from DSIP funds. There is no
evidence that the leader had an electoral office. There is also no evidence that
the leader paid any of the electoral officers from the electoral allowances he
received fortnightly. The evidence is scant as to whether the payment of wages
for electoral officers were from the leader's discretionary component of
K250,000.

The charge under this category alleged the leader as guilty of misapplication of
DSIP funds. Misapplication connotes innocent mistake or error more than an
intentional deviation from what is proper.
In the present case there was no mistake or error committed by anyone to pay
wages to electoral officers.

The structure was deliberately set up at the behest of the leader to employ
persons under the auspices of sections 7 & 23 of the Act to show that wages
were lawfully paid to electoral officers from DSIP funds.
By allowing payments to electoral officers by the Authority while the leader was
receiving allowances meant for such payments amounted to double dipping on
the part of the leader. By doing so the leader breached s 5(2) of the Organic Law

thereby being guilty of misconduct in office under s 27 (5) (b) of the Constitution
and s 13 of the Organic Law under this category. We find the leader guilty under
this allegation.

Category 11 -
Under this category it is alleged that the leader allowed for the appointment of
Hitolo Carmichael Amet as head of the Secretariat while being a member of the
board representing the community contrary to section 23 of the DDA 2014
thereby being guilty of misconduct in office under s 27 (5) (b) of the Constitution.
This allegation has no basis. The undisputed evidence by Hitolo Carmichael Amet
was that she was never at any time appointed a member of the board representing the community.

We find the leader not guilty of the allegation under category 11.

Category 12 was Withdrawn.

Category 13. Misappropriation of K15, 649,312.50 of Madang DSIP funds
through the Madang Works and Equipment Ltd in funding plant and equipment
without following procurement processes.

Under this category the allegation is that the leader intentionally applied K15,
549.50 funding for plant and equipment for Madang roads through the Madang
District Works and Equipment Limited without following procurement processes
thereby being guilty of misconduct in office under s 13 (a) of the Organic Law.

The referrer alleged that the leader failed to apply the normal procurement
process in relation to raising of claims by annexing three vital documents namely
Madang District procurement committee decision, Legal clearance by the

Solicitor General and Contract agreement in breach of a Court ordered for
compliance with legislative procurement requirements, and paid monies to
Madang Works and Equipment limited which was unlawful and applied to a

purpose to which it could not be lawfully applied. Therefore, the leader was
guilty of misconduct in office under s 13 of the Organic Law.

The leader contended that the law allegedly breached was not pleaded as there
was no law defined as procurement process. The company was not an associate
as he was not a shareholder or director. There was no personal unilateral
decision by him to apply the funds as it was imposed on the authority by a Court
Order. The allegation had no merit and ought to be dismissed.

This allegation is associated with a Court Order which directed the DSIP to pay
monies to Madang Works & Equipment Limited. The allegation states that
procurement processes ordered by the Court were no complied with.

The Court Order under item 4 states.

"The Madang District Finance Manager shall by 30 June 202;
release K5m of K10.9m deposited into Madang District Development Authority
operating account for Madang town roads which shall be paid to Madang Works
and Equipment Ltd to fund the implementation of the Modilon Road project ;
and (b) raise a cheque for the amount of K15m from the Madang District
Development Authority District Services Improvement funds made payable to
Madang District Works & Equipment Ltd to procure works and plant equipment
in compliance with legislative procurement requirements."

The Court Order is specific as to who and which funds are to comply with
procurement requirements. There are two lots of funds from the evidence. One
was the amount deposited into Madang Development Authority operating
account. This fund is not required to comply with procurement requirements
because a court order directed it to be paid to Madang works & Equipment. The
Court order did not specify whether procurement processes were to be
complied with under this transaction.

The other fund is the money paid to Works & Equipment Ltd from Madang

District Services Improvement funds. This fund is the one that required
procurement by the Court Order. The enabling words being "funds made payable to Madang Works & Equipment Ltd to procure works, plant and equipment in compliance with legislative procurement requirements".

The evidence before us relating to Madang Works & Equipment Ltd consist of
financial documents for 6 tranches of K2.5m paid in compliance of the Court
order. There is no evidence of where the money received by Works & Equipment
Ltd was spent on to ascertain whether the money spent was misappropriated.
We pose the question as to whether the company bought a grader for K1rn
without following procurement processes because spending attaches with
misappropriation. Without spending no misappropriation can occur.

The oral evidence of the DA was that the company bought some plant and
equipment and acquired some from the old regime, but they broke down or
were no longer in use. This evidence was not verified by any documentary or
other evidence.

By a lack of spending records under this allegation it would be farfetched to hold
that because there was no record of spending by Works & Equipment Ltd the
money was misappropriated.

The allegation has not been proved to the required standard. The leader is not
guilty under this allegation.

In conclusion we declare the following findings.
Category 1. Guilty
Category 2. Guilty
Category 3. Not Guilty
Category 4. Not guilty
Category 5. Guilty
Category 6. Guilty
Category 7. Guilty
Category 8. Not guilty

Category 9. Guilty
Category 10. Guilty
Category 11. Not Guilty
Category 12. Withdrawn

Category 13. Not Guilty

Lawyers for the referrer: Public Prosecutor
Lawyers for the leader: Giruakonda Solicitors and Barristers