SC1884

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA NO. 107 OF 2018

BETWEEN
HON PATRICK PRUAITCH MP
Appellant

AND
CHRONOX MANEK, JOHN NERO & PHOEBE SANGETARI, COMPRISING THE OMBUDSMAN COMMISSION
First Respondent

AND
JIM WALA TAMATE, THE PUBLIC PROSECUTOR
Second Respondent

AND
HON DEPUTY CHIEF JUSTICE GIBBS SALIKA, SENIOR MAGISTRATES PETER TOLIKEN & NERRIE ELIAKIM, COMPRISING THE LEADERSHIP TRIBUNAL
Third Respondent

AND
THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Fourth Respondent

Waigani: Kandakasi DCJ, Shepherd and Berrigan JJ
2019: 28th August, 6th December

SUPREME COURT – Appeal against dismissal by the National Court of proceedings as abuse of process – Power of National Court to review proceedings of Ombudsman Commission restricted to cases where the Commission has exceeded its jurisdiction – S.155(3)(e) and S.217(6) of Constitution and s.24 of Organic Law on Ombudsman Commission – Abuse of process for litigant who has selected one mode of proceedings and failed to prosecute same cause of action by an alternative proceeding – Both Supreme Court and National Court have inherent power to intervene at any stage of

proceedings to prevent abuse of process – Circumstances which give rise to abuse of process are varied and not limited to fixed categories – Court must take into account circumstances of case, prejudice to each of the parties and need for public confidence in administration of justice – Delay in conduct of proceedings and failure to take available procedural steps are factors capable of constituting abuse of process.

LEADERSHIP TRIBUNAL - Delay in commencement of Leadership Tribunal's hearing of charges caused by piecemeal interlocutory applications to National Court and multiple appeals to Supreme Court can constitute abuse of process – Constitutional process under Leadership Code sanctioned by Organic Law on Duties and Responsibilities of Leadership should be completed before any judicial challenge against that process may be brought in National and Supreme Courts, including judicial challenges against decisions made by the Ombudsman Commission, the Public Prosecutor or a Leadership Tribunal.

Cases Cited:
Papua New Guinea Cases

Patterson Lowa, Minister for Minerals and Energy and Others v. Wapula Akipe and Others [1991] PNGLR 265
Attorney-General and Luke Lucas v. Public Employees Association of Papua New Guinea [1993] PNGLR 264
Nilkare v. Ombudsman Commission of Papua New Guinea [1999] PNGLR 333
Anderson Agiru v. Electoral Commission and The State (2002) SC687
Curtain Bros (PNG) Ltd v UPNG (2005) SC788
Pruaitch v. Manek (2009) N3903
Pruaitch v. Manek (2010) N4149
Pruaitch v. Manek (2010) SC1052
Pruaitch v. Manek (2011) SC1093
Somare v. Manek (2011) SC1118
Pruaitch v. Manek (2012) SC1168
Wartoto v. The State (2015) SC1411
Micah v. Lua (2015) SC1445
Special Reference by the Attorney General pursuant to Constitution, Section 19 (2016) SC1534
Jacob Popuna v. Ken Owa (2017) SC1564
Pruaitch v. Manek (2017) SC1593
Telikom (PNG) Ltd v. Rava (2018) SC1694
Pruaitch v. Manek (2018) N7379

Overseas Cases Cited:

Hunter v. Chief Constable of the West Midlands Police and Others [1982] AC 529
Batistatos v. Roads and Traffic Authority of NSW (2006) 226 CLR 256

Legislation and other materials cited:

Sections 18, 23, 29, 155(4) and 217(b) of the *Constitution*
Sections 20, 27 of the *Organic Law on the Duties and Responsibilities of Leadership*
Section 24 of Organic Law on the Ombudsman Commission
Order 12 Rule 40 of the *National Court Rules*

Counsel

Mr G. Shepherd and Mr P. Tabuchi, for the Appellants
Mr V. Narokobi and Mr M. Kirk, for the First Respondent
Mr L. Kandi, for the Second and Fourth Respondents

DECISION ON APPEAL

06th December, 2019

1. BY THE COURT: This is an appeal against the whole of the decision of the National Court delivered on 19 June 2018 dismissing the entire proceedings in OS No. 34 of 2010(**OS No 2**) on the basis that the proceedings were an abuse of process: *Pruaitch v. Manek* (2018) N7379.

2. The decision was made out of two motions:one filed by the Appellant on 12th February 2018 seeking to refer questions to the Supreme Court by invoking s. 18(2) of the *Constitution;* and the other by the First Respondent filed on 23rd February 2018 seeking to dismiss the proceedings pursuant to Order 12 Rule 40(1)(a)(b) and (c) of the *National Court Rules* for failing to disclose a reasonable cause of action, for being frivolous and vexatious, and for being an abuse of process.

3. The First Respondent's Motion was filed in response to the Appellant's Motion. For completeness, we also note that a third motion, filed by the Fourth Respondents on 18 December 2017, seeking the same relief as that of the First Respondent, was also before the Court, and heard together with the latter.

FACTUAL AND PROCEDURAL BACKGROUND

4. The matter has a long history:

- On **29th September 2006** the First Respondent (the Commission) wrote to the Appellant pursuant to s. 20(3) of the *Organic Law on the Duties and Responsibilities of Leadership (OLDRL)* and informed him of his right to be heard on 11 allegations of misconduct in office.

- In **October 2006** the Appellant appeared in person before the Commission and gave a verbal response to the allegations. In late November 2006, in further exercise of his right to be heard, the Appellant submitted a detailed written response to all 11 allegations.

- On **22nd January 2008** the Commission issued a summons requiring Mr Kanawi Pouru, Managing Director of PNG Forest Authority, to provide certain information. Mr Pouru responded to the Commission on 4th February 2008.

- On **22nd July 2009** the Commission wrote to the Appellant advising that it had considered his responses to the 11 allegations and decided to refer 8 of those allegations to the Public Prosecutor for possible prosecution under ss. 20(4) and 27(1)(a) of the *OLDRL* and s. 29(1) of the *Constitution.*

- On **20th August 2009** the Appellantfiled judicial review proceedings OS No. 456 of 2009 (**OS No 1)** challenging the referral pursuant to Order 16 of the *National Court Rules* on the basis that the Commission had, *inter alia,* exceeded its jurisdiction and that he had been denied the right to be heard on the allegations.

- On **8th September 2009** Hartshorn J refused leave for judicial review on the basis that there was no arguable case that the Appellant had not been duly heard on all 8 allegations: *Pruaitch v. Manek* (2009) N3903. The appellant did not appeal that decision.

- The Public Prosecutor subsequently wrote to the Chief Justice requesting the appointment of an appropriate tribunal to inquire into the matter. On **3rd February 2010** Chief Justice Sir Salamo Injia appointed the Third Respondent (the Leadership Tribunal).

- On **4th February 2010**, almost five months after leave for judicial

review had been refused, the Appellant filed a new set of proceedings, OS 34 of 2010 **(OS No 2),** pursuant to ss. 23, 155(4) and 217(b) of the *Constitution* seeking declaratory, preventative, injunctive and stay orders, including declaratory orders that the Commission's referral to the Public Prosecutor was unconstitutional, in excess of jurisdiction and therefore illegal, invalid and of no force and effect on the basis, again,that the Appellant had been denied his right to be heard on the allegations. It is these proceedings that are the subject of this appeal.

- On **12th February 2010** Kariko J dismissed the proceedings in OS No 2 on the basis that the Appellant was in effect seeking to bring the same claim as that made in OS No 1, that there was therefore a multiplicity of proceedings that was bad for abuse of process, and, further that the matter was *res judicata*: *Pruaitch v. Manek* (2010) N4149.

- On the same day the Appellant appealed against the decision of Kariko J by filing proceedings SCA No 7 of 2010.The Appellant argued that Kariko J should have found as a fact that there were further investigations done by the Commission against him when Mr Pouru was summoned to provide information. Further, that the Commission should have given him an opportunity to be heard on the information provided by Mr Pouru before deciding whether to refer the matter to the Public Prosecutor. The Appellant argued that Kariko J erred when he found that the materials contained in Mr Pouru's affidavit were not new.

- On **19th February 2010** the Appellant obtained an *ex parte* stay order before Sevua J (sitting as a single judge of the Supreme Court), restraining the Tribunal from convening its hearing.

- On **31stMarch 2010** the Supreme Court (Kirriwom, Gavara-Nanu and Davani JJ) refused leave to appeal on the question of fact alone on the basis that the Appellant was simply "rehashing" the same claim he had previously raised in OS No 1, and further that there was no arguable case that the matters deposed to in Mr Pouru's affidavit constituted new investigations and new allegations. The Supreme Court ordered that the interim stay orders should remain until the remaining grounds of appeal were determined: *Pruaitch v. Manek* (2010) SC1052 (***Pruaitch SC No 1 (2010))***.

- On **30thJune 2010** the Supreme Court (Sakora, Lenalia and

Manuhu JJ) dealt with the remaining grounds of appeal. On **31st March 2011** the Court allowed the appeal, quashed the order of the National Court in *Pruaitch v. Manek* (2010) N4149, reinstated OS No 34 of 2010 (OS No 2) and ordered that those proceedings be heard by the National Court presided over by another judge. The Supreme Court further restrained the Respondents, their officers, servants, agents, or whomsoever, from taking any further actions or steps or conducting any further inquiries under the *OLDRL* or otherwise pursuant to the referral, and discharged the order on suspension:*Pruaitch v. Manek* (2011) SC1093 (***Pruaitch SC No 2 (2011)***. It is this decision which the Appellant relies upon as authority that the proceedings in OS No 2 could not be dismissed for abuse of process pursuant to Order 12 Rule 40.

- On **14th June 2011** the National Court proceedings in OS No 2 returned to the National Court before Kandakasi, J (as he then was), who issued directions**.** On **5th July 2011** the Appellant filed an application for leave to appeal against those directions (SCA No. 74 of 2011). On **15th July 2011,** Injia, CJ (sitting as a single Supreme Court Judge) granted the Appellant leave to appeal on the basis that there was an arguable case of apprehension of bias and denial of fair hearing made out. On **19th July 2011** the matter returned before Injia, CJ. His Honour heard an application for stay and ordered that certain orders of Kandakasi, J made on 14 June 2011 be stayed until the hearing and determination of the appeal.

- On **26th July 2011** Kandakasi J re-called the matter in OS No 2 and vacated his orders of **14th June 2011**.The Appellant appealed against that decision on **5th August 2011**(SCA No. 86 of 2011) on the basis that in view of the stay order of **14th June 2011** in SCA No. 74 of 2011his Honour was *functus officio*.

- On **2nd March 2012** the Supreme Court (Batari, Gabi and Makail, JJ) dismissed the Appellant's appeal in SCA No 74 of 2011 as an abuse of process. It upheld SCA No. 86 of 2011 and quashed the orders made by Kandakasi J on the basis they were *ultra vires*: *Pruaitch v. Manek* (2012)SC1168 **(*Pruaitch SC No 3 (2012)*)**.

- On **5th September 2012** the Appellant filed a Notice of Motion seeking discovery under Order 9 Rules 5 and 7 of the *National Court*

Rules in OS No 2. On **3rd December 2014** Kassman J refused the application on the basis that any application for discovery should be made to the Leadership Tribunal.

- On **8 January 2015** the Appellant filed an application for leave to appeal that decision. Leave was granted on **24th March 2015**. The appeal was heard on **16th December 2015**. On **9th June 2017** the Supreme Court (Manuhu, Murray and Pitpit JJ) dismissed the appeal and upheld the National Court decision: *Pruaitch v. Manek* (2017) SC1593 (***Pruaitch SC No 4 (2017))***.

- On**12th February 2018** the Appellant filed a notice of motion seeking the referral of two questions to the Supreme Court for interpretation pursuant to s. 18(2) of the *Constitution*. This was heard on **9th March 2018**, together with the First and Fourth Respondents' motions for dismissal filed **18th December 2017** and **23rd February 2018**, respectively. On **19th June 2018** Polume-Kiele J dismissed the entire proceedings as being an abuse of process.

- On **29th July 2018** the Appellant filed this appeal against that decision. We heard the appeal on **29th August 2019** and reserved our decision.

GROUNDS OF APPEAL

5. The Appellantrelies on four grounds of appeal. The first and fourth grounds concern the learned primary judge's decision to grant the Commission's motion to dismiss the whole of OS No 2 as an abuse of process. The second and third grounds challenge her Honour's refusal to refer two questions to the Supreme Court for Constitutional interpretation.

6. It is well established that an appellate court "will not interfere with a discretionary judgment on a procedural matter within [the primary judge's] jurisdiction, except where the exercise of that discretion is clearly wrong, where the primary judge acted upon a wrong principle, was guided by extraneous or irrelevant matters, mistook the facts, or failed to take into account some material consideration. A discretionary judgment may be set aside if an identifiable error occurred in the exercise of discretion. Alternatively, it may be set aside where there is no identifiable error, but the resulting judgment or order is 'unreasonable or plainly unjust' and such that an error can be inferred": *Curtain*

Bros (PNG) Ltd v. UPNG (2005) SC788.

GROUNDS ONE & FOUR: ABUSE OF PROCESS

7. The Appellant submits that the learned trial judge erred in mixed law and fact in failing to find that the issue of whether or not the Appellant's proceedings OS No 2 could be dismissed pursuant to Order 12 Rule 40 had been authoritatively and conclusively determined by the Supreme Court in *Pruaitch SC No 2 (2011)* and was *res judicata*, and that her Honour was bound by the Supreme Court decision, such that she should have dismissed the First Respondent's motion as an abuse of process.

8. We are of the view that this ground is misconceived.

9. In *Pruaitch SC No 2 (2011)* the Supreme Court held that Kariko J was in error to find that the decision of Hartshorn J on the judicial review leave application was *res judicata* and that the filing of OS No 2 was bad for abuse of process.

10. Whilst not determinative of these proceedings, we are of the view that Kariko J's decision that OS No 2 was an abuse of process was correct. In those proceedings the Appellant sought leave to judicially review the Commission's referral pursuant to Order 16 of the *National Court Rules* on the basis that he had been denied his right to be heard on the allegations referred. Leave was refused on the basis that there was no such arguable case. The Appellant did not appeal that decision. Instead he filed separate proceeding five months later seeking declaratory preventative, injunctive and stay orders that the Commission's referral was unconstitutional, in excess of jurisdiction and therefore illegal, invalid and of no force and effect because he had been refused his right to be heard on the allegations. Thus he relied on the same cause of action. This amounted to an abuse of process for two reasons.

11. Firstly, a combined reading of ss. 155(3)(e) and 217(6) of the Constitution and s. 24 of the *Organic Law on the Ombudsman Commission* makes it clear that the power of the National Court to review the proceedings of the Commission is restricted to cases where it is specifically alleged that the Commission has exceeded its jurisdiction: *Somare v. Manek* (Salika DCJ (as he then was), Kirriwom and Kandakasi J (as he then was) (2011) SC1118 at paragraphs 109 – 119. Thus, the proper and only mode for the appellant to bring his claim was pursuant to Order 16, which he had already tried and which had failed.

12. Secondly, it is an abuse of process for a litigant, having selected one mode of proceedings and failed, to prosecute the same cause of action through an alternative proceeding: see *Attorney-General and Luke Lucas v. Public Employees Association of Papua New Guinea* [1993] PNGLR 264*; Anderson Agiru v Electoral Commission and The State* (2002) SC687.

13. It is immaterial that the appellant was not accorded an opportunity to argue the substantive merits of his review. That was the result of his deliberate decision not to avail himself of his right of appeal to the Supreme Court in the first instance against the refusal to grant leave under Order 16: see *Agiru (supra)*; see also *Telikom (PNG) Ltd v. Rava* (2018) SC1694 at paragraph 20.

14. Here we agree with the reasoning of the Supreme Court in *Pruaitch SC No 1 (2010)* at paragraphs 31 to 35; *Somare v. Manek* at paragraphs 21to 27 and *Pruaitch No 4 (2017)* at paragraph 25. Accordingly, we respectfullyrefuse to follow *Pruaitch SC No 2 (2011)*.

Abuse of process

15. For the purpose of this appeal, however, the correctness or otherwise of the decision in *Pruaitch SC No 2 (2011)* is beside the point.

16. It is not the case, as the Appellant contends, that the National Court was precluded by *Pruaitch SC No 2 (2011)* from ever finding that the proceedings in OS No 2 was an abuse of process. As mentioned above, the Supreme Court in that decision held that the primary judge erred in finding that OS No 2 was an abuse of process for bringing a multiplicity of proceedings. It remitted the substantive matter back to the National Court for hearing. Once the matter was before the National Court, the Court was entitled to deal with it in accordance with its jurisdiction, which jurisdiction was not and cannot be restricted by the Supreme Court.

17. Pursuant to that jurisdiction the Commission filed a notice of motion seeking that the proceedings be dismissed as an abuse of process pursuant to Order 12 Rule 40 of the *National Court Rules*.

18. Quite apart from the Court Rules, both the National and Supreme Courts have an inherent power to intervene at any stage of a proceeding to prevent an abuse of their process: see *Somare v. Manek* at paragraph 13. This Court in *Anderson Agiru v. Electoral Commission and the State* (2002) SC687 described the power in the following terms (emphasis added):

> *"[T]he court's inherent power is its authority to do all things*

> *that are necessary for the* ***proper administration of justice****. Such inherent power consists of all powers reasonably required to enable the courtto* ***performefficiently its judicial functions and to protect its dignity and integrity****."*

19. In *Telikom (PNG) Ltd v. Rava* (2018) SC1694 the Supreme Court dismissed as an abuse of process an application for the review of a National Court decision brought pursuant to s.155(2)(b) of the *Constitution* in circumstances where the National Court decision had previously been appealed and dismissed for want of prosecution. In doing so the Supreme Court applied the reasoning of the Court in *Jacob Popuna v Ken Owa* (2017) SC1564 (emphasis added):

> "*17. In Pokia v Yallon (2014) SC1336 the Supreme Court at[20] stated:*
> *'An abuse of process will exist if a plaintiff commences more than one proceeding concerning the same cause of action. Such an abuse can be committed when two proceedings are conducted simultaneously regarding the same cause of action (Telikom PNG Ltd v ICCC (2008) SC906) or when the plaintiff loses one proceedings then comes back to court for a "second bite at the cherry" to prosecute the same cause of action (Anderson Agiru v Electoral Commission (2002) SC687).'*
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> *18. In our view, the processes of this Court have been improperly used by the applicants. As Gavara-Nanu, J noted in Michael Wilson v Clement Kuburam (supra) at [25]:*
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> > *'The types of abuses of process may vary from case to case but to establish an abuse of process there must be evidence showing that* ***the processes of the court have been improperly used; or have been used for an improper purpose; or have been used in an improper way; or that such abuse of process have resulted in the right of the other party being denied, defeated or prejudiced****: National Executive Council v. Public Employees Association* [1993] PNGLR 264 *and The State v. Peter Painke* [1976] PNGLR 210*."*"

20. Whilst the power is most often invoked to stop proceedings that have been instituted improperly, it is also well established that the circumstances which might give rise to an abuse of process cannot be restricted or strictly defined. As the Supreme Court went on to make clear in *Telikom v. Rava*, per Hartshorn J at paragraph 21:

> "*[I]t is not necessary that there has to be more than one proceeding filed concerning the same cause of action simultaneously for an abuse of process to be constituted.... To emphasise that* ***the kinds of circumstances in which an abuse of process may arise are not closed****... I reproduce the following classic statement of Lord Diplock in the House of Lord's decision of Hunter v. Chief Constable of the West Midlands Police and Others [1982] AC 529:*
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> > *'This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which,* ***although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied****; ..... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.*"'

21. Similar statements have also been made in other jurisdictions. In *Batistatos v. Roads and Traffic Authority of NSW* (2006) 226 CLR 256 Gleeson CJ, Gummow, Hayne and Crennan JJ of the High Court had regard to the development of the doctrine in Australia and said at paragraphs 14 to 15 (emphasis added):

> "*In Ridgeway v The Queen, Gaudron J explained:*
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> > *'The powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose, as well as proceedings that are 'frivolous, vexatious or oppressive'. This notwithstanding, there is no very precise notion of what is vexatious or oppressive or what otherwise constitutes an abuse of process. Indeed, the courts have resisted, and even warned against, laying down hard and fast definitions in that regard.* ***That is necessarily so. Abuse of process cannot be restricted to 'defined and closed categories' because notions of justice and injustice, as***

> ***well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case****…'*

Earlier, in Rogers v The Queen, McHugh J observed:

> *'Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories:* ***(1)the court's procedures are invoked for an illegitimate purpose; (2)the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3)the use of the court's procedures would bring the administration of justice into disrepute****.'*

His Honour added:

> *'Many, perhaps the majority of, cases of abuse of procedure arise from the institution of proceedings. But* ***any procedural step in the course of proceedings that have been properly instituted is capable of being an abuse of the court's process****.'*

To that it should be added that the power to deal with procedural abuse extends to the exclusion of particular issues which are frivolous and vexatious. Further, ***the failure to take, as well as the taking of, procedural steps and other delay in the conduct of proceedings are capable of constituting an abuse of the process of the court****.*"

22. We agree with those observations and add that when determining whether to exercise its power to prevent an abuse of process, the Court should have regard to the full facts and circumstances of the case, the prejudice to each of the parties and the need for public confidence in the administration of justice. As the authorities above make it clear, this power exists to enable the court to protect *itself* from abuse and thus safeguard the administration of justice. In the words of Gleeson CJ, Gummow, Hayne and Crennan JJ in *Batistatos* "that purpose may transcend the interest of any particular party to the litigation".

23. In this case, the learned primary judge was entitled, indeed obligated, to have regard to the entire history of the proceedings in determining the application before her. That history showed that almost nine years had passed since the Commission had referred the matter to the Public Prosecutor. The Appellant had not appealed the decision of Hartshorn J dismissing leave for

judicial review but instead had waited five months before bringing OS No 2 and only did so after the Public Prosecutor had requested the Chief Justice to establish a tribunal. The Appellant had been quick to appeal against Kariko J's decision refusing leave to bring OS No 2, doing so in a matter of days to restrain the Tribunal from convening, but had subsequently dragged his feet.

24. Moreover, almost eight years had lapsed since the decision in *Pruaitch SC No 2 (2010)* remitting the proceedings back to the National Court for hearing and yet the Appellant had still to bring his matter to trial. Exclusive of the present one, the Appellant had brought 4 appeals against interlocutory decisions of the National Court, the resolution of which inevitably added to the length and delay of proceedings, and the Appellant had then been slow to act once those appeals were determined. The Appellant had taken 6 months to file a notice of discovery following the Supreme Court decision in *Pruaitch SC No 3 (2012)*. When his application was refused, the Appellant took almost 4 months to do something against that decision. When that appeal was subsequently dismissed, the Appellant took a further 8 months to put on a motion seeking the referral of two questions to the Supreme Court for Constitutional interpretation.

25. Against this background of piecemeal interlocutory applications, multiple appeals and extended delays, the learned primary judge found that when taken as a whole, the conduct of the proceedings constituted an abuse of process, the effect of which was to bring the Leadership Code process to a "standstill".This finding was clearly open to her Honour on the facts. Not only did the unreasonable delay frustrate the Leadership Code process but the Respondents had also demonstrated that the lengthy passage of time, during which at least one witness had died, meant that serious prejudice has been caused by the Appellant's delay. In the meantime, the Appellant's substantive rights remain protected pending determination by the Leadership Tribunal. Furthermore this is a case which threatens "to bring the administration of justice into disrepute among right thinking people". As has been said many times, proceedings under the Leadership Code by their very nature must be administered effectively and speedily to ensure good governance and public confidence in the administration of government. To allow these proceedings to continue would be an affront to the very purpose of the Leadership Code and those whom it is intended to protect, the people of Papua New Guinea.

26. Adopting the language of the Supreme Court in *Curtain Bros*, we are not satisfied that, in exercising the discretion to dismiss the Appellant's proceedings as an abuse of process, the learned primary Judge was clearly wrong, or that an identifiable error occurred in the exercise of discretion. Further, we are not satisfied that her Honour's resulting judgment or order was "unreasonably or plainly unjust" such that an error could be inferred. Hence we find no error of law or fact or mixed fact and law. On this basis alone we would dismiss the

entire appeal.

Premature and an abuse of process

27. On a separate but related issue, the primary judge also found that the proceedings were an abuse of process for being premature. In *Somare v. Manek* the Court held that applications to intervene in proceedings brought under the Leadership Code prior to the Tribunal hearing are an abuse of the Court's process, and should be declined by the Court without exception in the public interest. There the Court at paragraphs 58 to 59 said (emphasis added):

> "*[T]he interest of justice and the need to allow for the due process of the law to take its proper course for the greater good of society will be better served by the superior courts, that is the National Court and or the Supreme Court as the case might be, maintaining the age old tradition of not intervening.* ***This should be without any exception because*** *as this Court said in SC Ref No. 3 of 2005,* ***all issues concerning both the process and the substance can be taken up as a preliminary point when the proper court or the tribunal assumes jurisdiction and is seized of the matter. If after that process, the court or the tribunal finds for the accused or the alleged offender that could in appropriate cases, form the foundation for appropriate remedial actions*** *as highlighted by this Court in Pato's case.*
> *An intervention by the superior courts allows for instance, stopping the process only to restart it again. By then, the freshness of the evidence, availability of witnesses and interest in seeing justice being done gets lost and ultimately justice is not served.* ***Justice can only be done without much delay and all steps that need to be taken being taken in a timely and orderly fashion. Otherwise, the converse of that is true. Justice delayed is justice denied with those who seek to delay justice ending up gaining.*** *If those who are accused or implicated have nothing to hide they would readily allow the process to take its proper course. ...Most of the harm and damage is caused by people who choose to take all sorts of unnecessary issues with the process, without merit most of the time, which results in unnecessary costs and delay. Usually such steps are taken to divert attention from the real issues.*"

28. The reasoning in *Somare v. Manek* was adopted by the five member bench of the Supreme Courtin *Wartoto v The State* (Injia CJ; Sakora, Kirriwom, Kandakasi, Davani, JJ (2015) SC1411 for the purpose of holding that it would be an abuse of process for an accused person to resort to any other means, even

s.155(4) of the *Constitution*, to challenge charges against him without first exhausting the criminal justice process.

29. The Supreme Court reached a similar conclusion in *Pruaitch SC No 4*(2017) when dismissing the appeal against a decision refusing discovery in the same OS No 2 proceedings now before us. In doing so the Court held that the entire proceedings were premature, and that a cause of action arises only once a Leader has been found guilty and penalised by a Leadership Tribunal.In other words,the Constitutional process under the Leadership Code should be completed before any challenge may be brought against that process, including decisions made by the Commission, the Public Prosecutor or the Tribunal. At paragraphs 15 to 20 the Court said (emphasis added):

> "*In relation to proceedings under the Leadership Code,* ***we are also of the view that the National Court in its civil jurisdiction should not interfere with proceedings of the process under the Leadership Code****. Proceedings under the Leadership Code are sanctioned by an Organic Law - not any ordinary Act of Parliament. For that reason alone, an aggrieved person enforcing his private right should not be allowed to interfere with the proceeding when it is still in progress.* ***In the exercise of discretion, the Courts ought to take into account the hierarchy of laws and supremacy of Constitutional Laws and refrain from entertaining intervening civil proceedings****.*
>
> *Secondly, a leader found guilty does not lose his right to challenge the proceeding of the Commission and any adverse finding of a Leadership Tribunal.* ***With his right preserved, it is against public interest for a Leader to interfere midstream with a proceeding under the Leadership Code****. In this case, for instance, the Appellant's right to challenge his referral will not be lost if he is found guilty. There would be no cause for concern if he is found not guilty.*
>
> ***The OS proceeding, in our view, was instituted prematurely.A cause of action in a case like this matures only when a Leader is found guilty and penalised. In other words, the constitutional process has to be completed before any challenge can be made against the process including decisions made by the Commission, the Public Prosecutor or the Tribunal.*** *But if a leader is found not guilty, there would not be any cause of action against the constitutional process.*
>
> *Thirdly, the Commission, like the National Court, is an institution of the State. Institutions of the State are charged with the responsibility, with enabling laws, to administer the affairs of this country.* ***The Commission should be permitted to carry out that constitutional function unhindered***

by private law cause of action.

Furthermore, when civil suits are entertained prematurely, the same cause of action is thus subjected to two different processes. This course is more likely to result in delays. Delays in the prosecution of leaders charged with misconduct offences undermine good governance and the public loses confidence in the systems of government.

This case is a classic example. *The referral was made on 22nd July 2009. The OS proceeding was filed in February 2010. To date, there has been a delay of more than eight years. The delay has seriously undermined the Ombudsman Commission, the Organic Law and all efforts to promote good governance in the country. The Appellant has continued to be a Member of Parliament in the last eight years. If he loses in the coming elections, the Commission's investigations and resources spent on the investigation would be a waste of public funds*."

30. It is clear from the face of the primary judge's decision that her Honour considered *Pruaitch SC No 2 (2010)* in light of the subsequent decisions in *Somare v. Manek* and *Pruaitch SC No 4 (2017)* in finding that the proceedings were premature. That finding was clearly open to her and she found accordingly.

31. *Pruaitch SC No 2* had the effect of reinstating the Appellant's substantive cause of action but there was nothing in that decision that precluded the application of later Supreme Court authorities that required as a procedural matter that such a claim should not be brought until after the Tribunal's hearing.

32. Furthermore, the response of theAppellantwas simply to ignore those decisions. There is no evidence to suggest that he raised them with the National Court at an early opportunity, or at all, to seek directions.

33. In these circumstances, we find no error of fact or law or of mixed fact and law which warrants correction by this Court. Accordingly, we would dismiss appeal grounds 1 and 4.

GROUNDS 2AND 3: REFERRAL PURSUANT TO S. 18 CONSTITUTION

34. Consequential on our findings above, the Appellant's appeal against the decision of the learned primary judge in refusing his motion in OS No 2 to refer questions to the Supreme Court for interpretation pursuant to s. 18(2) of the *Constitution* should automatically fall away.

35. Nevertheless, we consider it appropriate to examine the questions raised in the appellant's notice of motion. Section 18 of the *Constitution* provides:

> "*18. Original interpretative jurisdiction of the Supreme Court.*
> *(1) Subject to this Constitution, the Supreme Court has original jurisdiction, to the exclusion of other courts, as to any question relating to the interpretation or application of any provision of a Constitutional Law.*
> *(2) Subject to this Constitution, where any question relating to the interpretation or application of any provision of a Constitutional Law arises in any court or tribunal, other than the Supreme Court, the court or tribunal shall, unless the question is trivial, vexatious or irrelevant, refer the matter to the Supreme Court, and take whatever other action (including the adjournment of proceedings) is appropriate.*"

36. The principles to be applied when considering whether a question for referral arises are well settled. A question of both interpretation and application must arise: per *Somare v. Manek* at paragraph 89, applying Kapi DCJ in *Patterson Lowa (Supra)* (emphasis added):

> "*[I]t is now well settled law that, a question of interpretation and application of a constitutional law may arise in either of two ways as highlight by Kapi DCJ. The first is in cases where factual circumstances giving rise to a question of a constitutional law interpretation and application arises. The second is where a provision of a statute appears to be in conflict with a constitutional law in its interpretation and application.* ***In either case, there must be an argument over two things: (1) interpretation of a constitutional law provision; (2) its application. Both must arise in order to qualify for a case of an issue arising in relation to the interpretation and application of a constitutional law***."

37. Where a question of interpretation and application of a Constitutional law arises in any Court other than the Supreme Court, or before a tribunal, the Court or tribunal in which the question arises must refer the question to the Supreme Court, provided however that the lower court or a tribunal is satisfied that the question is not trivial, vexatious or irrelevant: see s. 18(2) of the *Constitution*.

38. On the face of it, the Appellant's notice of motion dated 12 February 2018 has failed to plead with precision the facts upon which he relies to invoke s. 18 of the *Constitution*. A complete copy of OS No 2 itself, out of which the notice of motion arises, is not contained in the Appeal Book. It is unclear if the

facts are pleaded therein. However, we note "Facts as contended" are set out over seven pages in the Appellant's submissions in the lower court.

39. As observed in *Somare v. Manek* at paragraphs 101 and 102, it is incumbent upon an applicant to plead succinctly the facts upon which the questions arise. Those facts must have been established in the lower proceeding. They are not simply matters for submission but are essential for laying the foundation of the referral under s. 18(2) of the *Constitution*. On this basis alone the Appellant's motion was defective.

40. The two questions the Appellant sought to raise were, whether on a proper interpretation and application of Section 20(3) and (4) of the *OLDRL*:

1. The Ombudsman Commission is obligated to afford the leader the right to be heard after the completion of the investigation, and before referral;

2. The Ombudsman Commission was obligated to afford the leader a further right to be heard after conducting further investigation after October 2006 and before making the referral.

41. It is well settled and clear law that a leader is entitled to a right to be heard pursuant to s. 20(3) of the *OLDRL*, which provides:

> "***PROCEEDINGS OF THE COMMISSION.***
> *(1) Every investigation by the Commission or other authority under this Law shall be conducted in private.*
> *(2) The Commission or other authority may hear or obtain information from any person who the Commission considers can assist and may make whatever inquiries it thinks fit and shall, before taking action under Subsection (4) notify the person whose conduct is being investigated.*
> *(3) Nothing in this Law compels the Commission or other authority to hold any hearing and no person, other than the person whose conduct is being investigated is entitled as of right to be heard by the Commission.*
> *(4) If, after an investigation, the Commission is of the opinion that there is evidence of misconduct in office by a person to whom this Law applies, it shall refer the matter to the Public Prosecutor for prosecution by him before the appropriate tribunal.*"

42. It is our view that in general terms, whether the obligation has been met is a question to be determined on the particular circumstances of each case and not

a matter requiring Constitutional interpretation and application. It is only a case of the latter.

43. The obligation on the Commission in respect of the right to be heard is well settled. The Commission is to notify a leader of the fact that allegations have been made against him; setting out the substance of the charges; such that he is able to understand their nature and to inform him of his right to be heard in respect of each of them; and to accord him that right if he chooses to exercise it: per Kapi DCJ in *Nilkare v Ombudsman Commission of Papua New Guinea* [1999] PNGLR 333 (Amet CJ, Kapi DCJ (as he then was), Los J and Injia JJ (as the latter then was).

44. The key issue is whether the leader has a meaningful opportunity to exercise that right. As Amet CJ said in *Nilkare* when setting out some guidelines for determining whether a person has been given such an opportunity:

> *"It must be understood of course that these are by no means exclusive and exhaustive.* ***Some variation and modification to these must necessarily be permitted, depending on the varying circumstances of each particular case.*** *But I think as a general principle some of these are sufficiently developed in the body of judicial precedents from the common law jurisdictions that we have adopted and have relied upon in many cases under these general heading principles of natural justice. The requirements of the right to be heard could be deemed complied with if the following procedures were adopted:*
>
> > *1. Notice is given of the nature and substance of the allegations made against the leader.*
> > *2. Reasonable opportunity is given to the leader to respond, either in writing or in person before the Commission, if the leader so elects.*
> > *Particulars and clarification of the allegations ought to be given if the leader requests the same in order that his right to be heard in respect of the allegations are to be considered adequate.*
> > *3. Any relevant documents are to be furnished to the leader if requested, to enable the leader to fully respond to the allegations.*
> > *4. It would not be appropriate to oblige the Commission to hand-over all documents concerning the leader at the time it gives notice of a right to be heard. By the same token, if there are particulars and documents which are*

> *relevant and* ***vital to a fuller and better understanding of the nature of the allegations, by the leader, in order that his explanations thereto would be full and complete to enable the Commission to make the determination as to whether or not there is a prima facie case, then it is incumbent upon the Commission to ensure that the leader is fully aware of the existence of such materials and documents.*** *If the leader requests copies of the same then they should be made available to him. It would not be appropriate for the Commission to withhold such information with the presumption that they should be used in the prosecution of the allegations before the Leadership Tribunal."*

45. The Appellant relies on the decision of *Micah v. Lua* (2015) SC1445. In that case between August 2014 and early 2015 the Ombudsman Commission had requested information from the former managing director of Independent Public Business Corporation to provide (the Grand Papua Hotel) information and/or documents in relation to the allegation of the Appellant using his office to gain a benefit in hotel accommodation. Meanwhile on 16th February 2015 it wrote to Mr Alex Wilson, the General Manager of the Grand Papua Hotel requiring him to provide information and/or documents in relation to the same allegation. The further information sought from Mr Wilson included whether the Appellant had accommodated family members at the hotel and who it was that paid for the accommodation and laundry. It was towards the end of February 2015 that both gentlemen provided information and documents to the Ombudsman Commission. This was 6 months after the Appellant had provided his response to the allegations on 15th August 2014. The information and documents were not given to the Appellant for his response.

46. The Supreme Court held that the trial judge erred in refusing leave for judicial review on the basis that there was an arguable case that the appellant had a right to be heard on the further information received in relation to the allegations against him and thus whether there was a proper and valid referral by the Commission. It said that it was arguable that the phrase "*If, after the investigation*" in s. 20(4) of the OLDRL could mean that all of the evidence gathering must be *complete* and given to the appellant to respond to before a decision is made by the Commission.

47. The Appellant argues that the same questions of interpretation and application arise here. We do not agree. The facts are distinguishable from those in *Micah.* There were no further investigations, and no new information obtained by the Commission in this case. The essential facts are apparent from the affidavit material. The Commission wrote to the Appellant outlining 11

categories of allegations, including an allegation that he had improperly received operational cost allowances for a support vehicle when the vehicle was already fully maintained by the State. The Appellant gave a detailed response, in which he explained that upon realising he had made an error he had repaid K20,000 and asked the Department to advise him of the balance, if any, still outstanding. Mr Pouru's letter to the Commission confirmed this and that the Appellant had been informed of the remaining outstanding amounts. That letter was copied to the Appellant.

48. Even if we are wrong, and on those facts a question of interpretation and application arises on a technical basis, the question in our view is a trivial one. It is clear that the Appellant was notified of the 11 allegations that had been made against him, and the substance of those allegations, such that he was able to understand their nature. He was notified of his right to be heard in respect of each of them, and he exercised that right both verbally and in a detailed written response.

49. Moreover the Appellant has waited eight years to raise these questions which arise out of the same facts he complained of in OS No 1 in 2009. He had the opportunity to raise the questions then but he failed to do so until now in OS No 2. The questions are a vexatious attempt to further delay the Tribunal from substantively hearing the allegations which formed the basis for the establishment of the Tribunal.

50. If any question of interpretation and application of a Constitutionalquestion did genuinely arise, these should have been raised by the Appellant before theTribunal. If the Appellant did not succeed then he was entitled to bring those matters to the National Court via judicial review at the conclusion of the proceedings before the Tribunal and not at any time before then. Of course, if he was still unsatisfied at the judicial review stage before the National Court, he has the opportunity to come to this Court on appeal at the end of the National Court review process. We note that the Supreme Court already made this point very clear in *Somare v. Manek,* at paragraph 133 in the following terms:

> "*Going by the overall purpose and scheme of the provisions on leadership under the Constitution as well as the OLDRL as discussed above, it was proper and appropriate for Sir Michael to raise all questions concerning the Ombudsman investigations into possible breaches of the Leadership Code, through to the appointment of the leadership tribunal, only at the tribunal as clarified and reaffirmed by this Court's decision in SCR No. 3 of 2005: Reference by The Ombudsman Commission of Papua New Guinea (supra). If he did not succeed at the leadership tribunal*

level, it was open to him to challenge that through a judicial review to the National Court and if still not satisfied, to the Supreme Court on appeal. That was the appropriate and correct forum and processes available to him."

51. In *Nilkare* the Supreme Court found significant procedural errors established on the part of the Commission, in particular the referral of four new charges on which the leader had not been given the right to be heard. Furthermore the Supreme Court found there were grounds for suspecting bias on the part of the Commission. Despite that, we note, the Supreme Court held (emphasis added):

> "***The Leadership Code is an important law which must be administered effectively and speedily to protect the people and the nation from improper and corrupt conduct of people in leadership positions****. In balancing all these considerations, we have reached the conclusion that it would be in the interest of everyone that this Court should not quash the referral but allow the Public Prosecutor to proceed with the charges before a Leadership Tribunal. In reaching this conclusion we have considered the four new charges that were included in the referral and bias, which has been established on the part of the Commission.* ***These procedural errors only affect the rights of the Appellant at a preliminary stage only and do not affect the substantive rights, which will be determined by the Leadership Tribunal. In relation to the four new charges, the Appellant by now has ample opportunity to consider the charges and he will no doubt prepare his defence at the tribunal hearing.*** *In relation to bias, again he will be able to defend all the charges before the Tribunal. Any bias by the respondent will not have any impact on the Tribunal, which is differently constituted...*
>
> *Since the decision of the Commission is not in conclusive or determinative of any of the allegations, the balance of justice and convenience both in the interest of the people of Papua New Guinea and leaders who are subject to the Leadership Code is to allow the allegations to be proceeded with to be finally determined on their merits. The court does not believe that the balance of justice and convenience and the interest of leadership integrity and honesty and good government would be met by totally quashing the referral as sought by the Appellant.*"

52. As have subsequent decisions of this Court, we endorse the decision in *Nilkare* as sound. It should follow therefore from *Nilkare* that even if there has

been some irregularity or failure to provide natural justice which taints a referral and establishment of leadership tribunal, it does not spell an end in itself. Instead a leader who is affected by such a process has the right to defend himself at the tribunal. If unsuccessful there, he may utilise the judicial review process once the tribunal has come to a final decision and if also finally unsuccessful there then the appeal process.

53. In this case the Appellant has failed to demonstrate any prejudice. In his affidavit the Appellant states that he paid the outstanding balance a few days later. He says in his affidavit that if the Commission had asked him about Mr Pouru's letter he would have informed it of that fact. There is nothing preventing the Appellant from putting this claim and his evidence before the Leadership Tribunal, whose task it is to enquire into the substantive merits of the case and come to a decision based on evidence produced before it. What is important for our purpose is that the Appellant in his capacity as a leader was made aware of and given a meaningful opportunity to respond to the allegations themselves, before the decision to have him referred.

54. The Appellant has now had more than ample opportunity to consider the charges against him and the material provided in Mr Pouru's letter. The Appellant may well dispute all of the allegations raised against him by the Commission's referral. That is his right and those are substantive matters to be determined by the Leadership Tribunal.

55. It has now been 10 years since the Commission referred the matter to the Public Prosecutor. The Appellant has successfully brought time, delay and prejudice to the Ombudsman and the people of PNG in that a witness has since died and others may have changed employment or addresses and even if they are readily available, may have lost memory of the various matters forming the foundation for the referral, something this Court spoke clearly of in *Somare v. Manek* at paragraphs 51 and 55. We also note with concern that those who constituted the Leadership Tribunal to inquire into and make a decision on each of the allegations may no longer be available to now constitute the Tribunal and discharge its duties. In these circumstances the interests of justice clearly call for the matter to proceed to a Leadership Tribunal hearing without any further delay to avoid any further prejudice to justice and the people of PNG and for the Tribunal to finally determine the allegations on its merits. The Appellant will of course have the opportunity to present his case in full before the Tribunal.

CONCLUSION

56. The Appellant has exhausted, albeit improperly and irregularly, all judicial review and claims of Constitutional interpretation and other process both before this Court and the National Court challenging the Commission's

decision to referhim to the Leadership Tribunal. Leave for seeking judicial review pursuant to Order 16 was refused in 2009.The current proceedings brought pursuant to ss. 23, 155(4) and 217(b) of the *Constitution* have now been dismissed as an abuse of process. The matter must now proceed to a Leadership Tribunal and the Tribunal must be allowed to come to a decision on the substantive merits of each of the allegations pending before it. This is necessary and dictated by the matters discussed and forming the foundation for the decision in this judgment. In short, a hearing and determination by the Leadership Tribunal of each of the allegations now pending hearing is necessary given that all conceivable preliminary issues have been raised and determined in the various National and Supreme Court proceedings to date. For clarity what this means is this: the Appellant will not be at liberty to raise the same preliminary issues that have been raised and determined by the various National and Supreme Court decisions. The Appellant may be at liberty to raise any new preliminary matters but any judicial review and or appeal against any preliminary decision will have to wait until there is a final decision on each of the allegations pending before the Leadership Tribunal.

57. Finally, given the lapse of time which has also adversely affected the Leadership Tribunal, the Chief Justice will need to have it reconstituted to enable it to commence its inquiry into the allegations against the Appellant without any further delay.

Orders

58. For the above reasons we conclude that in all the circumstances of this case the Appellant has failed to show that the learned trial judge erred in factor in law or on a question of mixed fact and law.Accordingly, we make the following orders:

(1) The appeal is dismissed.

(2) The referral pending before the Leadership Tribunal must now proceed to a hearing and final determination on its merits by the Leadership Tribunal.

(3) The Chief Justice shall take all steps necessary to have the Leadership Tribunal reconstituted to enable it to commence its inquiry into the allegations against the Appellant as a matter of urgency.

(4) The parties are restrained from returning to the National Court or the Supreme Court on any preliminary issue until the Leadership Tribunal has finally come to a decision on each of the allegations constituting the referral pending before the Leadership Tribunal.

(5) The Appellantshall pay the Respondents' costs of and incidental to the appeal, such costs to be taxed if not agreed.

Young & Williams Lawyers:	*Lawyers for the Appellant*
M S Wagambie Lawyers:	*Lawyers for the Second and Fourth Respondents*
In House Counsel:	*Lawyers for the First Respondent*