

Papua New Guinea

[In the National Court of Justice]

OS 414 OF 2004

MICHAEL NALI

Plaintiff

AND

**THE HONOURABLE JUSTICE ELENAS BATARI (as Chairman) AND THEIR
WORSHIPS SENIOR MAGISTRATE NIALLIN KITEIAP AND SENIOR
MAGISTRATE THOMAS VOGUSANG CONSTITUTING THE LEADERSHIP
TRIBUNAL**

Defendants

WAIGANI: SALIKA, J

2005: 20 April

2006: 10 March

Judicial Review – Leadership Tribunal Decision – Order of evidence to be given – Applicant gave evidence after his witnesses – Queried at hearing – no ruling or order made by Tribunal as to the appropriateness of applicant giving evidence last – Tribunal allowed applicant to give evidence last – whether tribunal could discount the applicant’s evidence after allowing applicant to give evidence last – Tribunal erred in not giving directions or order as to the appropriateness of applicant giving evidence last – Error sufficient to quash decision of Leadership Tribunal.

Counsel:

Mr F Griffin for the Plaintiff

Mr F Kuvi for the Defendants

10 March, 2006

This is an application for Judicial Review of a decision of the Defendants sitting as a Leadership Tribunal by way of an originating summons. The originating summons seeks the following orders pursuant to Order 16 Rule 3 of the National Court Rules.

- 1. An order in the nature of certiorari quashing the finding of the Defendants on 2 April 2004, that the Plaintiff was guilty of misconduct in office because he was in breach of the provisions of S.27(5)(b) of the Constitution.**

2. An order in the nature of certiorari quashing the finding of the Defendants on 2 April 2004, that the Plaintiff was guilty of misconduct in office because he was in breach of the provisions of Section 5(10) of the *Organic Law on the Duties and Responsibilities of Leadership*.
3. An order in the nature of certiorari quashing the finding of the Defendants on 2 April 2004, that the Plaintiff was guilty of misconduct in office because he was in breach of Section 27(5)(b) of the Constitution.
4. An order in the nature of certiorari quashing the finding of the Defendants on 2 April 2004, that the Plaintiff was guilty of misconduct in office because he was in breach of the provisions of Section 5 (1) of the *Organic Law on the Duties and Responsibilities of Leadership*
5. As order in the nature of certiorari quashing the recommendation on penalty imposed by the Defendants on the Plaintiff on 29 April, 2004, that he be dismissed as Parliamentary member of the Mendi Open Electorate.
6. Such further or other orders as the Court sees fit.
7. That the time for the entry of this order be abridged to the time of settlement by the Registrar, which shall take place forthwith.

Order 16 Rules 3 provides:

"3 Grant of leave to apply for Judicial Review

- (1) *No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this Rule.*
- (2) *An application for leave must be made by originating summons ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported –*
 - (a) *by a statement, setting out the name and description of the applicant, the relief sought and the grounds on which it is sought; and*
 - (b) *by affidavit, to be filed before the application is made, verifying the facts relied on.*
- (3) *the applicant must give notice of the application to the Secretary for Justice not later than two days before the application is made and must at the same time lodge with the Secretary copies of the statement and every affidavit in support.*
- (4) *Without prejudice to its powers under Order 8 Division 4, the court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any,*

as it thinks fit.

- (5) *The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*
- (6) *Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction, or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*
- (7) *If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.*
- (8) *Where leave to apply for judicial review is granted, then –*
 - (a) *if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;*
 - (b) *if the other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun in writ.*

The plaintiff was granted leave to apply for judicial review on 9 September 2004 by the National Court. He has thus complied with the provisions of Order 16 Rule 3 of the Rules of the National Court.

I heard the review application on the 20 April 2005. Due to other judicial commitments I was not able to attend to this matter as quickly as I ought to have.

The plaintiff's grounds for seeking judicial review are: -

1. *The Leadership Tribunal erred in law in that it made findings of guilt in respect of Allegations 1, 2, 4 and 5 when there was no evidence before the Tribunal that the Leader and his relatives, notwithstanding that he deposited the subject fund into his personal accounts, benefited directly from the use of such funds, such that the Tribunal could make those findings of guilt.*
2. *There appeared to be a real likelihood of bias and impartiality when the there appeared to be a real likelihood of bias and impartiality when the Leadership Tribunal held that the leader had the onus to explain and had not explained how and why he received funds under allegations 1 and 2*

- when he did explain such in his evidence.
3. *the Leadership Tribunal after finding the leader may not have personally benefited from the funds under allegations 1 and 2, unreasonably and irrationally held that the leader did use the funds for his own benefit after he improperly and illegally received it in the first place.*
 4. *The Leadership Tribunal unreasonably and irrationally made findings that the Leader had recently invented "Exhibit W" when there was no factual or legal basis for such a finding.*
 5. *The Leadership Tribunal unreasonably and irrationally made findings that the Leader's failure to create a trust account in relation to allegations 4 and 5 was improper when the creation of such a trust account by a Leader was contrary to and in breach of s.15 of the Public finance (Management) Act.*
 6. *The Leadership Tribunal acted ultra vires when it allowed and made amendments to allegations 4 and 5 of the charges against the Leader. That is, that the words "District Development Program" were amended and replaced with the words "District Support Grants" and the figure "K610,000.00" was amended and replaced with the figure "K460,000.00" in the allegations 4 and 5. Thereby re-drawing the charges to the prejudice of the Plaintiff and in excess of its powers contained in sections 28(1)(g) and (1a) of the Constitution and s.27(4) of the Organic Law on the Duties and Responsibilities of Leadership.*
 7. *The Leadership Tribunal unfairly and in breach of the rules of natural justice allowed evidence i.e. "Exhibit N.T" to be tendered late during the hearing when such evidence was never disclosed to the leader at anytime before the Tribunal conducted its hearing.*
 8. *The Leadership Tribunal acted unfairly and in breach of the rules of natural justice because the time allowed to the leader to prepare his defence was insufficient causing prejudice to the leader.*
 9. *There appeared to be a real appearance of bias and error of law on the part of the Leadership Tribunal by it holding the weight to be given to the Leader's evidence should be discounted because of the order of the evidence given in the leaders defence.*
 10. *The Leadership Tribunal erred in law when determining penalty by failing to give sufficient or proper weight to its own finding that the leader never intentionally applied public money to purposes to which it could not lawfully be applied.*
 11. *The Leadership Tribunal erred in law in determining the penalty against the Leader when it did not give sufficient and proper weight to the conduct of the Finance Department, the Office of Rural Development and Mr Anderson Agiru, as extenuating circumstances.*

1. Background:

This application for judicial review by the applicant seeks to review the decision of the

leadership tribunal constituted by Justice Batari as Chairman and Senior Magistrates, Nialyn Kitiap and Thomas Vogusang. The Leadership Tribunal found the applicant guilty of misconduct in office and recommended that he be dismissed from office.

It all started on 24 November 2003 when the Public Prosecutor referred seven allegations of misconduct in office to the Leadership Tribunal, following an Ombudsman Commission investigation. The allegation concerned the manner in which Mr Nali dealt with two sets of funds of public money that had come under his control. The funds were:

- K50,000.00, the then Governor of Southern Highlands, Anderson Agiru gave him in 2000; and
- K600,000 which was the District Support Grant for the Mendi Open Electorate during 2001 and 2002.

The allegation against the applicant were:-

Allegation 1:

Having received K50,000.00 of public money in the form of a cheque from the Governor of Southern Highlands Province, Mr. Anderson Agiru, drawn against the Southern Highlands Province Regional member's Trust Account, being funds beneficially held for the development of the Southern Highlands province; Mr Nali.

- (i) deposited the cheque into his personal bank account No 111 219046 held at the Port Moresby branch of the ANZ Bank; and***
- (ii) applied a significant part of that public money to his personal use;***
- (iii) made approximately 11 unverifiable and/or improper debit transactions totalling about K46,738.36 by writing out cheques to pay cash.***
- (iv) Made approximately 3 unverifiable and/or improper debit transactions totalling about K3,703.30 by writing out cheques to "Steel Industries" and "Service Centre".***
- (v) Made approximately 11 unverifiable and/or improper debit transactions totalling about K1,800.00 through automatic teller machine (ATM) withdrawals to obtain cash;***
- (vi) Made approximately 11 unverifiable and/or improper debit transactions totalling about K3,469.64 through electronic funds transfer at point of sale (EFTPOS) transactions for personal goods and services; and***
- (vii) Failed to properly acquit that public money;***

Thereby failing to carry out his obligations as a leader under s.27(1) and 27(2) and being guilty of misconduct in office under s.27(5)(b) of the Constitution.

Allegation 2

Having received K50,000.00 of public money in the form of a cheque from the Governor of Southern Highlands Province, Mr Anderson Agiru, drawn against the Southern Highlands Province Regional Member's Trust Account, being funds beneficially held for the development of the Southern Highlands Province, Mr Nali.

- (i) Deposited the cheque into his personal bank account No 111 29046 held at the Port Moresby branch of the ANZ Bank; and***
- (ii) applied a significant part of that public money to his personal use; and***
- (iii) made approximately 11 unverifiable and/or improper debit transactions totalling about K46,738.36 by writing out cheques to pay cash; and***
- (iv) made approximately 3 unverifiable and/or improper debit transactions totalling about K3703.30 by writing out cheques to 'Steel Industries' and 'Service Centre'; and***
- (v) made approximately 11 unverifiable and/or improper debit transactions totalling about K1,800.00 through automatic teller machine (ATM) withdrawals to obtain cash; and***
- (vi) made approximately 11 unverifiable and/or improper debit transactions totalling about K3,469.64 through electronic-funds-transfer-at-point-of-sale (EFTPOS) transactions for personal goods and services; and***
- (vii) failed to properly acquit that public money;***

thereby directly accepting a benefit and using his official position for the benefit of himself and being guilty of misconduct in office under S.5(1) of the Organic Law on the Duties and Responsibilities of Leadership.

Allegation No 4:

Having been allocated K600,000.00 of public money in the form of five cheques by the National Government under the Discretionary Support Grants, being funds intended for the development of the Mendi Open electorate in respect of the years 2001 and 2002, Mr Nali –

- (i) deposited those cheques into his personal bank account No 202 006 78152 held at the Waigani branch of the Papua New Guinea Banking Corporation; and***
- (ii) failed to ensure that the public money was properly applied to the rural infrastructure projects for which it had been allocated; and***
- (iii) applied a significant part of that public money to his personal use***

- and the use of his associates; and*
- (iv) made approximately 63 unverifiable and/or improper debit transactions totalling about K281,700.00 by writing out cheques to pay cash; and*
- (v) made approximately 15 unverifiable and/or improper debit transactions totalling about K95,500.00 by writing out cheques payable to individuals; and*
- (vi) failed to properly acquit that public money.*

*Thereby failing to carry out his obligations as a leader under s.27(1) and 27(2) and being guilty of misconduct in office under s.27(5)(b) of the Constitution.
Allegation No 5:*

Having received K600,000.00 from the National Government, being public money allocated for the development of the Mendi Open electorate in respect of the years 2001 and 2002, Mr Nali –

- (i) deposited those cheques into his personal bank account No 202 006 78153 held at the Waigani branch of the Papua New Guinea Banking Corporation; and*
- (ii) failed to ensure that public money was properly applied to the rural infrastructure projects for which it had been allocated.*
- (iii) Applied a significant part of that public money to his personal use and the use of his associates; and*
- (iv) Made approximately 63 unverifiable and/or improper debit transactions totalling about K281,700.00 by writing out cheques to pay cash; and*
- (v) Made approximately 15 unverifiable and/or improper debit transactions totalling about K95,500.00 by writing out cheques payable to individuals;*
- (vi) Failed to properly acquit that public money.*

Thereby directly accepting a benefit and using his official position for the benefit of himself and being guilty of misconduct in office under s.5(1) of the Organic Law on the Duties and Responsibilities of Leadership.

Applicants submission:

The applicant made the following submissions:

Ground 1:

The Leadership Tribunal erred in law in that it made findings of guilt in respect of Allegations 1,2,4 and 5 when notwithstanding that the Plaintiff deposited the subject funds into his personal account, there was no evidence before the Tribunal

that the Plaintiff or his relatives, benefited directly from the use of such funds, such that the Tribunal could make those findings of guilt.

- It was submitted by the Plaintiff that the Leadership Tribunal erred in law in that it made findings of guilt in respect of Allegations 1,2,4 and 5 when there was no evidence before the Tribunal that the Leader and his relatives, notwithstanding that he deposited the subject funds into his personal account, benefited directly from the use of such funds, such that the Tribunal could make those findings of guilt.
- In relation to allegations 1 and 2, the Tribunal found at p.15 par.3 of its Decision, that firstly the plaintiff didn't know the source of the funds. Secondly, that the funds came from Mr Agiru out of the Southern Highlands Provincial Government fund. Thirdly the Tribunal didn't believe the K50,000 payment to the Plaintiff was made without his "prompting".
- There is no finding – no evidence cited for the last conclusion or why such prompting would render the Plaintiff guilty of misconduct. If he did not know the source of the funds, why "he has to explain why he was paid that money from the public purse"
- Yet despite these conclusions, the Tribunal specifically found that the Plaintiff or his family "may not have benefited from the public money" On that finding alone the Plaintiff operation of by section 27(2) of the Constitution was not guilty of misconduct.
- In relation to allegations 4 and 5, these were the charges that were amended by the Tribunal under objection from the Plaintiff, that the amended charge constituted a substituted charge. It had not been through the referral process and there was no adjournment or time permitted for the Plaintiff to consider his evidence. These arguments are addressed fully under Ground 6 below.

Ground 2

"There appeared to be a real suspicion of bias and partiality when the Leadership Tribunal held that the Leader had the onus to explain and had not explained how and why he received funds under allegations 1 and 2 when he did explain such in his evidence."

- It is submitted by the Plaintiff that there appeared to be a real appearance of bias and partiality when the Tribunal held at p.15 and para.3 of its Decision that the Plaintiff had the onus to explain and had not explained how and why he received funds under allegations 1 and 2, when at p.14 of the same Decision the Plaintiff explains such in his evidence. The plaintiff had also given his evidence of his explanation relating to allegations 1 and 2, which his contained at pp.867 to 897 of Exhibit A (Volume 3).
- The Supreme and National Courts have considered the tests for bias. The

decisions of BOATENG V THE STATE [1990] PNGLR 342, NILKARE V THE OMBUDSMAN COMMISSION (1996) SC498 AND DIRO V JUSTICE AMET & ORS. [1995] PNGLR 411 have essentially adopted the statement from R v Liverpool City Justices; Ex parte Topping [1983] All ER 490 at p.494:

- *"Would a 'reasonable and fair minded person sitting in a court and knowing all relevant facts have a 'reasonable suspicion that a fair trial for' the appellant was not possible'?"*
- These cases have also adopted the principle of Lord Hewart CJ in R V SUSSEX JUSTICE; EX PARTE McCARTHY (1924) 1 KB 256 that:
- *".... A long line of cases shows that it is not merely some importance but is of fundamental importance that justice should not only be done, it should manifestly and undoubtedly be seen to be done.... Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".*
- Hinchliffe J in Diro (supra) stated at p.421 that:
- The applicant submitted that in the light of the Plaintiff's explanation given in his evidence at the Tribunal proceedings that he assumed the K50,000.00 he had received had come from Mr Agiru's discretionary fund and on that basis he acquitted the funds to Mr Agiru and copied the acquittals to the Office Rural Development, the Tribunal did give an appearance of bias and partiality when it stated that he had to explain why he was paid the money from the public purse and why he used his private account to keep and use the money. The plaintiff's explanation was backed by his own actions as the Tribunal found.
- The placing of the onus on the Plaintiff to prove that there had been no misconduct was a fundamental breach of the Plaintiff's right to a fair process.
- There might well be a requirement for a person to provide facts particularly within his knowledge. That had been done – the Plaintiff had given evidence of his knowledge of the relevant matter. The tribunal record of this is summarised at p.14 of its Decision. The full text of his evidence is at pp.867 to 897 of Exhibit A (volume 3).
- Significantly the Plaintiff's evidence is supported by his subsequent actions of accounting for the funds as the Tribunal found including the fact that he did not personally benefit.
- It was submitted that,, what the Tribunal failed to do was to assess that evidence, the Plaintiff's evidence and give reasons why it did not accept it.
- It is respectfully submitted that to any reasonable person such a statement that the plaintiff had the onus to explain why, when in fact he did explain would have given a reasonable appearance of bias and partiality on the part of the Tribunal.

Ground 3

The leadership Tribunal after finding that the Leaders may not have personally benefited from the funds under allegations 1 and 2, unreasonably and irrationally held that the Leader did use the funds for his own benefit after he improperly and illegally received it in the first place".

- the Plaintiff submitted that the Tribunal after finding that the plaintiff may not have personally benefited from the funds under allegations 1 and 2, nonetheless unreasonably and irrationally held that the Plaintiff did use the funds for his own benefit after improperly and illegally receiving it in the first place.
- The Tribunal at para.3 of p.16 of its Decision stated that the Plaintiff "may not have personally benefited from the public money but the inference is overwhelming that the monies were used for his own benefit having improperly and illegally received it in the first place."
- The Plaintiff submitted that the above statement made by the Tribunal was unreasonable and irrational on the face of it. In the first part there was no evidence that the Plaintiff received the money knowing he was acting illegally. Despite the Tribunal finding that the plaintiff may not have personally benefited from the public money, in the second part they state that he used it for his own benefit.
- It was submitted that such a decision must be seen as irrational as it is not only contradictory in itself but offers no explanation for the contradictions.
- Once the fact was established by the Tribunal that the Plaintiff had not personally benefited from the moneys – it was not logical – to say that the leader did in fact benefit.

Ground 4

The leadership Tribunal unreasonably and irrationally made findings that the leader had recently invented "Exhibit W" when there was no factual or legal basis for such a finding.

- The applicant submitted that the Tribunal unreasonably and irrationally made findings that the Plaintiff had recently invented "Exhibit W" at pp.19 to 20 of its decision, when there was no failure to cross-examine and no inconsistency in the plaintiff's evidence.
- This ground is founded on serious breach of procedural fairness. At p.19 para.4 of its decision the tribunal states that it "suspects that Exhibit W is a recent invention".
- It was submitted that this is based wholly on the Tribunal's ruling on the way the applicant conducted his defence on this issue, cross examination or lack of cross-examination, supplying evidence which the prosecution couldn't prove.
- The positive evidence is not assessed by the Tribunal against the prosecution evidence. It is simply suspected it as being a recent invention,

and the Plaintiff not believed.

- The plaintiff carries no onus in the Leadership proceedings other than supplying information particularly within his knowledge. This is provided for under s.37(4)(a) and (f) of the Constitution. The Plaintiff is entitled to give evidence and have his evidence tested but he has no obligation to conduct his defence in a particular way.
- The issues under this allegation are raised again at Ground 9 in these proceedings.

Ground 5

The leadership tribunal unreasonably and irrationally made findings that the Leader's failure to create a trust account in relation to allegations 4 and 5 was improper when the creation of such a trust account by a Leader was contrary to and in breach of s.15 of the Public Finance (Management) Act.

- the plaintiff submits that the Tribunal unreasonably and irrationally made findings that the Plaintiff's failure to create trust accounts in relation to allegations 4 and 5 was improper when it also made findings that the creation of such a trust account was in fact prohibited and therefore illegal i.e. that it was contrary to section 15 of the Public Finance (Management) Act 1995.
- Section 15 of the Public Finance (Management) Act 1995, provides:

21. Establishment of Trust Accounts

Within the Trust Fund, Trust Accounts may be established as directed by the Minister or prescribed by any other law –

- (a) To receive moneys held by the State as Trustee;***
- (b) To receive the proceeds of commercial or trading activities carried on by any arm, agents or instrumentality of the State; or***
- (c) For such other purpose as may be approved by the Minister.***

- At p.13 par.4 of its decision, the Tribunal correctly noted that s.15 of the Public Finance (Management) Act, authorized the Minister for Finance to approve the establishment of Trust Funds. It further noted that any trust fund operated outside the Finance Minister's "approval is deemed illegal under the Act".
- At p.13 par.4 of its Recommendations on Penalty, the Tribunal stated that the K50,000.00 payment from Mr Agiru was paid to the Plaintiff "from a purported Public Trust Fund established outside the Public Finance (Management) Act and therefore an illegal trust fund.

- At p.29 par.4 of its decision, the tribunal found that current and past Members of Parliament had opened trust accounts from their District Support Grant funds. The tribunal noted that these members trust accounts may have not been legally established under s.15 of the Public Finance (Management) Act (p.30par.1), thus intimating that these trust accounts were illegally created.
- The creation of a trust account outside section 15 of the Public Finance (Management) Act 1995, by a Leader is contrary to section 15. This position is clearly noted by the Tribunal in its statements above.
- continuing at p.30 of its decision, the Tribunal in effect held that the plaintiff's failure to create an illegal trust account for funds in relation to allegations 4 and 5 was improper and with respect irrational.
- the plaintiff therefore submits that the tribunal unreasonably and irrationally made findings, at pp.29 to 30 of its decision, that the plaintiff's failure to create trust accounts in relation to allegations 4 and 5 was improper when the creation of such an account by a leader was noted by the tribunal to be contrary to s.15 of the pf at pp.29 to 30 of its decision, that the plaintiff's failure to create trust accounts in relation to allegations 4 and 5 was improper when the creation of such an account by a leader was noted by the tribunal to be contrary to s.15 of the Public Finance (Management) Act 1995.
- Simply stated the Tribunal's conclusion was irrational and Wednesbury unreasonable when it said in effect that to be honest, the Plaintiff as a Leader should have created a trust account even though to do so would be illegal.

Ground 6:

The Leadership Tribunal acted ultra vires when it allowed and made amendments to allegations 4 and 5 of the charges against the Leader. That is, that the words "District Development Program" were amended and replaced with the words "District Support Grants", and the figure "K610,000.00" was amended and replaced with the figure "K460,000.00" in allegations 4 and 5. Thereby re-drawing the charges to the prejudice of the Plaintiff and in excess of its powers contained in section 28(1)(g) and (1a) of the Constitution and s. 27(4) of the Organic Law on Duties and Responsibilities of Leadership.

- The Plaintiff submitted that the Tribunal acted ultra vires and in excess of its jurisdiction when it amended allegations 4 and 5, which was outside its powers to "investigate and determine" and "inquire into" matters "referred" to it under s.28(1)(g)(i) of the leadership Code and s.27(4) of the Organic Law on the Duties and Responsibilities of Leadership.
- This ground refers to the Tribunal's ruling contained at p.8 of its Decision, its findings at p.36 par.5 of the decision, Schedule 4.1 and pp.425 to 428, pp.451 to 490 and pp.551 of Exhibit A volume 2.

- The duties of the Tribunal are prescribed by s.28(1)(g) and (1)(a) of the Constitution and s.27(4) of the **Organic Law on Duties and Responsibilities of Leadership**.
- Under s.28(1)(g) of the Constitution and s.27(4) of the **Organic Law on Duties and Responsibilities of Leadership**, the Leadership Tribunals that are established under these laws are duty bound to investigate and determine any cases of... misconduct in the office referred to them" and to "make due inquiry into the matter referred.... Without regard to legal formalities or the rules of evidence, and may inform itself in such a manner as it thinks proper, subject to compliance with the principles of natural justice" (Emphasis by the writer).
- The Tribunal relied on the decision of Jerry Singirok v Hon Justice Jalina and Ors N.2068, for dealing with the issues of amendment of the cases. That decision only dealt with the plaintiff, Jerry Singirok, being wrongly charged under s.12(1)(a) of the **Organic Law on Duties and Responsibilities of Leadership** when he in fact was found guilty of misconduct under s.12(1)(c) for which he was not charged under.
- The tribunal at pp.554 to 555, relied on Sheehan J's statement contained at p.9 of the Singirok case where he said:-

"While failure to cite the appropriate sub paragraph of section 12 can be said to be an error of law on the face of the record, the discovery of error is not a self executing invalidation of the Tribunal finding In Judicial Review the determination of the appropriate relief, if any, remains in the discretion of the Court. In this case I am satisfied that such error is quite insufficient to have any finding of the Tribunal set aside because it is not an error in any way affecting the substance of the decision.

The misquotation of the enumeration of the appropriate sub paragraph of s.12 detailed and set out in the charge and in the Tribunal's decision, was, I am satisfied an insignificant error. The charge itself clearly states and shows the intent of the charge, one clearly understood and addressed by the Tribunal. Equally clearly, there was no misapprehension of the nature and content of the charge on the part of the applicant."

- At p.10 Sheehan J further stated:

"Nor could it be said that the error of enumeration in allegation two (2) has prejudiced the applicant in any way or caused him injustice. Such could only be said to have occurred if the error precluded him from raising some valid defence that would lead as of right to a finding that he was not guilty of the charge. The allegation which was correctly understood by the applicant

counsel and the Tribunal alike does not support such claim. I am satisfied that had the error as to the proper sub-section been adverted to at any time during the Tribunal Inquiry there would have ready acknowledgement by all parties that the correct citation was section 12 (1) (c) and the appropriate amendment made".

- The applicant submitted that the Singirok case did not deal with an application for an amendment. In fact it dealt with a minor matter which went to the facts as they were understood by the parties. There was no alteration or change of the charge – the charge understood and argued by all parties was simply incorrectly ‘named’ by or even in citation of the appropriate section.
- In the present case, the evidence the Plaintiff was to have responded to before the amendment was made, related to the facts that were contained in the original charges. Had the charge proceeded as it was referred and for which the Plaintiff had prepared his defence, he would have successfully defended it. He would have been entitled to an acquittal – a finding that he had not been guilty of misconduct.
- The applicant submitted that if he was not acquitted he was obliged to face a fresh charge for which he had not been referred, had not been charged for by the Public Prosecutor and for which inadequate opportunity was given for him to respond.
- The Applicant submitted that in any event this Honourable Court should adopt the statements of the Leadership Tribunal in Re Andrew Kumbakor (2003) N2363 relating to a Leadership Tribunal’s duties at p.4 where it said:-

"The tribunal’s duty to ‘inquire’ or ‘investigate and determine’ the matter referred to it is not intended to confer on the tribunal the traditional prosecutorial function of the Public Prosecutor... The tribunal’s function is to simply inquire into and determine the truth or otherwise of these allegations, without resort to technical rules of procedure and evidence. Its powers include summoning relevant documents and witnesses to give evidence and/or relevant documents, which may be over-looked by the parties."

- The Applicant submitted that a Leadership Tribunal’s inquiry is restricted to those allegations of misconduct in office referred to it as pleaded in the referral document. He said Leadership Tribunals have no inherent or conclusive jurisdiction to alter or re-draw those allegations or charges of the referral where the alteration has the effect, as it did here, or substantially changing the nature of the charge.
- It could not be said that changing an allegation from "you stole K610,000 from the District Development program" to "You stole

K460,000 from the District Support Grants," is not a major change of charge. The Plaintiff further submits that the time given to the Plaintiff to consider the amendments before having to proceed was inadequate and prejudiced his defence preparation to respond and defend the amended charge.

- It is submitted that this Honourable Court adopt the statements in Kumbakor (supra) at p.5 of that decision that:-

"There is one other important jurisdictional point to make. The scheme of provisions of the Leadership Code and the ORGANIC LAW ON DUTIES AND RESPONSIBILITIES OF LEADERSHIP is that the tribunal's jurisdiction to inquire into the matter before it is defined by reference to the matter "referred" to it by the Public Prosecutor. In the past as in the present case, the Public Prosecutor developed the practice of presenting formal charges of misconduct in office, which made reference to the relevant duty in the Constitution and the ORGANIC LAW ON DUTIES AND RESPONSIBILITIES OF LEADERSHIP and the relevant factual parties. These charges are accompanied by the Statement of Reasons prepared by the Commission as required by the ORGANIC LAW ON DUTIES AND RESPONSIBILITIES OF LEADERSHIP, s.27(2). It is our view that the tribunal's inquiry is restricted to those allegations of misconduct in office as pleaded in the referral documents. The tribunal itself has no power to alter or re-draw those allegations or charges as it pleases.

As to the security of the evidence, the evidence must support the wording of those charges in order to sustain the charge. And because the consequences of the most serious kind flow from the allegations, the standard is indeed a high one: in re James Eki Mopio, ante. For it would constitute a denial of natural justice for a leader to be called upon or expected to answer an allegation which does not form part of the charges 'preferred' against him".

A Leadership Tribunal convened under the provisions of s.27 of the Leadership Code is in the nature of an ad hoc executive or administrative inquiry.

- Although it has the widest of powers of inquiry particularly in relation to the reception of evidence, it is nevertheless limited, as we have already observed by the requirement to observe the rules of natural justice.
- It is however, not an open-ended inquiry, or one which has a boundless jurisdiction. There are other limitations to its jurisdiction. For example, it is submitted that the jurisdiction of a Leadership Tribunal is strictly limited by the terms of reference contained in the referral made to it by the Public Prosecutor.

- As a statutory creature of the leadership Code, Leadership Tribunal has no 'common law' or 'inherent' jurisdiction or indeed any "reserve powers".
- In the present case the Tribunal's jurisdiction was determined in part by the terms of the reference contained in the Referral made to it by the Public Prosecutor dated 31 October 2004.
- The Plaintiff therefore submits that the Tribunal had no jurisdiction to amend alter or re-draw the charges or the Referral. The applicant submitted that he tribunal in amending allegations 4,5 and 7 thus acted in excess of its jurisdiction and ultra vires to inquire into the matter referred to it.

Ground 7

The Leadership Tribunal unfairly and in breach of the rules of natural justice allowed evidence i.e. 'Exhibit N7' to be tendered late during the hearing when such evidence was never disclosed to the Plaintiff at anytime before the Tribunal conducted its hearing.

- The Plaintiff submits that the Leadership Tribunal unfairly and in breach of the rules of natural justice allowed evidence i.e. 'Exhibit n.7' to be tendered late during the hearing when such evidence was never disclosed to the Plaintiff at anytime before the Tribunal conducted its hearing.

Ground 8

The leadership Tribunal acted unfairly and in breach of the rules of natural justice because the time allowed to the Leader to prepare his defence was insufficient causing prejudice to the Leader.

- The plaintiff submits that the Leadership Tribunal acted unfairly and in breach of the rules of natural justice because the time allowed to the Plaintiff to prepare his defence was insufficient causing prejudice to the Plaintiff.
- This ground relates to the charges that were amended by the Tribunal under objection from the plaintiff that the amended charge constituted a substituted charge. It has not been through the referral process and there was no adjournment or time permitted for the Plaintiff to consider his defence.

Ground 9

There appeared to be a real appearance of bias and error of law on the part of the Leadership Tribunal by it holding that the weight to be given to the Leader's evidence should be discounted because of the order of the evidence given in the Leader's defence.

- The Applicant submitted that there appeared to be a real appearance of bias and error of law on the part of Leadership Tribunal by it holding that the weight to be given to the Plaintiff's evidence should be discounted because of the order of the evidence given in the Leader's defence.
- The Tribunal's reasons for discounting the Plaintiff's evidence are contained at p.10 of the Decision of Schedule 4.5.
- Section 27(4) of the Organic Law On Duties and Responsibilities of Leadership which provides that inquiry may be made without recourse to legal formalities does not overthrow the basic principles of natural justice and the right to be heard.
- There are two aspects of this argument. Firstly the Tribunal is not obliged and more importantly is not entitled without proper notice to impose any order of giving of evidence. The Tribunal in this instance did not give any such order.
- Secondly the Plaintiff was not obliged to give evidence or follow any particular order of giving evidence.
- The English decision in *BRISCOE V BRISCOE (1967) PD 501*, established the principle that it is a breach of procedural fairness for a tribunal to refuse to allow a party to call his witnesses in the order that he thinks best, if there is a real possibility of prejudice to the effective presentation of the case. See also *BARNES V B.P.C (Business forms) Ltd (1975) 1 All ER 237*.
- It was submitted that this constituted a fundamental breach of the right to be heard s.37(4)(f) of the constitution provides the right to give evidence and call witnesses – the same manner as the prosecution.
- It was submitted that the prejudice to the Plaintiff was plain. The whole of his evidence was discounted because of the order of his witnesses, not his demeanour or the substance of his evidence. His credibility was destroyed in the eyes of the tribunal because of the order he called his witnesses.
- It was submitted that such a finding was tantamount to prejudicing the Plaintiff unheard. At the very least, rather than proceeding from a presumption of innocence till full examination of the evidence was made, he was from the moment of the commencement of his defence viewed with suspicion. This is apparent in the Tribunal's decision at p.10 and Schedule 4.5
- Under such circumstances the applicant submitted that the Tribunal conduct of the inquiry was flawed and in breach of natural justice.

Ground 10

The Leadership Tribunal erred in law when determining penalty by failing to give sufficient or proper weight to its own finding that the leader never intentionally applied public money to purposes to which it could not lawfully be applied.

- The Applicant submitted that the Tribunal erred in law when in recommending the penalty to be imposed against the Plaintiff it did not give sufficient weight to its own findings at pp.21 and 49 of its decision, that the Plaintiff never intentionally applied public money to purposes to which it could not lawfully be applied.
- He further submitted that at p.21 of its decision, the Tribunal acquitted the Plaintiff of allegations 2 which charged the Plaintiff of having intentionally applied the same funds under allegations 1 and 2 which were public monies to any unlawful purpose.
- At p.49 of its decision the Tribunal acquitted the Plaintiff of allegation 7 which charged the Plaintiff of having intentionally applied the same funds under allegations 4 and 5 which were public monies to any unlawful purpose.
- These findings were not considered nor given proper weight or consideration when the Tribunal recommended the penalty of dismissal from office against the Plaintiff.

Ground 11

The Leadership Tribunal erred in law in determining the penalty against the leader when it did not give sufficient and proper weight to the conduct of the Finance Department, the Office of Rural Development and Mr Anderson Agiru, as extenuating circumstances.

- The Applicant submitted that the Tribunal erred in law in determining the penalty against the Plaintiff when it did not give sufficient and proper weight to its own findings on the conduct of:
- Anderson Agiru at pp.13 to 15 of its Recommendations on Penalty in respect of allegations 1 and 2; and
- The Finance Department and office of Rural Development at p.18 in relation allegations 4 and 5,
- Of its Recommendations on Penalty.
- In relation to Mr Agiru, the most important fact that went towards supporting allegations 1 and 2 was the fact that Mr Agiru had created a trust account styled "SHP Regional Members Trust Account Hon. Anderson Agiru" (the SHP Trust Account), which was outside the authority and approval of s.15 of the Public Finance (Management) Act 1995.
- The Tribunal had found the Plaintiff deposited funds from an illegal sources into his personal account. It did not find that the Plaintiff was aware of such illegality and there was no evidence offered on which it might be so. The Tribunal had found that there was no intention on the part of the Plaintiff in creating this illegal account, which had been created by Mr Agiru in November 1998.

- Apart from finding that the Plaintiff did put the K50,000 into his personal account, it had not been found that he personally and directly benefited from these funds. In fact the Tribunal had acquitted the Plaintiff of intentionally applying the same funds to unlawful purposes at p.21 of its decision.
- The Applicant therefore submitted that the Tribunal erred in law in not giving proper and sufficient weight to the conduct of Mr Agiru when it imposed the penalty of dismissal from office against the Plaintiff.
- In relation to the conduct of the Finance Department and the Office of Rural Development, the Tribunal found that the Plaintiff received a total of five (5) cheques to the total amount of K600,000.00 from the Office of Rural Development for the discretionary component of the District Support Grant for 2001 and 2002. The Tribunal at para.5 of p.18 of its Recommendations on Penalty stated that "it was the Finance Department and the ORD that were responsible for those unlawful payments in the first place so that it can be said the payment into his (the Plaintiff's) private account was intended by those two bodies".
- Thus it was submitted that the Tribunal erred in law in not giving proper and sufficient weight to the conduct of the Finance department and the office of Rural Development when it imposed the penalty of dismissal from office against the Plaintiff.

The respondent made the following submissions

For myself at the outset I find the charges or the allegations are rather lengthy. One has to try very hard to understand what the charges are. I have read the allegation and then go to Section 27(1) and Section 27 (5) of the constitution to make some sense out of the changes.

Section 27 (1) reads:- my understanding and construction of s.27(1) is that each of the subclauses (a) (b), (c) and (d) create distinct and separate charges. This is because of the use of the word "or" at the end of subclauses (a) (b) and (c). For instance a leader who placed himself in a position in which he has or could have a conflict of interest or might be compromised when discharging his public or official duties should be charged for that offence on its own under s.27(5)(b) of the Constitution. What I am saying is that if a person is in breach of all, (a), (b), (c) and (d) of s.27(1) then 4 separate charge should be laid. If he is alleged to have breached subsection (1) (a) then the charge should be laid for breach of subsection (1)(a) only.

I only make these remarks because the allegations or the charges in this case are lengthy and cumber some. I note however, that this is not one of the grounds for review although I note that it was raised during the course of the tribunal proceedings.

I now turn to address the various grounds for review:

Ground No 1:

The leadership Tribunal erred in law in that it made findings of guilt in respect of Allegations 1, 2, 4 and 5 when there was no evidence before the Tribunal that the leader and his relatives, notwithstanding that he deposited the subject fund into his personal accounts, benefited directly from the use of such funds, such that the Tribunal could make those findings of guilt.

There was no direct evidence that the leader and his relatives benefited directly from the use of the K50,000.00. That is clear from the evidence.

The Tribunal however received evidence that the leader had received K50,000 of public money. The Tribunal considered this evidence as not disputed. It was not disputed that the K50,000 was deposited in to the leaders private cheque account No 11129046 held at the ANZ Bank, Port Moresby Branch on 31 July 2000. At that time, the account had a credit balance of K503.62. Various withdrawals, payments, cash cheques with drawls, ATM withdrawals and Electronic Funds Transfers at Point of Sale (EFTPOS) were made. The closing balance from total credits and debits during the period 31 July 2000 to 21 august 2000 was K930.00. This meant that within 3 weeks of the deposit of the K50,000 into the leaders account the money was gone. The question then was how was the money expended? The leader is said to have acquitted to Anderson Agiru how the money was spent.

An acquittal from was produced in evidence. The tribunal did not believe the evidence. In dealing with the issue of how the money was spent and who might have spent it the Tribunal said:-

"Having considered that the payment to Mr Nali of the K50,000 was illegal he had improperly converted that money by depositing it into his private account. That is a personal account with which he conducts his private bank transaction and over which he retains the sole signatory, authority and control In our view it is open on the evidence and from the manner in which the public fund was used with speed, to infer a fraudulent intention on the part of the leader in receiving the cheque and banking the proceeds into his private bank account".

While there was a no direct evidence of the leader applying the money for his personal use or the use of his relatives the Tribunal inferred that he did. Was the Tribunal entitled to draw inferences of the leader, using the money for his personal use or for the use of his relatives? The fact that the money was deposited into his personal bank account and that he was the sole signatory to the account and that the monies were withdrawn and depleted quite speedily were reasons enough for the tribunal to draw inferences against the leader. Moreover a copy of the acquittal form to Anderson Agiru was treated as being fabricated recently. For the Tribunal to have come to that, finding is a matter that was within the ambit of its powers and discretions to either accept it or reject it. It was open to the Tribunal.

Likewise I am of the view that it was open on the evidence that was before it for the Tribunal to draw the inferences it did. I would therefore not tamper with the Tribunal's findings and I would dismiss this ground in so far as it relates to Allegations 1, 2, 4 and 5.

Ground 2:

"There appeared to be a real suspicion of bias and impartiality when the Leadership Tribunal held that the leader had the onus to explain and had not explained how and why he received funds under allegations 1 and 2 when he did explain such in his evidence."

I have on file the decision of the Tribunal which is annexed to the Affidavit of Michael Nali sworn and filed on 3 August 2004 which is document number 2 on the file.

The applicant had submitted that there appeared to be an appearance of bias and partiality when the tribunal at page 15 paragraph 3 of its decision held that the plaintiff had the onus to explain and had not explained how and why he received funds under allegations 1 and 2 when at page 14 of the same decision the plaintiff explains such in his evidence.

I note however that the Tribunal on page 18 paragraph 1 of the decision said:

"We do not believe that Mr Agiru had simply paid the leader without any prompting on the leader's part. He has to explain why he was paid that money from the public purse and why he used his private account to keep and use it at his will".

In that passage, the Tribunal said it did not believe that Mr Agiru had paid the K50,000 without the leader asking or requesting it. In other words the Tribunal is saying the leader could or may have asked or requested the money from Mr Agiru. The evidence is that the leader did not know why the K50,000.00 cheque was paid by Mr. Agiru under the name of the leader.

The leader had assumed that the K50,000.00 had come from Mr Agiru's discretion fund. If it had come from Mr Agiru's discretion fund the cheque should have been written out to the District Support Grant Fund and not to the Leader. Here the cheque was written out to the leader in person although he said he did not.

The Tribunal obviously did not accept the leader's version of why and how the money came in the cheque being written out in the name of the leader and deposited in his private account. That therefore is not a matter this court can review. It was in the Tribunal's power to either accept or reject the leader's evidence at the hearing.

In that regard I reject this ground of review.

The Tribunal was of the view that if the cheque was written out in the leaders name and deposited into the leaders personal account, the leader must have asked or requested Mr Agiru for the money. That inference may have been from the overall evidence before the tribunal.

Ground 3

The leadership Tribunal after finding that the leader may not have personally benefited from the funds under allegation 1 and 2, unreasonably and irrationally held that the leader did use the funds for his own benefit after he improperly and illegally received it in the first place".

The tribunal said:

"In this count, the leader is alleged to have applied a significant part of the K50,000.00 public money to his personal use. This allegation is without direct evidence. However it is clear from the evidence that leader made numerous drawings from his personal account No 11129046 after he had deposited K50,000.00 into the account....."

The tribunal considers that, the leader in depositing the K50,000 into his personal account, he is treating it as his own and had thereby converted the money into his personal property. He had unrestricted access to that account and transacted on at his own time and would distribute it at his own choosing. He may not have personally benefited from the public money but the inference is overwhelming that the money were used for his own benefit having, improperly and illegally received it in the first place". (underlining mine)

It is the underlined part of the judgement that is being complained of. Various interpretations can be made of that statement. One is entitled to interpret the passage the way it suits him. Various interpretations are open.. There is no direct evidence the leader benefited from the public money but the inference that he did personally benefit from the money is overwhelming taking into account that he improperly and illegally received it in the first place. Only the Tribunal can say with any certainty as to what it meant when it said that. I do not think the Tribunal in that statement made a definitive finding that the leader did not benefit personally from the public money. The use of the words "**but the inference is overwhelming**" lends support to the proposition that there was no definitive finding that the leader did not personally benefit from the money. I think it was rather a choice of words that the applicant is trying to play around with here.

Is there any process to review in this instance in so far as this allegation is concerned. The tribunal had found earlier that Mr Agiru was illegally maintaining a Trust Account which was against the Public Finance Management Act and therefore any funds coming out of that fund was illegal. Whether the applicant knew that fact did not matter or made no difference.

In the circumstances I dismiss this ground.

Ground 4:

The Leadership Tribunal unreasonably and irrationally made findings that the leader had recently invented "Exhibit W" when there was no factual or legal basis for such a finding.

The applicant submitted that the tribunal unreasonably and irrationally made findings that the plaintiff had recently invented "Exhibit W" when there was no failure to cross examine and no inconsistency in the applicant's evidence.

This is what the Tribunal said in relation to the ground of review raised by the applicant.

"The seventh allegation in Count 1 relates to the leaders failure to acquit the K50,000.00. The allegation is that Mr Nali failed to properly acquit that public money. The evidence is that the leader did acquit K50,000.00. However, the question of proper acquittal arises directly from the evidence.

The leader had testified that he had acquitted the K50,000.00 to Mr Agiru and copied the acquittals to the ORD. That was the first time the tribunal was made aware of the existence of any disbursement or acquittal concerning the K50,000.00 of public fund. The only reference up to that point in time was the statement in the affidavit of Kanuaba Kizana that he had made a thorough search of the records of the ORD but could find no trace of the disbursement and acquittal for the K50,000.00

Mr Kizana was later called to verify the reimbursement of K150,00.00 by the leader to the State. That was also the opportunity for the leader to cross-examine the witness on his affidavit statement. However, Mr Kizana was not tasked one question about his statement. Even so, the crucial omission was the leader's failure to then produce to the witness, copies of his disbursement and acquittal forms which he has now produced and marked as Exhibit 'W'. He also had an earlier opportunity to disclose those documents to the Ombudsman Commission or the Public Prosecutor and if he did, that would have been consistent with what he now claims. The only person who could verify Mr Nali's assertions in Mr Anderson Agiru. There is no evidence from Mr Agiru before us.

The Tribunal suspects that Exhibit 'W' is a recent invention and that the documents had been manufactured in the course of these proceedings. We find support for that view from a number of factors.

(i) the failure to cross examine the Prosecution witnesses on the acquittal

by the leader. There were a number of witnesses from the ORD who gave evidence and the leader's version should have been put to anyone of them. Putting the version one relies on in cross-examination of the witnesses goes to the issue of consistency and reliability when conflicting evidence are weighed up at the end of all the evidence.

- (ii) The manner in which the disbursements and acquittal documents were introduced into evidence appeared calculated other than expected because of its belated introduction into evidence and only after it became obvious that there was no record found in the ORD filing system for those documents;*
- (iii) The leader's own evidence that he signed the disbursement and acquittal forms on the same day of withdrawal and payment of the money to the recipient in contradicted by his omission to file disbursement and acquittal for Patricia Urum. We do not accept his explanation that it was a simple omission.*
- (iv) The documents in Exhibit W consisted of selective additions of cheques payments.*

We do not believe the leader and find that he had not acquitted the funds as alleged ".

The tribunal suspected that Exhibit W was a recent invention. The tribunal gave its reasons why it suspected Exhibition W as a recent invention.

The reasons the tribunal gave to suspecting the Exhibit W as a recent invention in my view were reasonable and logical. The tribunal was in a better position to make those findings than I find myself in. Moreover in my view it was open to the tribunal to make those findings. In the end the tribunal said in no uncertain terms "*We do not believe the leader and find that he had not acquitted the funds as alleged*" I find nothing wrong with that statement. Accordingly I dismiss this ground of review.

Ground 5:

The leadership tribunal unreasonably and irrationally made finding that the leader's failure to create a Trust account in relation to allegations 4 and 5 was improper when the creation of such a trust account by a leader was contrary to and in breach of section 15 of the Public Finance (Management) Act.

The applicant submitted that the tribunal unreasonably and irrationally made findings that the plaintiff's failure to create trust accounts in relation to allegations 4 and 5 was improper when it also made findings that the creation of such a trust account was in fact prohibited and therefore illegal that is it was contrary to section 15 of the Public Finance (Management) Act.

This is what the Tribunal noted and stated on page 16 of the decision:

Source of Funding of K50,000.00 for Mr Anderson Agiru

The affidavit of Mr Simon Frazer, Auditor and Liquidator of Pricewaterhouse Coopers, Chattered Accountants, states that the SHP Trust Account held funds deposited from various sources including the Southern Highlands Provincial Government, Electoral Development Program funds and funds from the Petroleum Resources (Kutubu) Ltd. Mr Frazer states and we agree with his conclusion that the Trust Account held funds beneficially owned by the Southern Highlands Provincial government, albeit, the State. The Trust Account held public money. The payment of K50,000.00 to Mr Nali was therefore made from public funds.

There is nothing before us verifying the legal basis and purpose of the SHP Trust Account. However, it might be inferred from the Audit Report the trust fund was set up by the former Governor of Southern Highlands province, Mr Anderson Agiru to transfer funds out of the Southern Highlands Provincial Government allocation and away from the Provincial Treasury and bureaucratic process into an account where he would retain the sole management, control and discretion over its use. Between November 1988 and April 2002 the SHP Trust Account held K2,346,000.00

Mr Agiru may have had good intentions in dealing with public money in that manner. However we could find no legal basis for that Trust Account. S.15 of the Public Finance (Management) Act, authorizes the Minister for Finance to approve the establishment of Trust Funds. Any trust fund operated outside the approval is deemed illegal under the Act. The list of public Trust Accounts established by the Minister does not include the SHP Trust Account (Exhibit 'R'). We conclude that the SHP Trust Account was an illegal Trust Account. It follows that any payment out of that fund to any individual including Mr Nali would be illegal payment."

My understanding of what the Tribunal said is this. The tribunal found that K50,000.00 paid to the leader came from a Trust Fund which was not approved by the Minister for Finance. That Trust Fund was operated by Mr Anderson Agiru. Mr Agiru had no approval from the Minister to maintain that Trust Fund. That Trust Fund was therefore being operated contrary to s.15 of the Public Finance (Management) Act by Mr Agiru. It was therefore an illegal Trust Fund.

The tribunal found that the K50,000.00 which was public money was deposited into the leaders private bank account.

The tribunal was making the point that for the leaders to be doing things properly Mr Agiru ought to have obtained approval from the Minister for Finance to operate the Southern Highlands Province Government Trust Account in compliance with s.15 of the

Public Finance (Management) Act and Mr Nali in this case should have established a Trust Fund and sought approval from the Minister for Finance to operate a Trust Fund that all public monies would have been put in such a Trust Account. That to my mind is the point being made by the Tribunal. There is nothing to review in this ground.

In that regard I would dismiss this ground of review.

Ground 6:

The Leadership Tribunal acted ultra vires when it allowed and made amendments to allegations 4 and 5 of the charges against the leader. That is, that, the words "District Development program" were amended and replaced with the words "District Support Grant" and the figures K610,000.00 was amended and replaced with the figure K460,000.00 in allegations 4 and 5. Thereby redrawing the charges to the to the prejudice of the plaintiff and in excess of its powers contained in Section 28(1)(1)of The Constitution and s. 27(4) of the ORGANIC LAW ON DUTIES AND RESPONSIBILITIES OF LEADERSHIP ".

I remind myself of the law in relation to Judicial Review application. As held by the Supreme Court in the case of ***KEKEDO v BURNS PHILIP (1988-89) PNGLR 122***. The purpose of judicial review is not to examine the reasoning of the subordinate authority with the view to substituting its own opinion. Judicial Review is concerned not with the decision but with the decision making process.

I have had the benefit of reading schedule 4.1 Ruling on the Power of the Tribunal to Amend Referral.

The question was did the tribunal have jurisdiction to amend the charges. The tribunal in this case thought they did and gave their reasons for saying that they had the power to amend the charges. They referred to case authorities decided previously to support their position. They also referred to the relevant laws and justified their reasons for holding that the tribunal had jurisdiction to amend the charges. Taking into account the law relating to judicial review applications the next question is, Is there anything untoward against the tribunal in its decision making process. Is there anything wrong done by the tribunal in its decision making process to say it had jurisdiction to amend the charges. At this juncture there is no definitive decision on the issue by the Supreme Court. The decisions that have been referred to me are National Court decisions. One National Court decision appears to suggest the Tribunal has no discretion or power on its own to amend the charges while another appears to be saying it has the power to amend if any application is made to it to amend the charges. The tribunal in this case has given its reasons for saying that the tribunal has power to amend the charges. In my view it is arguable and therefore was open to the tribunal to make that finding. Until such time the Supreme Court makes a definitive ruling on this matter I find that it was open to the Tribunal to make or come to that finding.

In the circumstances I dismiss this ground of review.

Ground 7

The ground was abandoned at the hearing.

Ground 8:

"The Leadership Tribunal acted unfairly and in breach of the rules of natural justice because the time allowed to the leader to prepare his defence was insufficient causing prejudice to the leader".

This ground arose as a result of the amendment made by the Tribunal. The applicant submitted that once the amendments were made by the Tribunal under objection, it acted unfairly and in breach of the rules of natural justice in that, the time allowed to the applicant to prepare his defence was insufficient thereby causing prejudice to the applicant. He further submitted that once the amendments were made, the amended charge constituted a substituted charge which had not gone through the referral process. He further argued that no time was permitted or allowed for him to consider his defence after the amendments were made.

From my reading of this ground I take it that some time was given or allowed to the leader to prepare his defence on the amended charges. The first amendment was in relation to allegation number 4. the words "District Development Program" were substituted with the words "District Support Grants". The second amendment was in relation to allegation number 5. The figure in that allegation of "K610,000.00" was substituted with the new figure of K460,000.00"

I do not have the transcripts to inform me how much time, if any, was given to the applicant to defend these new amendments. The Tribunal in this case adopted and followed the reasoning of the Leadership Tribunal in ***JERRY SINGIROK V HON. JUSTICE JALINA, BIDAR AND SAGU N2068*** when allowing an amendment. Sheehan J in that case said:-

"While failure to cite the appropriate sub subparagraph of s.12 can be said to be an error of law on the face of the record, the discovery of error is not a self executing invalidation of the Tribunal finding. In Judicial Review the determination of the appropriate relief, if any, remains in the discretion of the Court. In this case I am satisfied that such error is quite insufficient to have any finding of the Tribunal set aside, because it is not an error in any way affecting the substance of the decision.

The misquotation of the enumeration of the appropriate sub subparagraph of s.12 detailed and set out in the charge and in the Tribunals decision, was, I am

satisfied an insignificant error. The charge itself clearly states and shows the intent of the charge, one clearly understood and addressed by the Tribunal. Equally clearly, there was no misapprehension of the nature and content of the charge on the part of the applicant. Submissions of counsel for the Applicant to the Tribunal state that,

"It is the leaders submission that his allegation is similar to allegation one (1) already dealt with above. The only difference between this and the first allegation is that the gift or benefit accepted must be without a exception from the liability of the Ombudsman Commission. In other words the Ombudsman Commission must be made aware by the letters of the benefit to be exempted.

As to what evidence is available before this Tribunal gives me a respect of this allegation, is our submission that much of that which needs to be submitted here is already covered in allegation one (1) above. That is, the leader has made admissions that he received the benefit (money) from Mr Franklin. We therefore a request the Tribunal to consider the leaders submission in respect of evidence by taking that which have been submitted in allegation one (1) above."

That submission follows and uses the term of s.12(1)(c). It was in essence, as referred to earlier, that the benefits received by the applicant were unsolicited gifts. That submission of course was no denial or counter to the allegation. And of course gifts not exempted are in any case prescribed by the same subsection 12(1)(c). The Applicants acknowledgement of the receipt and use of such benefits (or gifts) made the finding of misconduct that the Tribunal arrived at, inevitable.

Nor could it be said that the error of enumeration in allegation two (2) has prejudiced the applicant in any way or caused him any injustice. Such could only be said to have occurred if the error precluded him from raising some valid defence that would lead as of right to a finding that he was not guilty of the charge. The allegation, which was correctly understood by the applicant, counsel and the Tribunal alike does not support such a claim. I am satisfied that had the error as to the proper subsection been adverted to at any time during the Tribunal Inquiry there would have been ready acknowledgement by all parties, that the correct citation was Section 12(1)(c) and the appropriate amendment made."

In this case the tribunal said:

The proposed amendment seeks to replace a broad descriptive funding source, were a specific category of funding from which the leader was alleged to have misapplied funds. The referral alleged misconduct arose from the use of funds from the District Development Programme Grant (DDPG). Evidence so far has established that the DDPG comprised the Provincial Support Grant, (PSG),

District Support Grant (DSG) and the social and Rural Development Grant (S&RDG). Whilst the PSG and DSG are constitutional grants, the S&RDG was a creature of the NEC Determination. These three different schemes of grants are administered under different legal or administrative guidelines but are all from within the umbrella of the DDPG and ultimately from within the umbrella of the all embracing basket of public money intended for the development of Mendi Open Electorate in respect of the years 2001 and 2002.

The charge in count 4 relates in substance to calling into question, the integrity of the office of the leader held. Count 7 relates to misapplication of those public moneys that came into the leaders possession, control and management by virtue of his elective office. The evidence has specifically established that the moneys the leader was alleged to have misused is from the DSG. Documents which are and were earlier served on the leader specifically identified the DSG as the source funds from which the allegations of misconduct arose. The explanatory notes from the Public Prosecutor accompanying the referral to the Tribunal clearly state the allegations relate to the use of the DSG. The amendment sought is to specify the source of fund from within a general funding scheme established by the Government.

The amendment does not in any way affect the substance of the charges counts 4 and 7. In effect it comes within the ambit of and clarifies the matter referred by specifying the source of funding which was already well within the leader's own knowledge,. The amendment does not alter or change the charges in any substantial way so as to amount to altering, re-drawal or recasting of the charges to allege something new or different. The charge itself shows the intention of the charges as clearly understood by the leader, Counsel and the Tribunal from the evidence.

Furthermore, there should clearly be no misapprehension of the nature and content of the charge as amended on the part of the leader. The amendment would cause the leader prejudice or injustice if it precluded him from raising some defence that would lead as his right to a finding that he was not guilty of the charge. Fairness also demands that the leader knew his rights in advance, that he had proper notice of the allegations he has to answer and that he had adequate opportunity to put his own case in person or through counsel. The effect of the amendment and the substance of the allegations when correctly appreciated and understood by the leader, counsel and the Tribunal are in the Tribunal's view such that, it would not support any claim of prejudice, injustice or unfairness."

The views as expressed and quoted above in my view were open. There is nothing in the decision specifically by the Tribunal in relation to the amendment of figure K610,000.00 to K460,000.00.

I however note that the Tribunal did say:-

"The tribunal adopts and follows His Honour's reasoning in dealing with the issue of amendments to Counts 4 and 7 in the case before us

The amendment does not in any way effect the substance of the charges in counts 4 and 7. In effect it comes within the ambit of and clarifies the matter referred by specifying the source of funding which was already well within the leaders own knowledge. The amendments does not alter or change the charges in any substantial way so as to amount to altering re-drawl or recasting of the charges to allege something new or different. The charge itself shows the intention of the charges as are clearly understood by the leader, counsel and the Tribunal from the evidence thus far".

It can be taken from the quotation above that the tribunal was of the opinion that the amendments did not alter or change the charge in any substantial way so as to amount to altering, redrawing or recasting of the charges to allege something new or different. Was that finding open to the tribunal? I am of the opinion that such a finding was open to the Tribunal. One might have a different opinion which one would be entitled to but the law on judicial review has been stated to mean that ones opinion does not matter, it is how the Tribunal came to that conclusion. The tribunal has given its reasons why and how it arrived at its decision. I am satisfied that it was open for the tribunal to come to that finding.

After the tribunal had come to make that finding how much time was given to the applicant to defend the charges on the amendments. While the applicant has alleged that not enough time was given to him he does not say how much time was indeed given to him. Did he request for a particular time period of adjournment which was unreasonably refused? How much time did the applicant require after amendments were made for him to prepare himself on the amended changes. How much time was he given? The applicant in his submission said that "there was no adjournment or time permitted for the plaintiff to consider his defence". That submission does not correspond with the allegation itself which said that "... the time allowed to the leader to prepare his defence was insufficient..... The allegation suggested some time was given but not adequate. The submission says no time was given or permitted to consider his defence.

Without the benefit of the transcript of the proceedings I do not know if any time was given or if any time was given, how much of it was given. In the circumstances I dismiss this ground.

Ground 9:

There appeared to be a real appearance of bias and error of law on the part of the Leadership Tribunal by it holding that the weight to be given to the leaders evidence should be discounted because of the order of the evidence given in the leaders defence.

The tribunal on page 10 of the decision said:-

In our view, that course was inappropriate. It invites suspicions that the presence of the leader during the testimony of his witnesses was to assist, encourage or prompt them in their story. It may even be intended to intimidate the witnesses. We consider it highly probable for the reasons set out below that the leader's choice to hear out his witnesses first was a deliberate and calculated act to ensure consistency in a defence that appear to be most recent.

First, the line of defence the witnesses were called to support was not raised initially during cross-examination of the prosecution witnesses until it became obvious that the leader had to explain aspects of the evidence that tend show misappropriation of funds. Second, during the testimony of the witnesses, we observed brief moments of hesitancy and eye contacts between some of the witnesses and the leader and others we assumed to be supporters of the leader in the public gallery. It was apparent that some of the witnesses were being "assisted" in their evidence. And thirdly, having heard the testimony of his witnesses, the chances are that the leader would tailor his own testimony to harmonize or improve his witnesses' version. There were traits of that when the leader was in the witness box.

We considered that the leader was entitled to adduce evidence in the order he preferred but his election to hear his witness first before he gave evidence is inherently inappropriate".

In schedule 4:5 of the Ruling on the subject matter the tribunal said:

"At the end of the evidence by the Public Prosecutor, the leader through counsel elected to give evidence after he had called his witnesses. He also preferred to hear any witness the Tribunal intended to call before he responded. The Tribunal queried with counsel, the propriety of such course but made no particular ruling. We consider that the leader is entitled to his choice in the order of representing his case before this Tribunal and left that to his election.

However, the critical part of that choice was the leader's presence during the testimony of his witnesses. The leader is ably represented and no doubt well informed on the dangers of his expressed election to first hear his witnesses before he testified.

In our view, that course was appropriate. It invites suspicions that the presence of the leader during the testimony of his witnesses was to assist, encourage or prompt them in their story. It may even be intended to intimidate the witnesses. We consider it highly probable for the reasons we set out below that the leader's choice to hear out his witnesses first was a deliberate and calculated act to ensure

consistency in a defence that appear to be most recent".

The applicant submitted that there appeared to be real appearance of bias and error of law on the part of the Leadership Tribunal because of the order the leader defence called his evidence.

The tribunal on page 10 of the decision said:-

We considered that the leader was entitled to adduce evidence in the order he preferred but his election to hear his witness first before he gave evidence is inherently inappropriate".

In schedule 4:5 of the Ruling on the subject matter the tribunal said:

"At the end of the evidence by the Public Prosecutor, the leader through counsel elected to give evidence after he had called his witnesses. He also preferred to hear any witness the Tribunal intended to call before he responded. The Tribunal queried with counsel, the propriety of such course but made no particular ruling. We consider that the leader is entitled to his choice in the order of presenting his case before this Tribunal and left that to his election.

However, the critical part of that choice was the leader's presence during the testimony of his witnesses. The leader is ably represented and no doubt well informed on the dangers of his expressed election to first hear his witnesses before he testified.

In our view, that course was appropriate. It invites suspicions that the presence of the leader during the testimony of his witnesses was to assist, encourage or prompt them in their story. It may even be intended to intimidate the witnesses. We consider it highly probable for the reasons we set out below that the leader's choice to hear out his witnesses first was a deliberate and calculated act to ensure consistency in a defence that appear to be most recent".

The applicant submitted that there appeared to be real appearance of bias and error of law on the part of the Leadership Tribunal by it holding that the weight to be given to the plaintiffs evidence should be discounted because of the order the leaders defence called his evidence.

The applicant through his lawyers cited two common law cases of **BRISCOE V BRISCOE (1968) PD 501** and **BARNES V BPC (BUSINESS FORMS) LTD (1975) 1 ALL ER 237**.

The applicant further submitted that the prejudice he suffered is that the whole of his evidence was discounted because of the order he called his witness and not because of his demeanour as a witness or the substance of his evidence.

He submitted that the credibility of his evidence was destroyed in the eyes of the tribunal because of the order in which he called his witnesses. He submitted that such a finding by the tribunal amounted to prejudicing the applicant unheard. He submitted that rather than proceeding on the basis that he was presumed innocent until proven guilty. It appeared he was already guilty. The applicant also submitted that the tribunal ought to have given proper direction or the order of giving evidence when it had the opportunity to do so. He argued that in this case the tribunal did not make any such order. He further submitted that the plaintiff was not obliged to give evidence or follow any particular order to give evidence.

I note that in this case the applicant called evidence from other witnesses first and he himself gave evidence last. He was heard on his defence. His right to be heard was given. There was no breach of natural justice, nor was there any breach of the Constitution s. 37(4)(1). The tribunal did not direct him to give his evidence first before the other witnesses. He had the benefit of a senior lawyer and went on to give his evidence last. While the Tribunal raised its concern on the course taken by the applicant, it did not make any direction or give any order.

After the tribunal allowed him to proceed as he liked, it criticized him later in Sheehan 4.5. I do not know if Schedule 4.5 is part of the main decision. The tribunal said:

"In our view that course was inappropriate. It invites suspicions that the presence of the leader during the testimony of his witnesses was to assist, encourage or prompt them in their story. It may even be intended to intimidate the witnesses. We consider it highly probable for the reasons we set out below that the leaders choice to hear out his witnesses first was a deliberate and calculated act to ensure consistency in a defence that appear to be most recent.

If the tribunal thought the calling of other witnesses first and the leader last was inappropriate it ought to have made a ruling on that point and gave directions or orders when the tribunal queried it right at the outset instead of allowing him to proceed. It was inappropriate for the tribunal to make the statement in schedule 4.5. That in my respectful view was a fundamental flaw. That must affect the validity and integrity of the decision as it offended the applicants rights to a fair trial.

On this point for the reason stated above I would uphold the application for review and quash the decision of the Tribunal and order that a new Tribunal be appointed to rehear the allegations.

Grounds 10 and 11:

These two grounds are against the penalty imposed by the Tribunal. Having now decided on Ground 9 to quash the decision, I do not think it is now necessary to discuss them as they only go to the penalty imposed.

In conclusion I have considered what I should do with the matter, that is whether to send the matter back to the same tribunal to rehear the whole matter, or send it to another tribunal to rehear the matter again.

After considering the circumstances I order that the matter be sent back to another tribunal to rehear the allegations.

In so far as costs are concerned I award costs.
