

SC1593

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA NO. 1 OF 2015

BETWEEN:
HON. PATRICK PRUAITCH
Appellant

AND:
**CHRONOX MANEK, JOHN NERO & PHEOBE SANGETARI, 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: Manuhu, J, Murray, J & Pitpit, J
2015: 16th December
2017: 9th June

***PRACTICE AND PROCEDURE – Discovery – Appellant sought discovery of
Ombudsman Commission’s investigation documents – National Court Rules,
Order 9 Rules 5, 7 & 16 – Public Interest – Private Interest – Maturity of
cause of action – Merits of cause of action.***

Cases cited

Wartoto v. The State (2015) SC 1411,
Nilkare v Ombudsman Commission [1999] PNGLR 333,

Albert Karo v Ombudsman Commission of PNG [1995] PNGLR 547
The State v Paul Loi (2009) N4058,
Hon Pruaitch v Manek (2009) N3903.

Counsel:

Mr. M Varitimos & Mr. P Tabuchi, for the Appellant
Mr. M Efi, for the First Respondent
Mr. L Kandi, for the Second, Third & Fourth Respondents.

9th June, 2017

1. BY THE COURT: INTRODUCTION: This is an appeal against a ruling by Kassman J refusing a motion for discovery under Order 9 Rules 5 and 7 of the *National Court Rules*. The motion was made in conjunction with a proceeding commenced by way of an originating summons (“The OS proceeding”) filed by the Appellant where he sought, among others, a declaration that his referral was unconstitutional, in excess of jurisdiction and therefore illegal, invalid and of no force or effect because the Ombudsman Commission (“The Commission”) did not accord to him the right to be heard before making the referral.

The Facts

2. The Appellant, as a Leader for the purpose of the Leadership Code, was investigated for misconduct in office, including double dipping of transport operational costs. In the course of the investigation, he appeared before the Commission and made oral submissions in response to the allegations. The Appellant on 30 November 2006 submitted his detailed written response to the allegations.

3. The Commission then summoned Mr. Kanawi Pouru in his capacity as Managing Director of PNG National Forest Authority (“PNGNFA”) to give evidence and produce documents relevant to the investigations. Mr Pouru responded and produced documents in accordance with the summons.

4. The Commission then advised the Appellant on 22 July 2009 that there was evidence of misconduct in office and that he would be referred to the Public Prosecutor for prosecution. The referral was made and a tribunal was empanelled to deal with the allegations.

5. The crux of the substantive proceeding is that the Commission’s decision to refer and the eventual referral of the Appellant to the Public Prosecutor is flawed and invalid in that he was not accorded the right to be heard in relation

to the materials that were subsequently produced by Mr. Pouru.

6. The motion then sought pursuant to Order 9 Rule 5 to discover “documents relating to the investigation”. In the alternative, the motion sought an order pursuant to Order 9 Rule 7 for the defendants to file an affidavit stating whether any minutes of meetings relating to any investigations into the allegations is or has been in their possession, custody or power and, if they have been but is not then in their possession, custody or power, when they parted with them and what has become of them. Interestingly, the Appellant did not specifically seek discovery of documents produced by Mr. Pouru.

Grounds of appeal in a nutshell

7. Public interest appears to be the main reason for the Trial Judge’s refusal of the motion. The seven grounds of appeal, in a nutshell, is that the motions Judge failed to consider the submissions and the legal principles in relation to discovery pursuant to Order 9 Rules 5 and 7 and erroneously refused the motion.

Main Issue

8. In the circumstances, the decisive issue, in our opinion, is whether discovery, disclosure or inspection of documents in question would be injurious to the public interest? This is a procedural law issue.

Relevant procedural law

9. Order 9 Rule 16 of the *National Court Rules* provides that discovery and inspection of documents “*does not affect any rule of rule which authorises or requires the withholding of any document on the ground that its disclosure would be injurious to the public interest*”.

10. What is the rule of law? The rule of law is the principle that all persons and institutions are subject to and accountable to law that is fairly applied and enforced. Public interest is welfare or wellbeing of the general public. The relation between these two principles is explained, as an example, in the criminal case of *The State v Paul Loi* (2009) N4058, by His Honour Batari J, thus:

“A decision to call evidence is such a heavy responsibility not to be taken lightly by prosecuting Counsel. The election must be based on a duty to act fairly and in the interest of promoting criminal justice administration. It must be guided by proper principles and application of the “rule of law.” The maintenance of the “rule of law” requires the involvement of a

fair, impartial prosecutor, consistent with ethical considerations of his role and the practice and procedure of the Court, to properly discharge his duty both to the State and the Court. At stake is the public interest which is to see that those charged with serious criminal offences such as unlawful killings are properly prosecuted in a Court of Law. The public interest represented by the State Prosecutor demands that, Counsel takes all reasonable steps to secure and adduce evidence as a general rule before prosecution case is closed. After all, that is the paramount consideration of a fair trial under s. 37(3) of the Constitution...”

Application of procedural law to the facts

11. In this case, the Appellant seeks discovery of documents relating to the investigation and of meeting minutes. Interestingly, the Appellant does not seek discovery of Mr. Poursu's documents, which are the very basis for taking out the OS proceeding.

12. In relation to meeting minutes, we are unable to see the reasons why the Appellant wants to discover them. We take into account that under the *Organic Law*, investigations of the Commission are conducted in private. Such privacy would cover their discussions and deliberations in meetings. The Commission is not obliged, for that reason, to disclose its meeting minutes to the Appellant. In any case, meeting minutes are not evidence. It serves no useful purpose for meeting minutes to be provided to the Appellant.

13. In relation to “documents relating to the investigation” we note that the Appellant has the right to challenge the proceeding of the Commission but it is also in the public interest that the proceeding of the Commission, or the Leadership Tribunal, should not be compromised and tampered with. In this case, documents which are the subject of the motion are not mere records in the possession, custody or control of the Commission. They are materials obtained by law for a specific purpose, that is, to present to the Leadership Tribunal as evidence. Until they are presented, it is not in the public interest for those materials to be released to and used by the Appellant in an irrelevant proceeding.

14. We are also of the view that it is not in the public interest for proceedings of the Commission to be subjected to other civil proceedings. Such is the growing undesirable judicial development in the country which has to be discouraged by proper exercise of discretion. In criminal cases, it was held in *Wartoto v. The State* (2015) SC 1411, that the National Court sitting in its civil jurisdiction should not interfere with criminal proceedings. An accused person still has the right of protection of the law under Section 37 of the *Constitution* and he or she can still exercise the other avenues for redress available to him or

her under the Criminal Justice System, the *Criminal Code* and *Criminal Practice Rules*.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. It also appears that the Appellant does not have any evidence to support his claim in the OS proceeding, hence the motion for discovery and inspection. In fact, evidence before us suggests that there was no breach of the requirement for procedural fairness as alleged in the OS proceedings. The Appellant's right to be heard was accorded to him. See *Nilkare v Ombudsman Commission* [1999] PNGLR 333 and *Albert Karo v Ombudsman Commission of PNG* [1995] PNGLR 547.

22. When the Appellant was served with the particulars of the allegations for him to respond to them, he did not raise any issue. He responded with ease. Mr. Pouru's materials relate to the allegation of double dipping of transport operational expenses to which the particulars were furnished to the Appellant and he responded to them on 30 November 2006. His responses were:

"As a responsible leader I have immediately ceased claiming such entitlements and the practice of reimbursements has ceased since I was advised. In addition, I have made a K20,000 payment to the Department to offset these payments. Once I am told of the remaining balance, I will ensure it is settled in full immediately."

23. Mr. Pouru's materials basically shows that the Appellant owed PNGFA a sum of K55,420.38. Mr. Pouru confirmed in his letter of 4 February 2008 to the Commission that the Appellant repaid K20,000 on 18 October 2006. Before writing to the Commission, Mr. Pouru, on 1 February 2008, advised the Appellant that he still owed PNGFA K35,420.38 and requested that "*he can make the necessary settlement and following which [Mr. Pouru] shall inform the Commission*".

24. If the Appellant had any issue with Mr. Pouru's materials, he was at liberty to raise those issues with Mr Pouru and the Commission but he did not. He waited until after the referral, which was done 17 months later on 22nd July 2009, and after a Tribunal had already been established, to file the OS proceeding in February 2010.

25. We note that the Appellant initially applied for leave to review the Commission's decision to refer him to the Public Prosecutor for prosecution before a Leadership Tribunal. See *Hon Pruaitch v Manek* (2009) N3903. That application was refused by Hartshorn, J on 8th September 2009. It appears that

that decision was totally ignored by the Appellant as well as the Courts, with due respect.

26. The whole situation of this case displays, among other things, an undesirable imbalance between private interest and public interest. The Court's exercise of discretion, with respect, has favoured the Appellant's personal interest in the last eight years at the expense of a constitutional law process, good governance and public interest. It is, in turn, a negative indictment on the rule of law.

Conclusion

27. For the foregoing reasons, the Appellant's motion should fail. Pursuant to Order 9 Rule 16, it is not in the public interest for documents and materials that were relied upon by the Commission to refer the Appellant to the Public Prosecutor to be discovered in the OS proceeding when the *Leadership Code* proceeding has not been concluded. The Appellant would be at liberty to resurrect his application for discovery if he was found guilty by the Leadership Tribunal.

Orders

28. Our conclusion is in line with the conclusion reached by the Trial Judge. Accordingly, we are obliged to dismiss the appeal and we do so with costs which, if not agreed, shall be taxed.

Young & Williams Lawyers: *Lawyer for the Appellant*

Ombudsman Commission: *Lawyer for the First Respondent*

Wagambie Lawyers: *Lawyer for the Second, Third and Fourth Respondents*