PAPUA NEW GUINEA

[IN THE LEADERSHIP TRIBUNAL]

IN THE MATTER OF A REFERENCE BY THE PUBLIC PROSECUTOR PURSUANT TO SECTION 27 (2) (e) OF THE *ORGANIC LAW ON DUTIES AND RESPONSIBILITIES OF LEADERSHIP*

AND

IN THE MATTER OF HON SIR MOI AVEI MP MEMBER FOR KAIRUKU – HIRI OPEN AND CENTRAL PROVINCIAL ASSEMBLY MEMBER

Hon. Justice Hinchliffe, CBE	Chairman
Magistrate Mark Pupaka	Member
Magistrate Steven Abisai, ISO	Member

Mr. C. Manek – Public Prosecutor with Mr. A. Kupmain

Mr. G. Sheppard with Mr. F. Griffin for the Leader

11th May 2007

TRIBUNAL: Pursuant to powers conferred upon him by Section 27 (7) (e) of the ***Organic Law on Duties and Responsibilities of Leadership*** (the OLDRL), the Chief Justice by an instrument dated 6th October 2006, appointed this Tribunal to hear, inquire into and determine allegations of misconduct in office by Hon. Sir Moi Avei MP (the Leader), member of the

National Parliament representing the Kairuku-Hiri Open Electorate and Central Provincial Assembly member.

We accepted nine (9) allegations against the Leader on 31st October 2006. The Public Prosecutor presented, together with those allegations, a set of Statement of Reasons. As a result of our formal acceptance of the allegations the Leader became suspended from office in accordance with Section 28 (2) of the OLDRL.

Thereafter we heard evidence and made enquiries into those 9 allegations against the Leader. At the end of our enquiries we carefully considered the evidence we gathered, together with the submissions filed for that purpose by the Leader's counsel and the Public Prosecutor. We then delivered our decision on verdict on 4th April 2007.

SUMMARY OF DECISION ON GUILT

We found proved or established three (3) instances of misconduct against Sir Moi Avei in our decision on verdict. We dismissed the rest of the allegations and the heads of charges contained in them.

First of all we found Sir Moi guilty of misconduct in office in relation to the general allegation that he failed to ensure that public money under his control was properly applied to the rural infrastructure projects for which it had been allocated to him.

We found that Sir Moi, from January 2002 to October 2002, failed to carry out obligations imposed upon him by Section 27 (1) and (2) of the Constitution, in that he, by conducting himself in his public life and in his associations with other persons in such a way that he demeaned his office or position as member of Parliament for Kairuku-Hiri Open Electorate and member of the Central Provincial Assembly and allowed his public or official integrity and his personal integrity to be called into question and endangered and diminished respect for and confidence in the integrity of government in Papua New Guinea in that he, after being allocated K250, 000.00 from the National Government, in the form of three cheques which were the member's discretionary component of the District Support Grant allocated for the development of the Kairuku-Hiri Open Electorate in respect of the year 2002, failed to ensure that the money was applied to the rural infrastructure projects for which it had been allocated, and thereby became guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

Secondly we found that from August 1995 to December 2004 the Leader failed to carry out his obligations under Section 27 (1) and (2) of the Constitution by conducting himself in his public life and in his associations with other persons in such a way that he demeaned his office or position as member of Parliament for Kairuku-Hiri Open Electorate and member of the Central Provincial Assembly and allowed his public or official integrity and his personal integrity to be called into question and endangered and diminished respect for and confidence in the integrity of government in Papua New Guinea in that he failed to carry out the obligations imposed upon him by Section 27 (2) of the Constitution, in that he, having entered into a Tenancy Agreement with the National Housing Corporation (NHC) in

1995 in relation to a property at Section 51 Allotment 128, Konedobu, NCD, and whilst receiving housing allowances from the National Parliament on a fortnightly basis and continuing to be the legal tenant of the said property, failed to pay rent as and when they fell due, and thereby became guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

Thirdly, on the basis of the same facts by which we found that the Leader had failed to pay the rentals as and when they fell due we also found that, between August 1995 to December 2004, he had failed to carry out the obligations imposed on him by Section 27 (1) and (2) of the Constitution when he knowingly, recklessly or negligently omitted to disclose to the Commission substantial information in relation to his rental liabilities in his annual statements for six consecutive reporting periods, namely 1995/96, 1996/97, 1997/98, 1998/99, 1999/2000, and 2000/2001, and thereby became guilty of misconduct in office under Section 27 (5) (b) of the Constitution.

Now, having said that, to set matters in proper perspective for the purpose of penalty, we need to restate some of what we said in relation to our decision on verdict in relation to the following: Sources of Evidence, Purpose of the Leadership Code, District Support Grants (DSG), Joint District Planning and Budget Priorities Committees (JDPBPC) together with the discretion on Members of Parliament (MPs), District Support Grant Guidelines, and the Evidence we gathered. We also need to restate what we said in relation to the general Fiscal Regime and the system of Financial Grants & Assistance available to the Provinces under the Organic Law on Provincial Government & Local Level Governments (OLPGLLG).

SOURCES OF EVIDENCE

We said in our decision on verdict that the evidence we have consist of the affidavits of the witnesses who testified before us including the annexures therein and the oral evidence from those witnesses. We also have before us the evidence provided by the Leader himself. Some documents, either referred to in the witnesses' oral evidence or clearer copies of documents already in evidence, are also before us. The Statement of Reasons – three volumes of it – is part of the transcript and records of this Tribunal. However as to which documents in the Statement of Reasons became evidence in this inquiry and indeed any documents contained in the Statement of Reasons which are not part of the evidence, maybe deduced by a perusal of the affidavits of the witnesses that have testified before us. Each affidavit identifies and exhibit documents from the Statement of Reasons that originated from the source that each of the deponents of the affidavits represented. In that way the documents that originated from the organisation each of the deponents represent, were able to be tendered into evidence before us. The contents of the Statement of Reasons did not become evidence before us as a matter of course.

PURPOSE OF LEADERSHIP CODE

As we did in our decision on verdict we must state an overview of the various provisions of the Constitution, the OLDRL and the Organic Law on the Ombudsman Commission (OLOC) which comprise the Leadership Code. In our view the fundamental aim of these provisions in the legislation

is the protection of the integrity of leadership and the integrity of the processes associated with public office (elected or otherwise). By this setup we think the Commission's duty is twofold.

In our view the first duty of the Commission is to prevent breach of the Leadership Code by giving directions to those to whom the Leadership Code applies. First of all it seems to us that the Commission is empowered under Section 27 (4) of the Constitution to direct leaders to either refrain from certain actions or conduct or direct them to comply with the requirements of a public office. Section 27 (4) of the Constitution provides:

"27 Responsibilities of office

.....

*(4) The Ombudsman Commission or other authority prescribed for the purpose under Section 28 (***further provisions***) may, subject to this Division and to any Organic Law made for the purposes of this division, give directions, either generally or in a particular case, to ensure the attainment of the objectives of this section."*

This power is restated, albeit in the context of a specific situation, in Section 4 of the OLDRL and that provision provides:

"4. Statement of income, etc

.....

(4) The Ombudsman Commission or other authority may, by notice in writing to a person to whom this Law applies, require him to explain

or give details or further details of any matters relating to the statement including –

(a) sundries and minor items shown in accordance with Subsection (3); and

(b) omissions or apparent omissions; and

(c) discrepancies in the statement or between it and other statements or other information available to the Ombudsman Commission or other authority."

We think that by issuing directions the Commission may advise leaders of their obligations concerning the integrity of public office or, in cases where possible breaches of the Leadership Code is detected or suspected, direct leaders to rectify or correct their conduct. This aspect of the Commission's powers is what we may call "pre-emptive or preventative" function.

We said that the purpose of the Leadership Code is preventative of misconduct in public office. Therefore if, in any given case, the protection of integrity of public office and restoration of trust and confidence in its processes can be achieved without a referral or prosecution then the purpose of the Leadership Code is adequately served. There would therefore be no need for the Commission to refer for prosecution if there is substantial compliance in the terms of any direction. We said that this was keeping in line with the essential requirements of the Principles of Natural Justice.

Any failure to comply with a Commission directive is also misconduct. The failure itself would become a prosecutable misconduct under Section 27 (5) (b) of the Constitution. In such instances the original breach, whatever the

suspected misconduct that prompted the Commission to issue the direction was, and the subsequent failure to comply, would both be referred for prosecution because a further advice or direction may not possibly restore confidence and integrity in public office.

We said that the second duty of the Commission is to gather evidence of misconduct and refer it for prosecution, or in certain instances, prosecute misconduct cases as the Commission is empowered to do by Section 29 (2) of Constitution and Section 27 (3) of the OLDRL. Referral for prosecution or prosecution, as the case may be, would happen when the Commission, in the exercise of its discretion, considers that a warning or direction cannot restore the people's respect and confidence in a public office and it is imperative that the misconduct is prosecuted.

We noted that the Supreme and National Courts have, in various instances, addressed the issue of purpose of the Leadership Code. We, on our part, made only brief comments to put in perspective our view that the Commission's enforcement of the Leadership Code is both by a system of advice or directions as well as referrals for prosecution or prosecution. We think penalizing or removing leaders from public office is principally to instil integrity and confidence in public offices. In the context and perspective of the point we make here, the fact that leaders are "punished" is only consequential and not the primary intended outcome.

We think the Supreme Court stated the Leadership Code's purpose adequately in ***SCR No 1 of 1978: Re Leo Robert Morgan [1978] PNGLR 460*** at 464 when it said that:

"A leader has a duty not to place himself in a position in which he could have a conflict of interests or might be compromised when discharging his duties, not to demean his office or position, not to allow his public official or personal integrity to be called into question, not to endanger or diminish respect for and confidence in the integrity of government and not to use his office for personal gain. And in this connection we consider that the Constitution, insofar as it seeks to preserve the people of Papua New Guinea from misconduct by its leaders, should not be considered a "penal" statute. In requiring a higher standard of behaviour from its leaders than from ordinary citizens, it should not be considered as "penalising" or "punishing" a leader; but as ensuring in the interests of the safety of the people that only persons who are prepared to accept added restrictions on their personal behaviour should become leaders. No citizen need become a "leader"...In interpreting s. 26(1) (f) of the Constitution one must have regard to the intention and spirit of the Leadership Code and the mischief that is aimed at."

We concluded discussions on this aspect by saying that the sincerity and motives of the Commission maybe questioned and the integrity of its processes become an issue, when a suspected case of misconduct, which could be corrected by an appropriate directive, is referred for prosecution.

DSG, JDPBPC & MPs DISCRETION

We discussed the Joint District Planning and Budget Priorities Committee (JDPBPC) and the role played in it by the local Member of Parliament (MP) in utilizing the District Support Grant (DSG).

By law each open MP is entitled to a minimum of K500, 000.00 per year to fund projects and activities in his or her electorate. These funds are called DSG, sometimes referred to as 'Constitutional grant'; so called because of its origin. The DSG is an imperative of Section 95A of the OLPGLLG, which of course is a Constitutional law. In our decision on verdict we reprinted Section 95A of the OLPGLLG in full but we see no need to do that again now.

The DSG is split into two parts or components [Subsection (1)]. The first half is the 'discretionary component.' It is to be disbursed towards projects and activities at the discretion of the MP. The other half is the 'nondiscretionary component' which is to be utilized to fund projects and activities that are collectively decided upon by the JDPBPC.

By law open members of Parliament have almost total discretion and control on how the entire DSG is spent. We said there was, in practical terms, no real difference between the discretionary and non discretionary components of the DSG. This, we thought, was because of the words of Section 33A of the OLPGLLG. We also printed that provision in full in our decision on verdict but it is again not necessary to do so now.

We noted that Subsection (2) (a) thereof make the MP Chairman of the JDPBPC. Subsection (2) (c) says the head of the local level government (LLG) or his or her nominee is a member of the JDPBPC. Subsection (2) (d) says that up to three people are to be appointed to the JDPBPC by the MP in consultation with the LLG head. Subsection (3) sets out the functions of the JDPBPC, which includes overseeing, coordinating, making district planning

recommendations including budget priorities for respective provincial governments and National Government, to rolling five-year development plans. Subsection (4) makes the District Administrator chief executive officer of the JDPBPC.

We concluded discussions on this aspect by saying that the OLPGLLG favours MPs in the management and expenditure of the entire DSG. There is opportunity for MPs to appoint supporters or 'team players' to the JDPBPC. The MP can, in his or her absence, appoint any member of the JDPBPC of his or her choice to act as chairperson [Section 33A (2A)]. We said that given this scenario MPs could exert total influence on how the entire DSG, both the discretionary and non discretionary components, are utilized.

DSG GUIDELINES

We noted that the DSG Guidelines are issued by the National Executive Council (NEC) pursuant to Section 95A (7) of the OLPGLLG.

The DSG Guidelines were first issued in 1998 and are still current. We further noted that these Guidelines apply to both discretionary and non discretionary components of the DSG. It also applies to and regulates utilization of Provincial Support Grants (PSG).

The guidelines define the objectives of the DSG and set out the way in which it is to be spent. It particularly postulates who may apply for project funding, how project proposals are to be prepared and submitted including what other requirements are to be met at that stage, the project selection and

approval criterion, how funds are to be managed and dispersed, and the reporting and inspection and acquittal requirements.

The guidelines also set out restrictions on where funds are to be invested. There are five specifically prohibited areas. Whilst the Guidelines state that ***"in principle, there are no restrictions on the type of projects that can be funded under the RAP so long as the funds are channelled into areas of social, economic and infrastructure"***, it also leaves matters in no doubt that the DSG is to be invested in infrastructure and in projects that would benefit the District or villages in the District. That is because the guidelines also state, among others, the following:

"Project proposals maybe initiated by any member of the JDP&BPC, Churches, Community Groups, Youth and Gender Groups and NGOs. Any group seeking DSG or PSG project funding must be registered or be a recognised institution or a group recognised by the member. Project proposals must address the needs of the village, be implemented within twelve months and be located in the member's electorate. All project proposals must be submitted using the standard format PROJECT PROPOSAL FORM. Project Proposals for funding under DSG must fill DSG-1 FORM and those for funding under PSG should fill PSG-2 FORM and have them submitted to the JDP&BPC and JPP&BPC respectively. All project proposals must be submitted no later than the end of March."

We said that an individual person's ineligibility for project funding assistance, on his or her own behalf and benefit, is conspicuous in the lack of mention or reference to it. The DSG is intended to be utilized only toward

projects that would start or capacitate or sustain economic activity at the district and village level. The DSG is to be utilized toward the collective benefit of every one in district.

The various requirements in the guidelines, particularly the system of project funding qualifications, the stringent project proposals preparation formats including requirements for supporting information, project selection and approval criterion, how funds are to be managed and disbursed, and the reporting and inspection and acquittal requirements, all point toward strict management and control of taxpayer funds. We said that the use of the words "discretionary" and "non discretionary" do not mean that the funds are to be utilized in any manner outside the express requirements of the DSG Guidelines.

We concluded discussions on this aspect by saying that the use of the words "discretionary" and "nondiscretionary" in the Guidelines is confusing, which we said was quite needlessly so. These descriptive words are only contained in the Guidelines and not stated or defined in Section 95A of the OLPGLLG. The words "discretionary" and "nondiscretionary" seem to have been introduced in the Guidelines to distinguish the two DSG components, the expenditure of which is separately controlled by the MP and JDPBPC respectively. We found that the insertion of these words is an NEC creation and not the work of Parliament. The NEC is empowered under Section 95A (7) of the OLPGLLG to issue the DSG Guidelines.

In our view the reference to "discretionary component" connotes nothing more than a restatement of the legislative (OLPGLLG) intent, which is that

the MP has unfettered discretion to singularly select or decide or nominate the projects into which 'his' or 'her' share of the DSG would be invested. As for the other half – nondiscretionary component – selection or nomination of projects is a collective decision of the JDPBPC. We therefore said that the discretion on MPs does not extend to expending DSG funds outside the scope and limitations of the Guidelines. We rejected an argument that the discretion vested in MPs authorises them to go outside the scope of the infrastructural and development purposes to which the funds are to be utilized upon. We stressed that Section 95A (1) (b) of the OLPGLLG specifically says that the MPs' half of the DSG is to be disbursed strictly in accordance with the Guidelines.

EVIDENCE

1. Misapplication of DSG Funds

We recounted the evidence we have before us and noted that the Leader's disbursements of the K250, 000.00 were mostly in the form of cheques or 'cash' cheques to individuals who then negotiated encashment. The balk of the disbursements was for relatively small amounts. Most of the individual payments were for K1000.00 or less and the rest under K3000.00. Apart from one cheque for K10, 542.00 there were only a handful of cheques for sums ranging from K4, 000.00 to K6, 000.00, but mainly for K5, 000.00.

We found that the first DSG cheque for K100, 000.00, dated 24th January 2002, was banked on 25th of January 2002. Bank records show that 5

withdrawals were made between 29th and 31st January 2002. A total of 19 withdrawals were effected on 1st February; 12 withdrawals on 4th February; 5 withdrawals on 5th February; 14 withdrawals on 6th February; 2 withdrawals on 7th February; 6 withdrawals on 8th February; 6 withdrawals on 11th February; 4 withdrawals on 12th February; 9 withdrawals on 13th February; 5 withdrawals on 14th February and thereafter 1 or 2 withdrawals each during the next several days. By the 3rd week of February 2002, which is in less than a month from the day the cheque was banked, the funds from the first DSG cheque of K100, 000.00 were nearly depleted. Close to 100 cheques were written in that time.

We discovered that the second lot of DSG, in 2 cheques dated 6th and 20th March, for K50, 000.00 and K100, 000.00 respectively, was banked on 2nd April 2002. As before, withdrawals happened almost immediately. Bank records show that most of the K150, 000.00 was drawn down by 21st May 2002, through over 95 separate withdrawals.

We were prompted to say that, in light of this fast paced manner in which the funds were drawn down, that any reasonable person could say that if there was any assessment done on the viability of each proposed project for which funds were committed, it must have been a major effort on the part of the Leader and his electoral workers in order for them to assess, approve and process funding for so many projects in such a short time. However the evidence indicate to us that assessment on viability of project proposals cannot possibly have been carried out, because we discovered that records of disbursements compose mostly of the Member's Disbursement Forms and requests for financial assistance from individuals. These so called 'request

for financial assistance' are not the same as proper Project Proposals that the Guidelines require. All these documents, we found, were dated to show that they were prepared or written out on the same days the respective cheques were written and possibly cashed as well.

Having grouped the various disbursements into the type of activities funded, mainly for the purposes of our own understanding of these matters, we found that a total of about K117, 304.00 was disbursed to groups, and the reminder paid to individuals.

Of the disbursements to individuals, the highest amount by far, by type, was disbursements to individuals as school fees. We identified 68 separate payments totalling K62, 500.00, disbursed as school fees. The majority of these were paid from out of the first K100, 000.00 DSG cheques, and that within the first two weeks from it being banked. We noted that 11 school fee disbursements were made from out of the second lot of DSG. On a few instances school fee disbursements were paid direct to respective institutions. We said that whilst we could not say whether paying for individuals' school fees is one of the intended purposes of the DSG, at least, direct payment to schools would perhaps project an image of propriety. Unfortunately, as we noted, the balk of the disbursements in school fees were made direct to individuals. We were prompted to say therefore that direct payments to individuals cannot eliminate the possible appearance of giving benefits to one's friends or supporters.

We explained that, in our endeavour to be fair to the Leader, we attempted to slot his disbursements into one of the general categories under the

Objectives of the DSG Guidelines. In that endeavour we could not succeed. We were unable to place or fit nearly all the disbursements to individuals and most of the other types of disbursements into any category of objectives in the Guidelines. We even endeavoured to loosely identify the disbursements generically as ***"economic activities"***, under the specific category of ***"self-employment and income generation"***. Again we were unsuccessful. We were unable to accept that expenditures such as school fees, medical fees, purchase of store cargo, funeral or death related expenses, airline tickets and PMV fares, sports or recreational activities and the like could possibly be characterized as ***"economic activities"*** or ***"self-employment and income generation"***. These types of disbursements obviously cannot easily or at all be categorized into any of the infrastructure development objectives of the Guidelines. Most of the Leader's disbursements were for the benefit of individuals or family units only and not for a whole village or the district, which is contrary to the express requirements of the DSG Guidelines.

We noted that the Leader never funded any infrastructure projects (either new or existing) by the DSG funds in question which would have benefited the district or a village or community in the district. When he gave evidence the Leader tried to differentiate between the discretionary component of the DSG with the non discretionary component and other Rural Action Programme Funds (RAPF). He left it open for the Tribunal to accept that the more permanent, self-reliance or capacity enhancing social and economic infrastructure projects are funded from out of the non discretionary component of the DSG or other RAPFs.

It was pointed out to the Leader that whilst the DSG Guidelines regulated the use of the entire DSG, the utilization and disbursement of the discretionary component of the DSG can only be in accordance with the Guidelines. It was pointed out to him that the "discretion" was only in relation to the respective MPs' exclusive power to select or nominate projects, and it would not, for instance, mean that the requirement for Project Proposals can be dispensed with or that no viability assessments are to be done or that project inspections are unnecessary. Indeed it did not mean that there was an open handed discretion to use the funds on purposes other than for which these funds were made available. The Leader said he disbursed his 2002 DSG discretionary component toward intended purposes.

Clearly the Leader wanted us to accept that the discretionary component of the DSG is only meant for activities like the type he expended the funds on. It was evident that the Leader seems to be of the view that the projects capable of building capacity or infrastructure and which are for the benefit of the whole district or village, are only funded from the non discretionary component and other RAPFs. However this is an erroneous misconception with which we cannot agree. Our view is that the DSG discretionary component is, and intended to be, a key source for district infrastructure development and for capacitating or enhancing or fostering rural economic activity. DSG expenditure activities must closely, if not exactly, reflect the overall developmental aspirations manifested in the DSG Guidelines.

We rounded up the evidence by saying that the pattern emerging from a perusal of the evidence, including the summary of records of payments submitted to the Commission by the Leader, copies of the Member's

Disbursement Forms, copies of the many request for financial assistance and copies of nearly 200 cheques showing relatively small amounts, is that the Leader's 2002 DSG discretionary component was treated as a social welfare fund, and not properly utilized as the district support grant with emphasis on infrastructure that it was always meant to be. Committing sums like K200.00, K300.00, or K500.00 or even K1, 000.00, to individual persons cannot, in our minds, build or enhance capacity in the district or villages. There is not even one project inspection report before us to prove if there are any viable projects up and running.

We further said in our decision on verdict that we could not find fault with the Leader for having deposited the DSG cheques into an account titled "Moi Avei's Discretionary Funds" instead of the District Treasury as it is supposed to be, in accordance with Section 95A (6) of the OLPGLLG. We did give reasons for not finding fault so we see no need to restate them.

However we did stress that there should never be any controversy over where DSG or other developmental funds ought to be deposited or kept in the future. By law the entire DSG is to be paid through the District Treasuries. We expressed a view that the reason why the non discretionary component is then paid by the District Treasury to the JDPBPC, after the same is received at the District Treasury, is most likely because the JDPBPC has the capacity to manage the funds, including assessing project proposals and retaining records for purposes of acquittals and the like. On the other hand the MPs' discretionary component is administered by the District Treasury because MPs would lack capacity to manage the funds properly, unlike the JDPBPC. However the MPs would obviously receive project

proposals and commit funds. The cheques though are to be raised and issued by the District Treasury, which the MPs may present to the respective recipients in accordance with the DSG Guidelines.

One of our findings was that the DSG Guidelines give the impression that the MPs' discretionary component will be made direct to respective MPs. In fact we found that in practice the ORD has written out cheques and given them directly to MPs. That practice is contrary to the clear law in the OLPGLLG. Having thoroughly perused the OLPGLLG we noted that the whole of Division 2 of the OLPGLLG deals with the ***"Fiscal Regime"***. Subdivision D of it specifically sets out the ***"Financial Grants and Assistance"***. Section 95A and 95B [which deals with DSG and PSG respectively] are in Subdivision D. We further noted that in all of the related provisions relating to financial grants in Subdivision D; which includes Sections 92 [Economic Grants]; 93 [Development Grants]; 94 [Town & Urban Services Grants]; 95 [Other Conditional Complementary Support Grants]; and 97 [Economic Grants], the grants are to be made available and channelled through the Provincial and District Treasuries.

We therefore said that the unlawful practice of giving cheques directly to the MPs may have contributed to the laxity in adhering to proper record keeping and substandard accountability or acquittal practises. The argument that there are, or as in this case, there were no District Treasuries at the relevant times, is not strong enough to circumvent the clear requirements of an Organic law. In any event there are Provincial Treasuries and these would be the best alternative where there are, as yet, no District Treasuries.

We further said in our decision on verdict that making cash cheque payments is not a prudent practice. It does not equate with good management practice when public funds are involved. Payment records are a primary source of evidence of correct expenditure. Payment records make the accounting and acquitting process simpler and create clear tracks for tracing and verification. Though we found no fault with the Leader's otherwise substandard record keeping, sufficient to find proved a related misconduct charge, we did iterated that the reason why the OLPGLLG requires expenditure of MPs' discretionary component of the DSG to be managed through the District Treasury is because of the need to keep proper records of the expenditure of public money, something which the MPs may not be properly or adequately capacitated to do.

We found that the Leader committed money on many activities in relatively insignificant amounts. This, no doubt, placed him in a situation where he could not possibly acquit every expenditure properly. The Guidelines require the Leader, like every other MP, to furnish copies of Project Proposals, Disbursement Forms and receipts and quotations and the like, including reports of project inspections where appropriate. However when all of the allocated funds are committed, through far too many almost insignificantly small amounts, in a matter of days or weeks, proper accounting and acquittal can be extremely difficult. In circumstances like this it is imminently possible and open for the integrity of the acquittals to be suspected.

All of these findings prompted us to say that DSG is a Constitutional grant. It is available to all electorates every year. Whilst one MP may represent the respective electorate for a term of 5 years with no guarantee that he or she

would be returned for another term, the financial grants however would always be available to every electorate each year, for as long as the requirement of the law (OLPGLLG) is current. Therefore it seems to us to be a sensible practice for MPs to concentrate on impact projects or activities which can be fully and properly funded selectively across the electorate, mindful always that any part of the electorate, or indeed any proposed project, that miss out in one year would be considered for the next or following years. A number of successful impact projects, preferably sustainable, is a much better option than spreading a quarter of a million kina into so many social welfare type activities, with negligible or no lasting benefit to everyone in the district or villages. Certainly acquitting public money in such circumstances can be needlessly difficult and time consuming. The time and of course expenses involved, the latter no doubt coming out of the DSG itself, can be saved.

That concludes our revisit of the important points and matters we covered in our decision on verdict in relation to the misapplication charge.

2. Failure to Pay or Declare NHC Debts

Evidence against the Leader is mostly contained in the affidavit of Walter Kapty, the former Managing Director of NHC. We were able to elicit the following from Mr. Kapty's evidence and the other evidence before us:

Sir Moi executed a tenancy agreement with the NHC on 16th August 1995 over the property described as Section 51 allotment 128, Konedobu Port Moresby, N.C.D. He did not pay the compulsory tenancy fees at the time he

executed the tenancy agreement. He also did not pay the K110.00 rental for the property which was payable every fortnight. The Leader made no payments starting from the date the first rental became payable a month after he executed the tenancy agreement on 16th August 1995.

The situation remained that way and the arrears accrued until the end of May 1998. On 29th May 1998 the Leader made two payments. He paid in the sum of K220.00, which was presumably toward the compulsory tenancy fees that he should have paid upon execution of the tenancy agreement. On the same day he made another payment of K7, 370.00, quite obviously to pay for most of the outstanding arrears to that point in time, which was about K7, 733.57. The total outstanding arrears after these two payments stood at K133.57.

Then for a period just short of five (5) years the Leader made no effort to pay rentals as and when the same became due.

The Leader made his second payment on 13th March 2003 when the arrears had reached K13, 883.57. He paid in a sum of K3, 000.00 on 13th March 2003, which left an arrears balance of some K10, 883.57.

Then the unpaid rental arrears began to accrue again and continued for another period of just under two (2) years. The records before us show that the arrears reached a total of K16, 273.57 by 22nd January 2005.

The Leader made his 3rd lump sum payment on 1st February 2005. He paid in a sum of K5, 000.00, leaving arrears of K11, 273.57. The total arrears reached about K11, 493.57 on or around 19th February 2005.

We found that at about this time the Leader must have made permanent arrangements to have direct deductions of his salary and have the deductions credited to NHC because by 2nd March 2005 regular payments of K660.00 began to be paid to the NHC.

It was clear to us that the Leader owed the NHC and was carrying a liability even soon after he executed the tenancy agreement because he did not pay the compulsory tenancy fees at the time he executed the tenancy agreement. He also did not pay the K110.00 rent for the property which was payable every fortnight. The Leader was never in the clear even when he was served with the notice, by the Commission, to exercise his right to be heard on allegations of misconduct in office on or around 13th April 2005.

For 9 years Sir Moi was in a debt situation in his relationship with the NHC. He allowed years to pass at a time before he acted to pay lump sums, but that did not help because the arrears kept increasing. And eventually this drew the Commission's attention on him.

We found that, as a leader, Sir Moi was always obligated by law, Section 27 (1) of the Constitution, to conduct himself in both his public and private life and in his associations with other persons in such a way that he did not demean the leadership offices or positions he occupied and also not allow his public or official integrity and his personal integrity to be questioned.

Sir Moi knew he had to pay rent to the NHC, consequent upon the execution of a tenancy agreement with it over the subject property. Also consequent upon the tenancy agreement Sir Moi had exclusive occupation of the

property. He certainly never abrogated any rights under the agreement if living in the house did not suit him and his family's convenience and safety. In fact we noted that he has since proceeded to complete purchase of the property. The point we make is that whether he sometimes did not live in the house because of break-ins does not and did not relieve him of his contractual obligations, and certainly it seems not to have discouraged him in his long term interest in the property. The various letters to him from the NHC indicates to us that people were frustrated with the Leader's conduct. That just goes to show how some members of the public were given cause to view the Leader's integrity and the integrity of the offices he occupied in those years. The Leader was receiving substantial fortnightly Housing Allowances at the time and the fact that his fortnightly rental obligation to NHC was only a small fraction of that allowance really does not make the Leader's pleas or excuses and explanations convincing or compelling.

We further found that Sir Moi never declared his NHC liability to the Commission. The leader has informed this Tribunal that he made an honest mistake. This is the same explanation he gave the Commission in his reply to the latter's notice to him to exercise his right to be heard.

We said Sir Moi ought to have known or remembered that he had to pay rent to the NHC. He was in lawful occupation of a house that was not his. How could he or anyone, whether leader or not, possibly forget that he had to pay the rent just like any other tenant. It seems to us to be quite telling that this Leader remembered to pay lump sums to partially reduce arrears once in a while, albeit at intervals of years apart. We cannot accept that he forgot his obligations. Certainly his failures were a cause for consternation at the NHC

such that he was, over the years, reminded in writing, advising him of his obligations. He must have received the advices of the arrears from NHC because he felt obligated to make partial payments, albeit very irregularly.

For these reasons we said Sir Moi Avei was guilty of misconduct in office, firstly in that he failed to conduct himself in his public or official life and in his private life and in his association with other persons in such a way that demeaned the various public offices and positions he occupied and allowed his public or official integrity and his personal integrity to be called into question when he failed to pay to the NHC his rental as and when the same fell due and secondly in that he knowingly, recklessly or negligently omitted to disclose to the Commission information in relation to his rental liabilities in his annual statements for six consecutive reporting periods.

THE LAW ON PENALTY

Section 28 of the Constitution is the penalty regime in relation to proved misconduct in office by public office holders. The relevant part of it reads:

"28. Further provisions

(1) For the purposes of this Division, an Organic Law –

.....

(g) shall establish independent tribunals that –

(i) shall investigate and determine any cases of alleged or suspected misconduct in office referred to them in accordance with the Organic Law; and

(ii) are required subject to (1A), to recommend to the appropriate authority that a person found guilty of misconduct in office be dismissed from office or position; and

(h) may make any other provision that is necessary or convenient for attaining the objectives of this Division.

(1A). An Organic Law may provide that where the independent tribunal referred in Subsection (1) (g) finds that –

(a) there was no serious culpability on the part of a person found guilty of misconduct in office; and

(b) public policy and the public good do not require dismissal,

it may recommend to the appropriate authority that some other penalty provided for by law be imposed".

Leadership Tribunals' power on penalty under Section 28 of the Constitution is repeated in Section 27 (5) of the OLDRL and it reads:

"(5) If the tribunal finds that a person to whom this Law applies is guilty of misconduct in office, it shall recommend to the appropriate authority that –

(a) he be dismissed from office or position; or

(b) *as permitted by Section 28 (1A)* (**further provisions relating to Leadership Code**) *of the Constitution and in*

circumstances set out in that subsection – some other penalty provided for by an Act of Parliament be imposed."

It is clear from the reading of the above provisions that a recommendation for dismissal from office is mandatory unless the Tribunal is satisfied that there is no serious culpability in relation to the misconduct of the person found guilty and that there are aspects of public policy and considerations of public good that clearly indicate dismissal from office is not the appropriate penalty. Only after having being satisfied, firstly there is no serious culpability in the misconduct and secondly that there are public policy considerations and issues of public good, can the Tribunal consider the appropriateness of any other penalties provided by law.

If the Tribunal is of the view that there is no serious culpability it would then have to consider the provisions of the ***Leadership Code (Alternative Penalties) Act 1976.*** This Act is the other law that Section 28 (1A) of the Constitution alludes to and Section 27 (5) (b) of the OLDRL speaks of. We now set out the relevant provision, which is Section 2 of it, in full:

"2. Alternative penalties.

The penalties that may be recommended and imposed under and for the purposes of Section 28 (1A) of the Constitution and Section 27 (5) (b) of the Organic Law are that the person found guilty of misconduct in office –

(a) be fined an amount fixed by the tribunal, not exceeding K1,000.00; or

(b) be ordered by the appropriate authority to enter into his own recognizance in a reasonable amount, not exceeding K500.00, fixed by the tribunal that he will comply with Division III.2 (Leadership Code) of the Constitution and with the Organic Law during a period fixed by the tribunal, not exceeding 12 months from the date of the announcement, under Section 27 (6) of the Organic Law, of the decision of the tribunal; r

(c) be suspended, without pay, from office or position for a period not exceeding three months from the date of commencement of the suspension; or

(d) be reprimanded,

or if he is a public-office holder as that expression is defined in Section Sch.1.2 (1) of the Constitution, that, as determined by the tribunal –

(e) he be reduced in salary; or

(f) *if his conditions of employment are such as to allow of* **(sic)** *demotion – he be demoted."*

In our view the Leadership Code's grant of power to Leadership Tribunals, especially in relation to the discretion vested in them, is fairly limited.

Nevertheless we are aware that these provisions were interpreted to confer in Leadership Tribunals a wider discretion by the Supreme Court. The Court, per Amet CJ, interpreted the Leadership Code's penalty provisions in the following manner in ***SC706 Re: Peipul –v- Sheehan & Ors:***

"I am prepared to accept the proposition that s. 28 (1) (g) does imply that in all findings of guilty misconduct in office in the Tribunal starts with the primary premise that it shall recommend dismissal from office unless pursuant to s. 28 (1A), (a), and (b) it found that there was no serious culpability and that public policy and public good do not require dismissal. I am satisfied that these two provisions under s. 28 (1A) are to be read together in the context of the total circumstances of the conduct of the leader, so that they are applied in their totality in arriving at the conclusion as to whether or not dismissal is to be the appropriate penalty to be recommended or that alternative penalties under the **Alternative Penalties Act** *are appropriate to be recommended for imposition"*

The statement of the Chief Justice, when read together with the following excerpts from one of the other members of that same Court seem to confirm the existence of a relatively wide discretion in Leadership Tribunals:

"It is clear to me from the wording of the Constitution s. 28 (1A) that it is really a question of degree as to whether or not the breach of duty which constitutes the misconduct is so serious in terms of "culpability", and contrary to "public policy" and "public good" that the ultimate penalty is warranted or some other lesser penalty prescribed by the **Alternative Penalties Act** *is warranted."* (Per Injia J, as he then was)

We state categorically that we are bound by Supreme Court precedents. Consequently we note that the Supreme Court in the *Peipul* case (supra) postulated a fairly liberal application of the Leadership Tribunal discretion to do justice in each case. It defined, and also seems to have widened, the

Tribunal's scope to determine culpability, particularly as to whether or not it thought there was serious culpability. However, in saying that, we are convinced that the Supreme Court did not change the major premise of the Leadership Code provisions on misconduct in office, in relation to penalty, which is that ***"...s. 28 (1) (g) does imply that in all findings of guilty misconduct in office in the Tribunal starts with the primary premise that it shall recommend dismissal from office unless pursuant to s. 28 (1A), (a), and (b) it found that there was no serious culpability and that public policy and public good do not require dismissal"*** (Supra).

CULPABILITY

Are the three (3) instances of misconduct which we have found proved against Sir Moi seriously culpable or not seriously culpable?

1. Failure to Pay or Declare NHC Debts

We deal first with the two cases of misconduct in Sir Moi's relationship with the NHC. One was that he failed to pay NHC rentals as and when the same fell due and the other was that he failed to declare his liability to the NHC in his annual statements to the Commission.

We note that these failures stem from the Leader's private relationship with another, albeit a government entity. The Leader is accountable for his private life as well as his public life so his failure to pay rent when due, especially over long periods at a time, was and still is, misconduct in office.

Yet many people, whether leaders or not, do end up owing on the rent. Rental liability, we believe, is a common occurrence. It is personal between two parties. Rental arrears otherwise creates a lawful right to sue for recovery. In this case Sir Moi paid his arrears, albeit irregularly and whilst not clearing his arrears account at any time during the relevant period. He eventually sorted out the irregularity in payments.

However, these features notwithstanding, Sir Moi displayed a clearly unacceptable level of careless disregard to his personal or private obligations such that it attracted the watchdog Commission's attention. People at the NHC were given adequate cause to doubt the Leader's sincerity and integrity. The NHC could have voided the tenancy agreement and evict the Leader from the property but they did not. It is not hard to understand why though. Sir Moi was a Member of Parliament during the period in question and he was a very senior member in cabinet and government. People in the NHC would have had every reason to not do anything to the Leader. For instance, the Managing Director of the NHC is appointed by the NEC. In our view these are the sorts of circumstances which make the Leader's failure misconduct in office. Sir Moi chose to be governed by the Leadership Code when he chose to put himself up for election as a Member of Parliament. He must have known that if he created any controversy of any kind it would not escape judgement or censure by the Commission or members of the public. He ought to have known that his conduct was never going to be ignored or overlooked.

Nevertheless the question is whether the Leader's conduct is seriously culpable, and indeed whether he must be dismissed from holding public

office for his failure to pay rentals and for failing to declare his liability to the NHC in his annual statements. We do not think so. To our mind there is no culpability sufficient to attract the ultimate penalty for these two failures. We reach this conclusion after balancing out the matters we alluded to in relation to these two acts of misconduct. Consequently we hold that there is no serious culpability in relation to the Leader's failure in not being regular and prompt with the payment of rent as and when it became due and his failure to declare the liability that he was carrying to the Commission.

2. Misapplication of DSG Funds

We now turn to the Leader's misconduct in the application of the 2002 District Support Grant discretionary component.

By the cluster of charges contained in the first four allegations Sir Moi was charged that, after he received three cheques totalling K250, 000.00 from the government, he (i) deposited those cheques into an account titled 'Moi Avei's Discretionary Funds' account No. 968-38670974 held at BSP Ltd Waigani branch and failed to ensure that that public money was properly applied to the rural infrastructure projects for which it had been allocated and (ii) converted a substantial part of that public money to his personal use and the use of his associates and (iii) made approximately 59 unverifiable and or improper cheque payments totalling approximately K79, 397.77 and (iv) made approximately 37 unverifiable or improper cash cheque transactions totalling K71, 910.00 and (v) failed to acquit that public money.

We dealt with these specific charges individually and concluded that the Leader was guilty of misconduct in office generically because we found that he had improperly applied the District Support Grants referred to above to purposes other than for which he had been allocated the money. In relation to the other assertions contained in the first four allegations we found no evidence to conclude that Sir Moi had converted any part of public money to his personal use and the use of his associates or that he made unverifiable payments or that he failed to acquit the money.

That said, we now ask ourselves whether or not, under these circumstances, serious culpability ought to be attached to Sir Moi's misconduct in office, which is that he failed to apply public money to intended purposes.

Sir Moi's conduct, or indeed misconduct as is now the case, must be assessed in the way the law intends that public office holders' conduct are to be judged or weighed. We consider that it is only fair to make the assessment as would ordinary and reasonable people in the community, because we believe the Leadership Code, at least the penalty aspect of it, clearly intend that we assess culpability in that manner. We also pause to remind ourselves that being a lawfully appointed tribunal composed of members of the judiciary we are bound by any binding precedent.

Having said that we would agree with the Public Prosecutor that there would be many people in the community who would say that any Member of Parliament who breaches DSG Guidelines and misapplies electoral project funds, like District Support Grants, commits a serious breach of duty. We have no doubt that that perception is widely held.

On the other hand there would be members of the community who would say that there is nothing wrong with spending public money in the respective electorates as long as it is disbursed to people in the electorate, just as Sir Moi has seemingly done. People who are so inclined would say that the money was intended to be expended to the benefit of people of the electorate. They would argue that the Leader did not receive for himself any portion of the money and that he did not give any to his associates and family members. We also accept this point to be one of the Leader's main contentions in his submission that we find no serious culpability on his part.

We think both of the above propositions are based on real beliefs of members of the community and so as such we consider them to be worthy of serious attention on our part. Therefore we have given careful thought, as indeed we must, to them and all other relevant propositions advanced by the Public Prosecutor and the Leader's counsel. We have reminded ourselves through out the course of our deliberations of the intent and purpose of the Leadership Code. Also foremost on our minds has been our awareness that a finding of serious culpability by Sir Moi can only give rise to grave and momentous adverse consequences for him. Consequently we do not consider our task to be anything else but critically important.

After having fully deliberated and considered all relevant matters, we consider that leaders who, whilst being bound by fiduciary duties, breach DSG Guidelines or other financial guidelines or instructions must be censured, more so if public funds are involved. Breach of guidelines or instructions or any conditions attached in relation to expenditure of large sums of entrusted public money is a serious breach. We may be a tribunal

vested with a discretion – how wide or narrow is for the time being not necessary to say. However we consider that we have no legitimate prerogative to redefine any act of misconduct, which can only be, in the ordinary course of things, seriously culpable.

Any conduct which indicates that there was no regard to the developmental aspirations postulated in the Guidelines and expressed and implied conditions that go with the release of government money is conduct that calls for severe censure. In our view the censure called for cuts across the spectrum of leadership distinctions. Whether a leader is of Sir Moi's calibre, standing and experience or whether he or she is of lesser known repute, in our view matters little. In the end what matters is that we, or any other Leadership Tribunal, must attach seriousness of culpability to misconduct that, in the ordinary and logical course of events, should not be committed.

We find no similarities between this misconduct case before us and the case of John Mua Nilkare (supra). In Nilkare's case the leader was acquitted on Appeal by the Supreme Court on most of the allegations a Leadership Tribunal found him guilty. The acquittal, we think, was for good reasons and on sound public policy too. The following is what Amet CJ said in that case:

"I consider primarily that if the purposes to which the funds were legitimately applied in the general spirit of the particular developmental programme are good general public purposes for the benefit of the people, with bona fide good intentions and substantial procedural regularity in the allocation and expenditure of the funds, then it could not be said to be unlawful application for the purposes of the Organic Law."

We are of the view that other cases of misconduct, except for any binding principles of law postulated by them, wherein the misconduct involved does not relate to the use and application of developmental grants, are not proper guides for the purposes of this instant misconduct matter before us.

We have carefully considered Sir Moi's personal status. We have evidence before us, for the purposes of this decision, of his contribution to the development of Papua New Guinea. Dame Carol Kidu, who is a Minister of State herself, testified on the Leader's behalf. Not that we really needed to be informed, but as a matter of formality for the purposes at hand. We accept that it is a matter of national history that Sir Moi has contributed much at the highest level. He has held various Ministerial portfolios. He has been a Deputy Prime Minister of Papua New Guinea, which means he must have acted as Prime Minister at times.

However the "public policy" and "public good" that the law speaks of forbid us from saying there is no serious culpability on the part of Sir Moi. We reiterate that we have no legitimate authority to categorise misconduct which is seriously culpable as not being so. We have no discretion to water down serious misconduct, to make it become not so serious. In our view, for some categories of misconduct in public office, only serious culpability can be attributed to leaders found guilty of them. In our view misapplication of District Support Grants discretionary component is one such misconduct.

A leader's status or other recorded good deeds or indeed, as in this case, acclaimed contributions and experience, does not make undesirable

misconduct any less a conduct. Public policy and public good applies both ways. It may work in favour of a leader or it may work against it.

A thought that has troubled us to some extent is the notion that, if Leadership Tribunals are required to accept and consider the past good records or noted public and personal attributes of a leader, for purposes of reducing culpability in relation to any serious case of misconduct in public office, quite obviously a popular and well achieved leader would have a better chance of obtaining a favourable result from Leadership Tribunals than perhaps an unknown first time parliamentarian or someone little known to the public, for the same misconduct. That is why we think the serious culpability is in the misconduct and the circumstances surrounding its commission, quite independent of a leader's personal attributes.

Public policy must surely be that District Support Grants are not to be treated as a social welfare fund, to be expended on school fees or medical fees or purchase of store cargo or funeral or death related expenses or airline tickets and PMV fares or sports and recreational activities. Surely there is no public good in dishing out disbursements for the benefit of individuals or family units only and not for a whole village or the district. To say there is public good in assisting struggling families with school fees and other expenses is not convincing. How does one pick out a desperate case in an electorate teeming with needy families? Even if cash support to families and individuals, from out of the DSG funds, is permissible, how does one justify the seemingly discriminatory selection of families and persons to those who miss out on assistance, especially considering that it is 'their' money too? Even if school fee support or other personal expenses are allowable

expenditures, how can the neediest of them be isolated from countless others who must also pay the same school fees or expenses? Is any fair assessment process followed or is it just random selection on first come first served?

District Support Grant is for district infrastructure. It is intended to be expended to enhance capacity in the respective electorates through project funding, for the benefit of everyone in the electorate. Treating the DSG as a welfare fund is not good policy, indeed it is contrary to public policy and public good. Expending government money in that way, particularly if it is repeated year after year, in any number of electorates in the country, only creates a culture of dependency and promotes the 'handout' mentality. We believe the desired outcomes expected through proper spending of the DSG is to help people in the electorates participate in economic and income generating activities and become self reliant, thereby enabling people to be creative and get rid of the mindset of dependency and free handouts.

We need to mention one other obvious fact we have deduced from out of the evidence before us and also as a result of our drawing upon common knowledge. The year 2002 was a National Election year, just like this year, 2007. Giving public money meant for infrastructure projects to individuals for purposes other than those provided for in the DSG Guidelines, in a matter of days, is capable of creating or portraying the impression that the funds are being distributed to one's supporters. Responsible leaders ought to guard against creating such impressions. We say that engaging in conduct capable of creating perceptions of impropriety is contrary to good public policy.

In the end we must conclude that Sir Moi's misconduct in applying District Support Grant contrary to the Guidelines and the express and implied conditions attached to the grant of it is serious misconduct in public office. We therefore say that there is serious culpability on the part of the Leader.

PENALTY

1. Failure to Pay or Declare NHC Debts

We recommend that the Leader be fined K750.00 each on the two counts; firstly for that he failed to pay the NHC rent as and when the same became due and secondly for that he failed to disclose his rental liabilities to the Ombudsman Commission. It means that we recommend that the Leader is fined a total of K1500.00 in relation to these two misconducts.

2. Misapplication of DSG Funds

We recommend that the Leader be dismissed from office as member of the National Parliament representing the Kairuku-Hiri Open Electorate and Central Provincial Assembly member.

The Acting Public Prosecutor

Maladina Lawyers for the Leader