

REGINA -v- GEOFFREY SIAPU

High Court of Solomon Islands

(Muria ACJ)

Criminal Case No. 34 of 1992

Hearing: 25,26,27,28,29 January, 1,2,3 & 4 February 1993

Judgment: 22 March 1993

R B Talasasa for Prosecution

T. Kama for the Defendant

MURIA ACJ: The defendant, GEOFFREY SIAPU, holds the post of Permanent Secretary in the Public Service. He is the Permanent Secretary, Ministry of Commerce & Primary Industry and he is brought before this court charged with 6 counts of misconduct in office. The offences were alleged to have been committed between the period of 1985 and 1989 during which time the defendant had already been holding the post of Permanent Secretary in a number of Ministries in the Government.

The defendant pleaded Not Guilty to all the charges. It is for the prosecution therefore, to prove the charges brought against the defendant.

The Standard of Proof.

I think it is convenient at this stage to first of all consider the standard of proof in cases where public officers are brought to court charged with offences of misconduct in office under the Leadership Code (Further Provisions) Act, 1979. The Provisions relating to proceedings for misconduct in office in the High Court are contained in section 23 of the Act which provides:

- "23 (1) Proceedings for misconduct in office shall be commenced in the High Court of Solomon Islands.
- (2) No proceedings may be commenced for misconduct in office except by the Director of Public Prosecutions.
- (3) In the event that the Director of Public Prosecutions does not institute proceedings in respect of any matter referred to him by

the Commission, he may furnish the Commission with a statement of the reasons for such decision:

Provided that such statement shall not be divulged to any other person by the commission."

There is not much of a guidance to be found in those provisions as to the appropriate standard of proof to be applied by the court nor is there any specific guidance in the provisions of Chapter VIII of the Constitution (*Leadership Code*). The proceedings taken by the Leadership Code Commission ("the Commission"), however, after receiving a complaint of misconduct in office by a leader are clearly investigatory. As such the standard of proof before the Commission may present no difficulty although the Commission has to be satisfied on the materials which it obtains from its investigation before it makes one of the decisions specified under section 21(1) of the Act. The distinction under our Leadership Code laws lies, I think, in the fact that one is a trial (in the High Court) and the other is an inquiry which is inquisitorial (before the Commission).

Mr. Talasasa suggested that the court should not treat cases of misconduct in office in the same way as it treats criminal cases and as such the standard of proof should only be on the balance of probabilities like in the ordinary civil cases. On the other hand Mr. Kama argued that the Act did not suggest any other standard of proof and as such since his client has been prosecuted for offences of misconduct in office, the standard must be that of proof beyond reasonable doubt, like in normal criminal cases.

This court has been given the responsibility of trying those Leaders who have been prosecuted for misconduct in office which is an offence both under the Constitution and the Leadership Code (Further Provisions) Act. That fact alone does bear some impact on the seriousness of the allegations brought against a Leader and does carry with it consequences which may be grave. The offence of misconduct in office is not in itself a criminal offence but if it is proved against a Leader, it can certainly carry adverse consequences of the most serious kind on the Leader.

There are numerous reported cases in which varying approaches were observed on the standard of proof in civil cases. In *Horual -v- Neuberger Products*, [1956] 3 All.E.R 970 Morris L.J. stated at p.978:

"In truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions ... Though no court and no jury would give less careful attention to issues lacking gravity than those marked by it, the very elements of gravity becomes a part of the whole range of

circumstances which to be weighed in the scale when deciding as to the balance of probabilities."

In the same case Lord Denning said at page. 973:

"The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case reach the very high standard required by the criminal law."

The two standards, that is, proof beyond reasonable doubt and proof on a balance of probability, still obtains today. But as Lord Denning explained in *Bater -v- Bater* [1950] 2 All.E.R. 458, there are varying degrees of proof within the two traditional standards of proof and these defer according to the gravity of the allegation of fact which is to be proved. At page 459 he stated:

"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

Those cases, of course, are concerned with ordinary civil cases. In this case the court is concerned with a case of misconduct in office. However, I find the cases I have cited as being helpful in deciding what the standard of proof is to be applied by this court in a case such as the present one.

It must be borne in mind that the Act is intended to promote the integrity of the country's leaders and should they commit acts of misconduct in office, that they be penalised.

The Act therefore, in my view, envisages that the standard of proof in cases of misconduct in office is one which is not as high as the criminal standard of proof

beyond reasonable doubt but one which is nevertheless requiring a higher standard of proof than the usual civil standard of proof, namely on the balance of probabilities. In other words, the court must be reasonably satisfied of the truth of the allegations brought against the leader bearing in mind the nature and gravity of the charge and the possible adverse consequences that the leader would be subjected to. The fact that the Director of Public Prosecutions institutes proceedings in this court as required by the Act, does not necessarily entail that the degree of proof must be that which is applicable in criminal cases.

Factual Background

The defendant was promoted to the post of Permanent Secretary (SS1) on 1st January 1982 and was posted as Permanent Secretary to the Ministry of Education and Training until 18th March 1984. He was later posted as Permanent Secretary in the Ministry of Employment, Youth and Social Development on 19 March 1984, a post he held until his posting in January 1985 as Permanent Secretary in Ministry of Trade, Commerce and Industry. On 10 January 1986 the defendant became Permanent Secretary in Ministry of Natural Resources until 28 June 1988 and on 29 June 1988 he was made Permanent Secretary of the Ministry of Agriculture and Lands. He is now presently the Permanent Secretary of the Ministry of Commerce & Primary Industry. The defendant is one of the Permanent Secretaries under the old terms and conditions of service at SS1 who successfully applied and was reappointed as Permanent Secretary as from 26 September 1990 on contract and under new terms and conditions of service.

On 10 August 1984, a limited company called South Pacific Development Associates Limited ("SPDAL") was registered by the Registrar of Companies. One of the subscribers to the company was the defendant who was the Secretary and a Director of the Company. One of SPDAL's objects was to conduct a consultancy practice in the area of Project Planning and administration and overseas procurement.

After the registration of his company, the defendant wrote a letter on 18 August 1984 the Chairman of the Leadership Code Commission declaring that he was the co-owner of South Pacific Development Associates Limited and explaining the work of his company.

On 19 August 1984, the defendant wrote to the Permanent Secretary in the Public Service Office and Permanent Secretary, Ministry of Finance requesting that SPDAL be given the task of recruiting ASAS Staff from Australia instead of Price Waterhouse as it would do the job at a lesser cost than that which Price Waterhouse charged the Government. Following some negotiations, the Government granted the Agency task to

SPDAL to implement the ASAS recruitment. The Agency Agreement was entered into between Solomon Islands Government and SPDAL on 1 July 1985.

The company SPDAL had been operating until 1988. Within that period the defendant had been receiving money from his company. The payments were said to be advances and not director's fees. Most of these payments were made into the defendant's personal account in the Hongkong & Shanghai Banking Corporation from SPDAL's account.

In 1988 SPDAL had also been subjected to the scrutiny of the Commission of Inquiry into the World Bank Primary School Project.

Following that Inquiry and a subsequent report by the Ombudsman, the Leadership Code Commission investigated into the conduct of the defendant. The Leadership Code Commission subsequently found prima facie evidence of misconduct by the defendant and referred the matter to Director of Public Prosecutions for prosecution.

The Issues:

The main issue for the court to determine is whether the defendant is guilty of misconduct in office. The issues of misconduct in office relate to the allegations of failing to declare to the Leadership Code Commission the various payments the defendant received from SPDAL, holding beneficial interest in the Agency Agreement, engaging in paid employment without approval of Leadership Code Commission and accepting a loan of \$21,000.00 from South Pacific Development Associates Limited.

The Evidence:

Evidence from a number of witnesses were adduced including evidence from two Permanent Secretaries at the time and with whom the defendant had dealt with. A number of documents were also tendered in court. The accused gave evidence in his defence and called witnesses also to support him.

The evidence relating to the charge of failing to declare the sum of \$21,000.00 (count 1) was that on 1 December 1987 the defendant was paid that sum by SPDAL.

The payment was by a cheque No.161589 from the company and deposited as a House Cheque Deposit to the credit of the defendant's account in the Hongkong and Shanghai Banking Corporation on 1 December 1987. In the Leadership Code Declaration made on 1st January 1988 for the year 1987, the amount of \$21,000.00 had not been shown on the Declaration. The only amount shown on the Declaration Part B - (Assets) was \$31,750.00 being the amount paid on 1 January 1987 to Government for a house. In his evidence in court, the defendant stated that he borrowed the \$21,000.00 from his

company SPDAL to buy off the house he won from the Government. The amount was lent to the defendant.

On the charge of failing to declare to the Leadership Code Commission the sum of \$1,008.00 received from SPDAL, it was clear from Frank Afu's evidence and the bank records that the sum was paid by SPDAL by cheque No.246757 to the defendant's Account at Hongkong & Shanghai Banking Corporation on 29 December 1987. It was also clear that the sum of \$1,938.52 was paid to the defendant by SPDAL. That sum comprised of \$964.67 paid to the defendant on 17 March 1988 and \$973.85 paid to him on 24 February 1988. The defendant agreed that he did not declare the amounts of \$1,008.00 and \$1,938.52 to the Leadership Code Commission.

There was no dispute that the company SPDAL concluded an Agency contract with the Government on 1 July 1985 and that the defendant was a director of the company holding major shares in the said company at the time. There was evidence that the Government and other authorities were concerned about the defendant's continuous employment as Permanent Secretary while at the same time working as Chairman and also a Director of SPDAL. This can be seen from the then Permanent Secretary, Ministry of Public Service, Mr. Manira's letter of 19 July 1985. The defendant's response was by a letter of 22 July 1985.

There was no evidence that the defendant sought approval from Leadership Code Commission to engage in paid employment as a director of SPDAL. The letter to Secretary to Cabinet & Public Service of 19 September 1984 and the letter to Permanent Secretary, Ministry of Public Service of 22 July 1985, however, did contain information about the defendant's involvement in SPDAL.

The Leadership Code Commission at the time came under the Prime Minister's Office and the evidence clearly showed that the Commission was functioning at the time on an ad hoc basis. There was evidence that a three member Commission was appointed on 10 January 1980 by the Prime Minister. A subsequent three member Commission was appointed by the Prime Minister on 11 February 1986.

Despite the appointment of the Leadership Code Commission members, much of the administrative work of the Commission were done through the Secretary to cabinet and Public Service, as there was no Secretary to Leadership Code Commission yet appointed at the time.

The Commission, however, later had a Secretary, Mr. Gordon Billy Gatu, followed by Mr. Swanson Konofilia and now the present Secretary Mr. Sam Fagaria. The Leadership

Code Commission was still under the Prime Minister's Office until recently when it moved away to a separate office.

Mr. Fangaria stated in evidence that even up to this stage, no regulation has yet been made to facilitate the work of the Commission effectively. But despite the lack of regulations, the Leadership Code Commission had carried out its investigation into the defendant's case as best as it could.

Mr. Fangaria gave evidence that the defendant had been notified and was given the opportunity to respond to the allegation of misconduct in office formally put to the defendant. Mr. Fangaria further stated that the defendant had not responded to the allegations despite reminders being sent to him.

The arguments:

The main force of contention on behalf of the prosecution is that the defendant had failed to comply with the provisions of the Leadership Code (Further Provisions) Act 1979 and in so doing, amounted to misconduct in office.

Mr. Talasasa argued that the failure by the defendant to declare the sum of \$21,000.00 paid to him by SPDAL amounts to misconduct in office. The same argument was made in relation to the other amounts of \$1,008.00 and \$1,938.52 which the defendant had failed to declare. Counsel argued that these were business transactions and as such they ought to be declared.

Counsel for the prosecution further submitted that as the defendant was a public officer and a leader at the time his company concluded the Agency Agreement with the Government, the defendant's failure to obtain approval from the Leadership Code Commission was a misconduct in office. This was particularly so, as the defendant had a beneficial interest in the Agency Agreement.

It was argued by Mr. Talasasa that the defendant's letters to the Secretary to Cabinet and Public Service of 19/9/84 and to Chairman of Leadership Code Commission of 18/9/84 were not letters of seeking approvals of the Leadership Code Commission. Counsel argued that the letter of 18/9/84 to Chairman of Leadership Code Commission merely declared that defendant had a company registered and that he was a co-owner of that company.

Mr. Talasasa submitted that as a Director of SPDAL the defendant was engaged in paid employment apart from his public Office duties. Having failed to obtain the approval

of the Leadership Code Commission to undertake such paid employment, the defendant's conduct amounted to misconduct in office.

Counsel further contended that the \$21,000.00 was a loan to the defendant from South SPDAL and that by accepting such a loan the defendant was guilty of misconduct in office. Counsel contended that the loan was not in the similar nature as applied to other borrowers and as such section 14(1)(a) of the Act prohibits such transaction.

The evidence, Counsel said, was overwhelming that the defendant had misconducted himself in office.

Mr. Kama, for the defendant, argued that under section 5(1)(e) of the Act, the prosecution must show that the person charged was a leader, secondly, that there must be a business transaction, and thirdly, that there was a failure to make the declaration.

Mr. Kama argued that the term "business transaction" as defined in section 2 related to transactions carried out in furtherance of any trade, profession or occupation. Counsel argued that, the amounts complained of were not business transactions but rather were of private or domestic nature.

It was further submitted by Counsel for the defendant that the \$21,000.00 was obtained for the purpose of purchasing ~~and~~ a house. That counsel said was not for the purpose of carrying on trade. Thus counsel argued there was no evidence to show that the \$21,000.00, although a loan from the company, was a 'business transaction' as defined in the Act.

Mr. Kama also argued that a leader who is also a director of a company is not carrying on a business transaction when he borrows money from the company for himself. The defendant, therefore, in the present case could not be said to have committed an act of misconduct in office when he borrowed the money from his own company.

In so far as the allegation concerning the failure to obtain approval of Leadership Code Commission before concluding the Agency Agreement with the Government, Mr. Kama argued that the failure to obtain approval was not due to the fault of the defendant. It was due to the non-existence of the Commission or the lack of the proper administration of the Leadership Code Commission. In any case, counsel argued, the defendant had done all he could to inform the Leadership Code Commission of his interest in SPDAL.

In so far as the question of whether the defendant was engaged in paid employment, Mr. Kama argued that there has never been any guidance of the procedure to be followed for obtaining approval in this respect. Counsel conceded that "paid

employment" included holding a directorship in a company. But he suggested that in the absence of such proper procedures of obtaining approval, the defendant could not be guilty of non-compliance with section 11(1) of the Act.

Other submissions by Mr. Kama dealt with the manner of investigation carried out by the Leadership Code Commission against the defendant. Counsel suggested that the Leadership code Commission had not exercised its powers properly under the Act and that, had it done so, it could have found that the complaints against the defendant were trivial.

Mr. Kama further complained that his client had not been fairly dealt with by the Leadership Code Commission. Thorough investigation should have been done before considering whether to proceed against his client in court. The suggestion by Counsel was that his client suffered the denial of natural justice.

Decision

There is no dispute that the defendant is a leader and as such he is a person to whom section 93 of the Constitution applies. The defendant also did not deny being a director and shareholder of SPDAL.. Again, the defendant did not deny receiving the sums of \$21,000.00, \$1,008.00 and \$1,938.52 from his company.

The evidence also showed that the defendant did not declare receiving the sums of \$1,008.00 and \$1,938.52. In so far as the amount of \$21,000.00 the defendant stated that although the figure \$21,000.00 did not appear in his Declaration of 1987 which he submitted on 1/2/88, that amount was included in the \$31,750.00 declared in Exhibit 17 (1987 Leadership Code Declaration).

The requirement of a Leader to disclose his financial affairs is provided for under section 5 of the Leadership Code (Further Provisions) Act, 1979. The Offence of failing to disclose such a financial affair is created by section 7 of the Act.

The defendant in this case is said to have failed to make declarations as required by section 5(1)(e) of the Act. That provision states as follows:

- " 5(1) Every Leader shall, within three months of the date of commencement of this Act or of his becoming Leader, and thereafter at intervals not exceeding two years, give a separate statement in respect of himself, his spouse and each of his children under the age of eighteen setting out to the best of his knowledge:-

-
- (e) all business transactions involving a sum of five hundred dollars or more entered into by each of them during the period to which the statement relates;
-"

That provision clearly requires all Leaders to declare all business transactions of \$500.00 or more which they entered into during the period covered by the statement. The amounts alleged not to have been declared by the defendant in this case were more than \$500.00.

In so far as Counts 1,2 and 3 are concerned, the first question that must be determined is whether, the defendant declared the amounts stated in those counts. Secondly, if the amounts were not declared, were they 'business transactions'?

On the first count, relating to the sum of \$21,000.00, evidence were adduced that the defendant did not declare receiving that amount from South Pacific Development Limited although he declared that on 1/12/87 he acquired a house from the Government for \$31,750.00. The defendant gave evidence that on 1/12/87 he received the \$21,000.00 from his company and on the same day paid that to the Government for the purchase of the said house. Mr. Newton Magi confirmed that the defendant paid \$21,000.00 to the Government on 1/12/87 for the said house.

The defendant agreed he did not declare the amount of \$21,000.00 at the time, the reason being that he did not know then of the nature of the \$21,000.00, whether it was a loan or not. When one turns to Mr. Alex Bartlett's evidence, it is clear the sum of \$21,000.00 paid to the defendant by SPDAL on 1/12/87 was a loan. It is clear from the evidence that he did not declare the sum of \$21,000.00 lent to him by SPDAL.

However, the matter does not end there because what must be declared is a "business transaction" as required by section 5(1)(e) of the Act. Was the loan by SPDAL to its director, the defendant, of the sum of \$21,000.00 to enable the defendant to obtain a house, a 'business transaction'?

The phrase 'business transaction' is defined in the Act as follows:

" 'business transaction' means any transaction carried out in furtherance of any trade, profession or occupation and any concern or adventure in the nature of trade."

For the transaction to be a business transaction it must be done in furtherance of a trade or profession or occupation. Also any concern or adventure in the nature of trade is also a business transaction.

Mr. Kama sought the court to accept that the defendant had never engaged in any trade, profession or occupation, although he agreed that the defendant's position as a director could be regarded as an 'occupation'.

The word 'trade' has been considered in other jurisdictions. *In Harris -v- Amory (1865) 13 L.T.504, at pp.505-506, Willes, J said :*

"Trade ... is a word having a technical meaning connected with buying and selling, as is limited to the case of the buying and selling of wares, and so forth."

In Southern (s) -v- A.B. Ltd [1933] 1 KB 713, 'trade' was said to be consisted in the marketing of a commercial article. In Sinner -v- Jack Breach, Ltd [1927] 2 KB 220 it was stated by Lord Hewart CJ at 225 that:

"No doubt in a great many contexts the word 'trade' indicates a process of buying and selling, but that is by no means an exhaustive definition of its meaning. It may also mean a calling.."

In this case Counsel for the defendant said that the defendant was not carrying on trade and as such he was not carrying on a business transaction.

In order to determine whether the transaction was a business transaction in this case it must be looked at as a whole. The defendant was offered to purchase a house from the Government. He had to borrow money to enable him to buy that house. He obtained a loan of \$21,000.00 from SPDAL, a private company in which he had substantial shares. Approval from the other major shareholders of the company was also obtained before the \$21,000.00 was released. The money was drawn from the company account and paid into the defendant's account in the Hongkong & Shanghai Banking Corporation after which it was paid to the Government. In return for that payment, the Government transferred the title over Lot 839/III/H to him. That whole process which I described

loan of \$21,000.00 from SPDAL, a private company in which he had substantial shares. Approval from the other major shareholders of the company was also obtained before the \$21,000.00 was released. The money was drawn from the company account and paid into the defendant's account in the Hongkong & Shanghai Banking Corporation after which it was paid to the Government. In return for that payment, the Government transferred the title over Lot 839/III/H to him. That whole process which I described indicates a process of buying and selling. It is connected with buying and selling, in this case, of Lot 839/III/H. The loan of \$21,000.00 undoubtedly connects with the buying and selling of the house in question and it was done through the process described.

The loan of \$21,000.00 from SPDAL was clearly a business transaction. That was a transaction required to be declared under section 5(1)(e) of the Act. The declaration of owning a house to the value of \$31,750.00 was not a declaration of receiving a loan of \$21,000.00, although that sum was also used in part in the purchase of the house.

Having admittedly failed to declare receiving the loan of \$21,000.00 which was a business transaction, I am reasonably satisfied that the defendant had committed the offence of misconduct in Office. I find him guilty of court one.

As to counts 2 and 3, the amounts taken were said to be advances to which the defendant was entitled as a director of the company although he would not regard them as director's fees. The payment of the sums of \$1,008.00 and \$1,938.52 were clearly transactions between the company and the defendant. But were they 'business transactions' so as to come under section 5(1)(e) of the Act?

The amount of \$1,008.00 was advanced by the defendant and given to a relative who was in need. That could not be a transaction in furtherance of a trade nor could it be in furtherance of a profession. Was it a transaction in furtherance of an occupation?

A directorship in a company may be regarded as an occupation. I say 'may be' because the defendant's main occupation was and still is a Permanent Secretary in the Public Service. His directorship in SPDAL could be regarded as his subsidiary occupation.

In Luckin -v- Hamlyn, 21 LT 366, Kelly, C.B. described "occupation" as the trade or calling by which one ordinarily seeks to get his livelihood. *Martin, B,* in the same case described "occupation" as the business in which one is usually engaged to the knowledge of his neighbours.

In the present case the occupation of the defendant by which he ordinarily sought to get his livelihood or by which he usually engaged was that as Permanent Secretary. His

doubt and slight, though it may be, I must, in the interest of justice, give the benefit of that doubt to the defendant. I must therefore record a finding of not guilty in respect of counts 2 and 3.

In count 4, the defendant was alleged that he had a majority shares in SPDAL which sought, accepted and hold a beneficial interest in the Agency Contract concluded with the Government. That allegation was not disputed by the defendant. However, he sought to rely on subsection (2) of section 10 of the Act and said that permission had been granted by the Leadership Code Commission. He relied on the letter of 18/9/84 to the Chairman of Leadership Code Commission and the two letters of 19/9/84 which were written to Permanent Secretary, Ministry of Finance, copied to Permanent Secretary, National Parliament Office and Permanent Secretary Cabinet and Public Service, copied to Permanent Secretary, NPO.

The two letters of 19/9/84 were obviously not letters seeking approval or permission from the Leadership Code Commission for the defendant to hold a beneficial interest in the Agency Contract concluded with the Government on 1/7/85. Those letters were simply seeking the Government's approval to be given the task of recruiting ASAS Officers, a job that had been handled by Price Waterhouse previously.

This is clear from the first paragraph of each of the letters which are as follows:

(Letter to Permanent Secretary, Cabinet & Public Service)

"Dear Sir,

ASAS RECRUITMENT

I am writing to you to explore how the South Pacific Development Associates Limited, a local company with 100% local shares and owned, can be of assistance to the Government of Solomon Islands to recruit ASAS staff from Australia under the Australian be-lateral aid to the Government of Solomon Islands, the service now undertaken by Price Waterhouse at quite an expensive price.

.....
....."

(Letter to Permanent Secretary, MOF)

"Dear Sir,

PROCUREMENT AGENT: AUSTRALIA

I am writing to explore with you how the South Pacific Development Associates Limited, a local company with 100% local shares and owned, can be of assistance to the Government of Solomon Islands in the area of procurement service of materials and goods to bring about smooth operations of Government services for our people.

.....
....."

The letter of 18/9/84 was addressed to the Chairman of Leadership Code Commission. As this is the letter largely relied on by the defendant, I shall set it out in full:

South Pacific Development
Association Limited

P.O. Box 569

Honiara.

18 September 1984

Chairman,
Leadership Code Commission,
Prime Minister's Office,
HONIARA.

Dear Sir,

I write to declare that I Geoffrey Siapu now the Permanent Secretary of the Ministry of Employment, Youth & Social Development is the co-owner of the South Pacific Development Associates Limited registered with the Registrar of Companies on 10th day of August 1984.

2. The company will engage in general consultancy work, project consultancy, overseas procurement and other areas of business the Board of Directors may direct from time to time.

3. At present the company has not yet issued the working capital and therefore no work is yet being undertaken. I will inform you as soon as the company becomes operational.

Yours faithfully

SOUTH PACIFIC DEVELOPMENT ASS. LTD.

G. Siapu

Secretary"

It is to be noted that the defendant by his letter firstly, declared that he was the co-owner of SPDAL which was registered on 10/8/84. Secondly, the defendant informed the Leadership Code Commission that the company would engage in general consultancy, project consultancy and overseas procurement. Thirdly the Leadership Code Commission was informed by the defendant that no working capital had yet been issued and as such no work had yet been undertaken. The defendant would advise the Leadership Code Commission when the company became operational.

When one looks at section 10(2) of the Act, it requires a written permission of the Leadership Code commission before a company in which a leader has a controlling interest can enter into contract with the Government. The permission required relates to the obtaining of a Government contract. Mere declaration of ownership of a registered company does not satisfy the requirement of section 10(1) and (2) of the Act.

The purpose of such a provision is to prevent Leaders from using their official positions in order to secure benefits for themselves from the Government through their private companies.

In the present case, the argument by Counsel for the defendant that the Leadership Code Commission had been notified of the defendant's interest in SPDAL through the letters of 18/9/84 and 19/9/84 cannot be accepted as satisfying the requirement of section 10(1) and (2) of the Act. In fact, on the evidence, no such permission was given.

Further the permission must be in writing. As such no implied permission can be read into section 10(2) of the Act. On the evidence I am reasonably satisfied that the defendant had misconducted himself in office when he, as a majority share holder in SPDAL which concluded a contract with the Government on 1/7/85, did not obtain a written permission from Leadership Code Commission. He is therefore guilty of misconduct in office and I so find.

I now turn to count 5 which alleged that the defendant misconducted himself in office by engaging in paid employment as a director of South Pacific Development Association Limited without the approval of the Leadership Code Commission. Section 11(4)(b) of the Act defines what "paid employment" is. It provides:

"(4)(b) 'paid employment' shall include the holding of a directorship in any corporation or local company whether or not any fees are paid or payable in respect of such directorship".

Quite clearly the defendant's directorship in SPDAL was covered by the above definition. The argument relied on by the defendant again was based on the letters referred to earlier. However, as I have said earlier, the terms of those correspondences were not seeking permission from Leadership Code Commission. On the evidence, no approval had been given. The evidence shows that the defendant declared his interest as owner/director of SPDAL. But mere declaration of interest is not the same as seeking and obtaining written approval of the Leadership Code Commission. The defendant simply did the former and as such the prosecution has made out the case against the defendant as alleged in count 5. I find him guilty of count 5 also.

The final count, count 6, alleged that the defendant had misconducted himself in office by accepting a loan from SPDAL of \$21,000.00 contract to section 14(1) of the Act. That section, so far as relevant is as follows:

"14 (1) Any Leader who, or whose spouse or child under eighteen -

(a) accepts any loan of money; or

.....

is guilty of misconduct in office.

(2) Subsection (1) shall not apply to -

.....

(b) a loan or transaction in the nature of a loan which has been obtained or entered into on the same or similar terms as may be applied to other borrowers;

.....

....."

Mr. Kama argued that obtaining a loan by the defendant was not a misconduct in office. This Counsel argued was because the Memorandum of Association clauses 25 & 39, of SPDAL allowed lending to any person including directors. Counsel sought to draw support from the English practice which allows lending to directors.

I would think the provisions of section 14 are clear. Leaders are not allowed to accept loan of money except those which obtained in the similar terms as applied to other borrowers. In this respect, one sees that loans from banks are usually obtained on similar terms as applied to other borrowers. But I do not think section 14(2) is confined to banks only. I would rather feel that it applies to any person or any company or corporation or Association who lends money on the same terms as applied to other borrowers.

The Memorandum of Association of SPDAL allows the company to borrow money or lend money to 'any person' which I feel includes a director. When a loan is made to the director who is a Leader, the proviso to the section applies, that is to say, such a loan must be declared as required under section 5 of the Act.

However the determining factor, in so far as the offence under section 14(1)(a) is the terms under which the loan is obtained. Such terms must be in the similar terms as applied to other borrowers.

Thus if SPDAL lends money to other persons, as it did to the defendant in this case, on similar terms as applied to any other borrowers who obtain loans from SPDAL then that cannot be misconduct in office. The prosecution, in this case, relied on the argument that because the loan to the defendant was not in the similar terms as those given by banks which terms applied to other borrowers the defendant has breached section 14(1)(a) of the Act. I do not think that subsection (2) excludes borrowing from any person, company, corporation or Association. If the intention of the provision is to restrict the application of subsection (2) of section 14 to banks, it would most certainly have done so in clear language.

The evidence adduced by the prosecution did not show that the loan obtained by the defendant was not on the similar or same terms as applied to other borrowers to whom SPDAL might have lent money to (which it had the power to do). The evidence had shown that the defendant obtained the loan of \$21,000.00 and that the Memorandum of Association of the company allowed it to give such lending on terms which the Board of Directors determined. Similar borrowings might be made by other borrowers on similar terms. The evidence, as I have said, did not show otherwise.

Of course, where such borrowings are done by Leaders, like the defendant, in this case, such borrowings must nevertheless be declared under section 5. In this case, the evidence did not establish that the acceptance of the loan of \$21,000.00 itself is a misconduct in office although the misconduct in office in so far as the \$21,000.00 was concerned, was the failure to declare it as required by section 5.

On the evidence before the court, I cannot find the defendant guilty of misconduct in office as alleged in count 6.

I have gone into great length in considering the relevant circumstances on the charges brought against the defendant, as this is the first case that has come before this court on misconduct in office by a Leader.

In many jurisdictions, the power to hear and determine cases of misconduct in office is exercised by a tribunal and only comes before the court on appeal or review. Unfortunately, the position under the Leadership Code (Further Provisions) Act is that prosecution is brought on the first instance, after referral to the Director of Public Prosecutions, to the High Court. The result of such a course of action is that the defendant has lost an opportunity to have his case reviewed by the High Court in the exercise of its supervisory functions under sections 84 and 138 of the Constitution.

Further, the rules of evidence applied in the courts are much more restrictive than those applied before tribunals. The disadvantage of proceeding at first instance before the court is that sometimes rules of evidence may curtail vital information for the prosecution or for the defendant. Whereas, proceedings before a tribunal are done in a much less strictness and hence full discovery of all relevant materials is much more possible.

Section 95 of the Constitution, in my view, envisages the establishment of such a tribunal to determine cases of misconduct in office. I feel that Parliament may, in the future, consider an amendment to the Act to this effect.

It would be remiss of me not to mention a word or two on the lack of Regulations under the Act. It is now over 13 years since the Act was passed and no Regulations "for the better carrying into effect of the provisions of the Act," particularly as to the manner in which Leaders may need to obtain advice regarding compliance with Parts II and III of the Act had been made.

As no Regulations have been made, those who are covered by section 93 of the Constitution are left at the hands of the Leadership Code Commission. The Leadership Code Commission can arm itself with its investigatory machinery without a Leader knowing the existence of such a process. Such a course of action is demeaning to the process of fairness in the administration of the law.

The Leadership Code Commission must ensure that Regulations are in place if it wants to effectively fulfil its constitutional functions. The Leaders who are covered by section 93 of the Constitution are entitled to be advised by the Leadership Code Commission in specific terms of the practice and procedures to follow in order to comply with the provisions of the Act. For the right to protection of the law under the Constitution encompasses both substantive and procedural laws.

Having said all that, the Leadership Code Commission nevertheless has the power to investigate any complaint it receives and to take any of the actions specified under

section 21 of the Act. This was what the Commission did in this case and resulted in the prosecution of the defendant.

As I have already indicated I find the defendant guilty of misconduct in office on counts 1, 4 and 5 and I find him not guilty in respect of counts 2,3 and 6.



(G.J.B Muria)
ACTING CHIEF JUSTICE