IN THE SEYCHELLES COURT OF APPEAL

WILLIAMSON RABAT **APPELLANT**

versus

THE GOVERNMENT OF THE REPUBLIC OF SEYCHELLES **RESPONDENT**

Civil Appeal No: 20 of 2001

[**Before:** *Ayoola, P., Pillay & De Silva, JJ.A]*

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Mr. A. Derjacques for the Appellant

Mr. B. Hoareau for the Respondent

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JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

The appellant, Mr. William Rabat, was, at all material times, a Mortuary Assistant employed by the Government of Seychelles which through its Ministry of Health operates a Mortuary at Mont Fleuri, Mahé. On 8th March 1999, the appellant was suspended in his employment and on 14th May 1999 his employment was terminated. The appellant filed a complaint against the termination with the Public Service Appeal Board ("the Board") which on 31st August 1999, after considering the complaint, found that the "*defendant has no reason to terminate the employment of the complainant*", and ordered:

(a) the Ministry of Health to reinstate the complainant in his former employment as a Mortuary Assistant by 15th September 1999; and

(b) the Ministry of Health to pay the complainant his salary and other benefits associated with his reinstatement by the 30h October 1999.

The latter was complied with.

The appellant alleging that the respondent, the Government of Seychelles, refused "*to obey or abide by the Public Service Appeal Board's determination*" and that such constituted a "*faute in law*" against him claimed damages. The respondent denied that it had refused to obey the Board's determination. It averred by its Defence that "*it was not the intention of the defendant to refuse or to disobey the determination of the Public Service Appeal Board*" and went on to aver that "*in view of the nature of duties at the Mortuary, the Ministry of Health had to fill the post of Mortuary Assistant urgently, and therefore, at the time of receiving the determination of the Public Service Appeal Board there was no existing carder vacancy to reinstate the plaintiff to the said post.*" By its letter dated 19th November 1999 the Ministry of Health informed the appellant that he was "*reinstated with immediate effect*" and that he would occupy the post of Porter (Medical) but would retain his personal salary of Rs.2,325. The appellant did not accept the offer and instituted the action which led to this appeal.

As found by the trial Judge, by a letter dated 13th November 1999 the two reasons which had been given for inability to comply in specific terms with the Board's order were that it may not be conducive to a healthy working environment for the appellant to return to any job in the Mortuary and that it was not practicable to reinstate him in the same job as it had been filled due to urgency of the work involved. Being of the view that the liability of the respondent depended on the legal validity of those two grounds the learned trial Judge proceeded to consider them. He decided that the respondent had acted prudently in engaging a permanent replacement to fill the post from which the appellant had been removed. The learned Judge held that the respondent complied with the order of the Board in substance by offering re-engagement without any financial loss to the appellant and that according to "*the nature of the work*", it was not

practicable for the Ministry to await the final determination of the Board without making permanent replacement. In the event he dismissed the action.

In this appeal four grounds of appeal were argued. The issues raised by the grounds were:-

(i) whether the trial Judge was right in holding that by offering the appellant a "*re-engagement*" the respondent had complied with the order of the Board.

(ii) whether the fact that a third party had taken up the appellant's position was a relevant consideration; and

(iii) whether the Judge was right in holding that faute had not been committed by the respondent.

To put the issues in proper perspective it is expedient to advert to some of the relevant constitutional provisions related to the Board. The Board is a body established by Section 145 of the Constitution as an independent body not subject to the direction or control of any person or authority with the functions of hearing complaints by persons aggrieved by appointment made or promotion to an office; disciplinary proceedings taken in respect of an officer; the termination of appointment of a person who was holding an office or any decision relating to the qualification of a person who has applied for an office or is serving in an office, in the Public Service. Article 146 (I). Article 146 (4) provides that:

> "Where after considering a complaint the Board is of the opinion that the complainant has been aggrieved as alleged in the complaint, the Board shall order the public authority concerned to take such appropriate action as is specified in the order within the time specified in the order and where the public authority

> fails to comply with the order the Board shall make a report to the National Assembly."

Article 146 (6) provides that:

> "A complaint made under this Article shall not affect the right of the complainant or other person to take legal or any other proceedings under any other law."

The Board in the exercise of its investigating powers may compel attendance of witnesses, examine witnesses on oath or otherwise call for and examine any relevant record and inspect any premises: Article 147 (1).

It is apparent from the provisions of the Constitution that a person aggrieved in the circumstances specified in Section 146 (1) has a right to make a complaint to the Board and, subject to Article 146 (3), the Board has a duty to consider the complaint. If the complaint is established the Board shall order the Public Authority to take such appropriate action as is specified in the order. Where the Public Authority fails to comply with the order the Board shall make a report to the National Assembly. It is clear that the Constitution prescribes a specific remedy for non-compliance with the order of the Board. The liability of the Public Authority to comply with the order of the Board and the remedy for non-compliance are thus created by the Constitution and not by general law. Mr. Hoareau was correct in his submission that there is no provision in the Constitution that the Public Authority shall comply with the order of the Board, but we are of the view that such liability must be implied in the provisions of Section 146 (4). The use of the word "*order*" rather than "*advise*" or "*recommend*" implies a duty to obey and to comply with the order. However there is nothing in the provisions of Article 146 (4) from which it can be concluded that

compliance is to be enforced other than by the mode prescribed in that Article.

Against the background of what has been said, we turn to a consideration of the submission made by Mr. Derjacques, Counsel for the appellant, that the Ministry's disobedience amounted to a "*faute*". The appellant's claim was in delict. Article 1382-1 of the Civil Code of Seychelles ("the Civil Code") provides that:

> "Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it."

Tortuous liability does not follow an act that causes damage unless the act amounts to fault. It is in this regard that Article 1382-2 provides that

> "Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission."

The appellant who sought his remedy in delict under the general law must establish the delict under the Civil Code. It is not sufficient to prove that there had been an omission to comply with the order of the Board. He must go further to show that the omission was inprudent in the special circumstances of the case. Seen in this light, the relevance of the trial Judge's consideration of the prudence of the respondent's conduct becomes evident. "*Practical difficulties*" and other "*exigencies*", as put in the appellant's counsel's argument, became relevant factors to consider. The argument advanced by counsel for the appellant that:-

> "A mere excuse citing 'practical difficulties' and other 'exigencies' and further allowing the excuse that the Ministry offered 're-engagement' in another post on the 19th November, does not render the 'faute' lawful."

is untenable. So also is the argument that failure of the respondent to comply with the Board's order must also amount to a *"faute."*

In our judgment, Perera, J. adopted the proper approach in considering the practicability of complying with the order of the Board when the question is whether the conduct of the respondent amounted to fault. Had merely failing to comply with the order of the Board been sufficient to found a cause of action, the question of practicability may probably not have arisen. However, as the cause of action was founded on delict that was a material question. The case of **Seychelles Public Transport Corporation v Elizabeth** (SCANo. 34 of 1998 – 19th April 1999) cited to us by Mr. Derjacques would not affect the conclusion. In that case failure of the Corporation to comply with the order of the Minister of Employment and Social Affairs to amend the Certificate was held to amount to fault. In that case the Corporation had contended, wrongly, that no such order was made by the Minister and had not attempted to establish the impracticability of compliance or that it acted prudently.

In the final analysis, this appeal will not turn on whether the trial judge was right or not in holding that by offering the appellant a 're-engagement' the respondent had complied with the order of the Board, notwithstanding that we are not inclined to share that view. The learned Judge himself had held that there was a distinction between *"re-instatement"* and *"re-engagement."* Granted that such distinction is valid, an order that the appellant be reinstated *"in his former employment was a Mortuary Assistant"* is not

complied with by re-engaging him as a medical porter. The respondent, in terms of Article 146(4) of the Constitution was expected to have taken "*appropriate action as is specified in the order*". (Emphasis ours). Be that as it may, we are of the view that the learned judge came to a correct conclusion when he held that the respondent acted prudently in the circumstances and that it could not be held liable in delictual damages.

Before we part with this appeal we may as well note the law as stated in **Basu, Administrative Law** (3rd Ed) p.202 that:-

> "the general rule is that when a statute creates an obligation (which did not exist in common law) and also prescribes a specific remedy for its non-performance, the performance cannot be enforced in any other manner, so that no action for damages would be for its breach."

It is in this regard that the appellant's action can only be considered under the Civil Code as founded on delict and not as suggested by appellant's counsel's argument as a remedy arising from a breach of statutory obligation.

One the last point. Article 146(6) of the Constitution provides another window of opportunity for the appellant to seek redress for his grievance by resort to judicial process. Article 146(6) rather than justifying an action founded on non-compliance with the order of the Board, as contended by counsel for the appellant, merely preserves the right of the complainant to seek judicial redress for the grievance he had taken to the Board in the first place.

We believe that the makers of the Constitution in their wisdom consider a report of non-compliance by the Board to the National Assembly to be sufficient and effective mechanism against flippant non-compliance with the order of the Board by a public authority. We are not prepared to question or doubt their wisdom. It does not seem appropriate to us that the Court should pre-empt whatever step the National Assembly may wish to take upon a report of non-compliance by awarding damages for non-compliance. This reinforces our view, already expressed in this judgment, that a claim for damages is not an appropriate remedy for mere non-compliance with the order of the Board when the Constitution itself had prescribed a specific remedy.

For the reasons stated, this appeal must fail. It is dismissed accordingly.

E. O AYOOLA	**A. G. PILLAY**	**G. P. S. DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe this 19th day of ***April*** 2002.