

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2018] SCSC 654  
MC 87/2018

In the matter between

**THE GOVERNMENT OF SEYCHELLES**  
**at the instance of the Commissioner of Police**  
*(rep. by Evelynne Almeida)*

**Petitioner**

and

**1. THE PUBLIC SERVICE APPEAL BOARD**  
*(rep. by John Renaud)*

**Respondents**

**2. Rolly Marie**  
*(rep. by Olivier Chang Leng)*

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**Neutral Citation:** *Government of Seychelles v Public Service Appeal Board & anor* (MC 87/2018) [2018] SCSC 654 (31 July 2019).

**Before:** Twomey CJ

**Summary:** Judicial review of decision of Public Service Appeal Board – standing to challenge decision of “independent” body- Government of Seychelles’ capacity to sue or be sued in its own name- authority to swear affidavit.

**Heard:** 6 June 2019

**Delivered:** 31 July 2019

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**ORDER**

The plea in *limine litis* that the Petitioner’s affidavit in support of the application has not disclosed the source of the deponent’s authority to represent the Petitioner and is accordingly defective and that consequently the petition is not supported succeeds. The Petition is dismissed.

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**RULING**

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**TWOMEY CJ**

[1] The Petitioner has brought a case for the judicial review of a decision of the First Respondent concerning the Second Respondent. In essence, the matter for review

concerns the decision of the Commissioner of Police to transfer a member of its force, a police constable, namely the Second Respondent from La Digue Police Station to Anse Royale Police Station. Leave for the judicial review was not objected to and was granted by the court.

- [2] We are not at this stage concerned with the merits of the petition but rather with three preliminary points of law raised by the Respondents.
- [3] In their answer to the petition, both Respondents have filed pleas in *limine litis*. The First Respondent has stated that the Petitioner has no legal standing to challenge the decision of the First Respondent and that when correctly constituted under Article 154 *et seq* of the Constitution, the Public Service Appeals Board (PSAB) is independent of the Executive and other organs of government in the performance of its work.
- [4] The Second Respondent in his plea has stated that the citation, Government of Seychelles, is incorrect as the Government of Seychelles cannot sue in its own capacity but only through representation by the Attorney General who must be specifically named as per section 29 of the Seychelles Code of Civil Procedure. He has also submitted that the deponent of the Petitioner's affidavit in support of the application has not disclosed the source of her authority to represent the Petitioner and accordingly the affidavit is defective and consequently the petition not supported.
- [5] There are three issues to be addressed by this Court, namely, whether a decision of the PSAB can be reviewed, whether the Government must necessarily sue or be sued in the name of the Attorney General and whether the deponent of the affidavit in support of the Petitioner's application has authority to do so.

### **1. Can a decision of the PSAB be reviewed?**

- [6] In support of its submission that the PSAB is not subject to the sanction of the courts by judicial review, the First Respondent has cited the provisions of the Constitution establishing the PSAB, namely Article 145, specifying that the PSAB "shall not in the performance of its functions be subject to the direction or control of any person or authority." This, the First Respondent submits, suggests that the PSAB is totally

independent from the courts or any organ of Government and that therefore its decisions cannot be questioned even by judicial review. Whilst the courts can certainly review the excesses of government, the independence of the PSAB immunises it from scrutiny by the courts.

- [7] No doubt, this is a novel and fresh argument that has not so far been litigated before these Courts. However, I do not propose to spill much ink on it. I only have to direct the First Respondent's attention to Article 125 (1) (c) of the Constitution which states in the clearest of terms that the Supreme Court has:

*“supervisory jurisdiction over subordinate courts, tribunals and adjudicating authorities and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction; ... (Emphasis added).*

- [8] Further, Article 125 (7) of the Constitution designates an “adjudicating authority” as including a body or authority established by law, which performs a judicial or quasi-judicial function. In this regard, Article 145 of the Constitution in providing for the functions and powers of PSAB make it clear that it is both an investigative and adjudicating body hearing and ruling on complaints from public employees. Overall, it performs a quasi-judicial function and in this respect, judicial review is available with reference to all bodies which have the authority to affect the rights of citizens and which have the duty to act judicially (*Joanneau v SIBA* (2011) SLR 262). Hence, no public body is above the law in that regard.

- [9] It must be noted that even in cases where the source of a body's powers cannot be identified, the Court has found that its decisions could be reviewed due to the importance and impact of the functions it undertook (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 409).

- [10] The provisions of the Constitution stating that the PSAB is not subject to the control or direction of anyone is used for all persons and bodies exercising a function which is to

remain independent of the influence of and/or manipulation by anyone and has no relevance to the review of the decision of a person or body to ensure that it acted rationally, reasonably and proportionally.

[11] There is yet another point, germane to this plea, which has been raised by the First Respondent that is, whether the Government of Seychelles can apply for the review of a decision of the PSAB, in other words can it self-review.

[12] The First Respondent has seemed to submit that a judicial review against its decision can only be brought by an aggrieved citizen or body corporate but not the Government. In this context it assumes that the PSAB is a Government body, although paradoxically not under the control of the Government. The submission assumes that the Government cannot sue the Government or in the context of the present case, self-review its decision. The Petitioner has responded to this submission by stating that in parallel to the fact that the government can sue and be sued, a judicial review can be brought against it as it can also bring such action against another adjudicating body or itself.

[13] The fallacy of the First Respondent's submission lies in the fact that the PSAB is a constitutional body and not a government agency. The petition therefore concerns a review at the instance of the Government against a decision of a constitutional body.

[14] In any case, self-review of government decisions is in fact permissible. Our rules relating to the supervisory jurisdiction of the courts over adjudicating bodies does not specifically provide for such review. However, the principle of legality as distilled from the rule of law which our Constitution commits us to uphold would bind any adjudicating authority.

[15] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), the Constitutional Court of South Africa stated:

*[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In The Matter of a Reference by the Government in Council*

*Concerning Certain Questions Relating to the Secession of Quebec from Canada* [[1998] 2 SCR 217], the Supreme Court of Canada held that:

“Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution... The Constitution binds all governments... (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.”

[16] Self-review or self-challenge is also a feature of judicial review in many jurisdictions., precisely because of the adherence of states to the principle of legality. In both the South African cases of *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14 November 2017) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC) (16 April 2019) the Constitutional Court of South Africa found that organs of state may have their own decisions reviewed under the principle of legality. Similarly, in the UK in *R (Lord Chancellor) v Chief Land Registrar* [2005] EHC 1706 (Admin) [2006] QB 795, the Lord chancellor sought a declaration by judicial review where the legality of his scheme concerning the leaseholds of magistrates courts had been doubted.

[17] I am of the view that should the situation arise, which is not the case in the present matter, the same principle would be applicable in our constitutional democracy.

[18] This plea in *limine litis* therefore lacks merit and fails accordingly.

### **In whose name should the government sue?**

[19] In respect of this plea, the Second Respondent has conceded from the outset that the challenged caption would not in any case be fatal to the suit. He is therefore only pleading that the representative capacity of the Attorney General be included in the caption. In this regard, he has drawn the Court’s attention to section 29 of the Seychelles Code of Civil Procedure, (hereinafter the SCCP) which provides in relevant part:

*29 (1) All claims by the Government of Seychelles against any private person shall be brought in the name of the Attorney General and (subject as hereinafter provided) shall be carried on in the same manner in every respect as suits between private parties.*

[20] He has submitted that the matter should therefore have been brought by the Attorney General and not the Government of Seychelles.

[21] The Appellant has countered the plea on this issue by submitting that section 29 of the SCCP merely encapsulates the representative power of the Attorney General. It does not preclude a suit by the Government of Seychelles. In any case as this suit was brought at the instance of the Commissioner of Police, case law on this issue (namely *Ernesta v Commissioner of Police* (2002) SLR 92 and *Madeleine v National Drug Enforcement Agency* (CS 25/2016) [2017] SCSC 422 (19 May 2017) is to the effect that the police are agents of the state and an action based on an act of an agent must be instituted against the Government of Seychelles and not the agency.

[22] I am not of the view that this latter point answers the plea raised by the Second Defendant. The issue simply is whether the representative capacity of the Attorney General with regard to the Government of Seychelles should be indicated in the caption or whether the Government of Seychelles can sue or be sued in its own name.

[23] With respect to section 29 of the SCCP there is no equivalent rule contained in the Supreme Court (Supervisory Jurisdiction Over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995(hereinafter The Rules). However, in the absence of specific rules, the general rules of the SCCP bind the Supreme Court. Moreover, in terms of the representative capacity of the Attorney General, the Constitution also provides that the Attorney General is the principal legal adviser to the Government (Article 76 (4) of the Constitution of the Republic of Seychelles).

[24] The Second Respondent's plea in this respect therefore has validity. Section 29 of the SCCP is unequivocal. The Government must be sued in the name of the Attorney General. The caption therefore ought to be amended to reflect this necessity.

**The authority to swear an affidavit in respect of an action by a public body**

[25] The Second Respondent has also pleaded that the deponent of the affidavit in support of the petition does not disclose her authority to represent the Commissioner of Police at whose instance the petition is brought despite the fact that she avers that she is the administrative head of the Police Department. He further submits that given the fact that the petition is brought at the instance of the Police Commissioner the delegation of his power or authority to swear an affidavit in this respect must be specially pleaded or averred.

[26] The Petitioner has contended in response to the plea that the averments in the affidavit clearly disclose that the deponent is acting in her capacity as the Director General of HR and or Administration for the Petitioner. Counsel for the Second Respondent has added that given that the subject matter of the petition deal purely with administrative issues the deponent is best suited to represent the Petitioner.

[27] It is my clear that the deponent’s authority to swear the affidavit in support of the petition is as Director General of Human Resources and Administration of the Seychelles Police Department. In the holding of that office she obviously has knowledge of the facts averred in the affidavit. There is therefore no merit in this plea either.

[28] There is however another matter that I need to highlight. Paragraph 18 (a) of the petition states:

*“That the Petitioner avers that that the said impugned order of the First Respondent herein by granting the relief as sought and on the complaint of the Second Respondent is:*

*(a) In violation of the express provision of Article 146(1) of the Constitution in view that the First Respondent passed the impugned Order outside its mandate and exceeding its jurisdictional power vested in it by Article 146 (1) of the Constitution....”*

[29] Given the provisions of Article 129 (6) in relation to contraventions of the Constitution arising in proceedings in a court, I necessarily have to refer the petition to the Constitutional Court.

[30] I therefore refer this matter to the Constitutional Court pursuant to section 130 (6) of the Constitution so that it may consider whether the order granted by the PSAB in which it directed the Commissioner of Police to re-examine the Second Respondent's personal situation and consider his social difficulties, and that he be refunded two months salaries; is outside the PSAB's mandate and exceeds the jurisdictional power vested in it by Article 146 (1) of the Constitution.

Signed, dated and delivered at Ile du Port on 31 July 2019.

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Twomey CJ