

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC ... 906
CS 129/2018

ALAIN BUTLER PAYETTE
(rep by Bernard Georges)
and

Plaintiff

THE ATTORNEY GENERAL

Defendant

Representing the Government of Seychelles
(rep. by George Thatchett)

Neutral Citation: *Alain Butler Payette v Attorney General* Cs 129 of 2018 delivered on October 2019

Before: **Vidot J**

Summary: Constitutional Appointees Emoluments Act; Pensions to ambassadors, No cause of action, Retroactivity of law

Heard: 11 June 2019

Delivered: 11th October 2019

JUDGMENT

VIDOT J

Background of Claim

- [1] The Plaintiff is a retired Ambassador and Plenipotentiary of the Republic of Seychelles. In fact he was appointed as Ambassador by the President of Seychelles and approved by the National Assembly on the 04th March 1997. This was done in accordance with the Constitution and the appointment has never been revoked. The Plaintiff spent over 20

years in continuous service with the Defendant. It is alleged that on the 31st October 2017, the Plaintiff retired.

- [2] It is the claim of the Plaintiff that upon his retirement from public service he was entitled to a monthly pension provided for by the Constitutional Appointees' Emoluments Act of 1993 as amended ("the Act"). The Plaintiff avers that the Defendant acted in contravention of the Act as it had failed or neglected to provide the Plaintiff with a monthly pension, despite repeated requests.
- [3] The Plaintiff is asking for the following reliefs from the court;
- (i) A declaration that the Plaintiff is entitled to a monthly pension , as provided for under the Act, as amended;
 - (ii) An order that the Defendant pays the Plaintiff a monthly pension in line with the Act with retrospective effect from the 01st November 2017, with interest; and
 - (iii) An order that the Defendant pays costs in this case.

The Plaintiff's Evidence

- [4] The Plaintiff was the only person to give evidence on his behalf. He basically expanded on the averments made in the Plaintiff. He added that at the time of his appointment he was he was acting Principal Secretary ("PS") of the Ministry of Foreign Affairs. In 1998 he was confirmed to the post of PS and in 2004 he joined the office of former President James Michel as Secretary of State. However he resigned from that position on 25th March 2009. He nonetheless was retained by President Michel as his consultant and personal advisor and he remained in that post until October 2017. As such he would have daily briefings with the President. His emolument was being paid by State House administration but he had to pay for his own Seychelles Pension Fund contribution and his own chauffeur.
- [5] The Plaintiff explained that his appointment as ambassador has never been withdraw or revoked he considers himself to be still an ambassador. Despite having never been posted abroad; he was a non-resident ambassador to the Holy See for a period of one year. When

he retired from public service he was not paid an ambassadorial pension. He explained that there is no requirement that an ambassador be posted overseas. Therefore he maintains that under the Act and Constitutional Appointee (Amendment) Act 2016, (Amending Act) he is entitled to a pension and prayed court to give such interpretation to the said Acts.

- [6] He further maintains that he was an ambassador until his resignation from civil service, which he calculated as including the time that he was a consultant and personal advisor to the then President . He further insisted that he is entitled to both a civil service pension and an ambassadorial pension.

The Defence

- [7] The Defendant raised a preliminary objection on the law in its statement of defence. In essence it states that the Plaintiff does not disclose a cause of action, that the Act as amended by the Amending Act “*does not apply to the Plaintiff as ex facie the Plaintiff’s Complaint and the Statement of Defence of the Defendant, at the time the post of ambassador was made pensionable the Defendant had ceased employment with the Defendant or had ceased to exercise the function of the office of ambassador upon his retirement or resignation from the public service*”

- [8] On the merits, the Defendant further avers that the Plaintiff does not qualify for a pension under the Act as amended by the Amending Act. Counsel argued that the Plaintiff was never posted to any foreign jurisdiction, therefore he never represented Seychelles abroad in the post of ambassador as per the function of ambassador under the Constitution, save for the brief period of appointment between 2007 and 2008 when the Plaintiff was appointed ambassador to the Holy See.

- [9] The Defendant added that the Plaintiff resigned or retired from Public Service on the 25th March 2009 and thereafter he did not exercise the function of ambassador and that at the date of promulgation of the Amending Act (30th December 2016) when the post of ambassador was made pensionable, he was not in office. The defence avers that contrary to the Plaintiff’s averment, he resigned from public service on 25th March 2009 and that

the Plaintiff did not receive any emolument as ambassador during his period of employment as ambassador.

The Defence Evidence

- [10] Mrs. Leka Nair was former PS for Administration and Finance in the President's Office from April 2012 to February 2015. At the time she occupied that office the Plaintiff was working as an advisor/consultant. The Plaintiff was on an annual contract and the Government of Seychelles was the employer and his remuneration was charged to the consolidated fund. However, that post is not one that is on the pay roll.
- [11] Ms. Jessy Esparon is the current Chief Secretary for Administration. She confirmed that Mr. Butler Payette was engaged in public service until his retirement on 25th March 2009. She explained that for a consultancy contract, the consultant is on business arrangement for which he is paid a monthly fee and not placed on pay roll. She drew a distinction between an employment contract and a contract for service.

No cause of action

- [12] As above mentioned the Defence raised a preliminary objection that the Plaintiff has no cause of action. The argument is that when the Plaintiff was made ambassador the law did not provide for a pension to ambassadors. It was enactment of the Amending Act in 2016 that a pension for such post was introduced. They claim that the Plaintiff has ceased to exercise the office of ambassador upon his retirement and resignation from public service. They further submitted that the Plaintiff had not served as ambassador for 48 months since his only appointment was to the Holy See, and that was for a period of 14 months only. It is also submitted that the Plaintiff did not represent Seychelles overseas.

(i) Plaintiff did not represent the Seychelles abroad

- [13] The Defence contended that despite being appointed ambassador to the Holy See the Plaintiff did not represent the Seychelles as such suggesting that he did not actually discharge the office of ambassador. His appointment was made on the 04th March 1997. That appointment by the then President followed from an endorsement by the National

Assembly. Article 64 of the Constitution provides that the president may with the approval of the National Assembly appoint inter alia Ambassadors to represent Seychelles abroad. The exact wording of the Article reads thus;

"The President may with the approval of a majority of members of the National Assembly, appoint a person as ambassador, High Commissioner or any principal representative of Seychelles to represent Seychelles abroad."

- [14] The Plaintiff was appointed as a non-resident ambassador to the Holy See. Counsel for the Defence maintains that the ambassador has to represent Seychelles abroad in the sense that he has to be based overseas. That would be a very strict interpretation of that section. The Plaintiff on his part gave a greater purposive interpretation to that section and it is an interpretation which finds favour with me. I don't believe that an appointee as ambassador need not represent Seychelles abroad by being based abroad. The interest of Seychelles can be represented by the appointee being in Seychelles as a non resident ambassador. Representing Seychelles abroad can be achieved by being based in Victoria. At the time of appointment it is not stated that where the appointee will be based, the Act and Amending Act do not draw distinction with regards to ambassadors' pension in that only those who are served abroad will be entitled to pensions. Clearly the Constitution does not articulate such a distinction between those who are based abroad and those who are non-resident and based in Seychelles. Therefore, a non resident appointee can benefit from pension similar to one who is stationed abroad.

(ii) Functions of the Office

- [15] Arguing further from the above, the Defendant submits that the Plaintiff did not discharge the functions of his office of Ambassador. Reference was made 37 of the IGPA. The section provides;

'A reference in an Act to the holder of an office by the term designating his office is a reference to the person from time to time holding, acting or discharging the functions of that office.'

- [16] What the Defendant is arguing is that since the Plaintiff was never posted abroad, then he never discharged the functions of ambassador. In his evidence, the Plaintiff stated without challenge, that ambassadors even if not posted abroad routinely discharge their functions from their offices at the Ministry of Foreign Affairs. It is my opinion that the Plaintiff was discharging his functions as an ambassador. Ambassadors do not necessarily have to be stationed abroad to be considered as having discharged that office. The fact that he was a non-resident did not stop him from discharging such functions. As such I declare that the Plaintiff was indeed a serving ambassador to the Holy See

Term of Office

- [17] Counsel for the Defendant further drew attention to section 38(2) of the Interpretation and General Provision Act ("the IGPA") that provides;

"An appointment made as provided in subsection (1)(b) operates to appoint the person who, from time to time, holds, act or discharges the functions of that office designated"

Counsel further drew attention to Exhibit P11 and P12 which are the appointment instrument and termination of mission to the Holy See of the Defendant. In his submission he maintained that the Plaintiff spent only some 14 to 16 months as an ambassador, he does not qualify for a pension. In fact exhibit P11 is a letter from "La Nonciature Apostolique" confirming the appointment of the Plaintiff to the Holy See. It refers to the letter of 23rd March 2007 nominating the Plaintiff as ambassador and the approval was granted on 18th April 2007. The letter dated 18th October 2008 from the Holy See acknowledged letter of the 2nd October 2008. That is equivalent to approximately 17 months that the Plaintiff served as ambassador to the Holy See. This is provided for under section 8(3)(b) of the Act which states that *"unless the appointee has served a minimum aggregate period of 48 months in one or more of the designated offices, after 21st June 1993 and has ceased to hold such office"*

- [18] The Plaintiff was appointed ambassador on 04th March 1997 and I find that the Plaintiff retired from public service on the 24 March 2009 when he resigned from his post as Secretary of State. This is evidenced by exhibit P5. I do not consider the time when he

served as a consultant that he was in employment in the public service. However, the appointment as ambassador is not determinant on an appointee being posted overseas. It starts from the appointment to the date of retirement from public service or the time that it is revoked or withdrawn. In evidence that the appointment was never revoked or withdrawn. Therefore, I find that the Plaintiff served more than 48 months as ambassador.

[19] Therefore, based on the above, the preliminary objection cannot be maintained.

One Pension Only

[20] On the merits the Defendant submits that the Plaintiff is entitled to one pension only and that the Amending Act does not apply to the Plaintiff as it had no retroactivity.

[21] He referred to section 37 of the IGPA which reads that "*A reference in an Act to a holder of an office by the term designating his office is a reference to the person from time to time holding*,"

[22] As I understand it a person who is covered under the Act and Amending Act is entitled to a Constitutional Appointee pension which is drawn from the consolidated fund and a pension from the Seychelles Pension Fund. That makes it 2 pensions. A person cannot draw 2 pensions from the consolidated fund. That is consistent with section 8(4) which reads that "*the pension payable to an appointee specified under subsection (1) shall not affect the right in any way to a pension that an appointee may have contributed to the Seychelles Pension Fund*". An appointee is entitled to the Constitutional Appointee pension provided he meets the requirements of 8(2)(b) in that the appointee should have served a minimum aggregate period of 48 months in the designated office. That section is also to be read in conjunction with section 7A(c) of the Amending Act which provides-

[23] "*there shall be a pension paid to an Ambassador, High Commissioner or any other principal representative of Seychelles – upon ceasing to hold office a monthly pension of an amount equivalent to 5/12 of 1% of the monthly salary in the salary band referred to in paragraph (a) at which the person ceased to hold office or of the monthly salary in the salary band in any other designated office specified under section 8(1) of this Act, in*

respect of each completed month of service up to a maximum of 180 months , subject to section 8(3),(4) and (5) of this Act. ”

- [24] The Plaintiff testified that he is already drawing a pension of SR40,000.00. I assume that that this is a pension from the SPF and not a pension under the Act and Amending Act.

No retroactivity

- [25] It is trite that an Act comes into effect on the day that it is promulgated. The Amending Act came into effect on the 30th December 2016. Section 25 of the IGPA states that an Act should be published in the gazette and that Act comes into effect on that day. Counsel for the Defendant relied on **Malvina v Esparon & Ors [2018] SCSC 33 CS 04 of 2017** which deals with the Public Officers Protection Act argued that unless explicitly expressed an Act does not have retroactive effect. In fact Article 2 of the Civil Code of Seychelles provides;

“No law shall be construed to have been retroactive effect unless such a construction is expressly [underline mine] stated in the text of the law or arises by necessary and distinct implication.”

The position of the Defence is that since the Amending Act was promulgated on 30th December 2016, that that was the date on which the Act came into effect and therefore that since the Plaintiff had retired/ resigned from his post in the public service, the Act has no applicability to him and as a result cannot benefit from it.

- [26] The Plaintiff in countering that argument submitted that the wordings of section 7A(c) in fact gives retroactivity to the Act and makes the Plaintiff eligible to an ambassadorial pension. Counsel for the Plaintiff stated that the words of section 7A(c) “*upon ceasing to hold office*” and “*at which a person ceased to hold office*” are both prospective and retroactive and that their combined effect is that the Act applies to any holder of office who qualifies. He suggested that the use of the past tense in the phrase “*which a person ceased to hold office*” can be construed as deliberate so as to cover all ambassadors, including those who had retired prior to the enactment of the amendment.

[27] Counsel further submitted ambassadors are vested with the title for life, either they never ceased to hold office (in which case they will not qualify for a pension) or they must act in the office of ambassador to qualify. The words "*upon ceasing to hold office*" in the context of ambassador merely means retirement wherever or whenever the office has been discharged.

Findings

[28] I have said it above, the Plaintiff served as an ambassador from the time of his appointment on 04th March 1999 to the point of his resignation from public service on 23rd March 2009. This is evident in exhibit P5. Thereafter the Plaintiff was a consultant / advisor to the President. This is supported by the Plaintiff's testimony and Exhibit P15 and D2. It does not matter that remuneration was paid from the consolidated fund. That allocated remuneration was placed under the President's Office budget for the recruitment of a consultant advisor. Ms. Jessy Esparon tried to explain that there is difference between a contract of employment and a contract of service for consultancy. I believe that there is a difference. A consultant provides services as a free agent; he not in employment with the person or entity he provides the services to, but he is self-employed. In exhibits P15 and D2, this is made abundantly clear where it states that government desires to retain the consultancy services of the Plaintiff. Furthermore, it is the reason why the Plaintiff had to pay his own pension fund contribution. Had he been in employment then the President Office will have been in default with the law by not making pension contribution for the Plaintiff. The Plaintiff was not in employment in the civil service let alone as an ambassador after 23rd March 2009. This is very clear from the fact that he was not earning an ambassadorial salary and nor a public service salary and neither did he make claim for one.

[29] As regards the issue of retroactivity of the Constitutional Appointees Emoluments Act, I have considered submissions made by counsel for the Plaintiff very attentively, but I cannot ascribe the same interpretation to section 7A(c) as counsel has so accorded. I hold the opinion that the act applies to in service ambassador as at the date of the enactment of the Amending Act. The term "*ceasing to hold office*" and "*has ceased to hold office*" as

they appear under section 7A(c), cannot be accorded both prospective and retrospective effect and the latter term cannot be held to cover all ambassadors including those who have retired. What I read into that section is that when the appointee ceases to hold office his pension is calculated to the amount as at that time that he ceased to hold office. I also remind myself that Article 2 (1) of the Civil Code that to have retroactive effect a law has to expressly state so in the text of the law or arises by necessary distinct implication. Provisions of the Amending Act and interpretation given to it by the Plaintiff, in my mind, do satisfy such requirement.

[30] I find that the Amending Act is not retroactive and therefore, the Plaintiff is dismissed.

[31] I make no order as to cost.

Signed, dated and delivered at Ile du Port 11 October 2019

A handwritten signature in dark ink, appearing to be 'Vidot J', written over a horizontal line.

Vidot J