

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 519

MC 33/2020

In the matter between:

SEYCHELLES PEOPLE’S DEFENCE FORCE

(rep. by Stefan Knights)

Petitioner

and

THE TRUTH, RECONCILIATION AND

NATIONAL UNITY COMMISSION

(rep. by Karen Domingue)

Respondent

Neutral Citation: *Seychelles People’s Defence Forces v The Truth, Reconciliation and National Unity Commission* (MC 33/2020) [2020] SCSC 519 (31 July 2020).

Before: Dodin J

Summary: Petition for judicial review - Preliminary objections - whether the Truth, Reconciliation and National Unity Commission (TRNUC) is subject to the supervisory jurisdiction of the Court – whether TRNUC has parallel jurisdiction to the Supreme Court – whether TRNUC has made a decision or recommendation in respect of the complaints subject to this Petition – whether the Petitioner has locus standi to bring and prosecute the Petition - The TRNUC is a public body subject to the supervisory jurisdiction of the Supreme Court – the TRNUC has parallel jurisdiction to the Supreme Court only to the extent of discharging its functions as provided by its mandate – TRNUC has made a determination and even if it has not taken a decision its procedures are challengeable by way of judicial review –Petitioner does not have locus standi per se but it is not fatal at this stage – Objections dismissed.

Heard: 13 July 2020

Delivered: 31 July 2020

ORDER

Subject to the Petitioner reconsidering its locus standi in this matter, the other objections raised by the Respondent are dismissed. The matter shall proceed to hearing on the merits.

RULING

DODIN J

- [1] The Petitioner, the Seychelles People's Defence Forces (SPDF), sought leave of this Court to proceed with a petition for judicial review against the Respondent, the Truth, Reconciliation and National Unity Commission (TRNUC) in respect of the disappearance at sea of two members of SPDF, Private Alberto Leonardo Antat and Private Rodney Dominic Payet who were last seen on the 8th October, 2018. Leave was granted ex parte by this Court.
- [2] In the petition, the Petitioner prays the Supreme Court to exercise its powers under the Supreme Court (Supervisory Jurisdiction over subordinate Courts, Tribunals And Adjudicating Authorities) Rules, 1995 in respect of complaints lodged before the Commission regarding the disappearance of the above two SPDF Privates.
- [3] The Respondent raised the following preliminary objections to the petition which are reproduced hereunder as filed:

A. The Petitioner is abusing its powers and acting in bad faith by attempting to seek a review in relation to the Respondent

1. Truth, Reconciliation and National Unity Commission cannot be reviewed by the Supreme Court

1.1 *The Truth, reconciliation and National Unity Commission Act set up under Act 9 of 2018, hereinafter referred to as the "Act", clearly lays down the mandate and the purpose of the Commission specifically in Section 3 (3), (7), (8) and (9). The powers of the Commission are to be found in Section 8 whereby "The Commission may make such rules of procedure and evidence as it thinks fit, in particular for the conduct and management of its inquiries and investigations."*

1.2 *It is worth noting that as per Section 8 (3) the Commission is vested with all the powers and rights of the Supreme Court. This is reiterated in Rule 6(1) of the Rules of Procedure and Evidence of the Commission. Hence the Commission*

has wide powers which the Petitioner is seeking to curtail. This is untenable in a democratic society.

1.3 The Court must interpret the Act not only with regards to what is laid down but what is the spirit behind it. As stated in the preamble of the Act, it is, “An Act to enable the President of Seychelles to establish a commission to unite the people of Seychelles around a common agenda that will help them move forward in confidence and with a sense of purpose.”

1.4 It is therefore submitted that any decision of the Commission cannot be reviewed by the Supreme Court of Seychelles for the following reasons:

1.4.1 The commission is vested with all the rights and powers of the Supreme Court and thus it cannot be reviewed by a parallel body. The Supreme Court (Supervisory Jurisdiction over Subordinates Courts, Tribunal and Adjudicating Authorities) Rules apply to the Rules to Courts, Tribunals and Adjudicating Authorities of inferior standing than the Supreme Court. This is not the case with regards to the Commission.

1.4.2 The powers of the Commission are subject to the President, the Commander-in Chief, of the Petitioner taking a final decision, upon the recommendation of the Commission. This is outlined in Section 7 (c) of the Act where the findings of the Commission must be submitted to the President.

1.4.3 According to Section 11 of the Act, the Commission shall submit its reports outlining its investigations, findings and decisions to the President. Interim reports must be submitted every 6 months and its final report within 3 months after the Commission has completed its inquiries, Section 11 (4) provides that it is the President who shall make the final report public and lay a copy before the National Assembly within a month of receiving it.

2. The Truth, Reconciliation and National Unity Commission cannot be reviewed by the Supreme Court as it is not an Adjudicating Authority nor an Authority which discharges quasi-judicial functions

1.5 A reading of the Act shows clearly that the Commission is neither an Adjudicating Authority nor a quasi-judicial body. According to Section 7 (d) one of the functions of the Commission is to determine and recommend appropriate remedies or reparation. At the end of the day the determination and recommendation are laid in the hands of the President and subsequently the National Assembly.

B. The Respondent has not made any decision or recommendations which the Petitioner is seeking to review and the Petitioner is abusing the process of the court and acting in bad faith.

3.1 According to Rule 2 (1) and (2) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, it is provided that

“(1) An application to the Supreme Court for the purpose of Rule 1 (2), shall be made by Petition accompanied by affidavit in support of the averments set out in the Petition.

(2) The Petitioner shall annex to the Petition a certified copy of the order or decision sought to be canvassed and originals of documents material to the Petition or certified copies thereof in the form of exhibits.”

3.2 The Commission has as yet made no recommendations nor decision which is attached to the Petition granting the Court a power of review, which it is submitted the Supreme Court does not have. (See **Green v. SLA & Anor, SCA 43/1997 [1998] SCCA 12** and **Sonny Labrosse v. The Chairperson of the Employment Tribunal, (SCA36/2012) [2014] SCCA 44 (12th December 2014).**)

3.3 No certified decision or recommendation of the Commission has been annexed to the Petition and the Respondent submits that this is ground for dismissing the Petition which clearly shows an abuse of the process of the Court and bad faith on the part of the Petitioner. What the Petitioner is seeking to do is to pre-empt

the actions of the Respondent and is attempting to tie the hands of the Commission. This is clearly abusive and vexatious.

C. The Seychelles People's Defences Force (SPDF) cannot bring an action in its name and the Petition should therefore be struck out for failing to follow the procedures

4.1 The Petition should have been brought in the name of the Attorney General and not that of the SPDF and thus the Petitioner has no locus standi to bring the Petition before the Court.

4.2 Section 29 (1), (2) and (4) of the Seychelles Code Civil Procedure confirms that

“(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.”

“(2) All claims against the Government of Seychelles being claims of which the subject matter would have been cognisable by the Supreme Court of Judicature if the claim had been against a private individual may, be preferred in the Supreme Court in a suit instituted by the claimant as Plaintiff against the Attorney General as Defendant.”

“(3) All documents which in a suit of the same nature between private parties would be required to be served upon the Defendant shall be delivered at the office of the Attorney General.”

4.2 Although there is no equivalent rule contained in the Supreme Court (Supervisory Jurisdiction over Subordinates Courts, Tribunals and Adjudicating Authorities) Rules, 1995, it was stated in that 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).

4.3 Hence as was stated in the case of **Government of Seychelles v. Public Appeal Board & Anor MC87/2018 [2019] SCSC 654 (31 July 2019)** on this issue “the Second Respondent’s plea in this respect must be taken as valid as Section 29 of the SCCP is unequivocal. The Government must be sued in the name of the Attorney General.”

D. The Petitioner is acting unreasonably and it had alternative remedies such as filing a Plaint against the Respondent seeking an injunction which it has failed to do.

[4] The Petitioner made the following submission in reply to the preliminary objections which are also reproduced hereunder as filed:

SPDF can bring a petition for judicial review in its name

[1] Judicial review is the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers. The superior court’s jurisdiction is always invoked at the instance of a person who is prejudiced or aggrieved by an act of body performing public functions. This is a public law matter. As such, the SPDF, as a military organization and a constitutional body, being aggrieved by the acts of the Commission, can bring the petition in its own name. Other constitutional bodies such the Public Service Appeals Board, Constitutional Appointment Authority and Electoral Commission can sue or be sued in their own name, and there is nothing preventing SPDF from bringing this petition in its own name. Counsel for the Commission has misdirected herself on the context of the issue before Twomey CJ in *Government of Seychelles v PSAB [2019] SCSC 654*.

The Commission made decisions on admissibility of 2 complaints

[2] This point raised by the Commission is one for the merits of the petition but it will be succinctly addressed and further elaborated on during the merits of the petition.

Rules of Procedure and Evidence

[3] The relevant provisions of Rule 25 (Admissibility of a Complaint) of the Rules of Procedure and Evidence provides that:

“(1) Upon the receipt of a complaint the Commission will determine the admissibility of a complaint.

(2) A complaint will be deemed inadmissible where the information contained within the complaint falls manifestly outside the mandate of the Commission.

(3) Where the Commission determines a complaint to be inadmissible the complainant shall be informed in writing of the decision of the Commission and the reasons for it within 14 days.” (Emphasis is mine)

[4] The relevant provision of Rule 26 (Admissible Complaints) of the Rules of Procedure and Evidence provides that:

“(1) Where a complaint is deemed admissible by the Commission the complainant will be contacted by the Commission within 14 days and requested to make a sworn statement or affirmation.” (Emphasis is mine)

Analysis

[5] Rules 25 and 26, read together, makes it clear that a complainant cannot give a statement in relation to the complaint unless the Commission made a decision that the complaint is admissible. Colonel Rosette in his affidavit in exhibit SPDF 9 has evidence that the family of Private Payet made a complaint and gave statements to the Commission. Mrs. McIntyre in her affidavit in exhibit R 4 shows that Mrs. Nella Houareau gave a sworn statement to the Commission in relation to her complaint.

[6] Under rules 25 (3) and 26(1), respectively, the Commission had 14 days to inform the family of Private Payet and Mrs. Houareau (Private Antat’s mother) that their complaints are either inadmissible or admissible. The deadline to file a complaint to the Commission was in February 2020. It is either the complaints are inadmissible or admissible. The Commission has not informed the complainants in writing that the complaints are inadmissible but the Commission has proceeded to gather statements from the complainants. The ineluctable inference is that the Commission made a decision that the complaints are admissible.

[7] It is submitted that there is an arguable case that the Commission has acted in excess of its jurisdiction by investigating these complaints. The Supreme Court has the evidence before it in the form of exhibit SPDF 9 in the affidavit of Colonel Rosette and exhibit R 4 of the affidavit of Mrs. McIntyre.

The Commission is amenable to judicial review

Law

[8] Article 125 (1)(c) of the Constitution provides that the Supreme Court shall have supervisory jurisdiction over subordinate courts, tribunal and adjudicating

authority and, in this connection, shall have power to issue, amongst other things, injunctions, certiorari, mandamus and prohibition as may be appropriate for the purpose of enforcing its supervisory jurisdiction.

[9] Article 125 (7) of the Constitution makes it clear that for the purposes of clause (1) (c) “adjudicating authority” includes a body or authority established by law which performs a judicial or quasi-judicial function. Under section 22 of the Interpretation and General Provisions Act, Cap. 103, “functions” includes powers and duties. It is submitted that a judge would therefore have to consider the duties, powers and functions of the Commission under the law. Moreover, the Judge will need to see if the Commission is endowed with coercive powers. These are attributes which would determine whether or not a particular body is an adjudicating authority.

[10] The general position in law is that the Supreme Court will intervene to correct unlawful acts or decisions that are in excess of jurisdiction. In *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, Lord Browne-Wilkinson averred at 701 C-E explained that:

“The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers are to be exercised only within the jurisdiction conferred . . . If the decision-maker exercises his powers outside the jurisdiction conferred . . . he is acting *ultra vires* his powers and therefore unlawfully . . .”

Analysis

[11] The source of the functions of the Commission is the Truth, Reconciliation and National Unity Commission Act. Section 3 of the Act makes it clear that the Commission is both an investigative and adjudicating body hearing and ruling on complaints from any person wishing to be heard by the Commission. Overall, the Commission performs both quasi-judicial and judicial functions that can affect the rights of any person in Seychelles. Some of the duties, powers and function of the Commission include:

1. Observing applicable and appropriate rules of natural justice and international fair trial standards (section 6 (8));
2. Determining the responsibility of individuals in respect of individuals in respect of any violations, providing its reasons and proposing measures to prevent the recurrence of such violations (section 7 (b));
3. Summoning any witness or suspect, examine that person on oath, and compel the production of any document or article (sections 8(2)(d) and 13); and

4. Granting amnesty.

[12] *The law requires that these functions are exercised judicially and is limited to addressing matters relevant to the Coup D'état. The Commission would therefore be amendable to judicial review in the supervisory jurisdiction of the Supreme Court. Any authority endowed with such powers cannot be less than an adjudicating authority envisage by law.*

[13] *Anisminic v Foreign Compensation Commission [1969] 2 AC 147 is an authority for the proposition that the National Assembly can oust the supervisory jurisdiction of the Supreme Court, provided that the National Assembly does so in clear terms. There is nothing in the Truth, Reconciliation and National Unity Commission Act that ousts the supervisory jurisdiction of the Supreme Court. The fact that the Commission has the same powers of the Supreme Court is irrelevant. Every Commission established under the Commissions of Inquiry Act has the powers of the Supreme Court and they too are amendable to judicial review.*

[14] *SPDF is not seeking to prevent the Commission from carrying out its lawful functions or any matters within its mandate. SPDF is complaining that the Commission is acting in flagrant excess of jurisdiction by investigating the disappearance of 2 SPDF officers which occurred in 2018. The SPDF officers were born in 1995 and 1999, respectively, and joined the Defence Forces in 2013 and 2016. There is no link between these disappearances and the Coup D'état. The Commission admits that the investigation is outside of its mandate and the justification given by the Commission for the investigation is that his Excellency the President Mr. Danny Faure is a member of the political party that came to power during the Coup D'état. Cases such as *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System) Court 151 DLR (4th) 1* and *Mitchell v Georges (sole commissioner of the Ottley Hall Commission of Inquiry)* and another (2008) 72 WIR 161 are strong persuasive authorities which indicate that the Court should intervene during an inquiry where a Commission is acting in excess of jurisdiction. The mandate of the Commission ends until October 2021 and as such, there is sufficient time to continue the investigation of the disappearance of the SPDF officers if the Supreme Court gives judgment in favour of the Commission.*

[15] *Based on the foregoing, the Honourable Court should proceed to the merits of the judicial review petition.*

- [5] I shall address the objections by determining first ground A the outcome of which would determine whether it would be necessary to address the other three grounds.

Whether the Commission is subject to the supervisory jurisdiction of the Supreme Court?

[6] Learned counsel for the Petitioner submitted that under Article 125(1)(c) and 125(7) of the Constitution of Seychelles, the Supreme Court has supervisory jurisdiction over the Commission as it falls under the definition of “adjudicating authority”. Article 125(1)(c) and 125(7) provides:

“125. (1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have -

... .

(c) supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority 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; ...”

... .

(7) For the purposes of clause (1)(c) “adjudicating authority” includes a body or authority established by law which performs a judicial or quasi-judicial function.

[7] The objections of the Respondent under ground **A** can be summarised under two headings as follows:

- i. the Commission is vested with all the rights and powers of the Supreme Court and therefore it cannot be reviewed by a parallel body; and
- ii. the Commission cannot be reviewed by the Supreme Court as the Commission is not an adjudicating authority nor an authority which discharges quasi-judicial functions.

The Supreme Court as parallel body

[8] The Commission is a statutory body established under the Truth, Reconciliation and National Unity Commission Act 9 of 2018 (TRNUC Act). The powers and functions of the Commission are contained in section 7 and 8 of the TRNUC Act:

“7. (1) The Commission shall perform such functions as are necessary to enable it to achieve its objectives, including, but not limited to –

- (a) gathering evidence pertaining to violations, including hearing of witnesses;*
- (b) determining the responsibility of individuals in respect of any violations, providing its reasons and proposing measures to prevent the recurrence of such violations;*
- (c) preparing reports of its activities, findings and decisions, based on evidence it has assessed to be credible and reliable and submitting the same to the President;*
- (d) determining and recommending appropriate remedies or reparations; and*
- (e) discharging other functions referred to in this Act.*

8. (1) The Commission may make such rules of procedure and evidence as it thinks fit, in particular for the conduct and management of its inquiries and investigation.

(2) The Commission may –

- (a) visit any establishment or place, enter on land or premises to gather information or inspect property;*
- (b) have access to public or private archives regardless of restrictions contained in the laws of Seychelles and make copies of any documents found therein;*
- (c) hold any hearing it deems necessary;*
- (d) summon any witness or suspect, examine him or her on oath, and compel the production of any document or article. A spouse of a suspect may be compelled to testify against the suspect;*
- (e) seek assistance from relevant authorities, including the Police and Judiciary to achieve its objectives, including the provision of security to any witness;*
- (f) establish such sub-committees as it deems necessary and determine the seat thereof;*

(g) hold meetings at any place, within or outside Seychelles; and

(h) in consultation with the appropriate government authorities, obtain permission from a foreign country to receive evidence from, or gather information in, that country.

(3) For the purposes of effectively exercising its functions and powers, the Commission is hereby vested with all the powers and rights of the Supreme Courts.

[9] Section 6 (8) of the TRNUC Act further specifies:

“6. (8) In the discharge of this functions, the Commission shall –

(a) observe applicable and appropriate rules of natural justice and international fair trial standards;

(b) not be bound by evidentiary rules;

(c) reach its decisions on a balance of probabilities; and

(d) respect the right to dignity of suspects, perpetrators, victims, and witnesses.”

[10] Learned counsel for the Respondent rightly submitted that the Court must interpret the TRNUC Act ‘*not only with regards to what is laid down but what is the spirit behind it*’. This requires a cursory look at the mandate of the Commission keeping in mind that at this stage this Court is not making any determination on the legal scope of its mandate. The mandate, purpose and the objectives of the TRNUC are specified in Section 3 of the TRNUC Act:

“3. (1) There is hereby established a Truth, Reconciliation and National Unity Commission.

(2) The Commission shall be a body corporate.

(3) The mandate of the Commission shall be to receive complaints in respect of alleged violations, to gather, collate and analyse information and evidence with respect thereto, and to make decisions.

...

(7) The objectives of the Commission are –

- (a) to ascertain the truth with respect to complaints of alleged violations;*
- (b) to create an accurate and objective public record of the complaints of alleged violations;*
- (c) to help bridge divisions caused by any violations;*
- (d) to provide closure for the victims and perpetrators of the violations;*
- (e) to determine –*
 - (i) the appropriate reparations for victims;*
 - (ii) the appropriate rehabilitation for the victims and perpetrators; and*
 - (iii) whether or not to grant amnesty; and*
- (f) to unite the people of Seychelles around a common agenda that will help them move forward in confidence and with a sense of common purpose, and ensure that such violations do not recur.*

(8) The Commission shall carry out its functions-in an open, impartial and transparent manner.

(9) The Commission shall abide by universally recognised legal principles and human rights norms.”

[11] Violation is defined by section 2(8):

"Violation" means human rights abuse committed during or in relation to the Coup D'etat of 5 June 1977 and includes the following acts –

- (a) unlawful killing;*
- (b) unlawful imprisonment or other deprivation of physical liberty;*
- (c) torture;*
- (d) rape*
- (e) enforced disappearance of persons;*
- (f) kidnapping;*

- (g) *forceful eviction from legally owned building or land;*
- (h) *unjustified acquisition or loss of property or business;*
- (i) *wrongful denial of the right to employment;*
- (j) *wrongful termination of employment;*
- (k) *forced exile;*
- (l) *abuse of office by a Government official, including the executive, judiciary or legislature; or*
- (m) *other acts of a similar character causing suffering, or injury to body or to mental or physical health.”*

A combined reading of the abovementioned sections illustrate that the TRNUC is indeed granted wide powers and rights, however, they are limited to the mandate of the TRNUC, which are matters defined as violations during or in relation to, the coup d'etat of 5 June 1977. What these matters are and whether a matter is related to the coup d'etat are left to be determined if this case goes on to be determined on the merits.

[12] Nevertheless, it is obvious that the intention and the spirit behind the TRNUC was not to establish the Commission as a parallel body to the Supreme Court. As defined by Article 119 of the Constitution, the Supreme Court is part of the Judiciary vested with the judicial power of Seychelles and is independent and subject only to the Constitution and the other laws of Seychelles. The judicial power of Seychelles is also vested in Court of Appeal and “*such other subordinate courts or tribunals established pursuant to article 137*”. Under Article 137 Acts may “*provide for the establishment of courts or tribunals which are subordinate to the Court of Appeal and Supreme Court, in this article referred to as “subordinate courts and tribunals”. . .*”. The purpose of establishing the Commission and the Supreme Court is obviously very different, and it was not the intention of the TRNUC Act that the general judicial power of Seychelles be vested in the Commission to the same extent as to the Supreme Court. To hold otherwise the Commission would have been established as a court or a tribunal.

[13] Furthermore, Article 125 of the Constitution provides that in addition to the jurisdiction and powers conferred by this Constitution, the Supreme Court has original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution; civil and criminal matters; supervisory jurisdiction over subordinate courts, tribunals and adjudicating authority; such other original, appellate and other jurisdiction as may be conferred on it by or under an Act.

[14] Additionally, the provisions of Part II of the Courts Act provides for further jurisdiction and powers of the Supreme Court (sections 4 -11). The Supreme Court is a Superior Court and, *“in addition to any other jurisdiction conferred by this Act or any other law, shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of Justice in England.”* The Supreme Court has jurisdiction in civil matters which include but are not limited to: wills, guardianship of minors, adoption, insolvency, bankruptcy, matrimonial causes and generally to hear and determine all civil suits, actions, causes and matters. In the criminal matters the Supreme Court has the jurisdiction to hear, try, determine, pass sentence and make orders in all prosecutions for criminal offences.

[15] The Supreme Court also has equitable jurisdiction and powers (section 6 of the Courts Act); admiralty jurisdiction (section 7); appellate jurisdiction and powers to hear and decide appeals from all other courts and *“any other bodies and persons as provided by any law now in force or to be enacted”* with general powers of supervision over such courts (section 9). The powers, functions, purpose and jurisdiction of the Supreme Court is significantly wider than those of the Commission, which are limited to matters relating to violations as defined above.

[16] Provisions vesting the powers of the Supreme Court are not uncommon in Seychelles legislation. Some examples are below:

- a. Article 54 of the Constitution (Removal of President for violation of Constitution or gross misconduct) subsection (3)(d) provides:

“(3)(d) the Constitutional Court in investigating the matter under paragraph (c) may summon and examine any witnesses or otherwise exercise all the powers of the Supreme Court.” (emphasis added mine)

- b. Article 104 of the Constitution (Committees, established by the National Assembly) subsection (3):

*“(3) For the purposes of effectively performing its functions **a standing or other committee** may summon any person the committee believes may assist the committee in the performance of its functions **and the committee shall have the powers, rights and privileges of the Supreme Court** for-*

(a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;

(b) compelling the production of documents; and

(c) issuing a commission or request to examine a witness abroad.” (emphasis added)

- c. Section 13 of the Commissions of Inquiry Act, 1962:

*“All persons summoned to attend and give evidence, or to produce books, plans, or documents at any sitting of the Commission shall be bound to obey the summons served upon them as fully in all respects as witnesses are bound to obey a summons issued from the Supreme Court, and the **Commissioners shall have the powers of that Court to compel the attendance of any witness failing to obey such summons.**”* (emphasis added)

- d. Rule 31 of the Seychelles Court of Appeal Rules, 1995:

“(1) Appeals to the Court shall be by way of re-hearing and the Court shall have all the powers of the Supreme Court together with full discretionary power to receive further evidence by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner.”

[17] Some of the abovementioned provisions specify for which acts and procedures the powers of the Supreme Court are conferred, although, others are more general. However, it cannot be said that provisions in relation to Commissions and Committees were aimed at excluding supervisory jurisdiction of the Supreme Court and as the examples mentioned above

demonstrate, the exercise of the rights and powers of the Supreme Court by Committees and Commissions is not absolute.

[18] Another example is Article 145(2) of the Constitution (Chapter XI - Public Service Appeal Board) which provides that subject to the Constitution, “*the Public Service Appeal Board shall not, in the performance of its functions, be subject to the direction or control of any person or authority*”. Yet, there are decisions of the Supreme Court granting writ of certiorari against decision of the Public Service Appeal Board (*Government of Seychelles v Public Service Appeal Board (CS 306/2003) [2005] SCSC 52 (17 October 2005)*; *Nourrice v The Public Service Appeal Board (MC49/2012) [2016] SCSC 702 (28 September 2016)*). It is clear that the purpose of Article 145(2) is not to make the decision of the PSAB non-reviewable by the Supreme Court but to emphasise the independency of the PSAB.

[19] In *Government of Seychelles v Public Service Appeal Board & anor (MC 87/2018) [2019] SCSC 654 (31 July 2019)*, in response to submission that the PSAB is not subject to the sanction of the courts by judicial review due to provision in Article 145(2), Twomey, CJ stated:

*“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.”*

[20] Learned Counsel for the Petitioner referred the Court to the case of *Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147* as plausible authority for the proposition that the National Assembly can oust the supervisory jurisdiction of the Supreme Court, provided that it is done in clear terms. Learned Counsel submitted that there is nothing however in the TRNUC Act that ousts the jurisdiction of the Supreme Court hence the fact that the Commission has some powers of the Supreme Court is irrelevant.

- [21] In *Anisminic* (supra) the House of Lords held that a clause purporting to oust the jurisdiction of the courts to review the decision of the Commission was ineffective in respect of a decision tainted by legal error. The clause did not prevent the court from deciding whether a decision was a nullity on the ground that the commission had misinterpreted a provision defining their jurisdiction. The House of Lords also considered wider constitutional implications of interpretation of a statutory provision that purports to prevent judicial oversight of the decision-maker. Giving effect to such clause “*would have prevented any consideration by the courts of the lawfulness of the Commission’s decision, breaching fundamental and well-settled constitutional principles (Wade, Constitutional Fundamentals (Stevens & Sons, London, 1980), at p. 82)*”.
- [22] The approach in *Anisminic* has also been considered in other jurisdictions in terms of the substance of an “ousting” clause. In New Zealand, a distinction was made between circumstances where the result of giving effect to an ouster clause would be the creation of dictatorial power (*Bulk Gas Users Group v Attorney-General [1983] NZLR 129*) and where the supervisory jurisdiction has, in substance, been preserved (*H v Refugee and Protection Officer [2018] NZCA 188*). In the former the courts applied *Anisminic* principles, and in the latter the courts did not engage in the reasoning adopted *Anisminic*. However, they both came to the same view that supervisory jurisdiction of the court cannot be entirely ousted by legislation.
- [23] In addition, Section 43(b) of the Interpretation and General Provisions Act, 1976 Part VII, in respect of Statutory Bodies provides that “*A body corporate constituted by an Act enacted after the commencement of this Act . . . may sue and be sued in its corporate name*”. Section 3(2) of the TRNUC Act states that the Commission is a body corporate. Therefore, the Commission may sue and be sued in its corporate name. If the intention of the TRNUC Act in vesting powers of the Supreme Court in the Commission was to exclude the jurisdiction of the Supreme Court, the Commission’s power to sue and be sued would not have been necessary. It is therefore not possible to agree with the Respondent that the Commission is a

parallel body to the Supreme Court with the effect of excluding the jurisdiction of the Supreme Court over the Commission. This ground of objection is therefore rejected.

Whether the Commission is the Adjudicating Authority

- [24] The second ground submitted by the Respondent is that the Commission cannot be reviewed by the Supreme Court as the Commission is not an adjudicating authority, nor an authority which discharges a quasi-judicial function. As noted earlier “adjudicating authority” includes a body or authority established by law, which performs a judicial or quasi-judicial function. The argument then is paradoxical to the previous ground: that is the Commission has all the powers of the Supreme Court to the extent that it is parallel body to the Supreme Court, and yet it is not a body exercising judicial or quasi-judicial functions.
- [25] The Petitioner submitted that the Commission is “*both an investigative and adjudicating body hearing and ruling on complaints*” and “*performs both quasi-judicial and judicial functions that can affect the rights of any person in Seychelles*”. In this submission the Petitioner notes some of the duties of the Commission: observing applicable and appropriate rules of natural justice and international fair trial standards (section 6(a)); determining the responsibility of individuals in respect of any violations, providing its reasons and proposing measures to prevent the recurrence of such violations (section 7(1)(b)); to summon any witness or suspect, examine him or her on oath, and compel the production of any document or article (sections 8(2)(d) and 13); amnesty (sections 12 and 3(7)(e)). The Petitioner argues that the law requires that these functions are exercised judicially and are limited to matters relevant to the Coup D’etat and that “*any authority endowed with such powers cannot be less than an adjudicating authority envisioned by law*”.
- [26] In addition to the powers and duties listed by the Petitioner in the submissions, the following powers and objectives are also worth mentioning: the Commission shall abide by universally recognised legal principles and human rights norms (section 3(9)); reach its decisions on a

balance of probabilities (section 6(c)); determine and recommend appropriate remedies or reparations (section 7(1)(d)); and hold any hearing it deems necessary (section 8(2)(c)).

[27] The Respondent submitted that as per section 7(1)(d) (determining and recommending remedies or reparations) “*at the end of the day the determination and recommendation are laid in the hands of the President and subsequently the National Assembly*” and therefore the Commission is not an adjudicating authority. The Respondent did not expressly address reasons for other powers not being adjudicating authority powers.

[28] The Judgment in *Cable & Wireless Seychelles Ltd v Ministry of Broadcasting and Telecommunication & Ano (MC 42/2017) [2018] SCSC 348 (9 April 2018)* provides a comprehensive overview on decisions that can be judicially reviewed. Twomey, CJ noted that, “*initially, the pre-constitution case of R v Superintendent of Excise and Anor ex parte Confait [1947] SLR 154 which established that decisions were not reviewable was followed*”.

[29] *R v Superintendent of Excise* (supra) held that it is a matter of interpretation whether a discretion given to an administrative official/body is an executive or administrative discretion or a judicial or quasi-judicial discretion. Woodman CJ stated:

“When a legislative enactment such as an Act of Parliament or an Ordinance confers upon an administrative official or body a discretion to do or not to do something which affects the rights of the subject such as his liberty or his right to dispose of his property as he pleases, that discretion may be either what has been called an executive or administrative discretion, or it may what has been called a judicial or quasi-judicial discretion. In the former case it is not liable to be controlled by the courts by Certiorari, in the latter case it is liable, on certain grounds, to be so controlled. The question of whether the discretion conferred is administrative or judicial is in every case a matter interpretation of the legislative enactment which confers the discretion.”

[30] It was ultimately held in *R v Superintendent of Excise* that the fact that the decision may affect the rights of a person was not enough and there had to be a duty on the authority to act judicially for certiorari to lie. Twomey, CJ in *Cable & Wireless* (supra) noted that, “*such*

distinction seems to have been preserved by the Constitution in its definition of adjudicating authority in Article 125 (7)”. The decision of Platte Island Resort and Villas Ltd v Minister Peter Sinon & Island Development Corporation & Government of Seychelles SCA 1 of 2012, was also noted, where it was held that the Minister’s decision in the circumstances of the case was not under the purview of article 125 of the Constitution as “[t]he Minister was not discharging the function of an adjudicator in the matter . . . In taking his decision, he was applying project management principles and principles of the law of contract as he saw them.”

[31] Twomey, CJ, however, further stated that Seychelles has, subsequently, adopted the widened interpretation of the duty to act judicially:

“A court may issue a writ of certiorari to review all acts by those making determinations affecting the rights of citizens. The concept of “acting judicially” includes determinations or decisions by legal authorities which determine questions affecting the “common law or statutory rights” of others (O’Reilly v Mackman (1983) 2 A.C. 309 as adopted in Joanneau v SIBA ([2011] SLR 262. See also Timonina v Government of Seychelles and anor (2008 -2009) SCAR 21).

The emphasis seems to be no longer in the distinction between an adjudicator acting in an administrative as opposed to in a judicial capacity (since even in administrative roles, the decision maker can affect the right of citizens) but rather whether the decision taken was judicious and not arbitrary, capricious, in bad faith, abusive or by the consideration of extraneous matters (Michel & ors v Dhanjee & ors supra)”

[32] Although, the petition in Cable & Wireless (supra) was dismissed for other reasons, Twomey, CJ has stated that:

“The Ministerial Order by Minister Vincent Meriton was made under section 33 (3) of the Act (Cap 19). This section provides that:

“Where the Minister is satisfied that a person is engaged in a practice in contravention of subsection (1), he may in writing, order such person to do, or refrain from doing any act within such time as may be specified in the order.”

The Minister's discretion under the provisions above is not an absolute discretion. He could only order a person to do, or refrain from doing, any act only if he was satisfied that the person has fallen foul of the requirements of section 33. As his discretion was curtailed by the provisions of section 33, he was in any case under an obligation to act judicially.

Further, even using the old distinction, although the Minister might not be an authority established by law to perform a judicial or quasi-function, his decision is reviewable because in the exercise of his powers as outlined in the provision above, he was performing a quasi-judicial function, as opposed to a purely executive or administrative function at the time the impugned decision was taken. In other words, he was discharging the function of an adjudicator in the matter. His decision is clearly reviewable by the Court."

[33] Following the reasoning in Cable & Wireless, under the old distinction, it should not matter whether the Commission was established to perform a judicial or quasi-function; it is the manner in which decision is taken that should be considered by the court: whether in making a decision the Commission is performing a quasi-judicial function, as opposed to an executive or administrative function.

[34] With regards to whether the discretion is absolute or curtailed, the decision in the much older case might be worth noting. In Benker v Government of Seychelles & Anor (CS 58/1996) [1999] SCSC 13 (01 December 1999) it was held that discretion conferred on the immigration officer regarding the issuance of visitor's permit is an administrative discretion not a quasi-judicial one:

"I find it so, because the Decree itself does not specify the ground upon which the discretion of the immigration officer is to be exercised. Hence, this is an absolute administrative discretion conferred on the Immigration officer."

[35] In support of the reasoning the Judge cited a different passage from Woodman C. J's judgment in R v Superintendent of Excise & Anor;

"There are cases in which the very nature of the discretion conferred excludes the possibility of it being an absolute discretion. There are other cases in which the Act itself specifies the ground upon which the discretion of the competent authority has to be exercised. Where the Act itself so limits the discretion of the competent authority it is clear that that discretion is not an

absolute discretion and the Courts have readily held in such cases that the competent authority was under an obligation to act judicially.”

[36] It was held in *Benker v Government of Seychelles* (supra) that the Decree did not limit the discretion of the Immigration officer; “*the authority is under no obligation to act judicially in this respect*” and “*the decision-maker is under no obligation to give the reason/s for his decision in this respect*”. The Judge also stated that if grounds limiting the discretion would have been specified in the Decree, then “*any decision taken on the basis of that discretion would of necessity, be judicial and subject per se to judicial review by the courts*”. The Judge further added in the final remarks:

“Having said that I have to state for avoidance of doubt, that the above proposition should not be misinterpreted as meaning that the Court has no jurisdiction to correct the decision of the Immigration Officer or executive when he falls into an error of law while exercising that discretion or acts ultra vires or out of his jurisdiction. In other words the courts have no control over or cannot interfere in his administrative discretion so long as he exercised his discretion in accordance with law and kept it within his jurisdiction.”

[37] Similarly, in *Faure v Prea & Ano (CP 08/2019) [2019] SCCC 11 (29 November 2019)* it was noted that when considering whether the National Assembly exercised quasi-judicial powers when it annulled statutory instruments, the Constitutional Court held that it did not as the provisions of the Constitution and Interpretation and General Provisions Act did not call for “*reasons to be given before or after an annulment is effected or for a party to be heard prior to the annulment being voted upon*”.

Has the Commission made a decision in this case?

[38] In this case the complaints documents submitted by the Respondent in its submission, that the Commission does provide brief statements with reasons for each complaint that was found not to be admissible. For example, if the Commission does not find a political element in the complaint and the complaint falls outside of their mandate. The Commission does not provide further details for its reasoning, and reasons for non-admissibility are often self-explanatory in many of the complaints. In one of the complaints, the Commission found part

of the complaint admissible and explained that as the complainant was a supporter of the opposition party's views and because the President is a member of the party that came and remained in power after the Coup D'etat, the Commission was of the opinion that there is a political element in the complaint that is within their mandate.

[39] In the present case, the Commission has also expressed the view that their mandate can extend to the disappearance of two SPDF Privates who have joined the SPDF way after the Coup D'etat because the President is the Commander-in Chief of the Defense Forces and the Party, of which the President is a member, is the Party that came and remained in power after the Coup D'etat. This is not an issue to be determined by the Court at this stage. I only refer to this in relation to whether the discretion of the Commission to decide whether the complaint is admissible is absolute or curtailed by virtue of its mandate and whether such a determination amounts to a decision capable of being challenged by an application for judicial review.

[40] The abovementioned decisions suggest that if the discretion is curtailed and the TRNUC Act specifies the grounds upon which the discretion is to be exercised, then the Commission is under obligation to act judicially and their procedures and decisions are subject to judicial review. The contention of Learned Counsel for the Respondent goes further arguing that the Commission has taken no decision in the case of the two SPDF privates as no certified recommendation or determination has been produced by the Petitioner.

[41] It appears that the Commission makes two opinions or findings which Learned Counsel for the Respondent submitted were not decisions. Firstly, in determining whether a complaint is admissible under its mandate; and, secondly, if the complaint is admissible when making further determinations and recommendations. At this point what is being challenged is the Commission's "letter" that seems to conclude that the complaints regarding disappearance of the SPDF Privates are admissible, as they fall within the Commission's mandate. It is clear that in substance it is a decision albeit not a final decision. Hence, the Respondent's argument that its determinations and recommendations of remedies or reparations will be ultimately be laid before the President and subsequently the National Assembly could be

arguable only if the Commission was not mandated to take any decisions, procedural or otherwise nor make any determination in its preparation of its final report.

[42] Nevertheless, even if the decision of the Commission, regarding final determinations, can potentially fall under the judicial review provisions the actual enquiry or investigation and the procedures by which such determination was arrived at could also be subject to judicial review. The judgment in Rohoboth Builders vs Licensing Authority (Cs 29.2013) [2014] SCSC 230 (04 July 2014) cited by Parker J in R v Manchester Legal Aid Committee (1952) 1 ALL E.R 480 at page 489 states:

“When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by question of policy, the duty to act judicially may arise in the course of arriving at the decision. Thus if in order to arrive at the decision, the body concerned has to consider proposals and objections and consider evidence, thus there is the duty to act judicially in the course of the inquiry.”

[43] It was held that the Licensing Appeals Board exercises quasi-judicial functions and was subject to the supervisory jurisdiction of the Supreme Court:

“It is evident that the Board after hearing an appellant has the power to decide on the fate of the appellant by upholding or varying the decisions made by the Authority and may also make a new decision and issue its own orders including directing the Authority to take the action that it may direct the Authority to do. Any Authority endowed with such powers cannot be less than an adjudicating authority envisaged by law.

It is my considered view that in the light of the above position of law it is reasonable to conclude that the legislature has envisaged that the complainant concerned be noticed and be heard and the opinion formed to be the result of an equitable decision. The order of the Board followed that same procedure and that necessarily affects the rights of the aggrieved party, therefore brings the Board within the description of an authority exercising quasi-judicial functions.”

[44] Secondly, in R vs Esparon and others (SCA No: 01 of 2014) [2014] SCCA 19 (14 August 2014) the Judge cited N.S. Bindra’s Interpretation of Statutes 10th Edition (of which he

was of the opinion is applicable in Seychelles also) when distinguishing between administrative and quasi-judicial as well as judicial decisions:

“Decisions which are purely administrative stand on a wholly different footing from quasi judicial as well as from judicial decisions and must be distinguished accordingly ... In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting are left entirely to his discretion...”

It follows therefore that where the Commission has to weigh the complaint against evidence or legal provisions the Commission steps into a quasi-judicial role and must by necessity discharge those functions in accordance with natural justice and becomes subject to the supervisory jurisdiction of the Court.

[45] Following the reasoning above and taking into account the scope of the Commission’s powers and functions as well as their objectives, it is not possible for this Court to sustain the objection of the Respondent that the Commission should not be considered an adjudicating authority or that the Commission does not have a quasi-judicial function. I also find that the Commission indeed makes procedural decisions on whether a complaint is within its mandate and whether investigations or further evidence are required. If I were to decide otherwise, then there would be no legal obligation upon the Commission to consider submissions and arguments or to collate any evidence or in fact to solve any issue. Considering sections 6(8), 7(1) and 8(2) of the TRNUC Act. The purpose of establishing the Commission appears to be quite the opposite. Consequently, I find that these two grounds of objection are not sustainable.

Whether SPDF have locus standi to appear in its own name

[46] The Respondent submitted that under section 29 (1), (2) and (4) of the Seychelles Code of Civil Procedure, the present Petition should have been brought in the name of Attorney-General and not that of the SPDF and relies on abstract from the decision in *Government of Seychelles v Public Service Appeal Board & anor (MC 87/2018) [2019] SCSC 654 (31 July*

2019) that “Section 29 of the SCCP is unequivocal. The Government must be sued in the name of the Attorney General”. The sentence that comes right after the cited abstract, stating that, “The caption therefore ought to be amended to reflect this necessity” was, however, omitted by the Respondent. In addition, the Respondent does not note that earlier in the judgment in determining whether the PSAB can be sued in its own name, the Second Respondent has conceded “that the challenged caption would not in any case be fatal to the suit” and was “only pleading that the representative capacity of the Attorney General be included in the caption”.

[47] The decision in Government of Seychelles v Public Service Appeal Board & anor also considered whether self-review of government decisions is permissible, as the First Respondent had argued that the PSAB is a Government body. It was held:

“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.

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.”

The Defence Force is established under the Constitution (Article 162). At the same time, the SPDF is also established by section 3 of the Defence Act, 1981. Nevertheless, whether the SPDF is considered to be constitutional or statutory body, as per the decision in Government of Seychelles v Public Service Appeal Board & anor self-review of government decisions is permissible and when the caption ought to be amended, it can be amended and is not fatal to the suit.

[48] It is therefore doubtful that the Petitioner as captioned now can sustain this Petition without making the necessary amendment to its caption but at this stage this defect is not fatal. As the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and

Adjudicating Authorities) Rules do not make any specific rules on amendment, the closest guidance is found in article 108 of the SCCP which states:

108. Where a suit has been commenced in the name of the wrong person as plaintiff, or where it is doubtful if it has been commenced in the name of the right plaintiff, the court may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person with his consent to be substituted or added as plaintiff upon such terms as the court thinks just.

In the case of Government of Seychelles v Public Service Appeal Board & anor it was also held that under section 29 of the SCCP, the Government must be sued in the name of the Attorney General and the caption therefore ought to be amended to reflect this. However, the necessity of such amendment may not necessarily be fatal to the suit. Hence although this ground of objection has some merits it is not fatal to the Petition, as such defect can be cured by the necessary amendment.

Conclusion

[49] With regards to the submissions that the Commission cannot be subject to the supervisory jurisdiction of the Supreme Court because the TRNUC Act vests the powers and rights of the Supreme Court in the Commission and, thus, making the Supreme Court a parallel body to the Commission, the analysis of the powers of the Supreme Court and powers the Commission renders it not possible to conclude that such was the intention of the wording used in the TRNUC Act. The powers of the Supreme Court are significantly wider than those of the Commission. The Commission is not granted the wide and overall judicial power as the Supreme Court. The Commission cannot perform certain functions of the Supreme Court due limitations of its mandate and lack of overall or “supreme” jurisdiction. Therefore, the Commission cannot be considered as a body parallel to the Supreme Court.

[50] In determining whether the Commission is an adjudicating authority, the Court should have regard to, amongst other considerations, whether the discretion of the Commission is absolute or curtailed by limitations of its mandate. The relevant factors to consider are:

whether the body concerned has to consider and/or has legal obligation to hear and address proposals and objections; to solve any issue; to collate and consider evidence; whether the decision-maker is under an obligation to give the reason/s for the decision. The Commission does have such powers and objectives.

[51] The Respondent's argument that final determinations are laid before the President and the National Assembly and that the Commission does not or has not made any decisions in the cases of the two SPDF privates, I find that the documents show that the Commission has formulated a determination in respect of at least one complaint. The argument that there must be a certified decision is erroneous and irrelevant to the decision on the admissibility of complaints. The procedural decisions taken by the Commission impact directly on the parties subject to the complaint and form the basis from which the Commission determines what next step to take in respect of any given complaint.

[52] In respect of whether the SPDF has locus standi to sue in its own name, it is determined that in the light of the lack of legal or constitutional provision to that effect, the SPDF cannot prosecute the Petition on the merits without the necessary amendment to insert or be replaced by the correct party with the necessary locus standi. Nevertheless at this stage, such misnomer or bona fide mistake in the caption is not fatal to the Petition and I find that amendments can be made as necessary for the determination of the real matter in dispute.

[53] Considering the findings of this Court it is not necessary for this Court to further consider whether the Petitioner should have availed itself to alternative avenues for redress such as the Supreme Court through a Plaint or the Constitutional Court.

[54] Further, in view of the above findings I find that the Petitioner is not abusing the Court's process or acting in bad faith or unreasonably.

[55] Consequently, subject to the determination that the Petitioner needs to reconsider its locus standi in this matter, the other objections brought by the Respondent are not sustainable

and are dismissed accordingly. The matter shall proceed to hearing on the merits subject to the Petitioner undertaking the needful to rectify the locus standi of the Petitioner.

Signed, dated and delivered at Ile du Port on 31 July 2020

Dodin J