

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC ... 497
MC94/2019

GOVERNMENT OF SEYCHELLES
(rep. by Luthina Monthly)

PETITIONER

and

PUBLIC SERVICE APPEAL BOARD
(unrep)

1st RESPONDENT

JIHAD JOUBERT
(unrep)

2nd RESPONDENT

Neutral Citation: *Government of Seychelles v PSAB & Anor* (MC94/2019) [2023] SCSC 497
delivered on 12 May 2023).

Before: Vidot J
Summary: Judicial review
Heard: Parties filed written submission
Delivered: 12 May 2023

ORDER

Application allowed. Decision of the PSAB is quashed and a writ of certiorari issued setting aside the Order of the PSAB

RULING

VIDOT J

- [1] The Petitioner filed an application in terms with Rule 2(1) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunal and Adjudicating Authority) Rules (“the Rules”) praying to the Supreme Court to exercise its supervisory jurisdiction and judicially review a decision taken by the first Respondent on 20th July 2019.
- [2] Together with this application the Petitioner also prayed for leave in terms with Rule 6(1) of the Rules and article 125(1)(c) to proceed with the application. The granting of leave is a pre-requisite to hearing the application for judicial review. Such application was initially denied by the Supreme Court on the grounds that the application was instituted by the wrong parties. The application was filed by the Government of Seychelles. The Court a quo held that the Seychelles Fire and Rescue Services (“the Agency”), with which the second Respondent was employed, is an entity distinct from the Government. It was argued that the Agency is an agency of Government which falls to be considered as a department or division of the Government for the purpose of article 146(7) of the Constitution.
- [3] The Government had appealed against such decision of the Court a quo to the Court of Appeal. By a judgment delivered on 19th August 2022, the Court of Appeal reversed the decision of the Supreme Court. That Court held that the Government could represent the Agency. It held that the fact that the caption of the case had named the “*Government of Seychelles acting for the Agency was not fatal to the application for leave and petition given the fudge regarding section 29 of the SCCP.*” The Court went on to add that “[W]e believe that Article 76(4) of the Constitution provides that the Attorney General is the principal legal advisor to the Government of the Republic of Seychelles, it is best that suits involving the latter is best sued in the name of the Attorney General. The caption therefore, ought to reflect this reality.”
- [4] The Court of Appeal proceeded to allow the appeal and granted leave to proceed and remitted the case to the Supreme Court to determine the application for judicial review.
- [4] Acting on the advice of the Court of Appeal, the petitioner amended the petition dated 07th December 2022 and the same was filed on the same date. The application is being sued in the name of the Attorney General at the instance of the Ministry of Home Affairs.

- [5] This petition concerns the termination of employment of the second respondent with the Agency as a fire fighter. He is cited as a party to this case as he is directly affected by the decision of the Agency that terminated his employment. The second respondent's employment was terminated as he was tested positive for illegal drugs on 09th April 2019. A meeting was conducted with him by senior officers of the Agency. It was considered that this constituted a serious discipline offence warranting the dismissal. Nonetheless, he was advised that within six months of the dismissal, if he could provide proof that he was clean from drugs, he would be given a second chance and be reinstated within the Agency if a vacancy exists.
- [6] Being aggrieved by the decision of the Agency, the second respondent lodged a grievance with the PSAB, the first respondent. After hearing the matter, the PSAB made the following Order;
- i. that the Agency pays the second respondent compensation for length of service in employment;
 - ii. that the Agency issue a good character certificate of employment for the complainant (the second respondent);
 - iii. that the payment should be made to the complainant (second respondent) by 30th September 2019.
- [7] Being dissatisfied with the Order of the first respondent, the Petitioner petitions the Court to consider such Order to be;
- i. illegal in view that the PSAB misdirected itself in law. In that line Order 175(h)(iii) of the Public Service Orders stated that "*on termination of appointment on grounds of misconduct*" a person "*is not eligible for compensation under this order*". However, contrary to the above, the PSAB ordered the Agency to pay the second respondent compensation for length of service.
 - ii. that the order was highly irrational and unreasonable in view that the first respondent made a decision that was contrary to law.

- [8] Therefore the Petitioner prays for a writ of certiorari to quash and set aside the order of the PSAB made on 20th July 2019.
- [9] The respondents were served. The second respondent never appeared before Court whilst the first initially did and was given time to file and Answer to the Petition but failed to do so. The Court decided to hear this matter ex-parte.
- [10] In making the application, the Petitioner needed to show that it has sufficient interest in the matter being an employer who was ordered to pay compensation to the second respondent. Unfortunately, this is not explicitly averred in the Petition. It must also be averred that the petition is instituted in good faith. This is determined at the leave stage. Whether the petitioner has good faith in the matter can be determined by averments made that the first respondent in making the order for compensation acted in contravention of the law. That means that the decision of the first respondent is illegal, highly irrational and unreasonable. The Petitioner did not also plead good faith, which is necessary in an application for judicial review.
- [11] Before considering the judicial review application, the Court has to address a procedural matter which the petitioner failed to observe. This is a matter that should have been considered at the leave stage. It appears that it was not. This is to do with the petitioner's failure to attach with the Petition a certified copy of the impugned decision as is provided for under Rule 2 of the Rules. The Order attached to the Petition is not certified. The Petitioner should have remedied that procedural failure or at least the Court of Appeal should have advised the Petitioner to correct that impropriety in allowing the appeal and remitting the matter to the Supreme Court. Otherwise, the Court of Appeal should have denied the application for leave outright.
- [12] However, since leave has been granted by the Court of Appeal and the matter remitted to the Supreme Court, this Court can only deal with the merits of this case. In this case, despite the second respondent testing positive for drugs in employment which is a serious disciplinary offence the PSAB, the first respondent, made the rulings listed in paragraph 6 above without basis.

- [13] The respondent argues that the findings were illegal and quoted **Beau-Vallon Properties v Ministry of employment and Social Affairs (MA 146/2021) [2022] SCSC 438 (30 May 2022)** wherein it was said that “[I]llegality is a ground of judicial review where one attacks the process’ failure to meet standards set out in the law. Such instance as brought by the case of *Vijay Construction v Ministry of Economic Planning and Development*, there is an error of law on the face of record.”
- [14] In this case, the first respondent should have made a finding as to whether the second respondent committed a serious disciplinary offence which warranted his immediate dismissal. Unfortunately, it did not make any express pronouncement on that issue. However, impliedly, it appears that they were stating that the second respondent was in breach Public Service Order (PSO) but acting on compassion decided to make the Orders that they did as stated above. The PSAB cannot act on compassion. It has to interpret the law and make a finding which in this case should have been based on the application of the PSO.
- [15] Order 175(h)(iii) of the PSO provides that “on termination of appointment on grounds of misconduct” a person is “not eligible for compensation”. However, in complete disregard to that Order, the first respondent ordered the Agency to pay to the second respondent compensation for length of service. The first respondent provided no reasoning for this order. This Order is explicitly illegal. The fact that the PSAB decided to depart from it is irrational and unreasonable.
- [16] As far as irrationality and unreasonableness are concerned, the case of **Beau Vallon Properties v Ministry of Employment and Social Affairs (supra)** held;
- “A decision is considered irrational if it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question could have arrived at it, per the Wednesbury principle.”*

Judicial review does not strike at whether the decision was right or wrong. It determines whether or not the decision or action taken by the respondents was legal. Illegality in essence whether the act is within the law.

- [17] In her written submission, Counsel for the petitioner, referring to **Georges v Electoral Commission (2012) SLR 199** and **Vidot v Minister of Employment and Social Affairs [2000] SLR 77**, noted that the test for unreasonableness is subjective where the court will evaluate whether an act is of such nature that no reasonable person would act in such a way.
- [18] As stated above the Order of 20th July 2019 made determination which are baseless. The decision was not supported with any reasons. In fact it states “*we cannot condone*” the action of the second respondent but ruled in favour of that respondent in complete disregard to Order 175(h)(iii) of the PSO, something that they could not do. That was illegal and highly unreasonable.
- [15] Therefore, I hereby issue a writ of certiorari quashing the Order of the PSAB dated 20th July 2019.

Signed, dated and delivered at Ile du Port on 12 May 2023.



Vidot J