

PUBLIC BODIES APPEAL TRIBUNAL

No. R/10. of 2014

In the matter of:-

Gowmatee Madhubala MADHUB-DASSYNE **(Appellant)**

versus

Public Service Commission **(Respondent)**

and

Andrew B. WADE **(Co-Respondent)**

Ruling

The Appellant lodged an appeal before the Public Bodies Appeal Tribunal (PBAT) against the decision of the Respondent to appoint Co-Respondent as Director, Forensic Science Laboratory (FSL) on the ground that the decision to do so was

- “(a) in complete disregard of the rule of fairness;
- (b) unreasonable;
- (c) illegal; and
- (d) in breach of my legal rights and legitimate expectations....”

In its Notice of Objections, the Respondent raised the following Preliminary Objection in Law:

*“Respondent moves that the present appeal be set aside as the Public Bodies Appeal Tribunal has no jurisdiction to hear the present matter in as much as the appeal relates to an appointment exercise made following a call for application for an office by **public advertisement.**”*

Counsel on both sides were invited to argue on the Preliminary Objection in Law raised by Respondent.

Submissions of Respondent

Respondent referred the Tribunal to the Scheme of Service prescribed on the 10 December 2009 which provides for the post of Director, Forensic Science Laboratory (FSL) to be filled by selection among candidates holding the following qualifications:

- “ (i) A Cambridge Higher School Certificate or Passes in at least two subjects obtained on one certificate at the General Certificate of Education “Advanced level”.
- (ii) A degree in Biology or Chemistry or Forensic Science from a recognised institution.
- (iii) Candidates should:
- (a) reckon at least ten years’ post qualification experience in the management and administration of a Forensic Science Laboratory;
 - (b) be computer literate; and
 - (c) possess marked managerial and leadership skills, administrative ability, drive and integrity.

International exposure in the field of Forensic Science is desirable.”

Moreover, on 30th July 2013, Public Advertisement No. 28 was issued, inviting application from qualified Mauritians and Non-Mauritian candidates for employment as Director, Forensic Science Laboratory on a contractual basis in the Prime Minister’s Office for a period of one year in the first instance.

Counsel referred to section 3 (3) of the PBAT Act 2008 which provides that *“No appeal shall lie to the Public Bodies Appeal Tribunal where the appeal relates to an appointment made following a call for application for an office by public advertisement”*.

She also referred to Section 91 A (1) of the Constitution, which created the PBAT. and which reads as follows:

“There shall be a Public Bodies Appeal Tribunal which shall, notwithstanding section 119 but subject to subsection (3), have jurisdiction to hear and determine appeals made by public officers against such final decisions of such Commission established under this Constitution ...”.

Counsel placed emphasis on the words “as may be prescribed”.

Again subsection 2 provides *“The Public Bodies Appeal Tribunal may also hear and determine appeals made against final decisions of such other public bodies as may be prescribed”.*

She submitted that “what has been prescribed is what is in the PBAT Act whereby the jurisdiction for appeals relating to public advertisement has not been given to this Tribunal”.

She also referred to the Hansard quoting the speech of the Prime Minister while he was presenting the Constitution (Amendment) Bill 2008 and the PBAT Bill 2008. and where he stated that the reason for excluding appointments made following a call for application for a post by public advertisement was *“to avoid the Tribunal from being submerged by frivolous, vexatious and trivial complaints from members of the public who apply in very large numbers of posts in entry grades such as police constable, primary school teachers, education officers and clerical officers who may feel aggrieved...”*. The Prime Minister, as promoter of the Bills, laid emphasis on the fact that members of the public will continue to have access to the Supreme Court by way of Judicial Review.

Finally, the Respondent averred that the Appellant had already lodged an application before the Supreme Court of Mauritius for an order granting her leave to apply for a judicial review of the decision of the Respondent and the Prime Minister’s Office to appoint the Co-Respondent.

Respondent moved that the Appeal be set aside.

Submissions of Appellant

Counsel for Appellant submitted that it was in fact a question of construction of the Constitution and of the PBAT Act 2008 which should be interpreted in relation to the Constitution. He laid emphasis on the fact that the PBAT Act 2008 derives its existence as well as its powers and its jurisdiction from the Constitution and nothing else. He objected to any reference made to the Prime Minister’s speech which he considered to

be a political speech and stressed on the fact that Section 91 A was an addition to the Constitution and not merely an amendment of something which is already in the Constitution.

Section 91A (1) as worded contains an imperative in that it is expressly stated that *“there shall be”* and *“which shall notwithstanding Section 119, but subject to subsection 3”*

Counsel stressed on the fact that Section 3 (1) of the PBAT Act which provides that *“the Tribunal shall hear and determine an appeal made by any public officer, or any local government officer, against any decision of the Public Service Commission or the Local Government Service Commission, as the case may be, pertaining to an appointment exercise or to a disciplinary action taken against that officer”* can only refer to final decisions of the Tribunal as per the Constitutional Amendment. He laid great emphasis on the fact that the jurisdiction is only as regards to final decisions of the Commission which is repeated in both subsections 1 and 2.

Referring to Section 3(3) of the PBAT Act which relates to a call for application for an office by public advertisement, Counsel submitted that this does not fit in all corners with the Constitutional Amendment. Since the Constitution has spelt out an exception but never enacted this exception, section 3 (3) of the PBAT Act is *ultra vires* the empowering section of the Constitution. It has not even been remotely referred to in the Act. He stated that this exception was “comme un cheveu sur la soupe”. It could easily have been introduced even at second or third reading before the National Assembly, but when it comes afterwards in another Act, it is merely an indication of the political thinking of the Government. Counsel stated that only if an appeal was frivolous and vexatious could the Tribunal refuse to hear it. Section 3(3) could only be aimed at “people who are not within the service, people who are outside the country, people who are not nationals.” Finally, Counsel stated that if the invitation to apply was by way of a letter, it would not fall under this exception as it would be a “private invitation”.

When questioned by the Tribunal on Section 91 A(1) of the Constitution which states that appeals heard by the PBAT concern public officers, Counsel agreed and stated that Appellant was a public officer. He further stated that if an Appellant, even though he is a foreigner, is a public officer, then the PBAT would have jurisdiction. Otherwise, he conceded that the PBAT would not have jurisdiction to hear an appeal from anyone who is not a public officer.

Counsel acknowledged that Appellant had gone to the Supreme Court by way of judicial review and maintained that both avenues were open to public officers who can either go to the Supreme Court or to the PBAT. Referring to the attempt by Counsel for Respondent to plead *Lis pendens* as there were two applications before two forums on the same cause of action, Counsel for Appellant objected to same as this was not raised as a preliminary point of law and stated that he was giving notice that he would object to any new point in law being raised later as this would mean that the case would drag on and this would go against the spirit of the PBAT Act which requires that cases be dealt with speedily.

Finally, Appellant stated that the Appellant was asking the Tribunal to interpret the Act and section 91A of the Constitution and not the Constitution as a whole.

Submission of Co-Respondent's Counsel

Counsel for Co-Respondent associated himself with the argument of Counsel for Respondent. He submitted that the Tribunal is not empowered to decide whether Section 3 (3) of the PBAT Act goes against the Constitution. He further submitted that to follow the logic of Appellant's Counsel would mean treating members of the public and public officers differently, creating a situation of "deux poids deux mesures"

Ruling

After giving careful consideration to the arguments made by Counsel on behalf of all parties concerned, the Tribunal has analysed both the enabling legislation which purports to set up the PBAT and define its jurisdiction as well as its procedure and powers. It must be remembered why the Tribunal has been created by a Constitutional Amendment. We see from Hansard during the speech of the Prime Minister when he was presenting the Constitution (Amendment) Bill 2008 and the PBAT Bill 2008 in the National Assembly that he stated the following:

"Since the PSC cannot, at present, be subject to the jurisdiction of an inferior Tribunal set up under an ordinary law, the proposed Tribunal be established under the Constitution"

In his presentation, the Prime Minister referred to both bills together as they were proposed together. Both Bills were passed by the National Assembly on the 20 May 2008.

The Constitutional amendment was therefore important for the creation of the Tribunal. It spells out why such a Tribunal has been set up, who should sit on such a Tribunal, their mode of appointment and removal and such connected matters. Its subsection 1 deals with this setting up and lays emphasis on its jurisdiction which concern “such final decisions of such Commission established under this Constitution, as may be prescribed....”.

Its subsection 2 relates to “final decision of such other public bodies as may be prescribed”

Subsection 3 does deal with an exception to its jurisdiction regarding a “decision taken after consultation with, or with the concurrence of, or on the advice of, the Prime Minister”.

The moot point is clearly whether the exception concerning public advertisement should have been included in the constitutional amendment or not and whether the content of Section 3 (3) of the PBAT Act is ultra vires the Constitution. The short answer to that question is that we do not have jurisdiction to decide on such a matter. Section 84 of the Constitution, which provides for questions as to the interpretation of the Constitution which arise in any Court of Law being referred to the Supreme Court, does not apply to an independent Tribunal like the PBAT. Counsel for the Appellant having raised the question as to whether the Tribunal considers itself as a subordinate body, it is important to refer to Section 111 of the Constitution (the interpretation section). It defines “subordinate court” as any Court of Law subordinate to the Supreme Court but does not include a Court Martial. If the Appellant is of the opinion that the Act is ultra vires the Constitution, she will have to enter the appropriate proceedings before the Supreme Court.

Until such time that there is a finding, if any and if justified, by the Supreme Court to that effect, we find that the language of the Act is very clear and straightforward and appeals may not be made when, according to section 3 (3) of the PBAT Act 2008, “*the appeal relates to an appointment made following a call for application for an office by public advertisement*”.

Since the advertisement for the post of Director, Forensic Science Laboratory (FSL) was made by way of public advertisement, the present selection exercise is outside the jurisdiction of the PBAT and the appeal is therefore set aside.

S. Aumeeruddy-Cziffra (Mrs)
Chairperson

Wong So
Member

P. Balgobin-Bhojrul (Mrs)
Member

Date:

Note: This case is not being treated confidentially as there has been a motion for Judicial Review before the Supreme Court by the Appellant. All information relating to the case was made public as the Supreme Court, unlike the PBAT, does not deal with such motions in camera. Since the case was withdrawn, the Determination of the Tribunal stands good.