MR 02 of 2020

- **Issues which have been fully investigated in a previous appeal concerning the same selection exercise cannot be relitigated anew. This would constitute an abuse of process.**

- **The Tribunal cannot go against its own Determination.**

The Appellants are challenging the decision of the Respondent to appoint initially Co-Respondents No 1 and 2 to the post of Deputy RTR in the Ministry of…. Subsequently, following the appointment of Co-Respondent No 3, Appellant No 1 lodged a second appeal with the same grounds of appeal as in his previous appeal. The third appointee was called as Co-Respondent No 3. The Respondent raised two preliminary points in law which read as follows:

1. The present appeal being in relation to the same selection exercise as the one which was subject to a Determination by this Tribunal, (Website reference Det 7 of 2019), this present appeal is invalid and/or an abuse of process of this Tribunal; and

2. The present appeal being in relation to the same exercise as the one which was subject to a Determination by this Tribunal, (Det 7 of 2019), there cannot validly be a second Determination of the Tribunal on the very same selection exercise.

The matter was fixed for argument. As the three appeals related to the same selection exercise, all three cases were consolidated for the purposes of the argument and only one ruling is being delivered.

It was not disputed that a determination had already been delivered in a previous appeal concerning the same selection exercise as referred to in the Grounds of Objections.

Appellant No 2 left default on the day the argument was heard and her appeal was consequently struck out.

After Counsel argued the case on behalf of Appellant No 3, Respondent decided not to insist on the preliminary objection raised against the appeal of Appellant No 3. Indeed Appellant No 3 was not a party to the previous Appeals and it was decided that his Appeal would be heard on the merits.

The Tribunal was left with the argument on the preliminary points in law against Appellant No 1 only.

Arguments

Counsel for Respondent argued that the appeal targeted specifically a selection exercise undertaken in … for the post of Deputy RTR and the Tribunal had already given a determination following an Appeal lodged by Appellant No 1. The Tribunal conducted a proper hearing and had the opportunity to examine all evidence produced to it by all parties before giving its determination. She added that the previous determination is binding and final by virtue of section. 8(5) of the Public Bodies Appeal Tribunal (PBAT) Act as the said determination had not been challenged by way of Judicial Review before the Supreme Court. She observed that the Appellant No 1 had raised the same grounds of appeal anew.

She submitted that, in trying to re litigate the same issue, this would be tantamount to an abuse of process. She made reference to the case of Chady v/s Habib Bank 2018 SCJ 363 and quoted the following from the judgement which was borrowed from the case of Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd (1982) 2 Llyod's Rep.132:

"*It is clear that an attempt to litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process*"

This reasoning was also reproduced in the case of S. Goojrah v/s S. Seni 2011 SCJ 150.

Counsel for Appellant No 1 submitted that he would take the two points raised in *limine litis* by Respondent together in as much as:

1. The preliminary points in law are premature in nature and need to be determined by the Tribunal on the merits of both appeals;

2. The appeals are neither invalid nor an abuse of the process of the Tribunal as the grounds of appeal are not frivolous, scandalous or vexatious in nature; and
3. The appeals involved different parties ex-facie the Determination of the Tribunal (Det 7 of 2019).

Counsel argued that, in order to determine whether the present appeals are allegedly in relation to the same selection exercise as the one which was subject to a Determination delivered by this Tribunal, there is a need to adduce evidence before the Tribunal. He was also of the opinion that the objections of the Respondent cannot be heard *in limine* unless the Respondent accepts, for the purposes of the present argument, all the material facts averred by the Appellant. He quoted the following from the Case of Rama v Vacoas Transport Co Ltd (1958 MR 184):

"*Objections cannot properly be heard in limine unless the objector accepts- for the purposes of argument only- all the facts alleged by the plaintiff but argues that even accepting them, his opponent cannot succeed. Where objection is based on disputed facts the court must hear evidence before it can rule on the point of law; the objection cannot be taken in limine."*

He further argued that the matter was still at an early stage of the proceedings and that there had been no exchange of information between the Appellant No 1, Respondent and Co-Respondents, so it could not be said with certainty that the present appeals were in relation to the same selection exercise. The Respondent must show that it did indeed abide by the Law and Regulations and acted in full transparency, was fair, equitable and reasonable in taking its decision.

As regards the issue of abuse of process, Counsel argued that the present appeals were neither invalid nor did they constitute an abuse of the process of this Tribunal in as much as the grounds of the appeals were not frivolous, scandalous or vexatious in nature. He added that by coming again before this Tribunal with the present appeal, this did not constitute an abuse of the process of the Tribunal. The case of Techsol Services Ltd v. National Transport Corporation (2019 SCJ 166) was cited with the following quotation:

> "*In order to decide whether abuse of process lies, the task of the Court is to "to draw the balance between the competing claims of one party to put his case before the Court and of the other not to unjustly hounded given the earlier history of the matter*".

The Tribunal drew his attention to the fact that he was still questioning that the appointments of the Co-Respondents were not made from the same selection exercise. His attention was also drawn to the fact that the grounds of appeals of Appellant were exactly the same as in his previous appeals.

He replied that, since we were in presence of different Co-Respondents, their qualifications and experience needed to be compared with those of the Appellant. The Tribunal agreed to seek from the Respondent a Statement of Qualification and years of service of Appellant No 1 as well as for the Co-Respondents together with the markings for the eyes of the Tribunal only.

Ruling

The Tribunal observed that the appointments of the three Co-Respondents emanated from a merit list prepared following a selection exercise after an interview exercise which was carried in … Appellant No 1 had made an appeal against all those appointees who were appointed for the first time as a result of the said selection exercise. He was given ample opportunity to put forward and to expatiate on all his grounds of appeal before the Tribunal. The Tribunal examined all the qualifications and experience as well as the markings of all those appointed and delivered Determination D/07 of 2019.

The Respondent objected to the appeal and raised a *plea in limine litis*.

The points in law were argued and the Tribunal considered the views of both parties. The Tribunal disagrees with Counsel of Appellant No 1 that the appeal should be heard on the merits and the objections raised by Respondent were premature for the simple reason that a determination had already been delivered for the same selection exercise. Further the grounds of appeal were exactly the same as they were in the previous appeal. The Tribunal is of the view that it cannot proceed to deliver a fresh determination for each and every appeal lodged after an appointment is made from the merit list drawn from a selection exercise unless there are new elements which were not taken during the first hearing.

The case of Rama v Vacoas Transport Co Ltd (1958 MR 184) raised by Counsel of Appellant No 1 is irrelevant in the present matter as no evidence was produced before the court in that case whereas in the present matter, there had been a complete hearing. The Tribunal reiterates that Appellant No 1 did put his case before the Tribunal during the hearing of his previous appeal and therefore the reasoning quoted above from the case of Techsol Services Ltd v. National Transport Corporation (2019 SCJ 166) does not apply here.

However, in all fairness, Respondent provided the Tribunal with a statement of qualifications and experience as well as the markings of the selection exercise. The documents were analysed and the Tribunal did not find any disturbing features for it to intervene.

The matters raised were "*res judicata*" which is a very well known principle that, when a matter has been finally adjudicated upon, it may not be re-opened by the original parties.

In the Code Civil, article 1351 refers to '*l'autorité de la chose jugée*'' and provides that *"il faut que la chose demandée soit jugée*" and provides that '*"il faut que la chose demandée soit la même, que la demande soit fondée sur la même cause, que la demande soit entre les même parties, et formée par elles et contre elles en la même qualité"*. This is the issue known as "*estoppel*''.

However, the Respondent did not base itself on this article as, though the Appellant and the Respondent were the same parties, the Co-Respondents were different.

It was probably wise on the part of the Respondent therefore to refer to abuse of process. In the case of Toronto (City) v. Canadian Union of Public Employees (C.U.P.E), Local 79, (2003) 3 S.C. 77; (2003) S.C.J. No. 64 Q.L. the Supreme Court of Canada held that "*Canadian Courts have applied the issue of abuse of process to preclude re-litigation in circumstances where the strict requirements of issue of estoppel are not met*". The Supreme Court then explains that *the principles underlying this doctrine are to ensure the finality of decisions and that people are not required to defend themselves a second time against the same issue, avoid contradictory decisions of a tribunal…"*

The principle of finality of judgements is crucial to the proper administration of justice, as is amply shown in the cases cited by Counsel for Respondent which documents the issues before the Tribunal.

The case of Chady v/s Habib Bank 2018 SCJ 363 produced by Counsel for Respondent was very supportive to rule on the present objections.

The Tribunal concluded that the preliminary points in law were rightly taken and agrees that this appeal was an attempt to relitigate issues which have been fully investigated and decided in a former appeal and therefore constitutes an abuse of process.

The Tribunal consequently sets aside the appeal of Appellant No 1 and orders that the Appeal of Appellant No 3 be fixed for merits.