

MR 04 of 2020

- **Each time that there is an appointment from a merit list which has been fully analysed by the Tribunal previously in several connected appeals, an Appellant cannot lodge a new appeal.**
- **This constitutes an abuse of process.**
- **The Tribunal cannot force the Public Body not to use the Merit List.**

The Appeal concerns the appointment of a Co-Respondent to the post of Deputy RTR.

Appellant's Case

The Appellant, who had already lodged four appeals concerning the same selection exercise, solemnly affirmed to the correctness of his Grounds of Appeal (GOA) in which he averred that:

- “1. *Appellant is an all rounder and a versatile candidate in addition to his qualification and experience.*
2. *The long years of service of the Appellant should not be disregarded.*
3. *The selection exercise has been carried out in an unfair and partial manner.*
4. *The decision not to appoint Appellant as RTR is unreasonable.*
5. *Appellant is constantly being deprived of a legitimate expectation.*
6. *Appellant has been systematically victimised by the PSC”.*

The Respondent's Stand

The Respondent filed Preliminary Points in Law (POL) as follows:

“Respondent moves that the present appeal be dismissed in as much as:

the present appeal being in relation to the same selection exercise as the one which was subject to a-

- (i) *Determination by this Tribunal, (i.e., Website Reference Det 07 of 2019); and*
- (ii) *Ruling by this Tribunal, i.e. (MR/02 of 2020)*

the present appeal is therefore –

- (i) *invalid and/or abuse of process of this Tribunal; and*
- (ii) *there cannot validly be a second Determination of the Tribunal on the very same selection exercise and run the risk of contradictory decisions of the Tribunal’.*

Arguments

Submissions of Counsel for Respondent

Counsel for Respondent submitted that the appeal was very similar to the first two appeals entered by the Appellant and in which the Tribunal had given a decision.

She said that however two further grounds had been added namely (i) the issue of victimisation (Ground 6) and (ii) the issue of legitimate expectation (Ground 5).

She submitted that, in the Determination on the case (Det 07 of 2019), the Tribunal had already thrashed out this issue at page 9 of the Determination and the Tribunal had stated that the “*issue does not in any case appear to be so fundamental as to change the result of the selection exercise*”.

As regards the issue of legitimate expectation, Counsel submitted that there are two types of legitimate expectation. One which relates to procedural form and one which concerns the facts.

Counsel filed an extract of the New Law Journal and quoted as follows: “*A legitimate expectation in its procedural form arises when there has been a failure to follow an agreed or customary process of consultation*”. It is concerned with the quality of the decision-making process.

She submitted that this should have been taken in the first Determination and not now, and therefore this amounts to an abuse of process.

Counsel referred to the case of Mauritius Turf Club v Lagesse in which the Hon Judge cited the case of Henderson v Henderson.

“...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case”.

Counsel also produced a copy of the judgement in the case of Modaykhan v The State Bank of Mauritius Ltd in which it was held that raising an issue again when there has already been a previous application was an abuse of process.

Submission of Counsel for Appellant

Counsel for Appellant submitted that Appellant had received very low marks for having acted as Deputy RTR which is why his total markings was imbalanced. She even believed that the Tribunal could have called the panel as regards the markings.

Counsel referred to facts concerning the previous cases and said that Appellant should not be penalized for his lashes.

She cited a string of cases among which the case of Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd (1982) arguing that since some of the facts are unknown to the Tribunal, the latter should analyse them.

She also cited the case of Brisbane City Council and reiterated her submission that the Tribunal not having gone deeply on the two new issues raised should look at these grounds again.

She however agreed that Appellant had nothing in particular to say about the Co-Respondent in this case.

Ruling

The Appellant has entered five appeals concerning the same selection exercise including this one in which Co-Respondent has been appointed.

The Tribunal had consolidated his first two appeals and given a Determination (Det 07 of 2019). Later he lodged two appeals and the Tribunal gave a Ruling (Website Reference MR 02 of 2020).

The Respondent has based its POL on the previous Determination (Det 07 of 2019) and previous Ruling (MR/02 of 2020).

In Det 07 of 2019 the Tribunal went through all the GOAs of Appellant. He did indeed raise the issue of victimization in his Statement of Case (SOC) but not in his Grounds of Appeal. And the Tribunal had decided not to pay heed to this point in order to respect section 6(5) of the Public Bodies Appeal Tribunal Act 2008 which provides that

“The Tribunal shall not entertain any ground of appeal not raised in the grounds of appeal.”

As for legitimate expectation, it is clear that the Tribunal, having analysed the facts in the previous cases, had concluded that there was no procedural flaw except the criterion of acting as Deputy Rector which should not have been included and the Respondent was invited to cure this defect.

Counsel for Appellant referred to the low marks obtained by Appellant under that criterion, which is an issue of fact and not relevant at this stage. But in any case, the Tribunal had dealt with this issue in the previous Determination (Det 07 of 2019).

After having given thought to the submissions of both Counsel, the Tribunal can only come to the conclusion that it cannot forever reopen the case concerning the same selection exercise. All relevant issues had already been thrashed out.

A full Determination has been given in the first two appeals in which the Appellant had the chance to express himself fully. A Ruling (MR/02 of 2020) was given on the issue of abuse of process concerning his third and fourth appeals.

Each time that a new candidate will be appointed from the merit list, the Appellant will be tempted to lodge a new appeal but he must bear in mind the Rulings given by this Tribunal.

It was clear that there was no specific Grounds of Appeal against the Co-Respondent. But Appellant tried to harp again on the issue of victimisation and legitimate expectation. When given the chance to raise these issues in his GOA of the first appeal, he never did so. The Appellant cannot at this late stage raise new issues of a general nature concerning the same appointment. His appeal can concern only issue regarding him and the appointed person and nothing more.

Now he knows that he will have to wait for his name to come up on the merit list to be appointed.

The Tribunal cannot force the Public Service Commission to stop appointing from the merit list even though there is a practice for such a list to last one or two years. The Respondent may consider closing that merit list now.

The preliminary points in law raised were rightly taken. The Tribunal cannot reverse its own Determination.

The Tribunal therefore sets aside the Appeal of Appellant.