No. R/04 of 2023

The onus of proof rests on the Appellant to prove its case. Disclosure of documents is not acceptable to avoid a fishing expedition

Appellant is challenging the decision of the Respondent to appoint the Co-Respondent to the post of DDSP of the Public Body.

Counsel for the Appellant made a motion to the effect to order the Respondent such explanations as would allow the Appellant and her legal advisers to consider, as they are duty bound to, whether there are sufficient grounds to continue with the appeal and to assist the Tribunal in eventually deciding on the relevant issues.

Counsel more specifically moved for the communication to the Tribunal and to the Appellant of all documents and/or information in possession of the Respondent relating to the selection and appointment process, including but not limited to the questions, markings, ranking notes and points at the interview stage and at all other steps of the selection process for all candidates, including the Appellant and the Co-Respondent.

Counsel argued the main points from their respective written and oral submissions. The submission of Counsel for the Appellant is geared towards the fact that there is a duty of candour owed by the Respondent to the Appellant to which the Respondent has failed to fulfil this duty and that the Tribunal has the power to issue an order of Disclosure and such an order should be made to enforce the duty of candour.

Counsel for the Appellant referred to commentaries in White Book emanating from Rule 51.14(Response) of Part 54 – Judicial Review and Statutory Review and applied in the case of **R. v Lancanshire CC Ex P. Huddleston [1986] All E.R. 941** stating that "*Although disclosure is not required in a claim for judicial review, unless the Court orders otherwise, the defendant is subject to a duty of candour*".

Moreover, it was submitted that the Respondent ought a duty to make a full and frank disclosure. It was also argued that the Respondent failed to fulfil its duty by only stating in its Statement of Defence that all relevant information has been taken in consideration but it failed to disclose how the selection process has given due weight to the criteria.

Furthermore, Counsel was of the view that the Respondent's decisions should include information relating to questions, markings, notes and points at interview stage and all other steps in the selection process. Finally, Counsel for the Appellant relied on Section 4(4) of the Public Bodies Appeal Tribunal Act 2008 **[PBAT Act]** to submit that the Tribunal has the power to make any order as necessary for the appeal and that there is no limit placed neither on the nature of the said production of documents nor restricting access to the said documents to any party.

Counsel for the Respondent relied on Section 6(4)(b)(ii) of the PBAT Act to submit that the Tribunal has the discretion to call for such documents or other materials as it considers necessary to determine an appeal. She further submitted that by virtue of Section 12 of the Public Services Commission Act 1953 any communication whether written or oral is considered as privileged information and no person shall, in any legal proceedings, be permitted or compelled to produce or disclose any information.

Similarly, Counsel relied on Section 91(A)(9)(b) of the Constitution to submit that the Tribunal is not under any obligation to disclose any document to the Appellant if the Respondent has communicated any document to the Tribunal and relied on the determination of the Tribunal **Heeramun v PSC No.11 of 2011** where disclosure of markings was declined and that the discretion to call and use of documents is for the Tribunal only.

In reply to the duty of candour, Counsel for the Respondent submitted that such duty is owed to the Tribunal and not to the Appellant personally and also relied on the case of R v Lancashire County Council (Supra). Counsel also argued that disclosure is not meant to be a fishing expedition and that the averments of the Respondents has amply disclosed all relevant facts and materials so as to enable to court to determine the merits of the appeal relying on the case of **Tweed v Parades Commission for Northern Ireland 2006 UKHL 53.**

RULING

The Public Bodies Appeal Tribunal was set up under Section 91A of Constitution which was introduced by the Constitution (Amendment) Act (Act No.9 of 2008) which must be read together with Public Bodies Appeal Tribunal Act [Act No.10 of 2008] as stated in the case of **Public Service Commission v Public Bodies Appeal Tribunal 2019 SCJ 137**. As such, the Tribunal is bound to be in compliance with both the Constitution and the PBAT Act.

The issue that we have beforehand is that of disclosure of documents. The Tribunal finds it apt to refer to Hansard when the above constitutional amendments and the bill were being discussed in Parliament. The following is reproduced on the issue of disclosure:

"… *The analogy has been made in reference to the criminal law where all documents are provided. In case of intermediate Court, you get it as per right now, in case of the District Court, you have to apply for it. Mr. Speaker Sir, we must not confuse that in the criminal cases the onus is on the State to prove, beyond reasonable doubt, the case against the accused. Here we are referring to another sort of case. We are referring administrative case, to an appeal, to the documents. The onus is on the person. Once the person has been able to meet the onus, therefore, we will get the necessary information.* ***We must avoid that the person goes on a fishing expedition if such is the case****. If the person goes on a fishing expedition, Mr Speaker, Sir, what will happen? At the end of the day instead of* crédibiliser l'institution*, we will slowly go to the fabric of* l'institution *and destroy* l'institution*".*
[Underlining is ours]

Further, we can further read from the Hansard the following on the issue of confidentiality, more specifically on the issue of markings, where it was stated that marks should be held confidential to avoid all sorts of arguments.

Moreover, **Section 91A (9) (b) of the Constitution** states that "... *the Public Bodies Appeal Tribunal shall not be bound to communicate to any other person the contents of any report, document or other material produced by any Commission or public body, and, except where necessary for the purpose of making its decision,* ***the Tribunal shall make no reference to the contents thereof in its decision***" **[Underlining is ours].**

Furthermore, **Section 6(4) of the PBAT Act 2008** is as follows:

"The Tribunal may, upon a consideration of the grounds set out in an appeal and the objections made against the appeal –

(a) dismiss the appeal, where it appears to the Tribunal that it is trivial, frivolous or vexatious; or

(b) entertain such appeal and, for that purpose –

(i) call for a report from the public body;

(ii) ***<u>require the public body to produce any document or other material which, in the opinion of the Tribunal, relates to the grounds set out in the appeal and which is necessary for consideration of the appeal;</u>***

(c) give notice of the appeal to an officer of any other public body whom the Tribunal considers likely to have been affected by the decision of the public body and require such officer to produce before the Tribunal any material which such officer may wish to produce before the Tribunal in connection with such appeal." **<u>[Underlining is ours]</u>**

A reading of the above gives the Tribunal the power to order the production of any document from the Respondent but it is not bound to communicate same. Moreover, the Constitution precludes the Tribunal to the extent that even the contents of such document cannot be referred to in a determination.

In a similar vein, in the case **<u>Local Government Service Commission v, The Public Bodies Appeal Tribunal 2021 SCJ 315,</u>** their Lordships stated that "…. *Due to the confidential nature of the marking sheets, their contents cannot however be disclosed to third parties, including those serving officers in the Local Government Service who participate in the selection exercise."*

Also, from the determination of **<u>Heeramun v PSC No. 11 of 2011,</u>** the same issue of disclosure was requested but same refused on the ground of privilege. It is to be noted that this determination went on appeal and was set aside *vide* **<u>Heeramun v Public Bodies Appeal Tribunal 2015 SCJ 269.</u>**

Their Lordships in **Heeramun (Supra)** went on further to state that *"With regard to the substantive judicial review of the Tribunal's decision,* ***<u>it must be remembered that in an appeal before the Tribunal the onus of proof rests on the applicant, pursuant to section 7 (3) of the Public Bodies Appeal Tribunal Act 2008 "</u>*****<u>[Underlining is ours]</u>.** As such, it is for the Appellant to prove its case based on her grounds of appeal.

In light of the above, the Tribunal declines to accede to the motion of Counsel for the Appellant, as couched, *viz. to* order to the Respondent for documents so that the latter's legal advisers may make a decision as to continue with the appeal, so as to prevent any fishing expedition. Reference is made to the case of **<u>Tweed v Parades</u>**

<u>Commission for Norther Ireland (supra</u>) where we quote the following "……*(b) the undesirability of allowing" fishing expeditions" where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible challenge…"*

The motion is therefore set aside and the matter will be heard on its merit.