

Date of notification is important to know when time starts running.

Ruling

The Appellant was challenging the decision of the Respondent to appoint the Co-Respondents to the post of EC in the Local Authorities.

The Appellant lodged an appeal before the Tribunal on 27th October 2023 with the Supreme Court Case ***N.T..... V LOCAL GOVERNMENT SERVICE COMMISSION 2023 SCJ 416*** as annexed.

Subsequently, the Respondent filed objections which read as follows:

- (a) The present application is time-barred, as per S. 3(2) of the Public Bodies Appeal Tribunal Act, and*
- (b) Appellant has lodged an application for leave to apply for Judicial Review against the decision and decision-making process of the Respondent appointing Co-Respondent and on 13th October 2023, the said case has been put in abeyance awaiting the decision of the **Judicial Committee of the Privy Council, SCR 123117 (5A/122/22)**.*

Co-Respondents Nos 1 and 2 also submitted their preliminary objections which are as follows:

- 1. The Co-Respondents Nos 1 and 2 aver that the present application is time-barred, in as much as the Appellant was aware of, and therefore notified of the decision of the Respondent since 5th November 2021. The present Appeal has therefore not been lodged within the delay prescribed by law and therefore cannot be entertained by the Tribunal.*

2. *The Co-Respondents further avers that the present application is an abuse of process and moves that the application be dismissed at the outset.*

Submission of Counsel for Appellant

Counsel for Appellant submitted that, following the appointment of the Co-Respondents to the post of EC on or about March 2022 by the Respondent, Appellant applied for leave for a judicial review before the Supreme Court against the said decision of the Respondent. He explained that the said appointment was made following a vacancy advertised on 5th August 2021 and open to both limited and open competition. The Respondent did not notify the Appellant about the appointment of the Co-Respondents nor a public notification was issued. He further produced a letter dated 26 November 2015 emanating from the Tribunal bearing Ref. PBAT/LGSC/129 which stipulates clearly that the Tribunal has no jurisdiction to entertain her appeal as the post of EC has been advertised through open and limited competition. He further produced a determination of this **Tribunal bearing no. D/14 of 2023** which set aside a similar appeal following a vacancy advertised to limited and open competition. This is a clear indication according to him, that the Tribunal has consistently set aside appeal involving limited and open competition. He added that any reasonable person would seek redress to the Supreme Court by way of Judicial Review rather than appealing to this Tribunal in light of its stand following the judgment of **P. Pothunnah v Public Bodies Appeal Tribunal (2015 SCJ 163)**.

On the issue time-bar, it is the contention of the Appellant that S. 3(2) of the Public Bodies Appeal Act provides that an appeal shall be made within 21 days of the notification of the decision. However, Counsel maintained that Appellant did not receive any notice personally nor a public notification was issued. She became aware of the appointment of the Co-Respondents through a colleague. Counsel submitted that the Respondent was under a duty to notify all candidates about any appointment made by it so that any aggrieved candidate may appeal to the Tribunal. Counsel was of the opinion that since no notification was made, the time did not start running and the application is not time barred. Counsel did not submit on the second ground of objection as both Counsel appearing for Respondent and Co-Respondents respectively decided not to insist on these objections.

Submission of Counsel for Respondent

Counsel for Respondent submitted that Appellant chose to contest the appointment of the Co-Respondents by way of Judicial Review before the Supreme Court instead of making an appeal before the Public Bodies Appeal Tribunal. He added that the Supreme Court refused to grant her leave for Judicial Review. He quoted S. 3 of the Public Bodies Appeal Tribunal Act to substantiate his argument. He maintained that the Tribunal has no jurisdiction to hear such cases. He invited the Tribunal to consider the fact that she was informed in November 2021 of the appointment of the Co-Respondents, that is the reason why leave for Judicial review was sought. Hence the Appellant cannot now come and inform the Tribunal that she was not notified and/or was unaware of who was appointed. He also submitted that the wordings of S. 3 of the Public Bodies Appeal Tribunal Act, does not seem to confer, a discretionary power to extend the time provided for to lodge an appeal. He moved that the appeal be set aside by upholding the preliminary objection raised. He informed the Tribunal that he would not insist on the 2nd ground of objection.

Submission of Co-Respondents

Counsel for Co-Respondent No 1 also appeared for Co-Respondent No 2 and offered submission with regard to the first ground of objection only as he did not insist on the second ground of objection.

He submitted that the framework of appealing a decision pertaining to an appointment is governed by S. 3 of the Public Bodies Appeal Tribunal Act. The prescribed delay to initiate an appeal is 21 days. He added that in the current matter, the Appellant lodged her appeal on 27th October 2023, almost 2 years after being informed of the decision to appoint the Co-Respondent no 1. He was of the opinion that it cannot be disputed that the Appellant was apprised of the Respondent's decision to appoint Co-Respondent No 1 as EC and that she promptly made an application for leave for Judicial Review.

Counsel further argued that the inordinate delay to appeal to the Public Bodies Appeal Tribunal is fatal. The Tribunal has no jurisdiction to hear and determine this dispute and that it does not have any inherent discretion to hear a matter that has been lodged outside the statutory delay. The Appellant was wrong not to seize the Tribunal way back in 2021 within the prescribed statutory delay and it is now too late to do so. He also moved that the appeal be set aside.

RULING

The issue to be determined in this appeal is whether the appeal is outside the statutory delay of 21 days in compliance with S. 3 of the Public Bodies Appeal Tribunal Act which reads as follows:

(1) Jurisdiction of Tribunal

(1) Subject to subsections (2) and (3), 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 any disciplinary action taken against that officer.

(2) An appeal shall be made-

(a) within 21 days of the notification to the officer of the decision referred to in subsection (1), or within 21 days of such public notification of the decision as may have been made, whichever is the earlier;

It is not disputed that the Appellant sought directly the Supreme Court for redress by way of leave for Judicial Review.

The Tribunal admits that since the case of **Pothunnah v PBAT (2015 SCJ 163)**, the Tribunal has consistently set aside all appeals pertaining to mixed competition, that is, open competition and limited competition. The reason for which, Appellant was sent a letter dated 26 November 2015 (copy produced by Appellant) confirming that her appeal could not be entertained as the Tribunal did not have the jurisdiction to hear such appeal. Counsel for Appellant produced copy of a Determination of this Tribunal bearing no. D/14 of 2023 which set aside an appeal for the same reason. Any reasonable officer would have recourse to the same course of action as the Appellant in the same circumstances as any appeal to the Tribunal would have been set aside for the same reason. Therefore, the reasoning that Appellant should have appealed to the Tribunal before having recourse to the Supreme Court is not tenable.

The issue to be determined is when the 21 days start running. It is also not disputed that the Appellant was never notified of the appointment of the Co-Respondents nor a public notification was issued with regards to the same appointment. There is a duty on the Respondent to notify all unsuccessful candidates about any appointment. The Respondent did not give any explanation as to why no notification was made in this case.

S. 3(2)(a) is clear that the 21 days should start running as from the date the Appellant is notified or on the date a public notification is issued, whichever is earlier. None of the parties provided the Tribunal with a fixed date as to when the Appellant was notified. The Respondent and the Co-Respondent submitted that the Appellant was made aware or was informed of the appointment in November 2021. This argument is too vague as the Tribunal should be in the presence of an official document to ascertain the statutory 21 days. Any appeal to the Tribunal should be accompanied with such document. Appellant was right to say that she appealed to the Tribunal after taking cognizance of the **Supreme Court Judgement 2023 SCJ 416** which she annexed to the Appeal.

In these circumstances, the Tribunal is of the view that the date of the aforesaid Supreme Court Judgement should be considered as the date the Appellant was duly notified and that the 21 days should start running as from the date the judgement was delivered. The judgement was delivered on 10th October 2023 and the appeal was lodged on 27th October 2023, that is within the statutory delay.

Therefore, the ground of objection is set aside and the matter to be continued under the merit.