

CONSTITUTIONAL COURT OF SEYCHELLES

Reportable
[2020] SCCC 3
CP 15/2019
(Arising in MC87/2020)

In the matter between

THE GOVERNMENT OF SEYCHELLES

Petitioner

At the instance of the Commissioner of Police
(rep. by Evelyne Almeida)

and

THE PUBLIC SERVICE APPEAL BOARD
(rep. by John Renaud)

1st Respondent

ROLLY MARIE
(rep. by Olivier Chang-Leng)

2nd Respondent

Neutral Citation: *Government of Seychelles v Public Service Appeal Board & Anor*
(CP15/2019) [2020] SCCC 3 (27 March 2020).

Before: Burhan, Dodin and Vidot JJ

Summary: Jurisdiction of Public Service Appeal Board under Article 146(1) of the
Constitution

Heard: 3 December 2019

Delivered: 27 March 2020

ORDER

The Public Service Appeal Board (PSAB) does not have jurisdiction to determine complaints about transfers within the Police Force.

Article 146(1) of the Constitution limits the PSAB's jurisdiction to only the five instances listed. Transfer is not included in that list.

The PSAB exceeded its jurisdiction when it considered the transfer and making the order that it did.

The order of the PSAB is declared null.

JUDGMENT

VIDOT J (BURHAN & DODIN JJ concurring)

[1] This matter was referred to the Constitutional Court by the Chief Justice, Dr. Twomey. She was sitting on a judicial review proceeding in respect of an Order made by the Public Service Appeal Board (“the PSAB”) before the Supreme Court. The referral is made in terms with Article 130(6) of the Constitution. The issue to be considered by this Court is *“whether the Order granted by the PSAB in which it directed the Commissioner of Police (hereafter “the Commissioner”) to re-examine the second Respondent’s personal situation and consider his social difficulties (in relation to his transfer from La Digue to Mahe) and that he be refunded 2 months’ salary, was outside the PSAB’s mandate and exceeded the jurisdiction vested in it by Article 146(1) of the Constitution.”* The 2nd Respondent, Mr. Rolly Marie, is a Police Officer. At the material time he held the rank of Constable.

[2] The background of this case is not contentious. The 2nd Respondent was in the employment of the National Police Force (“the Police Force”) since 2012. In 2013 he was transferred to La Digue Police Station. His employment was on contract from 2012 until 2016. In March 2017 he was employed retrospectively as a Constable and in March 2018, the Commissioner ordered that PC Marie be transfer from La Digue to Anse Royale Police Station. Being aggrieved by that order, which he refused to comply with, PC Marie did not report for duty on 26th March 2018 and as a result thereof he filed a complaint contesting the order. In the complaint he cited his family circumstances; particularly that together with his family they have established themselves on La Digue. He argued that his wife is a resident of La Digue and that they have 4 children together, one of whom has a disability. He contended that that the order of transfer was arbitrary and that he should have been consulted in respect of that transfer. He added that he was

not granted the possibility of putting forward his case as to the impact that the transfer would have on his family.

- [3] As a result the PSAB called for a response from the Police Force. The Police responded on the 7th June 2018, stating that *“the transfer was in accordance with section 8(2) of the Police Force Act (“the Act”) which provides that the Commissioner may from time to time make orders for the general government of Police Officers in relation to their transfer and any such order as he may deem expedient for promoting the efficiency and discipline of such Police Officers.”* The letter further advised that *“the transfer of PC Marie to Anse Royale Police Station on Mahe, does not contravene the powers and functions of the Police Force”* and that the *“Police Department will not negotiate the transfer of its officers and their compliance.”*
- [4] In July 2018, the Police Force sent a further letter to PC Marie, instructing him to report for duty at the Anse Royale Police Station. Again, PC Marie did not comply. As a result of that failure, his salary for July and August were suspended. As a result of such action being taken by the Police Force, PC Marie decided to comply with the order and reported for work at the Anse Royale Police Station. His salary was then reinstated. The PSAB proceeded to hear PC Marie’s complaint and the Police Force’s Human Resources representative attended. The PSAB made its determination and ruled that “the police had its own policy which should be followed by all its officers, however held the view that the social life and welfare of the police officers were to be considered when such transfers are anticipated. The special circumstances that the PSAB held that the Police should have taken into account prior to effecting the transfer have been referred to above. Therefore, the PSAB ordered the Police Force to re-examine the situation and consider the social difficulties of the 2nd Respondent and that he be refunded his salary for the months that he was not paid and that his salary be restored immediately until the matter is resolved.
- [5] Following that determination and order, the Petitioner made an application to the Supreme Court, asking that the Court invoke its supervisory jurisdiction in pursuance of Article 125(1)(c) of the Constitution to quash the determination of the PSAB. The main

thrust of that application was that the PSAB's determination was outside its mandate and exceeded its jurisdiction. The PSAB for its part raised preliminary objections opposing the application, challenging the Commissioner's locus standi and reaffirming the Board's independence under Article 145 of the Constitution. Thereafter, on the 31st July 2019, the Chief Justice referred the matter to this Court to decide whether the order granted by the PSAB in which it directed the Commissioner to re-examine the 2nd Respondent's personal situation and consider his social difficulties and that he be refunded two months' salary was proper and lawful.

The Petitioner's Submission

[6] Counsel for the Petitioner submitted that the Police Force is an important element in a democratic system and the Commissioner has the ultimate responsibility for determining the use, control and operations of the Police Force. This is provided for in Article 160 of the Constitution. Counsel for the Petitioner relies also on the Police Force Act 1959, promulgated consistently with Article 161(c) of the Constitution. The Act, in particular section 8(2), grants the Commissioner power to make orders for the general government of the police force in relation to, among others, the enlistment, rank and transfer – as may be expedient for promoting the efficiency and discipline of such police officers. Therefore, the power to transfer police officers is the prerogative of the Commissioner. Counsel further submitted that Article 146, which sets out the jurisdiction of the PSAB, does not include adjudication over transfers. This Article gives the PSAB jurisdiction in relation to appointment, promotion, disciplinary proceedings, termination of office or the qualification of a person who has applied for office or is serving. Counsel submits that the PSAB has exceeded its powers under Article 146 and interfered with the Constitutional and statutory powers of the Commissioner.

[7] It is the Commissioner's contention that the PSAB should not have entertained the complaint, and consequently it was not empowered to make a determination in its respect. The suspension stems from the transfer which the PSAB had no authority to adjudicate. The Commissioner also cited the Public Service Orders, particularly, Order 27, which allows the institution of disciplinary action against an employee who absents

themselves without reasonable cause or leave for more than two days. She also relies on Order 69 of the Public Service Manual which sets out guidelines to discipline employees for unauthorised absence. Finally the Commissioner cited provisions of the Employment Act 1995 and submits that PC Marie's unauthorised absence of approximately five months constituted a serious disciplinary offence which justified dismissal. In fact, it is considered that PC Marie had self-terminated himself. PC Marie was shown leniency with the suspension of salary. The PSAB's order that his salary be reimbursed is the result of a disciplinary proceeding taken in respect of another as part of Article 146(1)(c) of the Constitution. It is submitted that this order specifically explains that the issue brought forward by PC Marie was based on his unwarranted transfer. On the basis of these submissions, the Commissioner has asked this Court to find that the PSAB exceeded its jurisdiction, as it is not mandated to adjudicate the transfer and was not empowered to order the Police to refund the one month salary.

Submission of the PSAB

[8] In his submission, Counsel for the 1st Respondent submitted that the Petitioner ought to have challenged PSAB's jurisdiction at the time when the Board requested comments on the matter. In his view, the Commissioner acquiesced to the Board's jurisdiction, thus, it cannot now be shirked. Further, the Board's intervention in the matter follows the disciplinary action taken by the Commissioner against PC Marie.

Submission of the 2nd Respondent

[9] Counsel for the 2nd Respondent advocated for a broad interpretation of Article 146(1) of the Constitution. He submitted that the Police Force is a state government department and is a "Public Authority" for the purpose of Article 146 of the Constitution. He submitted that PC Marie's complaint could fall under Article 146(1)(a) or (b), as his relocation could be considered as an appointment or promotion to an office, or it could fall under Article 146(1)(c) as disciplinary proceedings taken against him for the suspension of his salary. Should the Court find favour with this view, then the PSAB would have had the jurisdiction to entertain the complaint. He further submitted that the order made by PSAB was lawful because Article 146(4) gives the PSAB broad powers to make orders to a

public authority to take appropriate action to address a complaint. It is Counsel's view that the PSAB had the appropriate authority to order the Police Force to reconsider the transfer taking into account the social circumstances of PC Marie and to refund the suspended salary.

Powers of the Police Force

[10] The PSAB requested that firstly the Commissioner reconsider the order of transfer of the 2nd Respondent to Mahe from La Digue. They referred to the special circumstances of PC Marie. The order to refund of salary stems from the issue of transfer. Therefore, the question to be asked is whether the PSAB has the jurisdiction to consider PC Marie's transfer?

[11] Transfer falls under the general function of the Commissioner. This is found in section 8(2) of the Police Force Act which provides:

“(2) The Commissioner of Police may subject to any orders and direction of the President, from time to time make orders for the general government of police officers in relation to their enlistment, ranks, duties, transfer (including expenses in connection therewith), discharge, training, arms and accoutrements, training and equipment and places of residence as well as their distribution and inspection and such other orders as he may deem expedient for promoting the efficiency and discipline of such police officer”
(underline ours)

[12] Further, section 9(1) of the said Act provides that the administration of the Police Force shall, subject to the orders and directions of the President, be vested in the Commissioner of the Police. This clearly provides that the transfer of police officers to different postings or locations falls within the jurisdiction of the Commissioner.

[13] Such functions of the Commissioner are in line with his constitutional mandate to determine the use of and control the operations of the Force in accordance with the law: see Article 160(2) of the Constitution and **Ernesta v Commissioner of Police [2002] SCSC 13 (CS 348/2001) (07th October 2002)**. The law however provides only for this general provision permitting the Commissioner to make transfers of officers. Otherwise,

under the law there are no procedural guidelines in the Act for how transfers are to be made or take place. The Act allows the President to make regulations to carry out the objects of the Act and for the general governance of the Police Force (section 62 of the Act). The Police Force Regulations, promulgated in terms of section 62, contain only a single provision which addresses transfers. That provision is section 22 which reads:

“Members of the Force who in the opinion of the Commissioner of Police is required to move his family, his home or personal effects by the exigencies of the police duty shall have his reasonable expenses reimbursed or removal carried out by the Police.”

[14] Since no special guidelines exist, it is unclear how transfers are dealt with. However, it seems from a reading of the Act, in particular section 8(2), that there is a general power given to the Commissioner to transfer members of the force, but no process stipulated. This firmly establishes that the power of transfer falls within the prerogative of the Commissioner and there is no established procedure for such transfer. The Act does not make provisions for recourse to be adopted by officers who are dissatisfied with an order of transfer. Neither the Act nor the Regulation actually make provision for recourse for dissatisfaction with a transfer. However, under the Regulations there is a general provision entitled “*complaints*”. It reads thus:

“Complaints

15(1) if any subordinate officer thinks himself wronged in any matter by any police officer of a lower rank than the officer in charge of the Police in a place where he is stationed, he may complain in respect thereof to such officer in charge, if he thinks himself wronged by such officer in charge or by any other officer of the same or a higher rank not being the Commissioner of Police and if he thinks himself wronged by the Commissioner of Police, either in respect of his complaint not being redressed or in respect of any of the matter he may complain thereof to the President” (underline ours)

(2) Upon any such complaint being made, the complaint shall be enquired into and steps shall be taken as may be necessary for giving redress to the complainant as the case requires.

(3) Every complaint shall be made in, or reduced to, writing.

[15] Supposing that the 2nd Respondent could file a complaint of such disciplinary measures taken against him to the PSAB, procedurally he would still have been in default of section 15 of the Regulations as he would have failed to exhaust remedies available to him under the Regulations. It is abundantly clear that the channel to follow to lodge a complaint against the Commissioner for a perceived wrong, is through a complaint in writing to the President. Nonetheless, neither the Act nor its Regulations define what is considered a perceived wrong. We consider that dissatisfaction with a transfer to qualify as a perceived wrong. This is logical, if one considers the fact there exists no complaint procedure available under the Act, or any remedy in the Regulation or any other regulations. The Regulations obviously prevail over the PSO as clearly anticipated in Clause 1.1(g) of the PSO, which reads:

“(g) It is emphasized that although these Orders have no legislative force, they are published by authority of the President. Where reference to an Act is made in these Orders, such reference shall be taken to include reference to any subsidiary legislation passed under or additional to the Act. If the Orders are in any way at a variance with the terms of any legislation, the terms of the legislation shall naturally prevail. Thus no amending legislation is required in order to vary the provisions of these Orders.”
(underline ours)

[16] This is also fortified by the extent of the PSAB’s jurisdiction over complaints in the Constitution. The jurisdiction of PSAB is clearly limited in terms of Art 146 of the Constitution.

[17] Normally when interpreting the Constitution one has to give a purposive and fair meaning to it, taking into account the spirit and intention of the framers of the Constitution, see **Chow v Michel [2011] SLR 1**. I find no reasons but to conclude that it is clear that the intention of the framers of the Constitution was not to include as part of the jurisdiction of the PSAB internal transfers of officers. No other interpretation to the contrary can be ascribed to the above referred article. On a literal meaning of the Constitution, the PSAB does not have jurisdiction to consider complaints about transfers; see **MD v BL (CA 26/2016) Appeal from the Family Tribunal 141 of 2016 [2017]**

SCSC 196 (01st March 2017) paragraphs 27 to 29 on a literal approach to the Constitutional text in the absence of ambiguity.

PSAB's Jurisdiction

[18] The extent of the PSAB's jurisdiction is clearly set out in Article 146. It serves as an appeal body where a complaint is made about an appointment to an office, a promotion to office, disciplinary proceedings taken in respect of an officer, termination of appointment of a person, and decisions relating to the qualifications of a person serving or who has applied for office in the public service. It only has these powers which are stipulated in the Constitution and it must exercise its functions in accordance with the Constitution. The provision makes no mention of transfers, thus no ambiguity exists. As we have already observed, on a literal reading of the provision, the PSAB does not enjoy jurisdiction to consider complaints about transfers; see **MD v BL** (supra).

[19] Transfer falls under the general function of Commissioner. This is found in section 8(2) of the Police Force Act. In **Samuel Kamau Macharia & Another v Kenya Commercial Bank and 2 others, Application No. 2 of 2011 [2012] KLR**, the Supreme Court of Kenya pronounced itself on jurisdiction and stated as follows;

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..... the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant). Constitutional Application No. 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of the Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon court of law beyond the scope described by the Constitution. Where the Constitution confers powers upon Parliament to set the jurisdiction of the court of law or tribunal, the

legislation would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law.”

- [20] In **Re the Matter of the interim Independent Electoral Commission** (supra) the Court stated the following: *“Assumption of jurisdiction is a subject regulated by the Constitution”*. The case of **Owners of the Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1** sets out that: *“jurisdiction flows from the law, and the recipient court is to apply the same, with limitations embodied therein. Such a court may not arrogate to itself jurisdiction through craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, the Court of Appeal and the High Court, their respective are donated by the Constitution”*.

The jurisdiction of the PSAB is regulated by the Constitution. The wording of Article 146 is not ambiguous. It has limited the PSAB’s jurisdiction to only those complaints specified. Any attempts by the PSAB to exercise jurisdiction beyond such mandate is impermissible.

- [20] Submissions by Counsel for the 2nd Respondent that the complaint fell within the PSAB’s jurisdiction because it was either an appointment or promotion under Articles 146(1)(a) or (b) is not supported by that article. A transfer cannot be and is not an appointment or promotion. There may be instances when a public official may be appointed and transferred simultaneously or promoted and transferred simultaneously. In such instances, the PSAB would have the jurisdiction to determine a complaint relating only to the appointment or promotion, but not the transfer. Counsel’s submission that the complaint was a disciplinary proceeding taken in respect of an officer because of the salary suspension is not supported by fact. The complaint of 24th May 2018 concerned the transfer.

- [21] Article 146(1) is clear and specific that the Constitution confers authority on the PSAB to adjudicate on matters that have been assigned to it. Such matters do not include transfers of police officers. The PSAB being a creature of the Constitution derives its jurisdiction from the provisions of the Constitution, and any other relevant statutory enactment. There

is no such other statutory enactment. As it is a constitutionally established institution with an essential constitutional function, its jurisdiction cannot extend beyond what is conferred to it by the Constitution. It has only those powers given to it by the Constitution and must exercise its functions in accordance with the Constitution. It follows from this, that the PSAB exceeded its jurisdiction when it considered a complaint concerning a transfer within the police force. It was consequently not empowered to make the order that it did. It is only empowered to make orders on matters falling within the terms of its jurisdiction.

Findings

[22] The referred question which seeks pronouncement from this Court is whether the PSAB can make findings and ultimately order the Commissioner to re-examine the 2nd Respondent's personal situation and consider the social difficulties (in relation to his transfer from La Digue) and order that he be refunded two months' of his salary. This Court finds that the PSAB does not have jurisdiction to determine complaints about transfers within the Police Force. Article 146(1) of the Constitution limits the PSAB's jurisdiction to only the five instances listed. Transfer is not included in that list. Section 15 of the Act makes it clear that complaints about transfers have to be directed to the President. Thus, the PSAB exceeded its jurisdiction when it considered the transfer, and making the order that it did. Therefore, this Court finds that the determination and the order a nullity; see **Mancienne v Government of Seychelles (CS10 of 2004) [2005] SCSC 11 (19 May 2005)**. We so declare.

Signed, dated and delivered at Ile du Port on ...

Burhan CJ

Dodin J

Vidot J

