

REPUBLIC OF TRINIDAD AND TOBAGO

ACTION FOR JUDICIAL REVIEW

Civ. App. No. 10 of 2004
H.C.A No. S-1264 of 2003

IN THE COURT OF APPEAL

Between

**Director of Personnel Administration
Police Service Commission**

Appellants

And

**Eusebio Cooper
Clifford Balbosa
Derek Junior Birjah**

Respondents

PANEL:

Sharma, C.J.
Nelson, J.A.
Kangaloo, J.A.

APPEARANCES:

Mr. F. Hosein S.C. and Mr. B. Primus for the Appellants
Dr. F. Ramsohoye S.C. and Mr. A. Ramlogan for the Respondents

Delivered on 19th January 2005.

JUDGMENT

DELIVERED BY SHARMA C.J.

[1] This appeal is against several orders of Myers, J. made on 30th December 2003 and arises out of applications for judicial review filed by Eusebio Cooper, Clifford Balbosa and Derek Junior Birjah, (the Respondents) and subsequently consolidated in the High Court as No. S 1264 and 2015 of 2003 POS and S 1808 of 2003.

[2] The only issue raised on this appeal is whether the trial Judge was correct in deciding that the Cabinet appointed Public Service Examination Board (the Board) was unconstitutional as being in breach of the doctrine of the separation of powers.

BACKGROUND

[3] The facts upon which this Appeal turns are undisputed. The Respondents are all employed as police officers. In August 2002, the First and Second Respondents sat promotion exams for the rank of Police Sergeant and the Third Respondent sat promotion exams for the rank of Police Corporal. These examinations were set by examiners appointed by the Board in accordance with an established practice since 1966¹ when Cabinet appointed the Board to regulate all examinations throughout the public service, namely the Prison Service, the Fire Service and the Police Service.

¹ See paragraph 5 of affidavit of M. Mahabir, (current DPA) filed on 3rd September 2003

[4] After nearly 11 months in or around July 2003, the Police Service Commission (the PSC) issued a media release in response to comments made by the President of the Police Social and Welfare Association on the failure to release examination results for August 2002. The release stated that:

“The sole responsibility for the conduct of promotion examinations falls under the purview of the Public Service Examinations Board, a Cabinet appointed body – the management of which is the responsibility of the employer.”²

The release of results was therefore not the responsibility of the PSC.

[5] On 11th July 2003, the First and Second Respondents moved for judicial review against the Appellants and sought the following reliefs:

1. A declaration that the appointment of an Examination Board by Cabinet managed by the Executive for the purpose of conducting and/or marking promotion examination papers is unconstitutional and/or *ultra vires* and/or illegal, null and void and of no legal effect.
2. A declaration that the Director of Personnel Administration (DPA) is the only person/office that is responsible for the conduct of promotion examinations in the police service of Trinidad and Tobago.
3. A further declaration that the DPA is the only office / person that is lawfully authorized to appoint the Board for the purpose marking promotion examination papers in the police service of Trinidad and Tobago.
4. An order of mandamus directing the DPA to forthwith correct and release the results of the last promotion examinations for the rank of police corporal and/or sergeant held in August 2002 (hereinafter called “the said promotion examination”).

² See statement of Respondents filed on 11th July 2003 and located at page 10 of Record of Appeal.

5. A declaration that the omission and/or failure and/or refusal of the DPA to correct and publish the results of the said promotion examination after more than 10 months had elapsed, was illegal, unfair and contrary to the principles of natural justice.
6. A declaration that the Respondents possessed a "legitimate expectation" that the results of the said promotion examination would be published within a reasonable time after completion of same.
7. A declaration that the DPA has acted unreasonably and/or unlawfully by reason of his continuing omission and/or failure to correct and publish the results of the said promotion examinations within a reasonable time after completion of same.
8. Damages and costs.

Leave was granted on 19th August 2003 by Rajnauth-Lee J.

[6] The Third Respondent sought multiple and identical reliefs against the Appellants in his statement of claim filed on 22nd July 2003. By order of Myers J. both sets of proceedings were consolidated on 3rd November 2003. On 30th November 2003 the trial judge, in a reserved judgment, granted *inter alia*, the following reliefs:

1. *That the appointment of the Board by Cabinet is unconstitutional, illegal, null, void and of no effect.*
2. *The PSC shall by 9th January 2004, appoint an Examination Board to select and appoint examiners ... to review the examination papers at the promotion examinations held in August 2002, to ascertain whether those examination papers may be adopted or ratified. The examiners shall complete that review process and decide on whether to adopt or ratify by 30th January 2004 and publicly announce their decision.*
3. *The PSC and the DPA shall not be entitled to declare any future promotions to the ranks for which the examination is held before*

the results of either the August 2002 examination as ratified, or any new examination set, are published and considered in the making of recommendations for future promotion to those ranks.

[7] On an appeal filed by the appellants it is sought to impugn only those reliefs numbered 1 to 3 above.

JUDICIAL REVIEW PROCEEDINGS BEFORE MYERS J.

[8] At the hearing of the consolidated proceedings, Myers J. identified the two main issues to be dealt with:

1. Was the appointment of the Board by Cabinet unconstitutional, null, void and of no legal effect?
2. Was the delay in releasing the results of the Police Promotional Examination of August 2002 unreasonable?

[9] There is no appeal by the Appellants of the judge's finding that the delay was unreasonable.

The Appointment of the Board by Cabinet was Unconstitutional

[10] Before the Judge the Appellants submitted that the conjoint effect of Section 75 of the Constitution and Section 45 (2) of the Interpretation Act together authorized Cabinet to appoint the Board, as part of its power to determine the general direction and control of the government of Trinidad and Tobago.

Section 75 of the Constitution reads:

“There shall be a Cabinet for Trinidad and Tobago which shall have the general direction and control of the government of

Trinidad and Tobago and shall be collectively responsible therefor to Parliament.”

Section 45(2) of the Interpretation Act³ reads:

“Where a written law empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to that act or thing.”

[11] In *Thomas v. Attorney General of Trinidad and Tobago* (1982) AC 113 Lord Diplock, speaking for the Board observed:

*“The whole purpose of Chapter VIII of the Constitution which bears the rubric “The Public Service” is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day.”*⁴

The Appellants submitted that this Privy Council decision applied in that it showed only potential direct political influence on the affairs of the PSC could be rendered unconstitutional. In the instant case there was no scope for direct political influence on the PSC’s responsibility in the promotion process. The Board insulated the examiners from any such influence by its very membership comprising eminent, independent and competent citizens of Trinidad and Tobago, namely:

- a. the Chief Education Officer
- b. a representative from the University of the West Indies
- c. an educationist
- d. two representatives from industry
- e. the DPA
- f. a member of the PSC.

³ Chap.3:01

⁴ At page 124

[12] In addition, the Appellants submitted that Cabinet had never played nor did it actually play any part in the appointment of the examiners who were drawn from the persons chosen by the Board. The Appellants argued however, like many sections of the Constitution, to which reference shall be later made, that Section 122 (2) of the Constitution allowed some contribution from the Executive since it provides:

“122 (2) The members of the Police Service Commission shall be appointed by the President, after consultation with the Prime Minister and the Leader of the Opposition.”

[13] It was further contended that the appointment by Cabinet of the Board did not usurp the duties of the DPA under Regulation 19 of the PSC Regulations. It was conceded by the Appellants (the Respondents in the Court below) that the PSC had the power to regulate its own procedure and it had for nearly forty years left open this very procedure on the appointment of the Board in the hands of Cabinet.

[14] I do not agree with the concession made by the Appellants. In my judgment the practice and procedure referred to in Section 123 (1)⁵ of the Constitution only relates to those matters which fall within its jurisdiction. The section itself is sufficiently clear and explicit. Later on in this judgment this would be further elucidated.

Reasoning and Decision of Myers J.:

[15] The Learned Judge disagreed with the Appellants' arguments. In his view, on the proper construction of Section 75 of the Constitution and Section 45(2) of the Interpretation Act, there was no authorization for

⁵ This section outlines the powers of the Commission to appoint, transfer, promote and discipline its officers.

Cabinet to appoint the Board as part of Cabinet’s “power to determine the general direction and control of the government of Trinidad and Tobago.”⁶ Such a construction on the sections involved a breach of a fundamental Constitutional principle – that is, the protection provided to all Service Commissions from Executive interference. In effect,

“The Interpretation Act cannot, as an inferior Act of Parliament be used to circumvent the Constitution, as the Supreme Law.”⁷

[16] In the view of the Learned Judge, the true effect of the exercise of Cabinet’s power under Section 75 of the Constitution and Section 45(2) of the Interpretation Act, to appoint the Board was unconstitutional.

[17] At page 26 of the judgment he stated:

“The Interpretation Act should be read in a manner that makes it consistent with the Constitution, as the Supreme Law. It must yield before the Constitution. ... A power derived from an inferior Act of Parliament cannot be construed in a manner which entitles Cabinet to act in breach of the checks and balances imposed upon the Executive power by framers of the Constitution.”

[18] I do not agree with the Learned Judge’s reasoning. It seemed that he initially determined that section 75 of the Constitution construed on its own showed that it was unconstitutional for the Executive to appoint the Board and therefore wrongly reasoned in my respectful view that section 45(2) of the Interpretation Act was inconsistent with section 75 of the Constitution.

[19] The Interpretation Act⁸ applies to all written laws of Trinidad and Tobago. It is an aid to construction and is used as an adjunct to

⁶ See page 5 of the Judgment dated 30th December 2003

⁷ (Supra) At page 25

⁸ See section 2 of the Act, Ch. 3:01

determine purposively any legislation which falls for interpretation from time to time.

[20] The Learned Judge fell into error in seeking to first define the ambit and scope of section 75 of the Constitution and holding that section 45 (2) of the Interpretation Act could not 'trump' the section. In my respectful view this was not the correct approach.

[21] In my judgment, the conjoint effect of section 75 of the Constitution and section 45(2) of the Interpretation Act was to discover the source of the power of Cabinet to appoint the Board, as part of its power to determine the general direction and control of the government of Trinidad and Tobago⁹.

[22] Although the Appellants' submissions are accepted in this regard, strictly speaking, in my view, it was not necessary to invoke the Interpretation Act to determine the question. On the authority of *Endell Thomas* it is clear that the Executive has the power to appoint the Board. (This point is further developed in paragraph 45 of this judgment.).

History of the Public Services Examinations Board

[23] As an alternative answer to the conclusion of the Learned Judge, (in the event that he was correct on the interpretation of the section), there is merit in the submission that for nearly 40 years the Cabinet has been the body appointing the Board. This has been a long-standing practice, untouched, without interference by the Executive for all these years and therefore has the same force as if it were a Regulation.

⁹ See Appellants' skeleton arguments dated 12th November 2004

[24] The Learned Judge finding no merit in this argument, stated in his judgment:

“The fact that the Police Service Commission’s misunderstanding of its Constitutional obligations is one of long standing and manifests itself in an unconstitutional practice of equal antiquity, does not by itself through a process of alchemy, render the unconstitutional practice constitutional.”¹⁰

[25] However, based on the uncontroverted evidence of Michael Mahabir¹¹ the Board comprises members from different spheres including the University of the West Indies, the Industry and the PSC as well as the DPA and the Chief Education Officer. These members are appointed by Cabinet and they in turn select a panel of examiners to set and mark the papers. Cabinet therefore has no role to play in the appointment or selection of the examiners by the Board. The panel is thus sufficiently insulated from any improper political influence from Cabinet.

[26] In adhering to the *Thomas* principle of insulation, the judge in my view, failed to acknowledge that for the last 40 years Cabinet has appointed the Board for the specific purpose of regulating “*ALL examinations in the Public Service.*”¹² The objective is to have some sort of unity throughout the Service Commissions with consistency of practice, economic use of limited expertise and avoidance of unnecessary duplication.¹³ In that regard, the Board is appointed by Cabinet to

¹⁰ Paragraph 80 of page 45 of Judgment of Myers J. dated 30th September 2003

¹¹ See affidavit of current DPA Michael Mahabir dated 2nd September 2003 and filed 3rd September 2003.

¹² See paragraph 48 of Appellants’ skeleton arguments filed on 12th November 2004. (Emphasis added).

¹³ See affidavit of current DPA, M. Mahabir filed 3rd September 2003

ensure all public servants in the various Service Commissions¹⁴ are meted with equal treatment.

[27] In my opinion therefore, the effect of this unchallenged practice for nearly forty years now has the same force and effect as the clear functions of the DPA specified in the PSC Regulations.¹⁵

Doctrine of the Separation of Powers

[28] In all Constitutions, based on the Westminster system of government, there is in operation the doctrine of the separation of powers. By this doctrine, the autonomy of each branch of government is presumed to be immune from undue encroachment from any others. Thus, the Legislature, Executive and Judiciary operate in an environment which is presumed free from influence from each other's sphere.

[29] While in the popular sense it may be convenient to divide the powers of government into three (3) spheres, in practical reality such rigid classification is neither desirable nor possible. On the basis of the doctrine as initially formulated by French jurist Montesquieu¹⁶, what is desired is not that the different organs such as the Legislature and Executive should have no influence or control over the acts of each other but rather that neither should exercise the whole power of the other. In essence:

“It's value lies in the emphasis placed upon those checks and balances which are essential to prevent an abuse of the enormous powers which are in the hands of rulers.”¹⁷

¹⁴ Mention is specially made of the Fire Service and Prison Service under the Public Service Commission Regulations

¹⁵ See Regulation 19(2) of the Police Service Commission Regulations

¹⁶ *Espirit des Lois*, Book XI Chap.6

¹⁷ See Wade & Bradley's *Constitutional Law*, 1965 at page 22

[30] It was the view of the Learned Judge that the Cabinet appointed Board showed the potential for direct political interference on the basis of the *Thomas* case. Such potential violated the separation of powers doctrine and therefore could not be consistent with the Constitution. The potential for political influence was direct instead of indirect in this case since the Judge found that there was no obligation on Cabinet to continue to choose its members from the same sources; and the members of the Board, from wherever they may have been drawn, had no security of tenure.

[31] The Judge stated at paragraph 60 of his judgment;

*“If Cabinet can eviscerate the Public Service Examinations Board at a whim by firing its members and changing the composition of its membership, thereby turning it into a ventriloquist’s dummy, a cipher, in my judgment, the consequence would be that any potential influence that Cabinet might exercise on the examiners, and the promotion process would be direct, not indirect.”*¹⁸

[32] On the facts, there was no scope, in my respectful view, for such an application of the doctrine. The Board had independent members who in turn selected persons on their own merit to sit as examiners without the influence of Cabinet. This arrangement did not violate the doctrine of the separation of powers since Board members were sufficiently insulated from any undue political influence from the Executive (Cabinet).

[33] There is an inherent danger in having power reposed in only one organ of the State, be it the Executive, Legislature or Judiciary. To avoid this mischief, and to act as a check and balance on the particular

¹⁸ See page 36, paragraph 60 of Judgment dated 30th December 2003.

organization, power may often be diffused in the hands of independent bodies. Judging from the very appointment of persons to high office under the Constitution it is clear that politics often plays an important if not an underlying role. In fact, the Constitutions of the Commonwealth Caribbean contemplate such diffusion and interplay by allowing the overlap of these three-fold categories. Thus similar instances of political infusion are evident in the appointment of persons to the offices under the Constitution such as the President, the Prime Minister, the Chief Justice and the Speaker of the House.

[34] The President is elected as the Head of State under section 29 of the Constitution by majority voting of the Electoral College (all members of Senate and House of Representatives). In the past the nominee of the party who commands the majority becomes the President. What can be more political than that? Yet his office is independent. The Prime Minister's appointment under the Constitution is of course wholly political and governed by section 76(1). He is appointed by the President and must be member of the House of Representatives capable of commanding majority support from the other members. The Chief Justice is appointed by the President in consultation with the Prime Minister and the Leader of the Opposition pursuant to section 102 of the Constitution. The Speaker of the House is elected from among members of the House of Representatives under section 50 and is also an entirely political appointment.

[35] Appointments to these positions of high office under the Constitution all involve some measure of political / executive input and overlap. In these appointments, there is no insulation or buffer as in the instant case with the appointed Board responsible for choosing its own

panel of examiners. The integrity of holders of high office must be presumed in order to have a functional working Constitution.¹⁹

[36] If the Judge were correct in his reasoning, it could be plausibly argued that the appointment of the President, without the insulation as is evident in this instant case with the Board (so-called independent) is also a political appointment and as such, the President would be directly influenced by the Executive. In fact, all appointments under the Constitution could be condemned for violation of the separation of powers, involving as they do, the necessary input from the Executive. To adopt such an inflexible approach to the application of the doctrine is simply to thwart the true intention of the Constitution and would render it unworkable. It would be a recipe for chaos.

Presumed Integrity of Holders of High Office

[37] As a further point, Cabinet has appointed the Board without impropriety over the years under its general mandate to govern the country. To suggest, in the absence of definite evidence, that the Cabinet-appointed Board would succumb to political interference or fail to insulate its members from undue political interference would be to presume "... a lack of professionalism, independence and integrity..."²⁰ on the part of its members.

[38] I expressed similar sentiments in the local decision of Richard Crane²¹

¹⁹ This point is further developed in the following section.

²⁰ Lt. Leon Chandler v. Mayor C. Bernard and Ors. (H.C.A. No. 21 of 1998 at page 44).

²¹ H.C.A. No. 58 of 1991

“It is of utmost importance for us to assume that those who hold high office would act with the greatest constitutional propriety. Were it otherwise, it would not only render our Constitution unworkable, but it would also be a recipe for disaster. It is expected that holders of high office ... would act with probity and rectitude at all times in the discharge of their duties.”²²

[39] In presuming impropriety from holders of high office and basing his entire decision on the threat or potential for such impropriety, the Learned Judge, with greatest respect, stretched this doctrine to unrealistic lengths and would render the Constitution practically unworkable.

Distributive Separation of Functions / Powers

[40] An analysis of the functions of the PSC, the DPA and the Executive reveals that the powers are distributive.

[41] The PSC has been created by the Constitution to function independently of the Executive. However, section 123 (1) of the Constitution outlines very specifically the functions of the Commission:

“123.(1) Power to appoint persons to hold or act in an office in the Police Service established under the Police Service Act, including appointments on promotion and transfer and the confirmation of appointments and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission.”

²² (Supra) at page 38 per Sharma J.A.

[42] This section clearly outlines the jurisdiction of the PSC. Any practice and procedure under the PSC must therefore relate to matters within the Commission's jurisdiction. The appointment of an Examination Board for the purpose of setting and marking promotion exams for the Police Service is not mentioned in the above section.

[43] In fact, as the Appellants contend, the promotion examination is part of the terms and conditions of employment falling within the sphere of the functions of the Executive as part of its general power under section 75 of the Constitution. This proposition is supported by Lord Diplock in Thomas where he observed:

*"The functions of the Police Service Commission fall into two classes: (1) to appoint officers to the Police Service including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation, whether primary or subordinate, it is for the executive to deal with in its contract of employment with the individual police officer..."*²³

The reasoning used to arrive at the conclusion that the exam is part of the terms and conditions of employment is based on Lord Diplock's classification in Thomas of the function "to prescribe categories of officers in the police service, including qualifications, duties and remunerations,"²⁴ as an executive function.

[44] The promotion examination as an aspect of qualifications therefore had to fall within the terms and conditions of employment and so was a function of the Executive.

²³ [1982] AC 113 at 128, per Lord Diplock

²⁴ See paragraph 18 of Appellants' skeleton arguments filed 12th November 2004

[45] I accept this submission. It accords with reason and common sense. The appointment of the Board cannot by any stretch of the imagination be a function of the PSC since it is clearly a part of the terms and conditions under which a person qualifies for promotion within the Police Service.

[46] Regulation 19 (1) and (2) of the Police Service Regulations reads as follows:

“19. (1) All examinations in the Police Service shall be set and the papers marked by such Examination Board as may be appointed for the purpose.

(2) The Director shall be responsible for the conduct of examinations set under sub-regulation (1).”

[47] By Regulation 19(2) it is sufficiently explicit that the Director should be responsible for the conduct of examinations only. The argument that there was a breach of separation of powers doctrine due to the usurpation of the DPA’s role by the Cabinet-appointed Board, was not accepted by the Judge in the Court below. He found that on a proper construction of Regulation 19²⁵ it was clear that the DPA had no role to play in the appointment of examiners and in the setting and marking of Police Service Promotion Examinations.

[48] Reading the language of the regulation as a whole, the Judge found that the DPA was to have *conduct* of the examinations which were to be clearly set with papers marked by an appointed Examination Board. Conduct in this regard was of an administrative nature. In his view,

“That use of clear and specific language displaces any suggestions that the proper interpretation is the Director of Personnel Administration is responsible for the setting and

²⁵ Police Service Commission Regulations

marking of the examinations. The clear language must prevail, as a matter of construction."²⁶

This reasoning adopted by the Learned Judge was sound and I accept it as the correct view. In any event, had it been intended that the DPA was to appoint the exam board in Rg.19 (1), nothing would have prevented the drafters from including him specifically in the sub-section.

[49] Section 123(1) of the Constitution read in conjunction with Regulation 19 and Section 75 of the Constitution (giving Cabinet the general power to govern as mentioned on page 5 of this judgment) clearly show that the powers are meant to be distributive.

Concentration of Power Leading to Abuse

[50] The Learned Judge demonstrated an acute anxiety to protect the PSC from any political influence from the Executive and was prepared to place virtually all power in the hands of the PSC. Such an arrangement, in my respectful view, is more susceptible to abuse than where, as in this case, the power is diffused.

[51] The fear that Cabinet can "eviscerate" the Board "at a whim" by firing its members and changing its membership to turn it into a "ventriloquist's dummy"²⁷ seems to stretch to limits the worst-case scenario in light of the fact that certain safeguards exist.

[52] Thus, should Cabinet carry out any impropriety in appointing the Board leading to some disadvantage being meted out to the applicant, such applicant may:

²⁶ See page 43, paragraph 75 of Judgment.

²⁷ See paragraph 60 page 36 of Judgment of Myers J. dated 30th September 2003

- (1) Request to have his papers remarked by a different examiner;
- (2) Apply to view his own paper under the Freedom of Information Act 1999 or
- (3) Apply for relief under Judicial Review proceedings.

[53] In my respectful view, the Judge focused on the “insulation principle” to such an extent that he failed to realize the danger inherent in having such power concentrated in the hands of one body. This scenario portrays the PSC as a law unto its own, answerable to no higher authority. Should this have been the intention of the legislators surely the power to appoint the Board by the PSC would have been clearly expressed in the Regulations. That this was not done, suggests in my respectful view, that the PSC was not the body authorized nor in any way responsible for appointing the Board.

[54] Furthermore, if the PSC were the appointing body for the Board, it would make little sense that the Regulations would specify the function of the DPA to ‘conduct’ the exams, which on balance is a less important function than that of appointing the Board yet remain silent on the crucial question of who was to appoint the Board. In any event, implying such a function is going beyond the mandate of the Commission’s Constitutional power to: “**...appoint persons to hold or act in an office in the Police Service...including appointments on promotion and transfer...**”²⁸

²⁸ Section 123(1) of the Constitution

Case Law on the 'Functional Approach to the Doctrine of the Separation of Powers

[55] Attention is drawn to the case law on the 'functional' approach to the separation of powers doctrine submitted by the Appellants.

[56] The Appellants in skeleton arguments argued for a 'functional approach' to the separation of powers doctrine based on US cases. *Mistretta v US* 488 US 361 and *Commodity Futures Trading Commission* 478 US 833 were cited to show the functional approach of the Supreme Court of the United States to the application of the doctrine. It is agreed as stated by the appellants that the principle of the separation of powers did not require a hermetic division among the separate branches of the state.

[57] Nevertheless, I do not propose to carry out any analysis on the mentioned cases since in facts and circumstances they are so removed from this instant case as to render any comparison quite unhelpful. It is clear that the role of the American Senate as opposed to the role of the Cabinet in the Westminster system is glaringly different.

Judge's Discretion to order Mandamus

[58] In light of the decision to which I have come, I see no need to discuss the judge's discretion to order mandamus. However in deference to Counsel, I shall make a few observations.

[59] Under the Rules of the Supreme Court Order 53 as well as the Judicial Review Act no 60 of 2000 a judge can make an order of mandamus requiring a person, corporation or tribunal to perform a

specified public duty relating to its responsibilities. Although the judge has discretion to make, these orders there are certain limits to this discretion. The order must command the party to do no more than it is *legally bound to perform*.²⁹ In *R v Caledonian Rly Co* {1850} 16 QB 19 at pg 787³⁰ it was stated:

“Before we can grant a peremptory mandamus ,the prosecutor is bound to satisfy us that there is a legal duty imposed upon the defendant to comply with all that is commanded in the writ .We consider it quite settled that, if any part of what is commanded by a peremptory mandamus goes beyond the legal obligation ,the whole writ must be set aside .”

[60] The learned judge in the instant case has ordered restrictions on the Commission regarding further promotions in the Police Service. The PSC is not legally bound to stop promotions or to restrict promotions in any way. Under Chapter III of the PSC Regulations, it is clearly seen that the role of the PSC deals with appointments, promotions and transfers and therefore any restrictions imposed on promotions where a party has followed the necessary avenues for promotion may lead to allegations of prejudice and unfairness.

[61] The Cabinet appointed Board did not violate any principle of the Constitution. It is my respectful view that the judge was not justified in restricting further promotions in the Police Service. Neither was he justified in imposing time limits since the PSC was not the body responsible for appointing the Board.

²⁹ Vol {1} Administrative Law Halsbury’s Laws of England para 134

³⁰ See also the case of *R v Tucker* {1824} 3 B& C 544 AT 547

DISPOSITION

[62] Accordingly in my judgment the appointment by Cabinet of the Board did not violate the Constitution. It is my respectful view that the judge was neither justified in imposing time limits nor preventing further promotions by the PSC.

[63] In light of these conclusions I hold that all the orders of Myers J. given on 30th December 2003 are unlawful save that which declared that it was the function of the DPA to conduct the examinations for promotion in the Police Service.

[64] In the dying stages of this appeal, on enquiry by the Court about the results, we were told that in conformity with the Judge's order the results were released. In these circumstances, this is a further reason why the relief granted by Myers J. and numbered 1, 2 and 3 at pages 4 and 5 of this judgment, should be refused.

[65] The appeal is therefore allowed. The Respondents are to pay the costs in this Court and in the Court below, fit for both Senior and Junior Counsel.

Sharma C.J.