

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA  
(CIVIL DIVISION)**

**MISCELLANEOUS CAUSE NO. 173 OF 2023**

**RICHARD BYARUGABA.....APPLICANT**

**VERSUS**

- 1. ATTORNEY GENERAL**
- 2. HON. BETTY AMONGI ONGOM .....RESPONDENTS**
- 3. PATRICK AYOTA**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**RULING**

This is an application for judicial review brought under Article 42 of the Constitution and Sections 33, 36 & 38 of the Judicature Act Cap 13 and Section 98 of the Civil Procedure Act and rules 3, 4, 5, 6 & 7 of the Judicature (Judicial Review) Rules, 2009 as Amended for Declarations and Orders:

1. An Order of Certiorari issue, calling up the decision of the 2<sup>nd</sup> respondent communicated by letter dated 30<sup>th</sup> June 2023, to the Chairman of the board of the National Social Security Fund (NSSF), which rejected the recommendation by the Board for the re-appointment of the applicant to the position of Managing Director, and further, purported to direct the board to commence a new process of recruitment for the said position.
2. An Order of Mandamus issue, directing the 2<sup>nd</sup> respondent to discharge her statutory duty to complete the reappointment of the

applicant to the position of Managing Director of National Social Security Fund as recommended by the Board and required by law.

3. An Order of Certiorari issue calling up and quashing the recommendation by the Board of Directors of National Social Security Fund, by letter dated 17<sup>th</sup> August 2023 to the 2<sup>nd</sup> respondent, for the appointment of Mr Patrick Ayota as Managing Director of National Social Security Fund, at a time when he was holding the substantive position of Deputy Managing Director on a fixed five-year term, thereby rendering him ineligible for such appointment.
4. An Order of Certiorari issue to call up and quash the decision of the 2<sup>nd</sup> respondent, by letter dated 18<sup>th</sup> August 2023, purporting to appoint Mr Patrick Ayota as Managing Director of the Fund, a position to which he is not entitled to be eligible to act.
5. An Order of Permanent injunction issue preventing/restraining Mr. Patrick Ayota from acting in the position of Managing Director of the Fund, a Position in which he is not entitled to act.
6. In the alternative, and without prejudice to the above remedies, an order of general and exemplary damages is awarded to the applicant as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.
7. Costs of this application.

The grounds upon which this application is based are set out briefly in the Notice of motion and the affidavits of the applicant as follows;

1. The applicant has served the National Social Security Fund twice as its Managing Director and was first appointed to that position in August 2010 for a term of three years. On 29<sup>th</sup> November, 2017, the applicant was reappointed as the Managing Director of National Social Security Fund for a term of five years, which term expired on 30<sup>th</sup> November, 2022.

2. That before the applicant's second contract could run its course, the 2<sup>nd</sup> respondent attempted to bring it to a premature end upon a premise that the applicant was supposed to have automatically retired upon reaching the age of 60 years. But it was the intervention of Attorney General that the applicant was able to complete the second term.
3. That the attempt to prematurely retire the applicant occurred after the Board of Directors of NSSF had recommended to the 2<sup>nd</sup> respondent that the applicant and Mr. Patrick Ayota be granted new contracts effective 1<sup>st</sup> December, 2022.
4. That the 2<sup>nd</sup> respondent only renewed the contract of the Deputy Managing Director and deferred the appointment of the applicant after raising various allegations of financial impropriety, alleged collusion with contractors and other corruption allegations. Alleged defiance of Presidential directives, alleged defiance of the Attorney General's directives, alleged misrepresentation of facts and many other accusations.
5. That the 2<sup>nd</sup> respondent personally lodged a complaint with the Inspector General of Government repeating the myriad false and unfounded allegations against the applicant. But the Inspector General of Government issued a report dated 29<sup>th</sup> June 2023 which cleared the applicant of all the allegations levelled against the applicant.
6. That the 2<sup>nd</sup> respondent wrote to the Chairman of the Board of National Social Security Fund on 30<sup>th</sup> June 2023 refusing to renew the applicant's contract. The 2<sup>nd</sup> respondent also directed the Board of NSSF to commence a new recruitment process which the applicant believes infringed on his legitimate expectation to be reappointed as required by law.

7. That the final decision by the 2<sup>nd</sup> respondent not to reappoint the applicant was not based on the allegations the 2<sup>nd</sup> respondent had made against the applicant but rather they appear to have been made on separate adverse conclusions drawn by the Inspector General of Government which adverse conclusions were never brought to the applicant's attention.
8. That the decision not to reappoint the applicant was demonstrably motivated by animosity and active bias towards the applicant which he contends was irrational in so far as it ignored the substantive outcome of the report of the Inspector General of Government.
9. That the Board considered and rejected promoting the Deputy Managing Director to the position of substantive Managing Director and decided that such a promotion was not possible because the 3<sup>rd</sup> respondent was not qualified for such promotion under NSSF Policy, having not acted in the position for a period of at least one year.
10. That the 2<sup>nd</sup> respondent refused to accept recommendations of the board and has instead cajoled and applied pressure and undue influence on the board, thereby interfering with the independent exercise of statutory mandate as envisaged under the law.

The respondents filed affidavits in reply and opposed the application through the affidavit of *Hon. Amongi Betty Ongom*-Member of Parliament and Minister of Gender, Labour and Social Development for 1<sup>st</sup> and 2<sup>nd</sup> while the 3<sup>rd</sup> respondent in his personal capacity which briefly have been set out;

1. That the 2<sup>nd</sup> respondent by virtue of her position as the Minister of Gender, Labour and Social Development is vested with authority by law to appoint the Managing Director of National Social Security Fund.

2. That the Board of National Social Security Fund in its meeting held on 24<sup>th</sup> November, 2022 resolved to recommend the applicant for the reappointment as the Managing Director of the National Social Security Fund.
3. That upon receipt of the recommendation, the 2<sup>nd</sup> respondent convened a meeting with the board on 25<sup>th</sup> November, 2022 in which she requested to be availed additional information to guide in the decision making process regarding the applicant's reappointment.
4. That during the meeting, serious issues were raised regarding the approval of the reappointment of the applicant as the Managing Director of the Fund including; performance of the fund, lack of strategic investment in real estate, lack of or limited view of strategic direction of the Fund and allegations of corruption.
5. That in a meeting held at State House Entebbe on 6<sup>th</sup> December, 2022, H.E the president guided that before the contract renewals of the Managing Director and Deputy Managing Director, there should be a meeting organized for him, with the Minister of Gender, Labour and Social Development, Board Members, NSSF and the applicant to discuss allegations against him.
6. That in a letter dated 7<sup>th</sup> December 2022, the Chairperson of the Board of Directors, the Minister notified him that a number of stakeholders had raised issues regarding the reappointment of the applicant as the Managing Director of the fund and requested for the responses on how the board intended to rectify them before the applicant could be considered for reappointment.
7. That the Minister fully disclosed the allegations against the applicant with the origin and source of all allegations against him in the letter dated 7<sup>th</sup> December and the one dated 5<sup>th</sup> January, 2023, to the Inspector General of Government and Auditor General.

8. That on the 27<sup>th</sup> December, 2022, the Chairman of the Board of directors requested the IGG to carry out investigations into the allegations against the applicant and that the Minister merely made a follow-up letter to Inspector General of Government based on directives of made by H.E the President, the Rt Hon. Prime Minister and Board Members NSSF.
9. That the IGG carried out investigations into the allegations of mismanagement, abuse of office and corruption by the applicant and established that the applicant had caused financial loss to the fund amounting to UGX 687,257,226/=.
10. That the Inspectorate of Government uncovered that the applicant placed himself in a position of potential conflict of interest when he requested for USD 100,000 from Anil Kuruvilla a Managing Director of Sybyl Ltd, a company which won 28 contracts from NSSF worth tens of billions in a space of four years.
11. That the 2<sup>nd</sup> respondent declined the recommendation to renew the applicant's contract due to the findings contained in the IGG's report which among others; include abuse of office and causing financial losses.
12. That the applicant is under investigation by the Inspector General of Government (IGG) whose report is partial, the Auditor General and the Criminal Investigation Directorate on recommendation of Parliament and the Directorate of Public Prosecutions.
13. That the Board made another recommendation for the appointment of another person as Managing Director and upon that recommendation of the Board, the Minister appointed a one Ayota Patrick as Managing Director of the Fund.

14. That all the actions by the 2<sup>nd</sup> respondent were well within her powers as the Minister of Gender, Labour and Social Development and followed a correct procedure as stipulated in the National Social Security Fund (NSSF) Act.

*The 3<sup>rd</sup> respondent in his affidavit contended and stated as follows;*

1. That on the 17<sup>th</sup> day of August 2023n the Board of NSSF, in accordance with its statutory mandate under the NSSF Act recommended the 3<sup>rd</sup> respondent for the appointment as the Managing Director of NSSF.
2. That on 18<sup>th</sup> August 2023, the respondent, in exercise of her statutory mandate under the NSSF Act and based on the recommendation of the Board of NSSF the 3<sup>rd</sup> respondent was appointed as a Managing Director for a period of five years.
3. That prior to the appointment as the Acting Managing Director, the 2<sup>nd</sup> respondent had declined to appoint the applicant as the substantive Managing Director. The acting appointment was as a result of the lacuna that had been left when the applicant's contract expired and the same was not renewed.
4. That the 3<sup>rd</sup> respondent was appointed as the Managing Director during a difficult period for the NSSF as the Fund was subject the subject of negative news stories and the 3<sup>rd</sup> applicant managed to steer the Fund against all odds and restored the confidence of our members. The 3<sup>rd</sup> respondent's performance was evaluated as the Acting Managing Director and Deputy Managing Director by the Board of NSSF and the same was found satisfactory which resulted in substantive appointment as the Managing Director.
5. That both the Board and the Minister exercised their statutory mandate legally in recommending the 3<sup>rd</sup> respondent as the Managing Director of NSSF and the appointment does not conflict any procedural or substantive requirements of the law.

6. That the appointment of the 3<sup>rd</sup> respondent was not a promotion of the Deputy Managing Director to Managing Director as alleged or at all and such appointment was not made in accordance with NSSF Recruitment Policy since the two positions are statutory appointment.
7. That the 2<sup>nd</sup> respondent did not dictate to the Board to recommend the 3<sup>rd</sup> respondent for the appointment but rather exercised its powers in assessing the 3<sup>rd</sup> respondent's competence and came to their decision independently. The Board of NSSF reserves the right to use any available options of recruitment and recommendation to appoint any person in proper exercise of the Board's statutory mandate and discretion, following a satisfactory assessment of the competence to steer the Fund to greater heights.
8. That the 3<sup>rd</sup> respondent ceased to serve as NSSF's Deputy Managing Director the moment he was appointed as the Managing Director and therefore Mr. Gerald Paul Kasaato was appointed to the position of Deputy Managing Director in Acting capacity pending a recommendation by the Board to appoint someone to serve in the position in substantive capacity.
9. That there is nothing in the law or the NSSF Human Resource Policy which prevents an employee of the fund from being appointed Managing Director on the basis that they are serving in another capacity. Therefore, there was no requirement for termination of my services as the Deputy Managing Director prior to my appointment as the Managing Director. The termination envisaged in the employment contract is one where a person is exiting the fund and not where he is assuming a different position in the same organization.
10. That the appointment of the 3<sup>rd</sup> respondent to the position of Managing Director followed a systematic process as provided for under the law which was commenced on or around 30<sup>th</sup> June 2023 and was

completed on 18<sup>th</sup> August 2023. The same was done lawfully and it was not done to defeat the present application. That it would be against public interest for the Fund to be without strategic leadership which would have catastrophic ramifications for the Fund and would expose members' savings amounting to over 18,000,000,000,000/= (Eighteen Trillion Shillings) to risks of misuse and stagnation in growth.

The applicant was represented by *Ebert Byenkya and Anthony Bazira* whereas the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by *Kodoli Wanyama (PSA), Akello Suzan Apita and Kamukama Allan*, 3<sup>rd</sup> respondent was represented by *Ellison Karuhanga and Augustine Idoot*.

The parties were directed to file written submissions which they did and the same have been considered in this ruling.

### *Issues for determination*

- 1. Whether the application is amenable for judicial review?*
- 2. Whether the application discloses any grounds for the grant of prerogative orders for judicial review?*
- 3. What remedies are available to the parties?*

### *Determination*

*Whether the application is amenable for judicial review?*

This issue is raised as a challenge to the propriety and competency of the application. The applicant's counsel submitted that the application is amenable to judicial review since it involved exercise of public power by the Minister in exercise of powers vested under the National Social Security Fund Act. The powers to appoint the Managing Director of NSSF are set out in section 18 of the National Social Security Fund Act.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent's counsel submitted that the applicant has no locus to bring this application for judicial review since his previous contract as Managing Director of NSSF had expired by effluxion of time. Therefore, he has no direct and sufficient interest in the matters in respect of which he seeks judicial review.

The respondent's counsel further argued that it only the board of directors of NSSF which could be aggrieved by the Ministers decision to reject their recommendation that the applicant be reappointed.

### *Analysis*

The question this court has to consider is whether the applicant has sufficient interest in instituting this application for judicial review or is a mere busy body. The task of the court in assessing whether a particular claimant has standing is a balancing act between the various factors. Sufficient interest is a standard which could sufficiently embrace all classes of those who might apply and yet permit sufficient flexibility in any particular case to determine whether or not 'sufficient interest' was in fact shown.

Rule 3A of the *Judicature (Judicial Review) (Amendment) Rules, 2019* provides that;

*Any person who has direct or sufficient interest in a matter may apply for judicial review*

The applicant is former office holder of the position of Managing Director National Social Security Fund for a period of 12 years and is aggrieved by the decision of the 2<sup>nd</sup> respondent in refusing to appoint or re-appoint him to the position of Managing Director after he was duly recommended by the Board of NSSF.

It is clear that the applicant has sufficient interest in the matter as a person who is aggrieved by the decision of the Minister-2<sup>nd</sup> respondent not to re-appoint him to the position of Managing Director. This court does not agree

with the submissions of counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent that it is only the Board that could be aggrieved with the decision of the 2<sup>nd</sup> respondent. This submission is erroneous and defies logic since the applicant has a direct interest in the decision made by the Minister not to reappoint him and or appointing another person to the same position.

*Whether the application discloses any grounds for the grant of prerogative orders for judicial review?*

The applicant's counsel submitted that the Minister is no longer empowered or expected to participate in identifying, interviewing, assessing qualifications, fitness or otherwise determining the suitability of any potential candidate for the Managing Director job. The said role was now vested with the Board of NSSF. In his view, the law only left the Minister with the simple though necessary role of signing the appointment letter to signify that the appointee is an official government appointee.

In counsel's view the power to make appointment does not equate to discretion on whom to appoint or grant power to reject any nomination or recommendation. It was his contention that the law intended to shift power and responsibility to the real stakeholders in NSSF. The stakeholders have not only their own interests to protect but also are given statutory guidance on what to take into consideration. With respect to the renewal of the contract of a person who has served as Managing director, the statutory considerations the board is required to consider are set out in section 39 of the National Social Security Fund Act: subject to satisfactory performance.

Counsel submitted that the Board has exclusive right to recommend an appointment or reappointment and it must consider whether the applicant has delivered satisfactory performance as the Managing Director of the Fund. It was their contention that so long as the stakeholder board had discharged their statutory duty, the Minister has no residual statutory power

to reject their recommendation and purport to re-assess the suitability of the applicant. The rejection of the recommendation of the Board for the reappointment of the applicant was therefore both unlawful and irrational and that a recommendation is binding.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent's counsel submitted that the Minister of Gender, Labour and Social Development appoints the Board and that the Board reports to the Minister in execution of its functions under section 33 of the NSSF Act. Therefore, the 3<sup>rd</sup> respondent has discretionary powers in the appointment process to reject or veto the person recommended. The Minister is not bound by the recommendation of the Board.

The 3<sup>rd</sup> respondent's counsel submitted that the Minister cannot be compelled to appoint the applicant when his appointment was rejected following due process of the law, in the exercise of her discretion granted by Statute. The 2<sup>nd</sup> respondent exercised her executive power arising from the NSSF Act section 39.

It was further contended that the appointment is preceded by the recommendation of the board, and once the Minister is not satisfied with the decision of or the recommendation of the board, then a fresh or new process of recruitment is done. It was their case that the Board recommended the appointment of the 3<sup>rd</sup> respondent for appointment to the position of the Managing Director of the Fund, therefore, the 2<sup>nd</sup> respondent in exercise of her discretion appointed the 3<sup>rd</sup> respondent.

### *Analysis*

The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. It is the courts to determine whether the authority has made an error of law bearing in mind

the broad degree of discretion in decision making. The court should identify the all-important dividing line between decisions that have been reached lawfully and those that have not. There are two questions: (i) was the decision taken within the powers granted? and (ii) if it was, was the manner in which it was reached lawful? *See Citizens Alert Foundation CAF Ltd & 4 Others v Attorney General & 2 Others HCMC No. 339 of 2020*

The courts have in practice had sufficient room for manoeuvre to be able to avoid being driven to reach unsatisfactory conclusions in interpretation of the law by the pressure exerted by conceptual reasoning. The court will employ the elasticity provided by the law giving such power and discretionary nature in executing of the said duties under the law. The applicant contends that the Minister of Gender, Labour and social Development who is the 2<sup>nd</sup> respondent in this matter has no power to reject a recommendation made by the board.

Section 39 of the NSSF Act as amended provides that;

*(1) There shall be a managing director of the fund appointed by the Minister, on recommendation of the board; and (b) by inserting immediately after subsection (1) the following subsection-“(1a) The managing director appointed under subsection (1) shall serve for a period of five years and may be reappointed, subject to satisfactory performance, for one more term only.*

The applicant's counsel seems to contend that whereas before the amendment the Minister had discretionally powers, such powers were curtailed by the Amendment Act which introduced the Board which had a duty to recommend a person or persons. It would be implied that the Minister is just a puppet of the Board and must accept without thought/reservation or argument regarding any person recommended for

the appointment. The same Minister appoints the Board under the NSSF Act which Board reports to the same Minister. The Act should be read as a whole in order to understand the extent of power of the Minister.

It is necessary to explain the basis on which that ordinary business of government is conducted, and the simple and satisfactory explanation is that it depends heavily on the 'third source' of powers, i.e powers that have not been conferred by statute in a narrow sense but are normal powers that give effect to the entire legislation. This is because a body like Parliament can have no mind; it is not possible to 'consolidate individual intentions into a collective, fictitious group intention'. Therefore, the provisions of a statute need to be understood in the context of the purpose of the statute as whole. It requires an understanding of the context in which it was enacted and 'mischief' at which it was aimed. See *R. (on the application of Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148 [2008] 3 All ER 548

This court with greatest respect would not agree with the applicant's rocky argument that the minister has no discretion in the appointment process. The Minister should not merely rubber stamp persons recommended for appointment. The Amendment to the law seems to have merely introduced a system of checks and balances in respect of appointment of the Managing Director and Deputy Managing Director of the Fund. Instead of the Minister choosing and or picking, the board was introduced to do the selection of the best suited persons based on satisfactory performance.

The role of the Minister for Gender, Labour and Social Development should not be rendered perfunctory without any exercise of discretion to question person/persons recommended to her. This exercise of discretion will be clearly made out if the board decides to send more than one name to the Minister for a given position. This is possible and the Minister's exercise of

discretion should never be curtailed by sending only one name so as to appear as having merely rubber stamped the decision of the Board. See *Osinde Osudo v Attorney General and Civil Aviation Authority HCMC No. 271 of 2021*.

The rejection of the applicant's name by the Minister was an exercise of discretion which is granted under the law to allow the system of checks and balances in the appointment process. The Minister as the appointing authority has some latitude of power to subject recommended persons to scrutiny and or reject the same and direct a fresh process of recruitment as it was done or approve of the recommended persons and effect the appointment. The amendment to the NSSF Act was intended to enable the Board participate in the decision making process of the Managing Director and Deputy Managing Director. The amendment merely took away the power of the Minister to appoint a person as the Managing Director or Deputy Managing Director directly without the participation of the Board.

The decision of the Minister to reject the applicant's name for the appointment as the Managing Director of National Social Security Fund was within the law and no irrationality has been shown in the decision making process. The recommendation by the Board of NSSF to the Minister does not become a directive or an order to the Minister who is vested with the powers to appoint the applicant. It is inconceivable to think that a recommendation is binding on the person or entity to which it is addressed. Recommendations call for the exercise of discretion in accepting or rejecting them. In all cases, recommendations are simply suggestions for further action.

The applicant further contended that the decision of the Minister was procedurally improper and violated his right to legitimate expectation. It was his submission that he expected the Minister to make her decision based on the recommendation of the Board for his reappointment.

Fairness is highly a variable concept. Therefore, courts will readily accept that fairness is not something that can be reduced to one-size-fits-all formula. This therefore means that the courts shall answer questions of fairness on a case by case basis, having regard to factors such as complexity and seriousness of the case.

The 2<sup>nd</sup> respondent was acting in accordance with the law-NSSF Act and the Act does not provide for a hearing before any decision is made for appointment or reappointment of the Managing Director of NSSF, affected persons must be accorded a hearing. Demanding a hearing before the Minister can exercise any discretion to appoint would be asking for so much and would be an absurdity. The decision-maker should not be unnecessarily burdened in taking a decision by demanding hearings at every stage. Such a hearing will only be required in exceptional circumstances if the person sets out strong and cogent grounds for it.

Essentially, procedural fairness involves elementary principles which ensure that, before a right or privilege is taken away from a person, or any sanction is otherwise applied to him or her, the process takes place in an open and transparent manner. It is also called 'fair play' in action and embraces the means by which a public authority, in dealing with members of the public, should ensure that procedural rules are put in place so that the persons affected will not be disadvantaged and are treated justly and fairly.

Article 42 of the Constitution provides;

*Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.*

The applicant seems to confuse the right to just and fair treatment in administrative decisions under Article 42 with the right to a fair hearing under Article 28 of the Constitution. The two rights are quite different and

distinct since the latter is only applicable before an independent and impartial court or tribunal established by law. Therefore, Minister's enquiries and concerns cannot be treated as court proceedings in order to require fair hearing as envisaged under Article 28 of the Constitution. The concerns were indeed investigated by the appropriate bodies which made reports and as such could not require according the applicant a hearing at this stage.

In working out what amounts to 'justly and fairly' treatment, the courts are wary of over-judicialising administrative process. They recognise that administrative decision-makers are not courts of law, and that they should not have to adopt the strict procedures of like a court or tribunal.

The applicant contends that the 2<sup>nd</sup> respondent's decision violated his legitimate expectations to be heard in respect of the recommended reappointment. The applicant premised his legitimate expectation on the guidance from all the relevant offices such as the 1<sup>st</sup> respondent, Solicitor General and the Prime Minister.

Matthew Purchase's (of the Matrix Chambers) Practice notes on legitimate expectations, **Legitimate expectations, Practical Law UK Practice Note 6-504-2351 (2017)**, legitimate expectation is a public law concept. It is an essential principle that can be summarised as follows: a public authority which has, by a promise or practice, conferred on a person a legitimate expectation of a procedural or substantive benefit may not frustrate that expectation if to do so would be so unfair as to amount to an abuse of power.

Whether or not a legitimate expectation exists is a factual question and must be answered and determined with reference to the circumstances and facts of each particular case. A legitimate expectation does not exist where the expectation relates to preventing the decision-maker from discharging a statutory duty. Neither can someone have a legitimate expectation of doing something contrary to the law.

The question of whether there is a legitimate expectation call for one to ask whether the duty to act fairly requires a hearing in a particular instance. Such a question is more than a mere factual one. In the case of *President of South Africa v South African Rugby Football Union (SARFA 3) 1999 (1) BCLR 1059; 2000 (1) SA 1 (CC)* the Constitutional Court said;

*“The question whether the expectation is legitimate and will give rise to a hearing in any particular case depends on whether, in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking a decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a ‘legitimate expectation of a hearing’ exists is therefore more than a factual question. It is not whether an expectation exists in the mind of the litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is whether the duty to act fairly would require a hearing in those circumstances.”*

Therefore, the expectation must be legitimate in the legal sense, whether the duty to act fairly requires a hearing in the circumstances. An expectation must be more than a mere ‘hope’ or unrealistic expectation. Legitimate expectations go beyond enforceable legal rights, provided they have a reasonable basis. Whether the expectation of the claimant is reasonable or legitimate is a question of fact in each case. Whenever the question arises it is to be determined not according to the claimant’s perception but in large public interest wherein other more important considerations may out-way what would otherwise have been the legitimate expectation of the claimant. *See R v Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115; Atwoyeire Robert v Board of Governors Kyambogo College School Miscellaneous Cause No.216 of 2016*

The applicant does not specifically show how his legitimate expectation was frustrated. It is true that there were letters written by the different offices like Attorney General’s opinion on his continued occupation of office as

Managing Director even after attaining the age of 60, Solicitor General's letter and the Prime Minister's guidance on the applicant's possible reappointment. These different communications should not be used to curtail the Minister's right to exercise discretion whether to reappoint the applicant or reject the recommendation to reappoint the applicant. What the applicant calls his legitimate expectation was merely a wish and could not constitute a basis of according him a hearing before the Minister could reject his reappointment.

The 2<sup>nd</sup> respondent did not breach any legitimate expectation of the applicant and the decision not to reappoint the applicant was an exercise of discretion vested in the Minister.

The applicant also challenged the decision of the Minister by contending that it was motivated by animosity and active bias and alleged that she assumed the role of the accuser, investigator, prosecutor and ultimately, Judge contrary to the rules of natural justice.

The court should look beyond the narrow question of whether the decision was taken in a procedurally improper manner, to a question of whether a decision properly taken would have been any different or would have benefited the applicant. The applicant thought that he should have been given a separate hearing after the protracted discussions about his possibility of reappointment and this was merely a question of perception but not standard procedure which has been applied to all other potential applicants for the position of Managing Director of NSSF. In the case of *R v Chelsea College of Art and Design, ex p Nash [2000] ELR 686*, the court held that " *would a reasonable person, viewing the matter objectively and knowing all the facts which are known to the court, consider that there was a risk that the procedure adopted by the tribunal in question resulted in an injustice or unfairness*"

In the case before this court, it has not been shown by the applicant that there was bias or breach of rules of natural justice. The applicant was investigated by separate organs including Parliament and IGG not at the instigation of the 2<sup>nd</sup> respondent but rather on the statutory and Constitutional mandate of different government agencies. I find this allegation devoid of any merit.

The applicant further challenged the appointment of the 3<sup>rd</sup> respondent contending that it was illegal since he was holding two positions of Acting Managing Director and Deputy Managing Director. The applicant is surprised how the board could have legitimately turned around, abandoned all their carefully considered decisions and recommended the appointment of the 3<sup>rd</sup> respondent.

The applicant seems to challenge the decision to appoint the 3<sup>rd</sup> respondent simply because he had run to court, then he expected the status quo to remain until the court matter was determined. The Board of NSSF was never restrained and was not part of the court matters and there is no way they should have sat back or refrained from executing their duties in relation to the appointment of a substantive Managing Director of National Social Security Fund.

The applicant has attempted to challenge the appointment by inferring that the 3<sup>rd</sup> respondent was holding 2 positions at the same time. With the greatest respect this is erroneous and devoid of merit. The 3<sup>rd</sup> respondent has clearly deposed that when he was appointed to the position of Managing Director, the Board appointed a one Kasaato to the position of Acting Deputy Managing Director.

The decision to challenge the appointment of the 3<sup>rd</sup> respondent by the Minister for Gender, Labour and Social Development based on the new recommendation of the Board cannot successfully be challenged without the

Board being a party to these proceedings. This court cannot quash the appointment of the 3<sup>rd</sup> respondent which resulted from a recommendation of the Board. Such a decision would violate the principle of fairness and would amount to condemning the Board unheard in respect of their decision to appoint the 3<sup>rd</sup> respondent.

The courts need to recognize that there is always need to justify their intervention or non-intervention in administrative matters. The courts constitutional role in judicial review is sometimes limited in their capacity to decide matters which admit of no generalized or objective determination. The judicial willingness to appreciate the constitutionally ordained province of administrative agencies and this is their preserve and act with restraint in assessing their decisions taken in exercise of their discretionary powers. In the case of *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs 2004 (4) SA 490(CC)* O'Regan J emphasized that in treating administrative decisions in a court is not expressing servility but simply recognising the proper role of the executive within the Constitution:

*“a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to the other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field....A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.....”*

*“respect for the decision does not mean simply rubber-stamping an unreasonable decision in recognition of the complexity of the decision or the identity.”*

The appointment of the 3<sup>rd</sup> respondent was an act involving the Minister of Labour, and Social Development as the Minister responsible for the affairs of NSSF through reporting and exercising supervisory function after applying her mind to the exercise of power and followed the law as prescribed and should not be interfered with in absence of any justification or any breaches of the law. The court will not lightly presume abuse or misuse of power and will make allowance for the fact that the decision-making authority is the best judge of the situation. See *Rameshwar Prasad (IV) v Union of India [2006] 2 SCC 1 168-169*

This application fails and is dismissed with no order as to costs.

It is so ordered.

**SSEKAANA MUSA**

**JUDGE**

**19<sup>th</sup> April 2024**