

Correction of Appointment made under Regulatory Statutory Authorities (Appointment to Certain Offices) Act 2004

Watson Simiong*

Introduction

Section 208B of the *Constitution* is the basis for the appointment and re-appointment of all Regulatory Statutory Authorities ('RSA') Chief Executive Officers ('CEOs'). This constitutional provision states that the appointment process of the RSA CEOs shall be prescribed by an Act of Parliament. The prescribed legislation is the *Regulatory Statutory Authorities (Appointment to Certain Offices) Act 2004* (RSAA). Since the appointment of a RSA CEO is subject to the RSAA, it must be made in accordance with the RSAA to be valid. Failure to comply with the procedure under the RSAA may amount to an error and render a ground for judicial review by the National Court. While appointment of the RSA CEOs is subject to the RSA Act, certain requirements for the appointments are provided in the respective agency's enabling legislation complementing the appointment process.

This paper addresses the issue of whether an error in the appointment process of a RSA CEO can be corrected after the appointment is made?

Appointment of a RSA CEO under the RSAA

If there is an error in the appointment of a RSA CEO, it can be corrected. The RSAA governs the appointment process of the RSA CEOs while other requirements such as age limit is covered in respective enabling legislation. Where the enabling legislation is silent on age limit, then the *Public Services (Management) Act 1995* (PSMA) applies since the RSA CEOs are part of the Public Service.

For the RSAA to apply in the appointment of the CEO, the enabling legislation of the subject authority must expressly adopt its application. In the event that it is silent, a declaration must be made by the relevant Minister and published in the National Gazette¹ to subject the appointment process to the RSAA.

This is the case with the appointment of the Immigration and Citizenship Services Authority (ICSA) CEO or the Chief Migration Officer (CMO), an authority established by the *Immigration and Citizenship Services Act 2010* (ICS Act). The administration, the appointment of the Board Members and the staff of ICSA are all governed by ICS Act while the appointment, suspension and dismissal the CMO is governed by the RSAA. This is provided in Section 22(1) of the ICS Act as follows:

..there shall be a Chief Migration Officer whose manner of appointment, suspension and dismissal is as specified in the *Regulatory Statutory Authorities (Appointment to Certain Offices) Act 2004*.

* Legal Officer, Office of the State Solicitor, Department of Justice and Attorney General.

¹ Section 3(1) and (2) of the RSA Act.

A similar set up can also be seen with the Papua New Guinea Sports Foundation (PNGFA). Section 27(1) of the *Papua New Guinea Sports Foundation Act 2006* (PNGSF Act) subjects the appointment of the Executive Director to the RSAA while the CEO's age limit is set in Section 27(3) of the PNGSF Act. These provisions provide that:

- (1) The Executive Director shall be appointed, suspended or dismissed in a manner as specified in the Regulatory Statutory Authorities (Appointment to Certain Offices) Act 2004.
...
- (3) A person who has attained the age of 60 years shall not be appointed or re-appointed as Executive Director and a person shall not be appointed or re-appointed as Executive Director for a period that extends beyond the date on which the person will attain the age of 60 years.

Similar arrangements apply to other RSA.

The appointment process

The process of appointment and re-appointment of RSA CEOs begins with recommendations from its Board and concludes with the Head of State making the appointment, of course, on the advice of the National Executive Council (NEC). This process is captured under Part 2 of the RSAA: The following is a summary of this process:

1. A vacancy is declared and advertised in the National Gazette and in at least one daily newspaper inviting applicants;²
2. The Board, complies with merit-based appointment and recommends to the Public Service Commission (PSC) its five preferred candidates in order of preference;³
3. The PSC conducts its own merit-based assessment on the five candidates and submits its list of three candidates in order of preference to the NEC;⁴
4. The NEC considers the list from the PSC and appoints a person from the list and advises the Head of State to execute a contract of employment with the successful candidate;⁵
5. This appointment is published in the National Gazette; and
6. The Head of State executes the contract of employment with the appointee.⁶

Vacancy in the position of RSA CEO and the Appointment process

A vacancy may occur in the position of a CEO in four circumstances. These are:

- (1) when his or her term lapses;
- (2) the incumbent is medically unfit to perform his or her duty;
- (3) CEO is suspended and removed from office for misconduct⁷;
- (4) or dies.

When a vacancy occurs, it sets in motion the appointment process under the RSAA. As alluded to above, the appointment must be made in accordance with the RSAA and where there is a breach in the appointment process, the appointment can be challenged in court through a judicial review.

² Section 4(1) of the RSA Act.

³ Section 4(2) of the RSA Act.

⁴ Section 6(1) of the RSA Act.

⁵ Section 6(3) of the RSA Act.

⁶ The NEC decision making the appointment will also direct the First Legislative Counsel to prepare the instrument of appointment for execution by the Head of State.

⁷ Section 8 of the RSA Act.

There are three main grounds for challenging the appointment of a CEO. These are: (1) breach of the appointment process; (2) the failure by the PSC to conduct a merit-based appointment; and (3) where the NEC appoints a person not on the list from the PSC. Each scenario is discussed below.

In the first instance, the Board is required to comply with the merit-based appointment process set out in Section 5 of the RSA Act. This provision provides that:

Regulations may prescribe a merit-based appointment process which shall involve the following:–

- (a) the advertisement of a vacancy in an office in the prescribed format together with minimum person specification for applicants to the position;
- (b) the assessment of each applicant's curriculum vitae, submitted in a prescribed format, and their competency to perform the prescribed duties as measured against the minimum person specification for the position;
- (c) a ranked ordered assessment of all applicants for the advertised position in terms of their relative competency to perform the prescribed duties;
- (d) the merit-based assessment described in this section shall be the primary consideration of the Public Services Commission in making a recommendation to the Board; and
- (e) all other considerations not related to the processes described in this section shall have no bearing in the recommendation of the Public Services Commission and of the Board.

This provision requires that the Board must:

1. Advertise the position of the RSA CEO in at least one of the daily newspapers when the vacancy is about to occur or occurs at the end of the term of the incumbent;
2. Considers a shortlist of five candidates in order of preference from the Pre-Selection Committee of the RSA. This Committee would have reviewed all the applications (received by the Human Resources Division of the RSA) based on the selection criteria set by the DPM; and
3. Must submit a list of its preference (from the shortlist of five candidates) to the PSC for its review.

It is incumbent on the Board to ensure that it complies with this provision of the RSA Act. In the case of *Mitio v Gardner*⁸, the court found that the appointment process under the RSAA was not followed. The Board relied on the Coffee Industry Corporation (CIC) constitution to recommend its most preferred candidate to the NEC for appointment. In quashing the CIC Board's decision, the court said:

The Regulatory Statutory Authorities (Appointment to Certain Offices) Act and the CIC Limited Constitution, which is the 'other instrument of incorporation' referred to in s. 3(2)(b) of the Regulatory Statutory Authorities (Appointment to Certain Offices) Act must be read subject to Part VIIA (Regulatory Statutory Authorities) of the Constitution. Any appointments, suspensions and dismissal of Chief Executive Officers or a non ex officio member of the Board, must be done in accordance with Section 3(2)(c) of the Regulatory Statutory Authorities (Appointment to Certain Offices) Act and Part VIIA (Regulatory Statutory Authorities) of the Constitution... I find that the defendants did not follow the procedure set out in ss. 4, 5, 6, 7, 8, 9, 10 of the Regulatory Statutory Authorities (Appointment to Certain Offices) Act.

Sections 4, 5 and 6 of the RSAA outlines the merit-based process which the Board follows in making its recommendation to the NEC for the appointment of a CEO. Where the Board fails to comply with these provisions, its decision can be challenged in court.

⁸ (2005) N2792.

The second scenario is where the PSC fails to conduct a merit-based assessment on the list submitted to it by a RSA Board. The PSC's involvement in the appointment process is provided in Section 6(1) and (2) of the RSA Act. The states that:

- (1) On the receipt of a list under Section 4(2), the Public Services Commission shall prepare a list, using the merit-based process, of not less than three suitable candidates in the order of preference, either from the list submitted by the Board or from the original applicants to the position, and shall submit its recommendations to the Board.
- (2) On the receipt of the recommendations under Subsection (1), the Board shall either—
 - (a) forward the list to the relevant Minister who shall submit his recommendation to the National Executive Council for its consideration within one month of the receipt of the list from the Board; or
 - (b) determine that the position be re-advertised and shall advise the Public Service Commission accordingly.

The PSC's involvement in the appointment process can be summarised as follows:

1. The PSC conducts its own merit-based assessment of the five candidates submitted by the RSA Board;
2. Where the PSC disagrees with the list, it may select a candidate from the original list of applicants; and
3. When making its recommendations to the Minister through the Board, the PSC may:
 - (a) list in the order of preference, three candidates for NEC's consideration; or
 - (b) advise the Board to re-start the appointment process if none of the candidates meet the requirement or the list has been submitted in breach of the process.

In *Luma v Tetaga*,⁹ the court quashed the appointment of a Departmental Head and ordered the re-commencement of the process because the PSC's list contained a candidate whose name was not in the initial list submitted by the DPM and the Central Agency Coordinating Committee (CACC). Based on the PSC recommendation, he was recommended by the NEC for appointment as the Departmental Head. The court said:

The Public Service Commission must not come up with a list out of the blue. It must have regard to the requirements stated by law and in this case all the relevant laws mentioned earlier together with the Regulations.

Although the case deals with the appointment of a Departmental Head whose appointment process is subject to the PSMA, the principle of following requirements set out in the law applies in the appointment of RSA CEOs appointed under the RSA Act.

Finally, where the NEC recommends to the Head of State a person whose name is not on the list provided by the PSC, the appointment process will be deemed as unlawful. The NEC's involvement in the appointment process is provided for in Section 6(3) of the RSA Act. This subsection reads:

- The National Executive Council may, in considering the submission from the Minister under Subsection (2)(a)–
- (a) select one of the candidates recommended by the Minister and shall advise the Head of State to make the appointment of the selected candidate to the position; or
 - (b) reject any recommendation for appointment in which case, the Board shall re-advertise the position.

In summary:

⁹ (2007) N3275.

1. The NEC considers the list submitted by PSC through the Minister and recommends one of the candidates for appointment and advises the Head of State accordingly; and
2. The same NEC decision recommending to the Head of State for the appointment will also direct the First Legislative Council to prepare the instrument of appointment to be published in the National Gazette and direct DPM to prepare the contract of employment for execution.

Who can correct the error in the appointment of a RSA CEO?

As already stated, the process under the RSA Act is completed when the Head of State on the advice of the NEC makes the appointment and it is published in the National Gazette. However, if the appointment was made in breach of the processes under the RSA Act, it cannot be corrected by any party in the appointment process except the same appointing authority making the appointment. In this case, the Head of State, acting on the advice of the NEC made the appointment. The question then arises, can the NEC through the Head of State change its decision when an error has been identified? The answer is yes, because it is empowered to do so under the *Interpretation Act 1975* (Interpretation Act). Under section 35 of the *Interpretation Act*, the power to make a decision includes the power to alter that decision. Section 35 of the *Interpretation Act* provides:

Where a statutory provision confers a power to make an instrument or decision (other than a decision of a court), the power includes power exercisable in the same manner and subject to the same conditions (if any) to alter the instrument or decision.

The Head of State, as the appointing authority, can alter his decision using the same process that was followed when he made his earlier decision. However, before the decision to appoint is altered, the portfolio Minister, facilitates the revocation of the appointment as stated in section 7 of the RSA Act. The process can be outlined as:

- (1) Where, in relation to a Regulatory Statutory Authority, the Board believes that grounds exist for the dismissal of the chief executive officer, it shall cause an investigation into the conduct, activities or performance of the chief executive officer.
- (2) The grounds for dismissal referred to in Subsection (1) shall be consistent with the grounds for dismissal as specified in the chief executive officer's contract of employment which include breach of contract, misconduct, poor performance, incompetence and ill health, as prescribed in the Regulations.
- (3) Where the Board has made an investigation under Subsection (1), it shall submit a report on its investigation together with its recommendations to the Public Services Commission.
- (4) On the receipt of a report under Subsection (3), the Public Services Commission –
 - (a) shall consider the evidence provided and the recommendations of the Board; and
 - (b) may make, or cause to be made, and consider such further investigations (if any) as it considers necessary; and
 - (c) shall, on the basis of the report and the results of further investigations (if any), inform the Board by way of a recommendation whether or not the appointment of the chief executive officer should be revoked.
- (5) The Board shall convey its recommendation to the Minister and, in the event that the National Executive Council approves the recommendation of the Minister to revoke the appointment of the chief executive officer, the National Executive Council shall advise the Head of State to revoke the appointment of the chief executive officer.

Although this provision in strict sense applies to the revocation of appointment by reason of misconduct in office, it also applies to the revocation of appointment to correct an error in the

appointment process. This means the Minister through the NEC will recommend to the Head of State to revoke the appointment. In revoking the appointment, the NEC will also direct the Board to re-commence the appointment process.

In the absence of a RSA Board or where the Board is unable to perform its function, the DPM facilitates the appointment process as provided in Section 13 of the RSA Act. Moreover, during the re-commencement of the appointment process, DPM facilitates an acting appointment pursuant to the RSA Act to ensure continuity in the administration of the subject authority.