IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

CIVIL JURISDICTION

2022-HC-DEM-CIV-FDA-705

BETWEEN:

CHRISTOPHER JONES

Applicant

v

1. **THE ATTORNEY-GENERAL OF GUYANA**
2. **CLIFTON HICKEN, ACTING COMMISSIONER OF POLICE**

Respondents

July 8, 20; August 11, 2022

Mr. Roysdale Forde SC and Mr. Selwyn Pieters for the applicant.

Mr. Mohabir Anil Nandlall, SC, Mr. Nigel Hawke, Ms. Deborah Kumar, Ms. Asasha Ramzan and Ms. Saabira Ali Hyderali for the respondents.

CORAM: ROXANE GEORGE, CHIEF JUSTICE (ag)

JUDGMENT OF THE COURT

INTRODUCTION and FACTUAL BACKGROUND

[1] This application seeks orders nullifying the appointment of the second respondent, Clifton Hicken, (the second respondent) to act in the post of Commissioner of Police, and all actions taken by him in the performance of this office.

[2] The following reliefs are sought:

a. A declaration that the invocation of the doctrine of necessity to appoint Clifton Hicken as acting Commissioner of Police is unreasonable, ultra vires the Constitution, common law and is illegal, null, void and of no legal effect;
b. A declaration that the decision to appoint Clifton Hicken as acting Commissioner of Police violates article 211 (1) and 211 (2) of the Constitution;
c. A Declaration that there was no consultation between the President and the Leader of the Opposition as required and contemplated by the Constitution prior to the appointment of Clifton Hicken as acting Commissioner of Police;
d. A declaration that there was no consultation between the President and the Leader of the Opposition as required and contemplated by the Constitution which was initiated by the President and the Leader of the Opposition between the 2nd day of August, 2020 and the 26th day of January, 2022;
e. An order quashing the appointment of Clifton Hicken as acting Commissioner of Police;
f. An order declaring that the actions taken by Clifton Hicken acting as Commissioner of Police is null and void and to be of no force and effect;
g. An order or writ quo warranto directed to Clifton Hicken to produce his authority to exercise and or discharge the functions of the office of Commissioner of Police in an acting capacity or any capacity whatsoever.

[3] The Guyana Police Force was headed by Mr. Nigel Hoppie who was performing the functions of Commissioner of Police from the time Mr. Leslie James, the substantive appointee, proceeded on pre-retirement leave on July 31, 2020. A letter signed by the Permanent Secretary, Ministry of Public Security, (now Ministry of Home Affairs) which was tendered in evidence, disclosed that Mr. James was advised that he was required to proceed on his pre-retirement leave. The letter also informed Mr. James that Mr. Hoppie would perform the functions of Commissioner of Police. Mr. James demitted office on May 1, 2021 at the end of his leave. Mr. Hoppie himself proceeded on pre-retirement leave with effect from March 27, 2022.

[4] With Mr. Hoppie proceeding on pre-retirement leave, the President then appointed the second respondent to act as Commissioner of Police with effect from March 30, 2022.

[5] Article 211 of the Constitution requires that the President meaningfully consult with the Leader of the Opposition and the Chairman of the Police Service Commission in relation to the substantive or acting appointment of a Commissioner of Police.

[6] Of additional importance to this factual matrix is that the term of the Police Service Commission had expired since August 8, 2021. Further, as at March 30, 2022, there was no one occupying the position of Leader of the Opposition since the former Leader of the Opposition demitted office on January 26, 2022.

SUBMISSIONS ON BEHALF OF THE APPLICANT

[7] It is the contention of the applicant that the second respondent was unlawfully appointed in violation of art 211 of the Constitution of Guyana. The applicant deposed at para 30 of his affidavit that:

> "His Excellency Mohamed Irfaan Ali, President of Guyana appointed Mr. Hicken as acting Commissioner of Police without any requisite consultation."

[8] The applicant quoted the following statement attributed to President Ali regarding the appointment of the second respondent:

> "*There is something called the doctrine of necessity, should I allow the country to function without an acting Commissioner? There is a doctrine of necessity and in the doctrine of necessity, I appointed an acting Commissioner.*"

[9] It is contended that the application of the doctrine of necessity given by the President as the reason for appointing the second respondent to so act cannot be relied on in the circumstances of this case since the Constitution provides for the appointment of the Commissioner. It was also submitted that by relying on the doctrine of necessity, the President and the respondents acknowledge that the second respondent's appointment was unconstitutional and that necessity is being advanced to clothe it with legality. In this regard, it was submitted that the doctrine of necessity cannot apply since this principle can only be applied in narrow or exceptional circumstances such as a national emergency

or where the functioning of the State was totally compromised, for example, where there has been a coup d'etat. The facts of this case therefore do not allow for its application since there were no such extreme circumstances. Thus, in the absence of an emergency, the second respondent could not be appointed to act as Commissioner of Police pursuant to the doctrine of necessity.

[10] It was also canvassed and submitted that since Mr. Harmon was Leader of the Opposition from August 3, 2020 (the President having been sworn in on August 2, 2020) to January 26, 2022, that during this period the President could have sought to appoint a Commissioner of Police after engaging in the required meaningful consultation. However, it must be recalled that the Police Service Commission ceased to function since August 8, 2021 so there could not have been the required consultation for the entire period suggested.

[11] It is also the contention of the applicant that in the absence of the Leader of the Opposition and a Police Service Commission, that the President could have extended the term of service of Mr. Hoppie by having him defer his pre-retirement leave. Alternatively, the President could have appointed Mr. Paul Williams, Deputy Commissioner of Police, who the applicant contended was next in line terms of seniority after Mr. Hoppie.

[12] In this regard, it was urged that the doctrine of necessity can only apply where there are no other options that could be pursued to satisfy the constitutional requirements. It was advanced that these other options were available to the President though in the oral submissions Mr. Forde did not rely on the averment in the applicant's affidavit that Mr. Williams should have been appointed, stating that any other person could have been appointed to perform the duties of Commissioner of Police.

[13] Mr. Forde argued that an appointment to act can only occur after meaningful consultation pursuant to art 211 and since this was not possible due to the absence of the Leader of the Opposition and the Police Service Commission, then the appointment could only have been to perform the functions of the office of Commissioner of Police.

[14] It was further submitted that the President could not have utilized prerogative powers to appoint the second respondent.

[15] As a consequence of the submission that the second respondent's appointment is unconstitutional and therefore unlawful, it was submitted that all his actions, and more particularly his action in promoting a number of ranks, were unlawful and could not be saved by an application of the de facto doctrine.

[16] It was urged that given the circumstances of the appointment whereby it was well known that there was no Leader of the Opposition and Police Service Commission with which the President could have meaningfully consulted, that it must have been appreciated that the President was acting outside the parameters and requirements of art 211 of the Constitution. In these circumstances, the second respondent's actions could not be saved by the de facto doctrine.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

[17] It was submitted on behalf of the respondents that the appointment of the second respondent to act as Commissioner of Police was within the bounds of the Constitution and therefore lawful. It was stated that the President's statement about the doctrine of necessity could not be relied on as a statement of law. In this regard it was unnecessary to resort to the doctrine of necessity.

[18] Further, if the appointment was unconstitutional, then the doctrine of necessity would be relied on and the de facto doctrine applied to save all the actions of the second respondent, including the promotions he authorized.

[19] It was submitted that a void could not be left in the command of the Guyana Police Force when Mr. Hoppie proceeded on leave. It was contended that to leave the Force without a Commissioner would have been inimical to the preservation of security and good order in the country, moreso given the statutory responsibilities of the Commissioner under the Police Act, Chapter 16:01, and other diverse pieces of legislation which were listed in the affidavit in defence. Therefore, it became a necessity for the President to act to fill the vacancy created by Mr. Hoppie proceeding on pre-retirement leave.

[20] It was also advanced that since the appointment of the Commissioner of Police was a national security issue, that the court should defer to the executive in this regard bearing in mind the separation of powers.

ANALYSIS

COMPLIANCE WITH ARTICLE 211

[21] Article 211 of the Constitution of Guyana provides for the substantive and acting appointments of the Commissioner of Police. It states:

> "211 (1) *The Commissioner of Police...shall be appointed by the President* ***acting after meaningful consultation with the Leader of the Opposition*** *and Chairperson of the Police Service Commission after the Chairperson has consulted with the other members of the Commission."*
>
> *(2) If the office of the Commissioner of Police is vacant or if the holder thereof is for any reason unable to perform the functions of his office,* ***a person may be appointed to act in that office and the provisions of the preceding paragraph shall apply to such an appointment as they apply to the appointment of a person to hold that office****; and any person appointed to act in the office of Commissioner of Police shall, subject to the provisions of paragraphs (3) and (4), continue to act until a person has been appointed to that office and has assumed the functions thereof or, as the case may be, until the holder thereof resumes those functions."*[Emphasis added]

[22] Thus, the Leader of the Opposition and the Police Service Commission, through the Chair of the Commission, play an integral role in the appointment to the position of Commissioner of Police, whether in a substantive or acting capacity.

[23] While some of the procedural points as regards the pleadings by the applicant have some merit, I prefer not to treat with them. It is a more beneficial use of judicial time to focus on the substantive issues to be determined.

[24] There was much by way of authorities cited on both sides in support of their lengthy submissions on what is a narrow point: **in the peculiar factual circumstances of this case, was it lawful for the President to appoint someone to act as Commissioner of Police?** This is to say, as submitted on behalf of the applicant (para 11) in the absence of a Leader of the Opposition and the Police Service Commission was there **"a power in the President by virtue of the Constitution to appoint the second named respondent otherwise than in accordance with articles 211 (1) and (2) of the Constitution of Guyana."** (Emphasis added.)

[25] The Attorney-General urged the application of the doctrine of separation of powers by which the judiciary should defer to the executive in a case such as this as regards the appointment of the Commissioner of Police since this is a national security issue. While I do appreciate the authorities cited including **Ram v AG & Others [2019] CCJ 14 AJ**, and the views expressed that each arm of the State must be mindful of and operate within the parameters set by the Constitution, I do not agree with this submission. The executive is not permitted to shelter behind these principles to circumvent judicial scrutiny to determine whether the Constitution was adhered to or not. If the appointment process pursuant to the Constitution was not followed, then the Court would be duty bound to so rule and declare the appointment void. In this regard I cite **Ravi Balgobin Maharaj v Attorney-General of Trinidad and Tobago & The Police Service Commission (First Interested Party) and Gary Griffith (Second Interested Party) Claim No. CV2021-031106** wherein N. Kangaloo J inter alia declared "that the appointment of Mr. Gary Griffith to act as Commissioner of Police from 18th August, 2021 is void and unconstitutional as being contrary to section 123 of the Constitution [of Trinidad and Tobago]."

[26] The overarching mandate of the Guyana Police Force is captured in art 197A (4) of the Constitution which provides as follows:

> "(4) *The Police Force established under the Police Act shall function in accordance with the law as the law enforcement agency of the State responding to the daily need to maintain law and order by suppressing crime to ensure that citizens are safe in their homes, the streets and other places."*

[27] Section 3 (2) of the Police Act, Chapter 16:01 speaks to the role of the Force:

> "(2) *The Force shall be employed for the prevention and detection of crime, the preservation of law and order, the preservation of peace, the repression of internal disturbances, the protection of property, the apprehension of offenders and the due enforcement of all laws and regulations with which it is directly charged and shall perform such military duties within Guyana as may be required of it by or under the authority of the Minister.*"

[28] **Section 7 (1) of the Police Act** details the duties of the Commissioner. It states:

> *"7. (1)* ***The Commissioner shall****, subject to the general orders and directions of the Minister,* ***have the command and superintendence of the Force, and he shall be responsible to the Minister for peace and good order throughout Guyana, for the efficient administration and government of the Force,*** *and for the proper expenditure of all public moneys appropriated for the service thereof."*[Emphasis added]

[29] These provisions highlight the importance of the Guyana Police Force, and that of the Commissioner of Police in the overall leadership and management of the Force in order for it to properly carry out its constitutional and statutory mandates. The statutory mandate as mentioned earlier is also captured in a large number of pieces of legislation which empower the police to investigate and lay charges in relation to allegations of criminal conduct.

[30] The fact that the applicant supported the deferment of Mr. Hoppie's leave or the appointment of Mr. Williams, and latterly in the oral submissions, the appointment of any other person to perform the functions of this office, is in my view a recognition of the importance of the post of Commissioner of Police and that it could not be left vacant.

[31] I note here that Mr. Forde did not press the contention in the applicant's affidavit that Mr. Williams was entitled to be appointed given the provisions of Rule 35 of the Public Service Rules as set out as Subsidiary Legislation to the Constitution. Rule 35 does not provide in absolute terms that the most senior person shall be appointed. It states that "where an acting appointment falls to be made otherwise than as a prelude to substantive appointment, the officer appointed – (a) shall **as a general rule** be the senior officer in the Ministry or Department eligible for such acting appointment." (Emphasis mine.) But no more need be said on this issue given the acknowledgment that the President could appoint anyone once the procedural provisions are complied with.

[32] Given Mr. Forde's oral submissions, it appears that the source of contention is the use of the word 'act'. He submitted that an appointment to perform the functions of the office is permissible, as was done in the case of Mr. Hoppie, but not an appointment to act which requires adherence to the requirements of art 211.

[33] The applicant relied on and exhibited the letter referred to earlier, dated July 30, 2020 from the Permanent Secretary, Ministry of Public Security (PS) which not only informed the substantive Commissioner of Police, Mr. James, that he was to proceed on

pre-retirement leave, but also purported to appoint Mr. Hoppie to perform the functions of Commissioner. The letter reads:

> " Ministry of Public Security
>
> ...
>
> July 30, 2020
>
> Mr. Leslie James, DSS, DSM
> Commissioner of Police
> Office of the Commissioner
> Guyana Police Force
> Force Headquarters
> Eve Leary
>
> Dear Mr. James
>
> **Re: Pre-Retirement Leave – Commissioner of Police Leslie James, DSS, DSM**
>
> Please be informed that approval has been granted for you to proceed on two hundred and seventy-four (274) days pre-retirement leave with effect from July 31, 2020.
>
> Approval has also been granted for Deputy Commissioner of Police Nigel Hoppie to perform the functions of Commissioner of Police.
>
> Yours sincerely
>
> Ms. Daneilla McCalmon
> Permanent Secretary
> Ministry of Public Security
>
> Copy: Secretary, Police Service Commission
> Auditor General
> Accountant General"

[34] While advancing adherence to the Constitution, the applicant's affidavit reveals seemingly similar non-compliance in the appointment of Mr. Hoppie. It is a notorious

fact that at July 30, 2020 there was a Leader of the Opposition and a Police Service Commission in place, albeit it is also a notorious fact that the nation was still in the throws of settling the results of the March 2, 2020 national and regional elections. Thus, it appears that art 211 was not adhered to, at least on the face of the correspondence tendered.

[35] The applicant highlighted at para 31 "that to the best of my knowledge, information and belief there has been no publication in the Official Gazette or any other published legal document which attests to or substantively proves that Mr. Hicken the 'appointed' acting Commissioner of Police is in fact legally in office." But he also swore at para 21 of his affidavit that Mr. Hoppie "performed the duties of Commissioner of Police in the absence of an Instrument of Office."

[36] While two wrongs do not make a right, it does seem disingenuous to advance a strict application of the constitutional provisions on the appointment of the Commissioner of Police, when the letter from the PS suggests that there may have been a breach of the Constitution as no reference was made to the art 211 process.

[37] As noted before, by art 211 the President can appoint the Commissioner of Police, substantively or to act, but only after meaningful consultation with the Leader of the Opposition and the Chairman of the Police Service Commission.

[38] The decision of Chang CJ (ag) in **In the matter of an Application by the Essequibo Cricket Board for Writs of Certiorari and Prohibition 2015-HC-CIV-DEM-CM-2 (H Ct)** provides a practical approach to treating with the situation where the law provides for consultation but due to no fault of the person mandated to consult, the consultation did not or could not materialise.

[39] In this case, the Guyana Cricket Administration Act, No. 14 of 2014 provided that after meaningful consultation with the West Indies Cricket Board, the Minister of Culture, Youth and Sport was empowered to appoint a Cricket Ombudsman. Before any candidate was identified, the Minister sent a letter to the President of the Board requesting proposals from the Board of the names and contact details of five persons who could be appointed as the Cricket Ombudsman. The letter also indicated a willingness to meet for discussion at a mutually convenient time. The Board did not respond and after three months the Minister proceeded to make an appointment without submitting the

name of the appointee to the Board as required by the Act. In these circumstances, the applicant sought orders quashing the appointment on the ground that the Minister had failed to engage in meaningful consultation with the Board in the appointment of the Cricket Ombudsman.

[40] In refusing the orders sought, it was held that while the Minister was duty bound to engage in meaningful consultation, where the person to be consulted refused to engage in the statutorily required consultation, then the purposes of the Act could not be stymied. As such, the Minister could not be faulted for concluding that the Board was not interested in being consulted. Chief Justice Chang reasoned thus:

> "Even though section 17 of the Cricket Administration Act prescribes the holding of meaningful discussion with the West Indies Cricket Board as a procedural condition precedent to the exercise of the Minister's power to appoint, that section did not confer upon the West Indies Cricket Board the power to prevent the exercise of the Minister's power of appointment by the device of refusing to engage in consultation. In other words, the holding of 'meaningful consultation' with the West Indies Cricket Board was not an **absolute** procedural requirement for the exercise of the Minister's power of appointment. 'Meaningful consultation' was a procedural requirement conditional upon the willingness of the West Indies Cricket Board to engage in meaningful consultation. Simply put, 'meaningful consultation' was not an absolute procedural requirement. It was a provisional or conditional procedural requirement. Breach of that procedural requirement could not and did not render the act of appointment invalid when the attitude of the West Indies Cricket Board was not to engage in any consultation with the Minister on the issue of the appointment of the Cricket Ombudsman. Otherwise, the West Indies Cricket Board would have been conferred with a power to stultify the power of appointment conferred by Parliament on the Minister by the adoption of a negative attitude of non-cooperation. The procedural requirement of meaningful co-operation in section 17 of the Cricket Administration Act was not at all absolutely mandatory but was only provisionally mandatory. In the circumstances in which meaningful consultation could not be had due to the negative attitude of non-co-operation adopted by the West Indian Cricket Board, the appointment made by the Minister was not unlawful or a nullity."

[41] Similarly in **Mayor and Corporation of Port Louis v The Attorney-General of Mauritius [1965] UKPC 17**, the Governor in Council was mandated, pursuant to the relevant legislation, to consult with the local authority regarding the alteration of the boundaries of the town of Port Louis. It was held that "the local authority cannot be

forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because a local authority had no views or did not wish to express or declined to express any views."

[42] These cases illustrate that while the provisions make it mandatory to engage in consultation, and in the case of art 211, meaningful consultation, where such consultation has not materialized due to no fault of the decision-maker, it does not mean that the decision-maker is precluded from acting.

[43] The appointment of the Leader of the Opposition was not within the mandate of the President. The Leader of the Opposition is elected by the non-governmental Members of the National Assembly pursuant to art 184 of the Constitution. The Constitution provides for the input of the Leader of the Opposition in a number of appointments to posts and commissions, including the appointment of the Police Service Commission (see art 210 of the Constitution) and in relation to this case, the Commissioner of Police.

[44] As noted above, as at March 30, 2022, the position of Leader of the Opposition was vacant and the Police Service Commission had not been reconstituted. It therefore meant, that at that date, compliance with art 211 as regards the appointment of a Commissioner of Police was impossible because of circumstances beyond the control of the President.

[45] It is hardly likely that the framers of Constitution would have contemplated a situation where an important constitutional office such as the Leader of the Opposition, who plays an integral role in appointments to other constitutional offices, would be vacant for such an extended period. As stated, as at March 30, 2022, this post had been vacant for three months since the previous incumbent had resigned with effect from January 26, 2022.

DOCTRINE OF NECESSITY

[46] I agree with the submission on behalf of the respondents that there is no need to rely on the doctrine of necessity. While the President may have made a statement to this effect, it is for the court to determine whether indeed in the circumstances of the case, this doctrine is relevant. It is not for the court to endorse what may have been a mistaken

interpretation or statement of law by the President. Nor is such a statement binding on a court.

[47] Indeed, the doctrine appears to be applicable to exceptional circumstances, for example, where there is such political upheaval in a country which does not permit adherence to the Constitution (See **Mitchell v DPP [1986] LRC Const 35 (CA)**). The doctrine applies to save actions that have been carried out in contravention of the constitutional provisions or other legal requirements (See **Mitchell**, **Attorney-General of the Republic of Cyprus v Mustafa Ibrahim [1964] CLR 195** and **Republic of Fiji v Prashad No. 2 [2001] 2 FLR 59**).

[48] While I agree that there was no extreme situation of emergency that led to a suspension of the Constitution or any of its provisions on the facts of the case at Bar, in the absence of a Leader of the Opposition to meaningfully consult with, I am of the view that, out of necessity, the President could have acted and it was reasonable for him to take action, in his own deliberate judgment pursuant to art 111, to address the unexpected circumstances of this case. There could have been a negative impact on national security if the highest office of such an important law enforcement agency was left vacant for what, on the situation as it stood at March 30, 2022, were circumstances of uncertainty. There was uncertainty not only because the Police Service Commission was not in being since August 8, 2021, but because for some three months, since January 26, 2022, a Leader of the Opposition had not been elected, and it was unclear when such an election would have occurred.

[49] Article 111 permits the President to act in his own deliberate judgment. It states:

> "111. (1) In the exercise of his or her functions under this Constitution or any other law, the President shall act in accordance with his or her deliberate judgment except in cases where, by this Constitution or by any other law, he or she is required to act in accordance with the advice or on the recommendation of any person or authority."

[50] This is not a case where the President had to act on the advice or on the recommendation of anyone or any entity. This is a case where the President is authorized to make an appointment, albeit under certain circumstances pursuant to art 211. Those art

211 circumstances could not be met as outlined. The fact that they could not be met does not mean that the President could not act to address this situation.

[51] I consider that art 232 (2), which was referred to during the oral submissions, provides some assistance in determining this case. Having read art 232 (2), I have also concluded that sub-article 232 (3) also assists. They provide:

> "(2) In this Constitution unless it is otherwise provided or required by the context –
>
> (a) A reference to power to make appointments to any office shall be construed as including a reference to a power to make appointments on promotion and transfer and to confirm appointments and the power to appoint a person to act in or perform the functions of that office at any time when the office is vacant or the holder thereof is unable (whether by reason of absence or infirmity of mind or body or any other cause) to perform the functions of that office;
>
> (b) A reference to the holder of the office by the term designating his or her office shall be construed as including a reference to any person for the time being lawfully acting in or performing the functions of that office."
>
> (3) Where by this Constitution any person is directed, or power is conferred on any person or authority to appoint or elect a person, to perform the functions of any office if the holder thereof is unable to perform those functions, the validity of any performance of those functions by the person so directed or of any appointment or election made in exercise of that power shall not be called in question in any court on the ground that the holder of the office was not or is not unable to perform the functions of the office."

[52] These sub-articles allow for the person who has the power to make an appointment to any office, to appoint a person to act or perform the functions of that office. When one reads art 232 (2) and (3) it does appear that the language of "act" and "perform the functions of" are interchangeable as in effect they amount to the appointment of someone to fill a position in what should be a temporary or holding situation. Thus, whether appointed to act or to perform the functions would amount to the same thing – a person would be permitted to carry out the duties and responsibilities of the post.

[53] Ultimately, it is the President who must appoint the Commissioner of Police. Bearing this in mind, in the context of this case, it could not be that the President should have been rendered incapable of appointing someone to act in, or perform the functions of such an important office as that of Commissioner of Police. Of course, once the other required actors would have been elected or appointed, then there must be compliance with the consultative process as required by art 211.

[54] It is in this sense that there was a necessity to act. I therefore draw a distinction between the doctrine of necessity that is applied to legalizing otherwise unlawful or unconstitutional acts, and necessity to act in order to ensure that the machinery of administration is not hindered. This distinction can be discerned from the learning in **Administrative Law by Wade & Forsyth, 11th edn at p 396** where the learned authors had this to say under the heading '**Indivisible Authorities: Cases of Necessity**':

> "In most of the cases so far mentioned the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases where no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity for otherwise there is no means of deciding and the machinery of justice or administration will break down."

[55] The learned authors then went onto discuss the common law necessity principle at p 396:

> "Necessity made an appearance in *Dimes v Grand Junction Canal* [(1852) 3 HLC 759] already recounted. Before the appeal could proceed from the Vice Chancellor to the House of Lords, the Lord Chancellor had to sign an order for enrolment. But it was held that his shareholding in the company, which disqualified him from hearing the appeal, did not affect the enrolment, since no one but he had power to effect it. 'For this is a case of necessity, and where that occurs the objectives of interest cannot prevail. Comparable situations have occurred in modern cases. For instance, the government of Saskatchewan called upon the court to determine whether the salaries of judges were liable to income tax; and the Privy Council confirmed that the court was right to decide it, as a matter of necessity. **[The Judges v AG for Saskatchewan (1937) 53 TLR 464]**
> In administrative cases the same exigency may easily arise. Where statute empowers a particular minister or official to act, he will usually be the one and only person who can do so. There is then no way of escaping the responsibility,

even if he is personally interested. … The court will naturally not allow statutory machinery to be frustrated in this way."

[56] Thus, while the necessity in this instance was not spawned out of a national crisis such as a coup as evidenced in **Mitchell** and similar cases, this is a case of a necessity not to cure an illegality but to ensure that the unexpected lacuna that resulted in an impossibility to comply with art 211 did not result in a situation that would have left the Guyana Police Force, and therefore the nation, without a Commissioner.

[57] I have also concluded that the submission that Mr. Hoppie could have had his pre-retirement leave deferred, and that evidence should have been provided by the respondents as to whether he was asked to defer his leave as being unmeritorious. Given the uncertainty of the situation, deferred until when could have been an issue, moreso as it is well known that the pre-retirement leave should not extend past the retiree's date of retirement. This was not as straightforward a circumstance as Mr. Forde would like it to appear. Further, given the evidence regarding how Mr. Hoppie came to be appointed to perform the functions of Commissioner of Police, it may have been problematic to extend his tenure. In any event, the President would have had to act in accordance with his own deliberate judgment in order to have Mr. Hoppie defer his leave.

[58] Mr. Forde canvassed that another option is that an officer could have been appointed to perform the functions of Commissioner of Police. I have dealt with the issue of an appointment to act as against an appointment to perform the functions – that they are essentially one and the same thing, albeit expressed in different ways. The end result is exactly the same, that is, that someone is appointed to hold a position until a substantive appointment is made. Thus, when Mr. Benn in his affidavit in defence stated that there had never been a vaccum in the position of Commissioner of Police this was indeed the case - whether by way of the substantive appointment of Mr. James or the performing appointment of Mr. Hoppie, someone held the post. And again, the President would have had to act in accordance with his own deliberate judgment to appoint someone to perform the functions of Commissioner of Police.

[59] Because of the circumstances of this case, I do not consider that appointing the second respondent to act in the post was anything more than ensuring that the position of Commissioner of Police was not vacant. As such I have concluded that the distinction

sought to be made by Mr. Forde between an acting appointment grounded in meaningful consultation which could not be achieved, as against a performing duties appointment appears to be splitting hairs and making much ado about nothing. In any event, the affidavit in defence disclosed that the appointment was meant to be temporary until the Leader of the Opposition and the Police Service Commission were appointed to allow for compliance with art 211. There is no evidence to rebut this assertion.

[60] Therefore, the options advanced by Mr. Forde are not countenanced as providing circumstances such as to negate the applicability of the President acting in his own deliberate judgment to address the administrative deficiency that had arisen.

[61] And if the President had used the language of perform the functions of instead of act – this would still have been an appointment in his own deliberate judgment. And as noted earlier, both the applicant and the submissions on his behalf recognise that someone had to be appointed to the post of Commissioner of Police. If Mr. Williams could have been appointed to perform the functions, then so could the second respondent. And as I have found, the language of act or perform the functions would be interchangeable, moreso since the end result would be the same.

[62] Given the peculiar circumstances of this case, the President could have acted, pursuant to art 111 (1), that is, in accordance with his own deliberate judgment, to make a temporary appointment to the post of Commissioner of Police. Thus, in appointing the second respondent, the President acted within the bounds of the Constitution.

[63] The evidence produced on behalf of the respondents which outlines the responsibilities assigned to or under the command of the Commissioner of Police supports the necessity of acting to have the post filled, and thereby the necessity of having the post temporarily filled.

[64] As such, I consider that the reliefs sought cannot be granted and that some of them appear disingenuous to say the least. As noted the doctrine of necessity does not apply and so the corresponding relief claimed cannot be granted. For the reasons outlined, given that at the time of his appointment there was no elected Leader of the Opposition or constituted Police Service Commission, it cannot be declared that the decision to appoint Clifton Hicken as acting Commissioner of Police violates article 211 (1) and 211 (2) of the Constitution; nor can it be declared that there was no consultation

between the President and the Leader of the Opposition as required and contemplated by the Constitution prior to the appointment of Clifton Hicken as acting Commissioner of Police. Indeed, without the factual context, if such reliefs are granted, it would appear that all was normal, yet the President deliberately did not comply with art 211. All was definitely not normal.

[65] The period between August 2, 2020 when the President was sworn in and January 26, 2022, unto when, the applicant contends, art 211 consultations could have been held with the then Leader of the Opposition, is of no moment. Whether the President should have consulted with the then Leader of the Opposition or not regarding the appointment of a Commissioner of Police, is to engage in speculation. In any event the Police Service Commission the term of which had expired since August 8, 2021, had not been reconstituted by January 26, 2022 and the Chair of this Commission and its members, as noted earlier, have a role to play in the appointment of a Commissioner of Police.

[66] The fact is that Mr. James remained substantive Commissioner of Police unto April 30, 2021 though he was on pre-retirement leave with effect from July 31, 2020. This is to say, Mr. James demitted office with effect from May 1, 2021. Mr. Hoppie performed the functions of Commissioner of Police from July 31, 2021 unto March 27, 2022 when he proceeded on pre-retirement leave. Thus, the substantive date in issue in this application is March 30, 2022 and I consider that it is only the status quo at this date that is relevant. Therefore, the declaration sought "that there was no consultation between the President and the Leader of the Opposition as required and contemplated by the Constitution which was initiated by the President and the Leader of the Opposition between the 2nd day of August, 2020 and the 26th day of January, 2022" cannot be granted.

[67] As a consequence of my conclusions, the orders sought quashing the appointment of Clifton Hicken as acting Commissioner of Police and declaring that the actions taken by Clifton Hicken acting as Commissioner of Police are null and void and to be of no force and effect are not granted. It follows that there would be no order for a writ quo warranto directed to Clifton Hicken to produce his authority to exercise and or discharge the functions of the office of Commissioner of Police in an acting capacity or any capacity whatsoever.

DE FACTO DOCTRINE

[68] Since I have concluded that the appointment is not in violation of the Constitution, there is really no need to apply the de facto doctrine.

[69] If I had concluded that the appointment was unconstitutional, I would have had to address my mind to the de facto doctrine, so for completeness I do so now.

[70] The de facto doctrine operates to save or deem valid the acts of an officer or judge even though their appointment is later found to be deficient or invalid. As stated in **Administrative Law by Wade & Forsyth (11th edn) at p 239**: "The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so. … This doctrine is firmly based in the public policy of protecting the public's confidence in the administration of justice. It is a well-established exception to the ultra vires rule."

[71] In addition, as stated in **State of Connecticut v Carroll (1871) 37 Conn 449** at pp 471 – 472:

> "An officer de facto is one whose acts, though not those of a lawful official, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised."

And in **Ravi Balgobin Maharaj v Attorney-General of Trinidad and Tobago & The Police Service Commission (First Interested Party) and Gary Friffith (Second Interested Party) Claim No. CV2021-031106** the following was explained by N. Kangaloo J at para 215:

> "The 'de facto officer principle' espoused in **Balbosa** guides the Court in this regard, as does the doctrine of necessity. An officer de facto is '*one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law.*" (See **R v Bedford Level Corporation** referred to at paragraph 87 of **Balbosa**). **Balbosa** went on to state that '*Because the public relies upon the decisions and actions of such a person, the de facto officer doctrine operates to preserve such actions and decisions.*"

[72] While there was and is no challenge to the appointment of Mr. Hoppie, it appears from the applicant's evidence that art 211 may not have been complied with in relation to his appointment to perform the functions of Commissioner of Police, and that he had no instrument of appointment. However, these circumstances would not lend to the invalidation of the acts of and decisions made by Mr. Hoppie.

[73] Although conceding that the applicant does not have evidence of all the actions that would have been carried out by Mr. Hicken, Mr. Forde nevertheless contended that the promotions that were authorized by him should be nullified while other actions, about which there is no evidence, would be saved. This is a most incongruous position to adopt – on the one hand stating that some actions could or would be saved, but that a particular action – the promotions approved by him would not. This would amount to cherry picking, moreso after it was pointed out that the relief sought that all actions be nullified was untenable. And what would be the basis for such a bifurcated ruling is unclear.

[74] In addition, one would be affecting the rights and entitlements of third parties - those ranks who would have been promoted pursuant to Mr. Hicken's decision to elevate them. They would have had to have been heard on what would have become a legitimate expectation to entitlements based on their promotions which were announced.

[75] Applying the authorities cited to the facts of this case, if I had ruled that the appointment was unconstitutional, I would have held that the actions taken by the second respondent as acting Commissioner of Police would have been saved.

OTHER ISSUES

[76] I do not consider that the other issues raised as regards prerogative powers warrant a lengthy discussion. Suffice it to say that I do not find this issue relevant. There has been no claim by the respondents that there was an exercise of prerogative powers in the appointment of the second respondent. It is the applicant who sought to introduce this as a possible reason for the appointment, and in so doing also sought to discredit it as being applicable.

CONCLUSION

[77] I consider it disingenuous of the applicant to plead what in effect is a want of action by the non-governmental members of the National Assembly to elect the Leader of

the Opposition, (which at March 30, 2022 stood at three months) which office holder is necessary for consultation on a number of posts and commissions, including the appointment of the Commissioner of Police and the Police Service Commission, and then use such a state of affairs to plead an unconstitutionality of action by the President in not engaging in meaningful consultation as required by art 211. There could be no disregard of and thereby a breach of the requirement for meaningful consultation when it was impossible to so engage. The applicant therefore is relying on an impossibility to ground a claim of unconstitutionality. On this basis alone, this application is vexatious and an abuse of the process of the court.

[78] As such the reliefs sought in the Fixed Date Application are refused. Costs to the respondents jointly to be assessed on an application by the respondents, if not agreed by August 31, 2022.

Roxane George
Chief Justice (ag)
August 11, 2022