

**CONSTITUTIONAL COURT OF SEYCHELLES**

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**Reportable**  
[2020] SCCC 4  
CP 16/2019

In the matter between

**THE GOVERNMENT OF SEYCHELLES**

**Petitioner**

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

and

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

**1<sup>st</sup> Respondent**

**GRETEL JACQUES**  
*(rep. by Rene Durup)*

**2<sup>nd</sup> Respondent**

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**Neutral Citation:** *Government of Seychelles v Public Service Appeal Board & Anor*  
(CP16/2019) [2020] SCCC 4 (27 March 2020).

**Before:** Burhan, Dodin and Vidot JJ

**Summary:** Jurisdiction of the Public Service Appeal Board - Article 146(1) of  
Constitution - Can it adjudicate on matters pertaining to internal transfers  
within the National Police Force.

**Heard:** 03<sup>rd</sup> December 2019

**Delivered:** 27 March 2020

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**ORDER**

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

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

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

The order of the PSAB is declared null.

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## JUDGMENT

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### **VIDOT J (BURHAN and DODIN J concurring)**

[1] This matter was referred to the Constitutional Court by her Ladyship Twomey CJ sitting on case MA86 of 2018, involving the same parties involved in this case, where the Petitioner was making an application for Judicial Review of an Order of the Public Service Appeal Board (“the PSAB”). The referral was made in pursuance of Article 130(6) of the Constitution requesting that this Court considers “*whether the order granted by the PSAB in which it directed the Commissioner of Police to re-examine the second Respondent’s personal situation and consider the social difficulties and that she be refunded 2 months salaries; is outside the PSAB’s mandate and exceeds the jurisdictional power vested in it by Article 148(6) of the Constitution.*”

### **Factual Background**

[2] The background of the referral is not contentious. The Respondent, Gretel Jacques was employed as a Police Officer with the Seychelles Police Force as a constable since 2012. In 2013 following her traineeship she was stationed at La Digue Police Station within the Response Services section. In March 2018, she was informed that she was being transferred to Response Services on Mahe. Therefore, she was ordered by the Commissioner of Police (hereafter “the Commissioner”) to take up that position on Mahe. However, Ms. Jacques failed to follow that order. She was therefore warned that disciplinary action could ensue. On 24<sup>th</sup> May 2018 she lodged a complaint with the PSAB and contested her transfer. She cited personal reasons as grounds for noncompliance with the order, which included the fact that she was a resident of La Digue, with four children, one of whom had a disability.

- [3] Upon receipt of the complaint the PSAB sought a response from the police. In the meantime since Ms. Jacques had failed to comply with the Commissioner's order for transfer, the Police suspended her salary for August 2018. It was only after this suspension that Ms. Jacques complied with the order and presented herself for service on 03<sup>rd</sup> September 2018; so her salary was reinstated.
- [4] The PSAB considered the complaint and on 13<sup>th</sup> September 2018, issued its determination and Order. Whilst acknowledging that the Police had its own policy, which its officers are under an obligation to follow, it nonetheless held the view they had taken into consideration Ms. Jacques circumstances. In its view, on considering the circumstances of Ms. Jacques, the transfer would create inconvenience and difficulties for her to be relocated. In its Order it called upon the Police to re-examine her situation and consider her social difficulties. It was also determined that Ms. Jacques should be refunded 2 months' salary and her salary reinstated with immediate effect. The Police being dissatisfied with the determination and Order lodged an application to the Supreme Court asking the Court to exercise its supervisory jurisdiction pursuant to Article 125(1) (c) of the Constitution and quash the determination of the PSAB. The main thrust of the application for judicial review was that the PSAB, in making the determination, was acting outside its mandate and exceeded its jurisdiction as provided under Article 146(1) of the Constitution. For its part, the PSAB opposed the application and raised preliminary points, challenging the Commissioner's locus standi and reasserting the independence of the PSAB under Article 145 of the Constitution. Thus the referral of the Chief Justice.

### **Submissions of the Petitioner**

- [5] Parties elected to file submissions in this case. They were also invited to make oral submissions. The PSAB provided written submission only. The Petitioner, the Commissioner of Police relied on provisions of the Constitution that establishes the Police Force. In fact, Article 160 of the Constitution establishes the Police Force as an important element of a democratic system and makes provision for the appointment of a Commissioner of Police and declares that the Commissioner shall be responsible for

determining the use and control of the operations of the Police Force. Indeed Article 160 reads as follows:

- “(1) The Police Force shall be commanded by the Commissioner of Police who shall be appointed by the President subject to approval by the National Assembly.*
- (2) Nothing in this Article shall be construed as precluding the assignment to the Ministry or Department of Government of responsibility for the organization, maintenance and administration of the Police Force, but the Commissioner of Police shall be responsible for determining the use and controlling the operations of the Force in accordance with the law”*

[6] The Petitioner further relied on the Police Force Act, 1959 (“the Act”) promulgated in terms of Article 161(c). Under this Act, and in particular section 8(2), the Commissioner can make orders for the general government of police officers inter alia, their enlistment, rank and transfer, as he may deem expedient for promoting the efficiency and discipline of such police officers. Thus, the power to transfer police officers is the prerogative of the Commissioner. Counsel for the Petitioner further submits that this is evidenced by the fact that Article 146 of the Constitution sets out the jurisdiction of the PSAB and that does not include the hearing of a complaint in regards to transfers of officers. In fact Article 146 reads as follows:

*“The Public Service Appeal Board shall hear complaints by person aggrieved by;*

*(a) An appointment made to an office;*

*(b) A promotion to an office;*

*(c) Disciplinary proceedings taken in respect of that officer;*

*(d) The termination of an appointment of a person who was holding an office;*

*(e) Any decision relating to the qualification of a person who has applied for an office or serving in an office’*

*in the public service.*

- [7] It is the Commissioner's view that the PSAB should not have heard the complaint as it had no jurisdiction to do so. In consequence since the suspension of salary stems from the transfer, they had no authority to adjudicate on that issue. It is also the Petitioner's position that pursuant to Public Service Orders (PSO) order 127, the Commissioner is permitted to take disciplinary action against an employee who abstains without reasonable cause on leave in excess of 2 days. Order 69 of the Public Service Procedure Manual sets guideline to discipline employees for unauthorised absence. The Petitioner also cited several provision of the Employment Act 1995, namely sections 53 and 55 and Schedule II and III, dealing with disciplinary offences and that Ms. Jacques' absence from duty amounted to a serious disciplinary offence for which the Commissioner may adopt measures to deal with when needed. The Petitioner submitted that as a result of the unauthorised absence from work of Ms. Jacques, the Commissioner was duty bound to take disciplinary action against her. In fact she was shown leniency with the deduction of one month's salary when in fact the offence warranted instant dismissal. In fact in these circumstances, Ms. Jacques is deemed to have self-terminated herself. The PSAB's order that her salary be reimbursed is not as a result of a disciplinary proceeding being taken in respect of Article 146(1)(c) of the Constitution. The Order, the Petitioner submits, specifically explains that the issue brought forward by Ms. Jacques was based on her unwarranted transfer. On the basis of these submissions, the Commissioner has asked this court to find that the PSAB exceeded its jurisdiction, as it had no mandate to adjudicate on transfer and was not empowered to further order the refund of one month's salary.

### **Submission of the 1<sup>st</sup> Respondent**

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

## **Submissions of the 2<sup>nd</sup> Defendant**

[9] Counsel for the 2<sup>nd</sup> Respondent, submitted that Article 145(1) of the Constitution provides that “there shall be a Public Service Appeal board which shall perform the functions conferred upon it by the Constitution and any other law.” In consideration to the latter part of that provision, “any other law”, Counsel submitted that the PSO is a law that permits an employee of the public service to appeal decisions affecting them to the PSAB. He further contended that the Constitution envisages a PSAB that is substantially autonomous. This is in pursuance with Article 145(2) of the Constitution which provides as follows:

*“subject to this constitution the PSAB shall not, in the performance of its functions be subject to the direction or control of any person or authority.”*

He therefore argues that this autonomy is an important function under a democracy because Article 146(4) allows the PSAB to make a report to the National Assembly in the instance that a public authority has failed to comply with its orders. He further cited Article 146(1), which stipulates the kinds of complaints the PSAB is mandated to hear.

[10] Therefore, Counsel further argues that in respect to whether the PSAB was empowered to order a refund of the retained salary for the month of August 2018, he submitted that non-payment of salary is clearly a disciplinary measure taken by the Public Authority. Counsel argues that this thus falls within the PSAB’s mandate. Counsel further argued that in relation to the PSAB’s determination ordering the Police Force to re-examine Ms. Jacques personal circumstances falls under general powers Order 2.3 of the PSO read with Article 145 of the Constitution.

## **Powers of Commissioner of Police: Transfer**

[11] As has been mentioned the referral order requires the Constitutional Court to make a pronouncement as to whether the PSAB could have directed the Commissioner to re-examine the 2<sup>nd</sup> Respondent personal situation and consider her social difficulties and that she be refunded 2 months’ salary falls as outside the PSAB’s mandate and the jurisdiction

vested in it by Article 146(1) of the Constitution. The first limb of this Order requires the Commissioner to reconsider the question of the 2<sup>nd</sup> Respondent's transfer from La Digue to Mahe. The Order to refund salary stems from the question of transfer.

[12] Transfers fall under the general functions of the Police Commissioner. This is stipulated in section 8(2) of the Police Act 1959 which reads:

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

Further, section 9(1) of the said Act provides that the administration of the Police Force shall, subject to the orders of the direction of the President, be vested in the Commissioner of the Police. This clearly provides that the transfers of police officers to different postings or locations fall within the jurisdiction of the Commissioner.

[13] Such functions of the Commissioner are in line with his constitutional mandate to determine the use and control the operations of the Force in accordance with the law; see Article 160(2) of the Constitution and **Ernesta v Commissioner of Police [2002] SCSC 13 (CS 348/2001) (07<sup>th</sup> October 2002)**. The law however provides only for this general provision permitting the Commissioner to make transfer of officers. Otherwise, under the law there are no procedural guidelines in the Act for how transfers are made or take place. The Act allows the President to make regulations to carry out the objects of the Act and for the general governance of the Police Force (section 62 of the Act). The Police Force Regulations, promulgated in terms of section 62, contain only a single provision which addresses transfers. That provision is section 22 which reads:

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

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

*“Complaints*

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

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

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

- [15] Supposing that the second Respondent could file a complaint of such disciplinary measures taken against her to the PSAB, procedurally she would still have been in default of section 15 of the Regulations as she would have failed to exhaust remedies available to her under the Regulations. It is abundantly clear that the channel to follow for a



complaint against the Commissioner, for a perceived wrong, is through a complaint in writing to the President. Nonetheless, neither the Act nor its Regulations define what is considered a perceived wrong. We consider that dissatisfaction with a transfer to qualify as a perceived wrong. This is logical, if one considers the fact that there exists no complaint procedure available under the Act, or any remedy in the Regulation or any other regulations. Therefore, the contention by Counsel for the 2<sup>nd</sup> Defendant that the PSO is a law which permits an employee of the public service to appeal decisions affecting them to the Public Service Appeals Service Appeal Board is misconceived and wrong. The Regulations obviously prevail over the PSO as clearly anticipated in Clause 1.1(g) of the PSO, which reads:

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

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

[17] Normally when interpreting the Constitution one has to give a purposive meaning to it taking into account the spirit and intention of the framers of the Constitution, see **Chow v Michel [2011] SLR 1**. I find no reasons but to conclude that it is clear that the intention of the framers of Constitution was not to include as part the jurisdiction of the PSAB internal transfers of officers. No other interpretation to the contrary can be ascribed to the above referred article. On a literal meaning of the Constitution, the PSAB does not have jurisdiction to consider complaints about transfers; see **MD v BL (CA 26/2016) Appeal from the Family Tribunal 141 of 2016 [2017] SCSC 196 (01<sup>st</sup> March 2017)**

**paragraphs 27 to 29** on a literal approach to constitutional texts in the absence of any ambiguity.

### **The PSAB’S Jurisdiction**

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

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

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

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

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

[21] Article 146(1) is clear and specific that the Constitution confers authority on the PSAB to adjudicate on matters that have been assigned to it. Such matters do not include transfers of police officers. The PSAB being a creature of the Constitution derives its jurisdiction from the provisions of the Constitution and any other relevant statutory enactment. There is no such other statutory enactment. As it is a constitutionally established institution with an essential constitutional function, its jurisdiction cannot extend beyond what is conferred to it by the Constitution. It has only those powers given to it by the Constitution and must exercise its functions in accordance with the Constitution. It follows from this, that the PSAB exceeded its jurisdiction when it considered a complaint concerning a transfer within the police force. It was consequently not empowered to make the order that it did. It is only empowered to make orders on matters falling within the terms of its jurisdiction.

## **Findings**

[22] The referred question which seeks pronouncement from this Court is whether the PSAB can make findings and ultimately order the Commissioner to re-examine the 2<sup>nd</sup> Respondent’s personal situation and consider the social difficulties (in relation to her transfer from La Digue) and order that she be refunded two months’ salary. This Court finds that the PSAB does not have jurisdiction to determine complaints about transfers

within the Police Force. Article 146(1) of the Constitution limits the PSAB's jurisdiction to only the five instances listed. Transfer is not included in that list. Section 15 of the Police Force makes it clear that complaints about transfers have to be directed to the President. Thus, the PSAB exceeded its jurisdiction when it considered the transfer, and making the order that it did. Therefore, this Court finds that the determination and the order a nullity; see **Mancienne v Government of Seychelles (CS10 of 2004) [2005] SCSC 11 (19 May 2005)**. We so declare.

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

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Burhan J

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Dodin J

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Vidot J