**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV 2017-00732**

**BETWEEN**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO PART 56 OF THE CIVIL PROCEEDINGS RULES, 1998 (AMENDED) AND PURSUANT TO SECTION 6 OF THE JUDICIAL REVIEW ACT CHAP 7:08**

**AND**

**IN THE MATTER OF AN APPLICATION WITHOUT NOTICE BY: DEVATA RAMLAL AND VIDYA RAMLAL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT, CHAPTER 35:01**

**AND**

**IN THE MATTER OF THE ACT AND DECISION OF THE MINISTER OF PLANNING AND DEVELOPMENT THE HONOURABLE CAMILLE ROBINSON-REGIS RELATING TO DEVATA RAMLAL AND VIDYA RAMLAL AND THE LAND AND THE LAND AND/OR BUILDING SITUATED AT NO.7 ETHEL STREET, ST JAMES, PORT OF SPAIN**

**BETWEEN**

**DEVATA RAMLAL**

**AND**

**VIDYA RAMLAL**

**Intended Claimants/Applicants**

**THE HONOURABLE CAMILLE ROBINSON-REGIS**

**MINISTER OF PLANNING AND DEVELOPMENT**

**Intended Defendant/Respondent**

**Before the Honourable Mr. Justice Ronnie Boodoosingh**

APPEARANCES:

Mr. Ravi Rajcoomar instructed by Mr. Irshaad Andre Ali for the Applicants

Ms. Coreen Findley and Ms. Tamara Toolsie instructed by Ms. Diane Katwaroo for the Respondent

Dated: 06 July 2017

**JUDGMENT**

1. This is an application for leave to apply for Judicial Review of the decision by the respondent to lay complaints 2016 No. 37572 and 2016 No. 37571 in the Port of Spain Magistrates' Court on November 29th 2016 against the applicants.

2. The applicants caused three applications to be submitted to the Town and Country Planning Division of the Ministry of Planning and Development ("the Planning Division"). These were applications for permission to develop their property at No. 7 Ethel Street, St James, Port of Spain. They are the owners of the property. The applicants contend that they commenced development on the property around July 2011 to August 2011. The applications were submitted on May 9th 2011, October 17th 2011 and February 1st 2012. The application dated May 9th 2011 was not exhibited and the applicants informed the court that they were not in possession of a copy of same.

3. In response, the respondent issued three notices of refusal of permission dated August 9th 2011, November 29th 2011 and April 20th 2012. The applicants submit that from the first notice of refusal dated August 9th 2011, the respondent had notice of the unauthorized development and did not serve an enforcement notice within the four (4) year limitation period. The applicants further assert that the first step taken by the respondent was the

issuance of an Enforcement Notice dated 1st April 2016, served on the applicants on the 7th April 2016.

4. Leave is now sought to challenge the decision to lay the complaints on the following grounds:
    a. Contrary to law and/or illegal and/or unauthorized and/or ultra vires and/or in excess of jurisdiction and/or in excess of jurisdiction and/or invalid and is null and void;
    b. Amounted to an abuse of power, bad faith;
    c. Unreasonable, disproportionate, irregular or improper exercise of discretion;
    d. An exercise of power in a manner that is so unreasonable that no reasonable person could have so exercised the power;
    e. Arrived at in a procedurally improper manner;
    f. In breach of the principles of natural justice and/or procedural fairness; and/or
    g. In breach of the applicant's legitimate expectation that they would be consulted by the Respondent and/or be given the opportunity to be heard prior to any enforcement proceedings being taken against them in relation to the property.

**Leave to Apply for Judicial Review**

5. The test to be applied when considering whether to grant leave to apply for judicial review is as outlined in the case of **Satnarine-Sharma v Browne-Antoine & Ors [2006] UKPC 57**, as follows:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; Fordham, *Judicial Review Handbook*, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application."

6. That case similarly deals with an application for leave to apply for judicial review of a decision to prosecute.

7. The actions taken by the respondent are based on the provisions of the **Town and Country Planning Act Chap. 35:01**. In particular **section 16** provides:

> "16. (1) Where it appears to the Minister that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part, or that any conditions subject to which the permission was granted in respect of any development have not been complied with, then the Minister may within four years of the development being carried out, or, in case of non-compliance with a condition, within four years after the date of the alleged failure to comply with it, if he considers it expedient to do so having regard to the provisions of the development plan, if any, and to any other material considerations, serve on the owner or occupier of the land a notice under this section."

8. Additionally, **section 18** states:

> "18. (1) Subject to this section, where an enforcement notice has been served under section 16 on the person who was, when the notice was served on him, the owner of the land to which the enforcement notice relates and within the period specified in the enforcement notice, or within such extended period as the Minister may allow, any steps required by the enforcement notice to be taken (other than the discontinuance of any use of land) have not been taken, that person is liable on summary conviction to a fine of one thousand five hundred dollars and, in case of a continuing offence, to a further fine of three hundred dollars for every day after the first day during which the requirements of the enforcement notice (other than the discontinuance of any use of land) remain unfulfilled.

9. The Complaints without Oath, laid by the respondent, have invoked the jurisdiction of the Magistrates' Court pursuant to **section 33** of the **Summary Courts Act Chap. 4:20**, which states:

"33. (1) Every proceeding in the Court for the obtaining of an order against any person in respect of a summary offence or for the recovery of a sum by this Act or by any other written law recoverable summarily as a civil debt shall be instituted by a complaint made before a Magistrate or Justice."

10. At paragraph 14(5) of the judgment of **Satnarine-Sharma v Browne-Antoine & Ors [2006] UKPC 57**, Lord Bingham said:

"(5) It is well-established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review: *Matalulu*, above, pp 735-736; *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, paras 17, 21. **It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy.** The language of the cases shows a uniform approach: "rare in the extreme" (*R v IRC, ex parte Mead* [1993] 1 All ER 772, 782, [1992] STC 482, 65 TC 1); "sparingly exercised" (*R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App Rep 136, 140, 159 JP 227); "very hesitant" (*Kostuch v A-G of Alberta* (1995) 128 DLR (4th) 440, 449); "very rare indeed" (*R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49); "very rarely" (*R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63. In *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 371, [1999] 4 All ER 801, [1999] 3 WLR 175, Lord Steyn said:

> "My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the Applicants is not amenable to judicial review."

With that ruling, other members of the House expressly or generally agreed: pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute (see *Mohit*, para 18): in such a

case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy: *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800, para 67, [2002] 1 All ER 1; *Matalulu*, above, p 736. In *Wayte v United States* (1985) 470 US 598, 607, Powell J described the decision to prosecute as "particularly ill-suited to judicial review". (Emphasis added)

11. Although the decision to prosecute is susceptible to judicial review, it is considered an exceptional remedy. Additionally, there is a high threshold to be met, which requires that there must be some form of dishonesty, mala fides or an exceptional circumstance, for judicial review of a decision to prosecute to become to be the remedy of choice. Further the case also states that decisions have been successfully challenged where an aggrieved person cannot raise their complaint during the course of a trial or appeal and judicial review provides the only remedy.

12. The respondent also relies on paragraphs 31 to 34 of the said judgment, which state:

"**[31]** The possibility of a challenge to the prosecutorial decision, and the apparent inevitability of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. They could properly be raised in the criminal proceedings, either in the course of an application to stay those proceedings on the ground of abuse of process or in any substantive trial. Like Lord Bingham and Lord Walker, we are not persuaded that the Chief Justice's complaint could not properly be resolved within the criminal process. It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court: cf *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, [1993] 3 All ER 138, [1993] 3 WLR 90, where Lord Griffiths (with whose speech Lord Bridge of Harwich, Lord Lowry and Lord Slynn of Hadley agreed) explained the rationale in the following passage (at pp 61H-62A):

"If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law."

**[32]** In our opinion, the same responsibility extends to the oversight of executive action in the form of a police or other prosecutorial decision to prosecute. The power to stay for abuse of process can and should be understood widely enough to embrace an application challenging a decision to prosecute on the ground that it was arrived at under political pressure or influence or was motivated politically rather than by an objective review of proper prosecutorial considerations (such as, in England, those set out in the Code for Crown Prosecutors issued under the Prosecution of Offences Act 1985).

**[33]** Among the authorities which give support to these propositions we would point to *R v Grays Justices, ex parte Low* [1990] 1 QB 54, [1988] 3 All ER 834, 152 JP 627; Hui-Ching v R [1992] 1 AC 34, 57, [1991] 3 All ER 897, [1991] 3 WLR 495; *Attorney-General of Trinidad and Tobago v Phillip* [1995] 1 AC 396, 417C-D, [1995] 1 All ER 93, [1994] 3 WLR 1134 and *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, [1999] 4 All ER 801, [1999] 3 WLR 175. In so holding, however, we must emphasise that we are expressing only an opinion on the existence of a legal basis for such an application and none whatever on the prospects of its success or failure.

**[34]** Viewing the matter generally, the present is clearly a case where all issues should if possible be resolved in one set of proceedings. **There are potential disadvantages for all concerned, including the public, in a scenario of which one outcome might be long and quite probably public judicial review proceedings followed by criminal proceedings. We add that, in our view, it will in a single set of criminal proceedings be easier to identify and address in the appropriate way the different issues likely to arise.** The suggestion of improper

political interference in or influence over the prosecuting decision is distinct in principle from the question whether the proposed charge has any basis – the decision to charge may have been entirely proper, without the charge being in any way sustainable. But there is in this case some potential overlap in some of the evidence relevant to each of these matters, and a risk that they would not be easily severable in the evidence or judgment given on any judicial review hearing. A criminal judge would we think be better placed to manage the different potential issues, such as whether the decision to charge was politically influenced, whether there is evidence fit to be left to the jury (both matters for him at separate stages of any trial) and, if the case gets that far, how the evidence should be left to the jury. The court is entitled to weigh all such disadvantages in the balance along with any possible advantage that the Chief Justice might hope to gain by judicial review proceedings. That was, as we see it, the approach taken by Lord Steyn in *ex parte Kebilene*."

13. This is not an application for judicial review of an enforcement order; this is an application where the impugned decision is a decision of the Minister to prosecute as a result of a failure to comply with an enforcement notice. To review the latter decision carries with it, a higher threshold. The applicant submits that there was no other remedy available. It is unclear why there was no application to review the enforcement notice. In any event, flowing from the position stated in the above case, it appears to me that the hearing of the complaints would provide ample opportunity for the applicants to submit to the Magistrate, their positon, that is, the enforcement order being out of time. Also, there exists the additional possibility that the proceedings in the Magistrates' Court will still be required based on the outcome of a judicial review application.

14. There are also some puzzling features of the applicant's case. When the applicants submitted the respective applications, were they all related to the same 'development'? If so, why was there a need to resubmit the same application when the Town and Country Planning Act provides that the decision of the Minister is final? While the applicant asserts

that the development began in 2011, is the only evidence of this the fact that when the first inspection was conducted in 2011, on behalf of the Town and Country Department, it revealed there were existing unauthorized 'developments'? Were these existing developments the subject of the three requests for permission to develop the property? What other information or evidence is there to support the assertion that the development took place when the applicants say it did?

15. I also note that there was one annexure from the Royal Bank of Canada which stated that there was a loan obtained in 2014 for the purpose of renovating said property. This letter was addressed to Mr Devata Ramlal. There are also photos of the development provided by the applicants; however, there is no date as to when these were taken.

16. The purpose of judicial review is not to embark on a fact finding exercise. It is meant to examine the nature of the impugned decision and/or the manner in which said decision was arrived at. More information is required and in need of consideration. There are some facts which need to be settled and for which findings need to be made. In the circumstances, judicial review is not appropriate for these purposes. The Magistrates' Court proceedings are more suitable to the enquiry needed.

17. The applicants rely on the case of **Maharaj Trading and Transport Company Ltd v The Minister of Planning and Development (1994) 3 TTLR** which concerned the validity of an enforcement notice issued pursuant to section 16 of the Town and Country Planning Act. The issue of the expired limitation period for serving an enforcement notice was raised in that case. That case involved the service of an enforcement notice and not a decision to lay a complaint. Therefore there was no challenge of a decision to prosecute. There was a lower threshold to be crossed in that case and the facts were not similar. In my opinion, the is distinguishable.

18. The respondent relies on the case of **Irvine v Carmathenshire County Council [2008] EWHC 2866**, which concerned an appeal from the conviction of the defendant in the Magistrates' Court for failing to comply with an enforcement notice. The defendant was

precluded from challenging the validity of the enforcement notice during the magisterial proceedings. The decision was a result of the provisions of United Kingdom Town and Country Planning Act, section 174, which gives a right of appeal against an enforcement notice issued outside of the limitation period. It was found that raising this issue during the proceedings was not the appropriate place for that issue to be addressed.

19. However, the case of **Boddington v British Transport Police [1999] 2 AC 143** is good authority for the proposition that a defendant in criminal proceedings is not precluded from raising the validity of a bye law of an administrative act as part of his defence. Essentially, public law defences may be utilized during criminal proceedings.

20. Sections **128**, **132** and **156** of the **Summary Courts Act Chap. 4:20** are provisions relative to the right of an aggrieved person to appeal a decision made by a Magistrate. The sections state:

> "128. (1) Where a Court refuses to make a conviction or order, the complainant may appeal to the Court of Appeal against such decision. (2) Where a Court makes a conviction or order, the party against whom the conviction or order is made may appeal to the Court of Appeal against such conviction or order.
>
> 132. A notice of reasons for appeal may set forth all or any of the following reasons, and no others:
>
> (a) that the Court had no jurisdiction in the case— Provided that the Court of Appeal shall not entertain such reason for appeal, unless objection to the jurisdiction of the Court has been formally taken at some time during the progress of the case and before the pronouncing of the decision; or
>
> (b) that the Court has exceeded its jurisdiction in the case; or
>
> (c) that the Magistrate or Justice was personally interested in the case; or
>
> (d) that the Magistrate or Justice has acted corruptly or maliciously in the case; or

(e) that the decision has been obtained by fraud; or

(f) that the case has been already heard or tried and decided by, or forms the subject of a hearing or trial pending before, some competent tribunal; or

(g) that the Court refuses to make a conviction or an order, or that the appellant is not guilty, as the case may be, either of which reasons shall entitle the appellant to maintain—

(i) that legal evidence substantially affecting the merits of the case has been rejected by the Court; or

(ii) that illegal evidence has been admitted by the Court and that there is not sufficient legal evidence to sustain the decision after rejecting such illegal evidence; or

(iii) that the decision is unreasonable or cannot be supported having regard to the evidence; or (h) that the decision is erroneous in point of law; or (i) that some other specific illegality, not mentioned above, and substantially affecting the merits of the case, has been committed in the course of the proceedings in the case; or

(j) that the sentence imposed is unduly severe.

156. (1) After the hearing and determination of any complaint, the Magistrate or Justice may, in his discretion, on the application of either party to such complaint or on his own motion without such application, state a case on any point of law arising in the case for the opinion of the Court of Appeal. The statement of facts in such case so stated shall, for the purpose of the determination thereof, be conclusive."

21. In light of these provisions, there are various opportunities available to the claimants to challenge any decision they deem unfavourable. In these circumstances, there will be sufficient opportunity during the hearing of the complaints for the applicants to show to the court that the enforcement notice was out of time. Further, where there is a decision

made by a Magistrate, that the applicants wish to challenge, there are statutory provisions which will facilitate such.

**Delay**

22. I find that in these circumstances the issue of delay, raised by the respondent is not applicable. The application was made within the three (3) month period pursuant to **section 9** of the **Judicial Review Act Chap. 7:08**.

**Illegality and Irrationality**

23. The applicants submit that the respondent's decision to lay the charge was unlawful, contrary to law, unreasonable, irrational and unfair. The applicants rely on the case of the **Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935** at pages 950 to 951. The excerpt defines illegality and irrationality as:

> "By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

24. The definitions provide guidance. However what is necessary is the determination of whether the Minister's decision to lay the charges falls within these definitions. The Minister caused to be served on the applicants, an enforcement notice, pursuant to **section 16** of the **Town and Country Planning Act**. The notice was not complied with, neither was it challenged. Pursuant to **section 18** of the said Act, the Minister made the decision to lay complaints. In those circumstances, I do not agree that the Minister acted illegally. Or that the Minister inappropriately or incorrectly applied the law. Further this does not appear to me to be a decision 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it".

**Bad Faith/ Dishonesty**

25. The applicants contend that the Minster has acted in bad faith and/or dishonestly. They have relied on an excerpt from ***Judicial Review Principles and Procedure*** **by Jonathan Auburn, Jonathan Moffett and Andrew Sharland** at page 379, where bad faith was explained as follows:

> "A public body may not exercise its powers in bad faith. In this context, acting in bad faith means more than simply acting unlawfully. It connotes intentional wrongdoing, such as acting in a way that is fraudulent, dishonest, vindictive, or malicious."

26. The respondent has also submitted that according to Fordham, ***Judicial review Handbook,*** **(5th Edition 2008)**, at paragraph 52.1, the assertion that a decision maker has acted in bad faith is not one which is lightly to be alleged and which is difficult to prove. Further emphasis is placed on the need to particularize and prove bad faith, with clear and cogent evidence.

27. The applicants assert that a pre-action protocol letter was sent to respondent on their behalf, to which the respondent responded indicating that it would respond to the issues raised in the letter. The next bits of communication received by the applicants were the complaints

initiated by the respondent. In my opinion, it would have augured well for the Minister to respond as promised. However, based on the information submitted by the applicants, without more, I cannot conclude that this conduct suggests dishonest, vindictive or malicious behaviour.

**Exceptional Circumstances**

28. Based on the case of **Satnarine-Sharma v Browne-Antoine & Ors [2006] UKPC 57,** the applicants have asserted that there is the existence of exceptional circumstances to warrant the use of judicial review as a remedy to examine the decision to prosecute. In so doing, the applicants have mentioned that irreparable harm would be caused to the applicants, should they be left to address the proceedings in the Magistrates' Court. The applicants cannot simply allege irreparable harm would be caused to them without providing clear details as to the harm that would be caused. They have not done so.

29. I find this to be a mere assertion without any supporting details or evidence. As such, I find that applicants have failed to show the existence of exceptional circumstances.

**Order**

30. This application for leave to apply for judicial review is denied.

31. There will be no order to stay the proceedings in the Magistrate Court. I will hear the parties on costs.

Ronnie Boodoosingh

Judge