

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2017-01240**

**IN THE MATTER OF THE JUDICIAL REVIEW ACT NO 60 OF 2000**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR  
JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE DECISION OF THE MINISTER OF COMMUNITY  
DEVELOPMENT, CULTURE AND ARTS TO ILLEGALLY AND/OR  
UNLAWFULLY APPOINT A COMMISSIONER TO THE NATIONAL  
CARNIVAL COMMISSION**

**BETWEEN**

**TRINIDAD AND TOBAGO CARNIVAL BANDS ASSOCIATION**

Claimant

**AND**

**THE MINISTER OF COMMUNITY DEVELOPMENT, CULTURE AND THE  
ARTS**

First Defendant

**THE NATIONAL CARNIVAL BANDS ASSOCIATION OF TRINIDAD AND  
TOBAGO**

**(Added as a Defendant pursuant to the Consent Order of the Honourable Madam  
Justice Charles dated 28th November, 2017)**

Second Defendant

## **Appearances:**

Claimant: Mr. Lakhan-Joseph lead by Mr. Sharma  
Instructed by Ms Ramsahai

First Defendant: Ms. Bello instructed by Ms. Ragbir

Second Defendant: Mr. Phelps with Mr. Viera (absent) instructed by  
Ms. Bisram

Date of Delivery: 10<sup>th</sup> January 2018

## **JUDGMENT**

[1] By way of the Judicial Review the Claimant challenged the decision of the Defendant to reappoint the representative from the National Carnival Bands Association (NCBA) to the Board of the National Carnival Commission (NCC) pursuant to **s.5(1)(b)** of the **National Carnival Commission Act Cap 42:05 (The Act)**, which provides that the Minister shall appoint one nominee to the NCC Board from the organisation that is most representative of carnival bands.

[2] The reliefs sought by the Claimant were:

- i. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017, to appoint a representative of the NCBA to the Board of the NCC is illegal and/or unlawful and/or ultra vires **s.5 (a)** of the Act, as the representative appointed does not constitute one nominee from the organization that is the most representative of carnival bands.
- ii. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017, to appoint what is ostensibly an interim representative to the Board of the NCC until 29<sup>th</sup> October 2017 is illegal and or unlawful and or ultra vires the Act in that the

Defendant is not vested with express and or implied power therefrom to create interim and or short term appointments.

- iii. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017, to appoint a representative of the NCBA to the Board of the NCC is in conflict with the policy of the Act, as the representative appointed cannot be considered as a nominee who is most representative of the carnival bands.
- iv. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017, to appoint an interim and or short term representative and or a representative at all of the NCBA to the Board of the NCC is unlawful in that this decision was taken in the absence of consultation and or was arrived at as a result of an improper and or unreasonable and or unfair consultative process.
- v. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017, to appoint a representative of the NCBA to the Board of the NCC is unreasonable, irregular and or an improper exercise of discretion as the Defendant has made the said decision without any reasonable basis and or criteria as to how a nominee can be classified as most representative of carnival bands.
- vi. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017 to appoint a representative of the NCBA to the Board of the NCC was arrived at in the absence of any or any proper evidence upon which the nominee most representative could have been determined in accordance with and as required by **s.5 (1) b** of the said Act.

- vii. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017 to appoint a representative of the NCBA to the Board of the NCC is improper in that the methodology utilized by the Intended Defendant to determine the statutory requirements of a nominee who is most representative of the carnival bands is unreasonable and or irrational and or procedurally improper.
- viii. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017 to appoint a representative of the NCBA to the Board of the NCC is demonstrative of an exercise of a power in a manner that is so unreasonable and or irrational that no reasonable Minister and or Ministry in the given circumstances could have so exercised the power.
- ix. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017 to appoint a representative of the NCBA to the Board of the NCC is in breach of the Claimant's Legitimate Expectation that the Defendant would have made the said appointment based upon the legislative criteria of a nominee who is most representative of the carnival bands.
- x. A declaration that the decision of the Defendant on or about 23<sup>rd</sup> January 2017 to appoint a representative of the NCBA to the Board of the NCC constitutes a failure and or omission of the Defendant to perform her statutory duty and appoint a representative to the NCBA based upon the legislative criteria of a nominee who is the most representative of the carnival bands.
- xi. An order of *certiorari* to bring into the High Court of Justice and quash the said decision of the Defendant with respect to the

appointment of a representative of the NCBA to the Board of the NCC.

- xii. An order *mandamus* compelling the Defendant to reconsider its decision to reappoint the current representative under **s.5 (1) b** of the said Act until 29<sup>th</sup> October 2017 as contained in the Defendant's letter of decision dated 23<sup>rd</sup> January 2017.
  - xiii. An order of mandamus compelling the Defendant to enter into proper and legal consultations with the Claimant on any proposed appointment in accordance with **s.5 (1) b** of the Act.
  - xiv. Damages inclusive of exemplary and or aggravated damages.
  - xv. Costs.
- [3] The Claimant challenged the decision on the basis that it is unlawful for the following reasons:
- a) It is ultra vires the provisions of **s. 5(1)(b)** of the NCC Act since the representative reappointed by the Minister is not a nominee from the organisation that is most representative of carnival bands.
  - b) That the representative appointed by the Minister is in conflict with the policy of **The Act** since he could not be considered as the most representative of the carnival bands.
  - c) That the Claimant ought to be considered as the organisation that is more representative of carnival bands since it consists of one hundred and sixty (160) bands from both senior and junior categories and one

hundred and fifty (150) kings and queens as well as traditional characters.

d) The Minister's decision was based on legal advice rather than a reasonable assessment as to which organisation was most representative of carnival bands.

e) The Minister's decision is unreasonable and irregular/improper exercise of discretion as:

i. said decision was made without a reasonable basis and/or criteria upon which a nominee who is the most representative of carnival bands;

ii. the methodology utilized by the Minister to determine the statutory requirements of who is most representative of carnival bands cannot be ascertained apart from the use of legal advice;

ii. no reasonable Minister in the given circumstances could have exercised the power as the Minister did, completely ignoring the statutory requirements of **s. 5(1)(b) of The Act**.

f) That the decision was in breach of the Legitimate Expectation of the Claimant that the Defendant would have made the appointment based upon the legislative criterion contained in **s.5 (1) b of The Act**.

[4] The Claimant also argued that the Defendant failed to consult with the Claimant in a fair and proper manner in that the appointment was made when the consultation process was not concluded. As a result, the Minister's decision was unjust and unfair.

[5] The decision to make the temporary appointment to the Board of the NCC was based on advice which was not shared with the Claimant; the latter

was not afforded an opportunity to consider/consult on the said advice and or make appropriate representations which unfairly deprived the Claimant of an opportunity to review and comment upon the said legal advice.

- [6] The Minister had, prior to the appointment of the nominee, assured the Claimant that it would be consulted before the appointment was made; contrary to such assurance, the Minister made the appointment contrary to the provision of the NCC Act and without proper consultation with the Claimant.
- [7] The Claimant's application was supported by the affidavit of Rosalind Gabriel, President and Secretary of the Claimant.

## **THE CLAIMANT**

### ***Affidavit of Rosalind Gabriel***

- [8] Ms. Gabriel deposed to her ongoing communication with the Minister on behalf of the Claimant on the issue of the appointment of the representative to the Board from 2015 up to the date of the said appointment. Ms. Gabriel stated that consultation on the issue of the organisation most representative of carnival bands was still in progress and incomplete when the Minister decided on the 23<sup>rd</sup> January 2017 to reappoint to the Board the NCBA representative until the 29<sup>th</sup> October 2017 based on legal advice received.
- [9] In support of her assertion that consultation on the issue was in its preliminary stages, Ms. Gabriel disclosed that further meetings on the issue were held post the above decision on 1<sup>st</sup> February 2017 and beyond.

## **THE DEFENDANT**

### ***Affidavit of Dr. Nyan Gadsby Dolly***

[10] The Minister deposed that on the 23<sup>rd</sup> January 2017 she reappointed the 2014-2016 nominee of the organisation most representative of the carnival bands, the NCBA, for a term co-terminus with the appointment of members of the NCC Board which was due to expire in October 2017.

[11] The First Defendant also stated that prior to the said reappointment in December 2016, she had requested from the carnival bands associations, lists of their membership in order to assist her in determining which organisation was the most representative of the carnival bands. On receipt of the said lists, the Minister discovered that said lists were based on varied considerations. This caused her to seek legal advice from the NCC and her Ministry. The advice from both sources recommended firstly, that an objective criteria be established in order to determine which organisation was the most representative of carnival bands, and secondly, that the status quo be maintained with the current Board Members. Since no objective criteria had been determined as at the 23<sup>rd</sup> January 2017, the reappointment of the NCBA representative was made.

[12] The First Defendant denied that there was any unfairness to the Claimant as a result of such reappointment for the following reasons:

- i. The decision to reappoint was the only fair one in the circumstances, the Claimant having been afforded a fair hearing before.
- ii. Alternatively, consultations have not yet ended on the issue of establishing criteria for determining the organisation most representative of carnival bands.



- iii. Pursuant to s. 5(3) of the Act the Minister can reappoint a member to the Board of the NCC. Section 5(3) of the Act also permits the Minister to make interim appointments. It was submitted that in the circumstances, the reappointment and termination of such appointment in October 2017 was a lawful exercise of the Minister's discretionary authority to terminate the appointment of a Commissioner pursuant to s.5 (3) of the Act since the timeframe for termination of the appointment was a condition of the appointment set by the Minister pursuant to s.5 (5) of the Act.

### **SUBMISSIONS OF THE FIRST DEFENDANT**

- [13] The First Defendant, relying on **Section 20** of the **Judicial Review Act**, contended that in the performance of her duty under the NCC Act, she acted fairly and in accordance with the principles of Natural Justice by receiving representation from stakeholders (the carnival bands), on the issue.
- [14] It was contended further, that pursuant to s.39 (1)(a)(b) of the Interpretation Act Cap 3:01, the Minister is allowed to reappoint the representative of the NCBA on the expiration of his office.
- [15] The First Defendant also submitted that legal advice obtained by the Minister advised that the Ministry should propose a position on the criteria to be used to conduct a mass audit of carnival bands and consult with the mas band associations to finalise those criteria. Legal advice also recommended that the status quo be maintained in the absence of this criteria.

- [16] The Minister began consultation with the Carnival Bands Association on 14<sup>th</sup> December 2016 which the Trinidad and Tobago Carnival Band Association attended. The Minister explained that this meeting was very brief as it was intended only as platform for initial discussion among associations who were being consulted and her team. The said criteria were not settled at the meeting.
- [17] The Trinidad and Tobago Carnival Bands Association responded to the call to provide written comments on the invitation of the Minister regarding criteria for representation of mas bands on the 28<sup>th</sup> December 2016, but at no point did the Minister indicate that the discussions had been finalised, or criteria established for the conduct of a mass audit which would be necessary to establish the organisation most representative of mas bands. It was therefore submitted that there had been adequate and fair consultation with the Claimant and other stakeholders in the circumstances of this case.
- [18] The NCBA applied to be joined as a party to the proceedings and by consent order dated 28<sup>th</sup> November 2017 the Association was so joined. An affidavit by one David Lopez was filed on behalf of the NCBA.

### **SUBMISSIONS OF THE NCBA**

- [19] The NCBA submitted, firstly, that the Claimant was not entitled to the Declaratory Relief claimed since the appointment, the subject matter of the decision complained of, had come to an end; there is therefore no live dispute among the parties and the Court should not grant the declaratory reliefs sought by the Claimant. In its submissions in reply filed on the 22<sup>nd</sup> December 2017, the Defendant also advanced this argument.

- [20] It is the NCBA's case that the Claimant is not the most representative of the carnival bands since the NCBA had a much larger membership; it was contended that as a result, this ground of the Claimant's application must fail.
- [21] It was also argued that the Claimant's ground of procedural unfairness must also fail given the evidence that there was consultation by the Minister for over one year; further, that where a power is given by statute which depends upon circumstances to be ascertained by the repository of that power, a wider discretion is afforded. The Second Defendant also submitted that there was therefore no erroneous construction of the NCC Act, since the Minister engaged in a consultative process to determine the most representative band; this process could not be completed since the criteria to determine this issue had not been settled as at the date of the appointment; the Minister therefore exercised her discretion as provided for in the legislation and reappointed the NCBA member in order to maintain the status quo.
- [22] The NCBA argued further, that the Minister is empowered to appoint a Board Member for a period of less than two years, contrary to the contention of the Claimant. Her appointment of the NCBA representative for a ten-month period was therefore neither illegal nor ultra vires the NCC Act.
- [23] It was also submitted that an express statutory power includes any ancillary power which would be necessary to carry out the statute's purpose. Relying on **The Attorney General v Great Eastern Railway Company**<sup>1</sup> and the opinion of Lord Blackburn that 'whatever may be incidental to, or consequential upon, those things which the legislature

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<sup>1</sup> 1880 5 APP Cases 473

had authorised, ought not (unless, expressly prohibited) to be held, by judicial construction, to be ultra vires' as further support for the contention that the appointment for the NCBA representative was neither ultra vires the NCC Act nor illegal.<sup>2</sup>

[24] The NCBA submitted that the claim be dismissed with costs.

### **THE FIRST DEFENDANT'S SUBMISSIONS IN REPLY**

[25] The First Defendant submitted, relying on **Charles Matthews v The State**<sup>3</sup> that it was no longer accepted that it is possible merely by looking at the language of the legislative provision to distinguish between mandatory provisions, the penalty for breach of which is nullification, and directory provisions the breach of which would result in the legislation being deemed to have intended a less drastic consequence. It was submitted further that most directions given by the legislature in statutes are in mandatory form, but in order to determine what is the result of a failure to comply with something prescribed by a statute, it is necessary to look beyond the language and consider such matters as the consequences of the breach and the implications of nullification in the circumstances of the particular case.

[26] The First Defendant also argued that the provision of s. (5)2 is not mandatory notwithstanding the use of the word 'shall'. Alternatively, even if the provision were held to be mandatory, the appointment would not be rendered invalid thereby - the nominee would still be entitled to serve the two-year term. If s. (5)2 is not mandatory, then no issue arises since the appointment does not violate the object and purpose of the statute.

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<sup>2</sup> Interpretation Act --- 44 and 45

<sup>3</sup> [2000] 60WIR 390

[27] Finally, it was argued that the Claimant has not suffered any prejudice, neither is the failure to comply with the provisions of s. 5(2) of any sufficient importance to make the appointment unlawful.

## **ANALYSIS & CONCLUSION**

### ***Was the appointment lawful***

[28] Section 5(1) of the Act prescribes that the Minister shall appoint nominees to the Board of the NCC by instrument in writing, one of whom shall include 'one nominee from the organisation most representative of carnival bands<sup>4</sup>'.

[29] Section 5 (2) provides that such appointment shall be for a period of two years, but provision is made for the termination of such appointment within the two year period<sup>5</sup>. The Act also makes provision for the reappointment of a commissioner<sup>6</sup>. It is to be noted that this power to reappoint a commissioner is not subject to any precondition; the commissioner holds office on such terms as the Minister may determine.

### ***Illegality - Breach of s 5 (1)(b)***

[30] It should be noted at the outset that the Minister embarked upon a consultative process with stakeholders in order to determine the most representative Carnival band. The Claimant and First Defendant agree that the process was not concluded at the time of the reappointment of the NCBA representative. The Claimant, Second Defendant and other

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<sup>4</sup> s5(1)(b)

<sup>5</sup> s5(2)a-c

<sup>6</sup> s5(3)

stakeholders, pursuant to a request from the Minister, had submitted data to her in order to assist her in complying with **s.5(1) of The Act**, but upon a review of same it was discovered that the bands did not apply uniform criteria in compiling their membership lists - as a result it was impossible to decide the issue.

[31] Upon seeking legal advice, the Minister was advised to maintain the status quo by reappointing the sitting NCBA representative until objective criteria could be established in order to determine which organization was the most representative of the carnival bands. This reappointment came to an end in October 2017.

[32] The Claimant and Defendants also agreed that the NCBA nominee whose term has ended was not appointed pursuant to **s.5 (1) (b)** since the criteria to determine that appointment was not yet in place. The issue, therefore, is whether the reappointment of the commissioner for a period of 10 months in the circumstances of this case was illegal, irrational, unreasonable and/or in breach of the Legitimate Expectation of the Claimant that the appointment would be made in accordance with **s.5(1)(b)**.

[33] The objects of the NCC are outlined in **Section 4 of The Act**, and include the provision of the necessary managerial and organizational infrastructure for the efficient and effective presentation and marketing of the cultural product of Carnival. In order to achieve this object, provision is made for the management structure of the NCC which includes the appointment of a nominee to the board of the organization most representative of carnival bands. The criteria for determining this issue is not set out in the Act. In previous years there was only one organization which represented Carnival bands so the issue did not arise. With the

advent of several organizations representing carnival bands, the issue has now become a live one.

[34] I have taken into account the following provisions of **The Act** in determining this matter. **Section 5 (8)** provides that the Minister may appoint a commissioner for the unexpired portion of the term of a member of the Board of the NCC whose appointment has been terminated<sup>7</sup>. Additionally, **s5 (3)** proscribes that a commissioner appointed under **s5 (1)** is eligible for reappointment. At the time when the NCBA Commissioner was appointed in 2014 for a two-year term, he was the nominee of the organisation most representative of carnival bands, the NCBA. It seems to me that **The Act** contemplates both the reappointment of a commissioner and the appointment of a commissioner for a term less than two years. I therefore conclude that the appointment of the NCBA representative was lawful and in accordance with the provisions of the Act.

***Whether the appointment was procedurally unfair/without consultation***

[35] From the undisputed evidence before me, the Minister engaged in discussion with the Board of the NCC, the Claimant and other stakeholders with a view to determining which organisation was the most representative carnival band. It was only when it became clear that based on the material submitted to her, that such a decision could not be made, and after receiving legal advice, that the Minister decided to reappoint Mr. Lopez.

[36] The evidence of the Claimant supports both past and ongoing consultation. I am of the view that the Claimant was afforded an

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<sup>7</sup> s5(8)

opportunity to fairly consult with the Minister before she made the decision to reappoint Mr. Lopez for the ten month period.

[37] I also hold that the Minister acted reasonably in the circumstances to reappoint Mr. Lopez to the Board in order to give effect to the statutory mandate of the NCC – to ensure that its managerial and organisational structure can provide for the efficient and effective presentation and marketing of the carnival, especially given the proximity of the carnival event. In light of my conclusion above it follows that the Minister’s actions were legal and fair in all the circumstances.

[38] The term of the nominee of the band most representative of carnival bands on the NCC Board ended in December 2016. The other commissioners’ (appointed in October 2015) terms ended in October 2017. In the absence of the criteria to conduct the mass audit of carnival bands in order to determine the most representative band, the Minister made the decision to reappoint the NCBA representative to a period co- terminus with the other commissioners – October 2017. I am of the view that until the criteria is established, this is the most reasonable, fair, and legal course to be adopted.

[39] In coming to this conclusion, I take into consideration **Section 39(1) (a)** and **(b)** of the **Interpretation Act** which states that the grantor of a power to appoint a person to any office is deemed to be vested with the authority/power to remove or suspend the appointee and to reinstate/reappoint that person on the expiration of his office or otherwise.

[40] In any event I do not consider that **s.5 (2)** of **The Act** is mandatory - that a commissioner’s term of appointment must be for a period of two years, since **subsection 2(a)** provides that that term may be shortened by the Minister’s decision to terminate same; further, **subsection (5)**



contemplates a commissioner holding office on terms and conditions set by the Minister, while **subsection (8)** provides for reappointment for a term shorter than two years.

[41] In the circumstances I hold that the maintenance of the status quo by the reappointment of the NCBA representative was the only reasonable and rational course to be adopted by the Minister.

[42] I am also of the view that the mass audit, already underway, should be completed in the shortest possible time and criteria for determining the most representative carnival band be established after consultation with stakeholders as soon as possible, so that a nominee from carnival bands can take his/her place on the NCC Board. The efficient and smooth operation of this important national event demands no less from the Minister and all stakeholders.

## **CONCLUSION**

[43] On the issue of costs I take note of the fact that the issue is an important one, and the exercise to determine the most representative band had never been undertaken before. On the other hand, the Claimant was aware of the efforts made by the Minister to resolve the issue up to the date of filing. It may have been advisable to await the Minister's decision after the audit had been completed, consultations finished, criteria established and any new decision under **s5 (1)(b) of The Act** made before pursuing a claim for Judicial Review.

[44] In the circumstances, I make the following Orders:

1. The Claimant's claim is dismissed;

2. The Claimant to pay one half ( $\frac{1}{2}$ ) of the First Defendant's costs, to be assessed by the Registrar in default of agreement.
3. The Claimant to pay one half ( $\frac{1}{2}$ ) of the Second Defendant's costs, to be assessed by the Registrar in default of agreement.

**Joan Charles**

**Judge**